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IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL HARVEY, AARON HARVEY, PHIL HARVEY, CAPACITY CHEMICAL, LLC and BLUETECH LABORATORIES, INC.	)	No.: 150, 2026
Defendants Below/Appellants,	)	On Appeal from
v.	)	C.A. No. 2024-0771-JTL
ARXADA HOLDINGS NA INC.	)	In the Court of Chancery of the State of Delaware
Plaintiff Below/Appellee.	)	

APPELLANTS' REPLY BRIEF

Dated: August 4, 2026

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I. ARXADA RESORTS TO UNTENABLE WAIVER ARGUMENTS BECAUSE IT CANNOT RESPOND ON THE MERITS.

A. The Chancery Court Considered Each Issue Being Appealed.

The Chancery Court ruled upon each issue being appealed. Yet Arxada asserts anemic waiver arguments. If adopted, those arguments would fundamentally rewrite Rule 8 of the Delaware Supreme Court and impose new preservation standards. Under Arxada's assertion, every pretrial argument, every trial objection, and every legal theory is waived unless it was explicitly and exhaustively presented in post-trial briefing. This is not and cannot be Delaware law.

Rule 8 provides "[o]nly ***questions fairly presented*** to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented." (emphasis added). The inquiry is functional, not formalistic.[1] If the trial court understood and decided the legal issue, it is preserved. *See Suber*, 2026 WL 184867, at *4; *In re Oracle Corp. Derivative Litig.*, 339 A.3d 1, 18 n.76 (Del. 2025) (issue fairly presented when the trial court "understands it is an argument

[1] The interest of justice exception demonstrates that the waiver doctrine as a whole is a prudential doctrine rather than a jurisdictional doctrine, *Suber v. State*, 2026 WL 184867, at *4-5 (Del. Jan. 15, 2026), though this Court need not address the distinction because the questions were fairly presented.

that must be considered and decided"); *In re Tesla, Inc. Derivative Litig.*, 2025 WL 3689114, at *9 (Del. Dec. 19, 2025) (issue fairly presented when the trial court "understood and addressed the argument being made on appeal"); *Origis USA LLC v. Great Am. Ins. Co.*, 345 A.3d 936, 953 (Del. 2025) (where trial court addressed argument, it has not been waived).

Parties "may preserve claims by ***referring to them*** in post-trial briefing and arguments." *In re Tesla*, 2025 WL 3689114, at *9 (emphasis added) (citing *Holifield v. XRI Inv. Holdings LLC*, 304 A.3d 896, 936–37 (Del. 2023)). Additionally, this Court has determined that a party need not anticipate and re-raise every single permutation of an argument that the court might adopt in post-trial briefing to preserve an issue for appeal. *See McGuinness v. State*, 312 A.3d 1156, 1191 n.212 (Del. 2024). Similarly, this Court has found that a party preserved its arguments for appeal where the arguments were made in the pre-trial brief and included in the post-trial brief only as "oh by the way arguments." *Holifield*, 304 A.3d at 936–37 (concluding that an issue was raised, albeit cursorily).

The Court has noted that it is "reluctant to find that an issue was fairly raised in the trial court when the issue was not addressed in the main post-trial briefs[.]" *In re Tesla*, 2025 WL 3689114, at *10. But that is not the end of the analysis because the "question fairly presented" is a legal question on which this Court gets to make the final legal determination. As described in *In re Tesla*, the post-trial order made clear that "the Court of Chancery understood and addressed the argument being made on appeal." *Id.* The Court held, "[w]here, as here, the trial court has addressed in its decision the issues raised on appeal, the arguments on appeal are not waived." *Id.*

Likewise, in *Origis USA LLC v. Great American Insurance Co.*, the lower court found waiver, but this Court stated, "[g]iven that the trial court did address the Insureds' advancement argument, we conclude it has not been waived." 345 A.3d at 954. The Court further stated, "the trial court addressing an issue on the merits may be sufficient to fairly present it to the trial court and enable this Court's review on appeal." *Id.* at 953 n.76 (citing *Lawson v. Preston L. McIlvaine Const. Co.*, 1988 WL 141168, at *2 (Del. Dec. 7, 1988) (issue properly before Supreme Court where the trial judge addressed its merits *sua sponte*)).

The *Origis* Court also noted that it did not fault the lower court for any confusion on the issue of waiver because the parties "continued to shift and evolve" their arguments. 345 A.3d at 954. The principle is long recognized that this Court:

> will not permit a litigant to raise in this court for the first time matters not argued below where to do so would be to raise an entirely new theory of his case, but **when the argument is merely an additional reason in support of a proposition urged below, there is no acceptable reason why** . . . **the argument should not be considered**.

Mundy v. Holden, 204 A.2d 83, 87 (Del. 1964) (emphasis added) (quoting *Kerbs v. California E. Airways*, 90 A.2d 652, 659 (Del. Ch. 1952)). These cases acknowledge that shifting nuances in argumentation is commonplace throughout litigation and on appeal and is proper so long as the general thrust of the arguments and theory underlying the presentation of issues remains constant.

All issues raised in Defendants' Opening Brief were fairly presented below. The legal question of DUTSA preemption was discussed at length in pre-trial briefing (A0650-A0651 at 58-59), and addressed in the final order. (Opening Br. Ex. C, 95-96.) The legal question of DUTSA extraterritoriality was discussed at length in the post-trial brief (A1808-1810), and addressed in the final order. (Opening Br. Ex. C at 46-47.) The legal question of the appropriate measure of compensatory damages was presented at length throughout pre- and post-trial briefing. The Chancery Court adopted Arxada's expert's misapplication of the main case on the issue of compensatory damages (*University Computing*). (Opening Br. Ex. C, 62-66.) This, too, was necessarily before the trial court.

Overall, Arxada's waiver arguments reveal its discomfort with the compelling assignments of error in this appeal. It seeks to escape its own burdens of proof as the Plaintiff, for instance, to demonstrate misconduct occurred in Delaware or to prove-up the appropriate measure of damages given these facts. The Court should reject every suggestion of waiver.

B. The DUTSA Preemption Argument Was Raised and Addressed.

Defendants raised preemption in their pre-trial brief, (A0650-A0651), and incorporated it by reference in Defendants' post-trial brief. (A1838) ("For reasons discussed in Defendants' pre-trial briefing and herein . . .").) Moreover, in the pre-trial order, Arxada agreed, and the Chancery Court ordered, that "[t]he Parties respectfully refer the Court to their respective pre-trial briefs for their statement of the issues of fact they intend to establish at trial and statements of legal issues to be tried." (B1538 (Pre-trial Order ¶ 104).) Thus, the scope of the legal issues for consideration by the court included those raised in the pre-trial brief. *See* Del. Ct. Ch. R. 16(c)(3) ("[A]ll all pretrial orders shall include . . . a statement of the issues of fact and of law which any party contends remain to be litigated."). Additionally, the Chancery Court addressed preemption in its order. (Opening Br. Ex. C, 95-96.) The issue was fairly presented multiple ways and thus preserved for appeal. *See, e.g.*, *In re Tesla*, 2025 WL 3689114, at *10 (no waiver when court "understood and addressed the argument being made on appeal").

Further, in arguing waiver, Arxada conflates ***a Chancery Court practice*** with ***this Court's Rule 8 preservation standard***. Arxada's reliance on *Oxbow Carbon & Mins. Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC* is misplaced because *Oxbow* describes, in a footnote, "[t]he *practice* in the Court of Chancery is to find that an issue not raised in post-trial briefing has been waived, even if it was properly raised pre-trial." 202 A.3d 482, 502 n.77 (Del. 2019) (emphasis added). But that does not alter this Court's preservation standard nor override this Court's holdings that issues are preserved when the trial court understood and addressed the argument. Waiver does not apply here.

C. DUTSA Extraterritoriality Was Raised and Is Not a "Choice of Law" Analysis.

Proving a nexus between the alleged misappropriation and Delaware was Arxada's affirmative burden at trial as a DUTSA plaintiff. It failed. When it did, Defendants appropriately raised the issue in their post-trial briefing – *i.e.*, the very first time it was possible to point out such a failure. (A1808-1810.)

Arxada cites *Berg v. Bar-Lavi*, 2026 WL 850780, at *9 n.134 (Del. Ch. Mar. 27, 2026), in asserting that an argument raised for the first time post-trial is waived. In *Berg*, the question was whether expert testimony could be excluded because of unreliable methodologies, and the Chancery Court determined that the *Daubert* challenge, raised for the first time in post-trial briefing, was waived. The *Berg* Court further cited *Beard Research, Inc. v. Kates*, 8 A.3d 573, 593 (Del. Ch. 2010), which also involved a challenge regarding the admissibility of expert testimony. The rule emerging from these cases is that a timely assertion of a *Daubert* challenge is either before trial or during trial. They do not speak to whether there has been a waiver where a plaintiff fails to prove a crucial element of its claim at trial.

Arxada attempts to recast Defendants' argument as a belated choice of law analysis. This is a mischaracterization. Defendants have never argued that another state's law should govern. Rather, Defendants contend that Arxada failed to establish liability under the Delaware trade secret law it invoked because the alleged misappropriation occurred entirely outside of Delaware. Defendants raised that issue in their post-trial briefing, and the Chancery Court expressly addressed and rejected it. Accordingly, the issue is fairly presented under Rule 8.

D. There Was No Waiver Regarding Whether the Court Misapplied the Law Regarding Damages.

The parties briefed compensatory damages issues at length in expert reports, motions in limine, pre-trial briefing, and post-trial briefing. (A0566, A0656, A1823.) Arxada nevertheless argues that Defendants never raised the inapplicability of Arxada's claimed damages because they incorrectly "'reflect[] the total value of [the] trade secret'; and (ii) are 'wrongful double recovery' 'in light of the permanent injunction.'" (Appellee's Br. 42.) Arxada is wrong.

Both parties raised the proper measure of damages, and the court directly addressed it. Presumably because Arxada has no evidence of lost profits, neither of its damages experts calculated "a number for lost profits from losing customers to Capacity Chemical." (Opening Br. Ex. C, 62.) Arxada also failed to present any evidence of Defendants' benefit from use of the trade secrets for a set period.

Instead, its expert Howard calculated the total value of the formulas if created anew. (A0563, A0566, A1510.)

Defendants' expert rebuttal report specifically cites to *University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 539 (5th Cir. 1974), as explaining various measures for computing compensatory damages for misappropriation. (A0415-A0417.) The avoidance component of compensatory damages was presented throughout trial, and both sides presented the issue in post-trial argument. (A1874-1875, A1911-1914, A1916.)

The post-trial order directly quotes *University Computing* to describe that courts should consider "the total value of the secret to the plaintiff," when determining a reasonable royalty. (Opening Br. Ex. C, 64-65.) The Chancery Court then misapplied *University Computing* when it (correctly) rejected the Bersin report on reasonable royalty, but still left in place the very same incorrect input of total avoided cost rather than award the avoided cost benefit received by the Defendants (which in this case is *only* the avoided cost during the period of misappropriation). But Arxada retained the full value of the purported trade secrets because there was no destruction of the trade secrets, and it obtained an injunction against Defendants for future use of the trade secrets. (Opening Br. 35-38.)

As to the issue of a double recovery, Defendants' rebuttal expert raised the issue that the benefit Defendants received by the trade secret would need to be adjusted for the "impacted period" of the injunction. (A0393.) Defendants could not have made any more of a nuanced argument on the issue until the Chancery Court actually, and improperly, awarded both. *See McGuinness*, 312 A.3d at 1191 (noting a party "could not reasonably be expected to raise a theoretical . . . argument in her post-trial motion in anticipation that the trial court would finally adopt her . . . [other] argument."). There has been no waiver.

II. THE CHANCERY COURT ERRED IN HOLDING DEFENDANTS MISAPPROPRIATED TRADE SECRETS.

A. Arxada Lacks Standing to Assert Claims Relating to Subsidiaries' Trade Secrets.

While Arxada correctly notes that DUTSA does not require formal title, it is inappropriate to ignore the distinct nature of the corporate entities involved. "Delaware law presumes respect for the corporate form: '[a] subsidiary corporation is presumed to be a separate and distinct entity from its parent corporation.'" *Nieves v. Insight Bldg. Co., LLC*, 2020 WL 4463425, at *8 (Del. Ch. Aug. 4, 2020) (internal citations omitted). Indeed, it is a basic tenet of corporate law that "[a] corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary; and, it follows with even greater force, the parent does not own or have legal title to the subsidiaries of the subsidiary." *Ronnoco Coffee LLC v. Peoples*, 2021 WL 5937428, at *15 (E.D. Mo. Dec. 16, 2021) (citation omitted); *see also Keystone Assocs. LLC v. Benjamin Fulton*, 2020 WL 3432601, at *3 (D. Del. June 23, 2020) (same). Thus to achieve standing, Arxada must demonstrate that it suffered a direct, particularized injury distinct from the harm to ET itself. *See Albence v. Mennella*, 320 A.3d 212, 216 (Del. 2024). However, if Arxada's claimed damages are derivative of ET's losses (*e.g.*, lost customers, lost profits, and formulas that belonged to ET's operational business), then Arxada lacks direct standing, and the claims properly belong to ET. *See id.*

The record demonstrates that ET is a separate entity from Arxada. All customer contracts belonged to ET, not Arxada. (A0783-0784 at 43:11-44:5.) Both corporations have separate revenue streams. (A0784-0785 at 44:24-45:8.) They keep separate books and records and file separate tax returns. (A0787 at 47:4-10.) The trade secrets at issue belonged exclusively to ET. (A0774-0775 at 34:19-35:3.) If any entity would have experienced harm from the alleged misappropriation, it was ET, not Arxada, and Arxada thus lacks standing.

The Chancery Court relied on *Applied Materials, Inc. v. Advanced Micro-Fabrication Equip. (Shanghai) Co., LTD*, in concluding otherwise. (Opening Br. Ex. C, 60-61.) But *Applied Materials* is a California federal case applying California statute, not DUTSA, and does *not* support a finding that Arxada had standing to pursue claims on behalf of ET. *See* 2009 WL 10692715, at *6 (N.D. Cal. Nov. 30, 2009). *Applied Materials* does not establish an exception to the general principle that a parent corporation cannot sue for harms caused to its subsidiary.

Arxada's claims relate to alleged harms that ***it did not experience***, and Arxada has failed to put forth evidence proving damages that are distinct from those of ET. Arxada lacks standing.

B. Arxada's DUTSA Claim Fails Because It Lacks Evidence of Misappropriation in Delaware.

Arxada had the burden of proving its DUTSA claim, including demonstrating misappropriation in Delaware. Yet it completely failed to present evidence that any trade secrets were misappropriated in Delaware. Arxada argues that the Chancery Court's decision on its DUTSA claim must stand because regardless of whether Delaware law or California law would have been applied, "the results would have been the same." (Appellee's Br. 21.)

This misses the mark. Defendants' argument is not about choice of law (*i.e.* which law should be applied). Arxada *chose* to sue under DUTSA and yet utterly failed to prove the elements of its chosen law because it failed to present evidence that misappropriation occurred in Delaware. *Sorrento Therapeutics, Inc. v. Mack,* 2023 WL 5670689, at *29 (Del. Ch. Sept. 1, 2023) ("Absent clear legislative intent, an individual cannot be punished under Delaware law for an action occurring exclusively in California.") (internal quotation omitted).

Arxada relies on *Dow Chemical Co. v. Organik Kimya Holding A.S.*, 2018 WL 2382802, at *5 (Del. Ch. May 25, 2018) and *Focus Financial Partners, LLC v. Holsopple*, 250 A.3d 939, 970 (Del. Ch. 2020), to argue that DUTSA extraterritoriality has always been regarded as a choice-of-law issue. Both are inapposite.

In *Dow Chemical Company*, the defendant argued on a Rule 12 motion that the complaint should be dismissed because it did not specify where the misappropriation occurred. 2018 WL 2382802, at *4-5. The court determined that the plaintiff only needs to provide a general notice of the claim to survive a motion to dismiss, and at that stage, "[t]he question is not whether the plaintiff has identified the correct legal theory for obtaining relief on the facts alleged." *Id.* at *5. Thus, for pleading purposes, the court concluded that the plaintiff could allege a trade secret claim without specifying where the misappropriation took place. That case does not provide that a plaintiff asserting a DUTSA claim at trial need not prove relevant conduct taking place in Delaware.

Neither does *Focus Financial Partners, LLC*, which also dealt with a motion to dismiss. 250 A.3d at 946. There, the court concluded that, at the pleadings stage, "it is not possible to determine what state's law would govern the trade secret claim. Some authorities would favor California; others would favor New York. One thing is clear: Delaware law does not apply." *Id.* at 971. Thus, the case is likewise cabined to the motion to dismiss stage.

Importantly, the court also stated, "Delaware law presumes that 'a law is not intended to apply outside the territorial jurisdiction of the State in which it is enacted.'" *Id.* at 970 (quoting *J.E. Rhoads & Sons, Inc. v. Ammeraal, Inc.*, 1988 WL 116423, at *2 (Del. Super. Ct. Oct. 21, 1988)). "DUTSA lacks any indication that the legislature intended for it to apply outside the territorial jurisdiction of Delaware, and Focus Parent has not cited any conduct that took place in Delaware." *Id.* Thus, the *Focus Financial* court recognized that DUTSA does not apply to cases where no alleged misappropriation took place in Delaware.

At trial, Arxada has the burden to prove each element of its claim on the merits. Arxada's sole statutory theory of recovery was under DUTSA. Accordingly, proving that there was misappropriation in Delaware was a crucial element of Arxada's claim. Since Arxada could not do so, reversal on DUTSA liability is appropriate.

C. Arxada Cannot Meet Other Essential Elements of Its DUTSA Claim.

Arxada was required to establish that the ET formulas have independent economic value, meaning each formula derives value from "not being generally known" or "readily ascertainable." *See* 6 *Del. C.* § 2001(4). Arxada failed to meaningfully address the arguments and record evidence in Defendants' brief on this issue. (Opening Br. 17-22.)

Arxada likewise failed to meaningfully refute Defendants' arguments relating to having failed to take reasonable efforts to protect its trade secrets. It did not. The record demonstrates that ET did not train employees on confidentiality, never required the majority of its employees to sign any kind of confidentiality agreement, and failed to implement data loss prevention software, monitor for bulk downloads, or restrict USB port access. (*See* Opening Br. 16-17.) Post-sale, ET likewise failed to: issue confidentiality agreements to its employees (less than 10% of ET employees had them), disseminate and enforce confidentiality policies, or provide security training. (Opening Br. 16.) Despite allegations of a restricted access system, Arxada facilities were often unsecure. (A1043 at Tr. 303:6-19, A1388-1391 at Tr. 648:24-651:16.) Arxada did not strictly enforce its confidentiality policies, as formulas were openly shared with third parties, thus causing them to lose their protected status. (A1095 at Tr. 355:3-16); *see E.I. du Pont de Nemours & Co. v. Hou*, 2017 WL 2531940, at *2 (D. Del. June 9, 2017) ("A failure by the owner to employ reasonable security measures to safeguard its trade secrets can cause such information to lose its trade secret status."). Arxada has thus failed to prove this necessary element as well.

Moreover, there is insufficient evidence that Defendants used or disclosed trade secrets. Arxada overstates the scope of the ET formulas purportedly used. There were 891 formulas included in Arxada's avoided-cost calculation, but only 44 formulas in Capacity's database bore the same name and ingredients as ET formulas. (A1095 at Tr. 355:17-358:17.) There is thus no evidence that Capacity used the vast majority of the 891 formulas (or any of them, for that matter), and an award of avoided-cost damages for all of them was erroneous. Similarly, the "use" standard under Delaware law requires more than mere possession; it requires that the defendant actually derived a competitive benefit from the specific trade secret. *See* 6 *Del. C.* § 2001(4). Arxada failed to prove this necessary element as well.

III. DUTSA PREEMPTS ARXADA'S COMMON LAW CLAIMS.

DUTSA preempts Arxada's common law claims because they are based on the same conduct as the misappropriation of trade secrets claims. 6 *Del. C.* § 2007. DUTSA preempts claims that are "grounded in the same facts which purportedly support the misappropriation of trade secrets claims." *Beard Rsch., Inc.*, 8 A.3d at 602.

Arxada contends that "the Court of Chancery held different facts supported Arxada's breach of fiduciary duty claims against Aaron and Phil." (Appellee's Br. 37.) While the Chancery Court made a statement that there were separate grounds for breach of fiduciary duty other than only misappropriation, it stated, "[e]xcept for the injunctive relief against Phil and Aaron, all the relief this decision awards for breach of fiduciary duty **falls within the relief already awarded under DUTSA**." (Opening Br. Ex. C, 95-96 (emphasis added).) As the court noted, a plaintiff under DUTSA is entitled to "the actual loss **caused** by misappropriation." (*Id.* at 62 (emphasis added).) And the Chancery Court awarded $900,000 as actual damages **caused by** Defendants' misappropriation of trade secrets. (*See* Opening Br. Ex. B, 3-4.) Likewise, the court included compensatory damages of "unjust enrichment **caused by** misappropriation that is not taken into account in computing actual loss," amounting to "$24,224,125.59 in avoided costs." (*Id.* (emphasis added).) The court's statement on damages and the final judgment show that the damages associated with the common law claims are identical to the DUTSA relief. This further demonstrates that the common law claims were based on the same conduct as the DUTSA claim and thus preempted.

IV. THE COURT ERRED IN CONCLUDING THAT THERE WAS BREACH OF OR INTERFERENCE WITH A VALID CONTRACT.

Arxada's telling makes no effort in its opposition to demonstrate that the restrictive covenants are enforceable. Since the restrictive covenants are broader than necessary to protect a legitimate business interest, they are unenforceable. (*See* Opening Br. 26-27); *see also Kodiak Building Partners, LLC v. Adams*, 2022 WL 5240507, at *13 (Del. Ch. Oct. 6, 2022) (concluding a non-compete in the context of sale of business was overbroad because the geographic scope was broader than necessary to protect the purchaser's reasonable economic interests). And even if the provision was enforceable, Mike did not engage in conduct that violated the SPA or posed any threat to ET's economic interests. (*See* Opening Br. 26-29.)

Similarly, no actionable tortious interference existed here. Without a breach of contract or active participation in its breach, there is no tortious interference liability. (*See id.* 29-30.)

V. THE CHANCERY COURT ERRED IN FINDING DEFENDANTS OWED FIDUCIARY DUTIES.

Arxada cites no law demonstrating that fiduciary duties continue post-employment other than the Chancery Court's novel interpretation of the Restatement. And Delaware courts have repeatedly held that employees' fiduciary duties expire on resignation or termination of employment. *See, e.g., Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1059 (Del. Super. Ct. 2001) (concluding the fiduciary duty that a former employee owed to its employer ceased on the day employee left the practice); *see also In re Walt Disney Co. Derivative Litig*., 906 A.2d 27, 51 (Del. 2006) (concluding that "[j]ust as Delaware law does not require directors-to-be to comply with their fiduciary duties, former directors owe no fiduciary duties" to their previous employers). The record demonstrates that Defendants never breached an extant fiduciary duty much less to Arxada, which was never their employer. (*See* Opening Br. 27-30.)

VI. THE CHANCERY COURT ERRED IN AWARDING WINDFALL REMEDIES.

A. The Chancery Court Erred in Awarding the "Total Value" of the Trade Secrets Calculated by Howard.

The Chancery Court erred in awarding astronomically high "avoided cost" damages as unjust-enrichment damages based on the hypothetical total development cost of re-creating Arxada's trade secrets instead of the benefit Defendants actually obtained. When the alleged unjust enrichment consists of the avoided cost in developing a trade secret, as is the case here, the damages cannot exceed that advantage. Arxada's expert used the correct baseline for the enrichment, avoided cost, but measured the benefit as the total cost of creating the trade secrets even though the law is supposed to measure only the benefit actually obtained by the defendant. Arxada at all times retained, and retains, possession of the purported trade secrets, and there is a permanent injunction against Defendants relating to their use. There is no harm to Arxada because of any continuing misappropriation.

The judgment rests on mutually inconsistent premises that Defendants have to both pay damages for the developmental advantage (avoided cost) of the total value of developing the trade secret while they are also enjoined from future use of that very benefit for which they are paying. The only reasonable amount of "avoided cost" damages is the amount of benefit Defendants gained from use of the trade secrets during the limited time in which Defendants allegedly misappropriated them—not the total value of developing the trade secret from scratch.

The preeminent case on calculating compensatory damages in trade secrets cases is *University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518 (5th Cir. 1974). There the Fifth Circuit explained, "Where the plaintiff retains the use of the secret . . . and where there has been no effective disclosure of the secret through publication ***the total value of the secret to the plaintiff is an inappropriate measure***." *Id.* at 535. The principle appears repeatedly in trade secret jurisprudence. (*See* Opening Br. at 32-35 (discussing *Softel, Inc. v. Dragon Med. & Sci. Commc'ns, Inc.*, 118 F.3d 955, 969 (2d Cir. 1997); *Syntel Sterling Best Shores Mauritius Ltd. v. The TriZetto Grp., Inc.*, 68 F.4th 792, 812 (2d Cir. 2023); *Caudill Seed & Warehouse Co. v. Jarrow Formulas, Inc.*, 53 F.4th 368, 396 (6th Cir. 2022) (Moore, J., concurring and dissenting in part)).)[2]

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[2] Arxada correctly noted a mistaken citation to the Restatement (Third) of Unfair Competition on page 36 of Defendants' Opening Brief. The correct citation for that quote is 1 Trade Secrets Law § 3:24. The same principle is reflected in Section 45, comment d, of the Restatement (Third) of Unfair Competition which states, "The plaintiff's loss usually consists of . . . the value of the trade secret if it has been destroyed through a public disclosure by the defendant."

This appeal provides the Court the opportunity to clarify this commonsense principle under Delaware trade secrets law. The rationale behind the avoided cost measure of damages is that it represents the savings the defendant obtains from not independently developing the technology because of the temporary head start benefit the trade secret provides the defendant in the marketplace. *See Agilent Techs., Inc. v. Kirkland,* 2010 WL 610725, at *26 n.230 (Del. Ch. Feb. 18, 2020) (describing head start and noting Chancery Court "has limited money damages for trade secret misappropriation by the time it would have taken the defendants to develop a comparable product without the use of the plaintiff's trade secrets"); *Sokol Crystal Prods., Inc. v. DSC Commc'ns Corp.*, 15 F.3d 1427, 1433 (7th Cir. 1994) (noting the general principle that "where a misappropriation of a trade secret only gives a competitor a 'head start' in developing a product, damages should be limited to the injury suffered in that 'head start' period").

Avoided costs are the economic measure of this head start advantage. But the avoided cost must still tie back to how the Defendant benefitted. Therefore, an avoided-cost model must reflect the benefit that was actually realized by the defendant during the period of unlawful use. It cannot assume years of future advantage from total value of development of the trade secret after an injunction has eliminated any future ability to exploit the trade secret.

An injunction, if granted in a trade secret case, is only permissible to last long enough to prevent that impermissible head start. (*See* Appellee's Br. 44-45 (quoting Restatement (Third) of Unfair Competition § 45, cmt. f ("It is often appropriate to enjoin the defendant's use of a trade secret only for the period of time that would have been required for the defendant to acquire the information by proper means."))).) At that point, the rationale is the defendant would have independently developed the trade secret. The only remaining damages would be, as Arxada notes, if the defendant avoided any (or saved) costs by developing reverse engineering to speed up the process of acquiring the information. (*See id.* (quoting Restatement (Third) of Unfair Competition § 45, cmt. f).

Arxada failed to present any evidence of Defendants' benefit from use of the trade secrets for the limited pre-injunction period. Instead, its expert Howard opined only on the total value of the trade secrets. (*See* A0565-66; *see also* A1510 ("***The total value of the formulas misappropriated***, as shown here, was over -- in my valuation, was over $24 million.") (emphasis added); (A1729 (Howard noting his analysis was based on "if a company today were trying from scratch to build up all these formulations."), A0276 (estimating total number of hours to develop the products).) He failed to tie the hypothetical total development costs to the enrichment actually obtained by Defendants during the period of misappropriation.

Arxada also brought forth no evidence that it sustained any actual or continuing harm from Defendants' alleged temporary use of its trade secrets. Defendants presented a rebuttal damages expert, Gardemal, who, among other opinions, critiqued Arxada's lack of evidence that Defendants' actions had in any way destroyed the value that the alleged trade secrets had to Arxada. (A0415-17, A0426.) It is also undisputed that while Defendants possessed the information claimed to be a trade secret, it was not disclosed to the public—as demonstrated by Arxada's efforts to seal the courtroom from public disclosure during trial. (*See*, *e.g.*, A0744-745.)

Howard purported to measure unjust enrichment through avoided development costs. Because that methodology measures the benefit of avoiding independent development of the trade secret, it cannot be disconnected from the duration of that developmental advantage the Defendants actually obtained. The total value of the trade secrets assumes that Arxada's profits would be at risk for approximately ten years without considering that Arxada was awarded an injunction. (A1567-568.) Because of the injunction, Defendants no longer benefit from any developmental advantage. If the Court affirms DUTSA liability, then, Defendants' "lost profits" calculation of $900,000 is the only reliable measure of compensatory damages within this record to prevent a windfall.

B. The Chancery Court Erred in Awarding Exemplary Damages.

The Court should also reverse the award of exemplary damages as a matter of law. Given Arxada's failure to protect ET's formulas and the fact that so many were in the public domain or belonged to customers, Defendants had a good faith basis to not regard the formulas as trade secrets. There is no evidence of the necessary malice to substantiate exemplary damages, let alone $25 million in exemplary damages. The exemplary damages award should be overturned, or at least significantly reduced to mirror an appropriately reduced amount of compensatory damages.

Arxada cites to *Great American Opportunities, Inc. v. Cherrydale Fundraising, LLC*, for the proposition that "lur[ing] away members of [plaintiff's] sales force and customer base" alone demonstrates malice. 2010 WL 338219, at *28 (Del. Ch. Jan. 29, 2010). But Defendants did not lure away customers. ET was driving them away through its "product rationalization project," increased lead times and fill weights, and discontinued formulas. (A1364-369, A1376, A1379-380, A1384.) Further, in *Great American Opportunities, Inc.*, even despite true "luring" of customers, the Court chose to award less than the maximum permissible amount. 2010 WL 338219, at *28.

Arxada's argument that spoliation of evidence during litigation supports exemplary damages is unsupported and misplaced, as its case law demonstrates. In

Kemezy v. Peters, the awarded exemplary damages had nothing to do with spoliation. 79 F.3d 33, 35 (7th Cir. 1996). The court instead discussed exemplary damages as a means to dissuade a defendant from "continuing to engage in the same type of wrongdoing." *Id.* Here, that would be misappropriation, not litigation conduct. Even if there had been spoliation, it would not justify exemplary damages.

CONCLUSION

Arxada has proven no harm and is not entitled to a windfall judgment under Delaware law. For reasons discussed in Defendants' Opening Brief and in this Brief, the Court should reverse and enter judgment for Defendants. Alternatively, the Court should affirm lost profits of $900,000, award exemplary damages of no more than that amount, and remand for recalculation of reasonable attorneys' fees, costs and applicable interest.

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