IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ELENZA, INC., a Delaware corporation, Plaintiff-Counterclaim Defendant, v. ALCON LABORATORIES HOLDING CORPORATION, a Delaware corporation, ALCON RESEARCH, LTD., a Delaware Corporation, Defendants-Counterclaim Plaintiffs, and NOVARTIS AG, a Swiss corporation, Defendant.	)	C.A. No. N14C-03-185 MMJ CCLD **FILED UNDER SEAL**

Submitted: January 19, 2017
Decided: April 20, 2017

OPINION

Jessica Kaufman, Esq. (Argued), Grant J. Esposito, Esq., Morrison & Foerster LLP, Benjamin A. Smyth, Esq., Daniel M. Silver, Esq., Michael P. Kelly, Esq., McCarter & English LLP, Attorneys for Defendant Novartis AG.

Daniel P. Shanahan, Esq. (Argued), Tamara A. Rubb, Esq., David Randall J. Riskin, Esq., Heidi K. Hubbard, Esq., Williams & Connolly LLP, Benjamin A. Smyth, Esq., Daniel M. Silver, Esq., Michael P. Kelly, Esq., McCarter & English LLP, Attorneys for Defendants Alcon Laboratories Holding Corporation and Alcon Research, Ltd.

Vincent I. Parrett, Esq. (Argued), John D. Pernick, Esq., Clark S. Stone, Esq., Jaideep Venkatesan, Esq., Daniel J. Bergeson, Esq., Bergeson LLP, F. Troupe Mickler IV, Esq., Andrew D. Cordo, Esq., Ashby & Geddes, P.A., Attorneys for Plaintiff Elenza, Inc.

JOHNSTON, J.

PROCEDURAL CONTEXT

This litigation involves numerous claims of disclosure or misuse of trade secrets, as well as breach of contract. ELENZA, Inc. ("ELENZA") brought suit against Alcon Laboratories Holding Corporation and Alcon Research, Ltd. (collectively, "Alcon") and Novartis AG in March of 2014.

Alcon filed a motion to dismiss and ELENZA filed its first amended complaint in May of 2014. ELENZA filed its second amended complaint in April of 2015. ELENZA filed its third amended complaint in February of 2016. The third amended complaint defines this action.

ELENZA asserts eight separate causes of action in its third amended complaint. Seven of the claims are made against all of the defendants. Those claims are: misappropriation of trade secrets (Count I), breach of contract (Count II), breach of the implied covenant of good faith and fair dealing (Count III), intentional misrepresentation (Count IV), affirmative misrepresentation (Count V), misappropriation (Count VII), and conversion (Count VIII). The claim solely against Novartis AG ("Novartis") is for interference with contract (Count VI). Count VI has been withdrawn.

STATEMENT OF FACTS

Alcon is an ophthalmic company and the world's largest developer and manufacturer of artificial intraocular lenses ("IOLs"). ELENZA is a company that was formed in 2008 to develop an electro-active intraocular lens ("EAIOL") to

treat patients suffering from cataracts by restoring much of the eye's natural accommodative function.

In 2010, ELENZA and Alcon discussed collaborating to develop an EAIOL that would use a change in pupil size as the physiological trigger for accommodation. In February of 2011, Alcon and ELENZA signed the Series B Preferred Stock Purchase Agreement ("SPA").

The SPA provided for a first tranche investment by Alcon. This "Initial Closing" resulted in Alcon acquiring about 30% of ELENZA's outstanding shares. The SPA also provided for a second tranche investment by Alcon. This "Milestone Closing" was subject to various conditions.

First, ELENZA needed to successfully complete a clinical study ("PCCS") demonstrating ELENZA's ability to develop an algorithm that would reliably measure and respond to changes in a patient's pupil diameter (the "Milestone"). Alcon and ELENZA jointly established the protocols for the PCCS. The parties' Joint Development Committee was tasked with determining the success of the study. Second, the "Milestone Closing" was conditioned on the execution of a Development Agreement and a Research License.

The SPA also allowed Alcon to make additional payments in order to secure a "right of first refusal" to purchase ELENZA if certain conditions were met. The SPA established procedures for converting investors' shares if they declined to participate in the second tranche of financing as well.

In December of 2011, Alcon concluded that ELENZA failed to meet the Milestone. Alcon based its conclusion on Alcon's own review and analysis. Alcon also concluded that pupil sensing was unlikely to provide adequate performance for an EAIOL.

On July 9, 2012, Alcon and ELENZA signed a "Clarification Agreement." This formally terminated the parties' relationship. ELENZA then attempted to secure further funding in a B-2 financing round. ELENZA was unable to obtain enough funding to complete development of its EAIOL, obtain regulatory approval, and get its EAIOL to market. Alcon did not participate in funding ELENZA in the B-2 financing round.

In July of 2014, Alcon and Google publicly announced that they would be collaborating in order to develop and market an EAIOL and an Accommodating Contact Lens.

PARTIES' CONTENTIONS

Alcon argues that there is no evidence that Alcon disclosed or misused any trade secrets or confidential information. Alcon also contends that ELENZA's conversion and misappropriation claims fail because they are duplicative and precluded by a non-disclosure agreement signed by the parties. Alcon further argues that the SPA itself bars ELENZA's claim that Alcon breached the SPA. Alcon also asserts that ELENZA's admissions foreclose it from bringing claims for intentional and affirmative misrepresentation. Finally, Alcon argues that ELENZA

cannot prove causation and that its damages claim is impermissibly speculative.

ELENZA contends that Alcon misappropriated its protectable trade secrets. ELENZA also claims that there are genuine issues of material fact as to ELENZA's contract and tort claims based on the alleged misuse of confidential information by Alcon. ELENZA claims that Alcon breached the SPA by failing to fund ELENZA after ELENZA successfully completed the Milestone. ELENZA argues that Alcon concealed its AFIOL program and its patent applications. ELENZA contends that these actions constitute intentional and affirmative misrepresentations. ELENZA further asserts that ELENZA relied on these alleged misrepresentations to its detriment. ELENZA argues that genuine issues of material fact exist that preclude summary judgment on damages and causation.

Finally, ELENZA argues that Novartis is liable for Alcon's actions because Alcon is an agent of Novartis.

STANDARD OF REVIEW

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[1] All facts are viewed in a light most favorable to the non-moving party.[2] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to

[1] Super. Ct. Civ. R. 56(c).
[2] *Burkhart v. Davies*, 602 A.2d 56, 58–59 (Del. 1991).

the specific circumstances.[3] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[4] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[5]

A plaintiff alleging misappropriation of a trade secret carries the burden of proving four elements:[6] (1) that a trade secret exists; (2) that plaintiff communicated the trade secret to defendant; (3) that the communication occurred with the understanding that defendant would protect the secrecy of the information; and (4) that the defendant improperly used or disclosed the trade secret.[7] An expert witness is necessary to prove the presence of a trade secret.[8]

The Court will address elements one and four of this claim. Elements two and three are not at issue because the relationship between ELENZA and Alcon was collaborative. As a result, it is conceded that ELENZA communicated the information in question to Alcon with the understanding that its secrecy would be protected.

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[3] Super. Ct. Civ. R. 56(c).
[4] *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).
[5] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
[6] *Dow Chemical Canada Inc. v. HRD Corp.*, 909 F.Supp.2d 340, 347 (2012).
[7] *Savor, Inc. v. FMR Corp.*, 2004 WL 1965869, at *5 (Del. Super.).
[8] *Trident Prods. & Servs., LLC v. Canadian Soiless Wholesale, Ltd.,* 859 F. Supp. 2d 771, 779 (E.D. Va. 2012).

ANALYSIS

Shadow Program

ELENZA asserts that Alcon secretly established a "Shadow EAIOL Program" with the intent to develop its own almost-identical product. ELENZA claims that most of the engineers who worked on Alcon's AFIOL had access to ELENZA's technology with no "firewall" set up to prevent misappropriation. When viewing the facts in the light most favorable to ELENZA, the Court finds that there are genuine issues of material fact as to whether Alcon secretly engaged in parallel research while using ELENZA trade secrets.

Disclosure of Trade Secrets – Count I

Assuming that Alcon did implement a "shadow program," the burden of proof still rests on ELENZA to demonstrate a genuine issue of material fact as to whether a trade secret exists. In order to do this, ELENZA must show that the alleged trade secret was defined with a "reasonable degree of precision and specificity . . . ."[9] ELENZA also must demonstrate that the information in question was not known or not readily ascertainable, and that the trade secret was improperly used or disclosed by Alcon.

Alcon argues that expert testimony establishing these genuine issues of material fact is necessary for ELENZA to prevail. Alcon points to ELENZA's expert witness, Dr. Frank. Dr. Frank admitted during his deposition that he did not

[9] *Savor,* 2004 WL 1965869, at *5.

do the analysis necessary to establish that the information in question was not already generally known. Alcon similarly contends that the testimony of Dr. Gupta (an ELENZA fact witness) is not adequate to show that the information in question was not already generally known. Alcon claims that this testimony demonstrates that there is no genuine issue of material fact as to whether the information in question qualifies as a trade secret.

Alcon asserts that in light of these admissions, there are only five possible disclosure allegations remaining. These are alleged patent application disclosures: 4a and 9, and alleged disclosures made in Alcon's presentations to Google: 2c, 7b, and 8.

Alleged Trade Secret 4a involves the design and testing of the application-specific integrated circuits ("ASICs") that control ELENZA's EAIOL. ELENZA contends that the Venkateswaran Application, a United States Patent Application, discloses the use of custom ASICs and charge pumps or charge amplifiers in an EAIOL. Alcon argues that the Venkateswaran Application does not mention ASICs, and that Alleged Trade Secret 4a was no longer a trade secret when the Venkateswaran Application was filed.

Alleged Trade Secret 9 involves properties required of a liquid-crystal compound. ELENZA argues that the Venkateswaran Application discloses ELENZA's liquid crystal materials. Alcon contends that there is not sufficient testimony to support this assertion. Alcon also argues that ELENZA's CEO

testified that the liquid crystal information in question could be found in prior literature.

ELENZA asserts that Alcon disclosed Alleged Trade Secrets 2c, 7b, and 8 to Google through Alcon's presentations to Google. However, Alcon argues that Dr. Frank's own testimony refutes that allegation as to Alleged Trade Secrets 2c and 7b. Alcon also contends that Alleged Trade Secret 8 was no longer a trade secret when Alcon made its presentations to Google.

The Court finds that ELENZA failed to present evidence upon which a reasonable factfinder could find disclosure of its trade secrets. ELENZA has not established a *prima facie* case, through expert testimony or other evidence, that Alcon used or disclosed any trade secret, defined with a reasonable degree of precision and specificity, that was not already known or readily ascertainable. There is no genuine issue of material fact as to the disclosure of trade secrets.

Misrepresentation Claims – Counts IV and V

The Court has found that there has been no disclosure of a trade secret. It follows that there is no basis for a misrepresentation claim. There are no genuine issues of material fact as to this claim.

Conversion and Misappropriation Claims – Counts VII and VIII

Alcon argues that ELENZA admitted no misuse in all but eight claims. However, the Court has found that there has been no disclosure of trade secrets. Therefore, there are no genuine issues of material fact relating to these claims.

Breach of Contract – Counts II and III

Section 2.1(g) of the SPA provides:

> In the event that the Milestone is met and all conditions to Closing pursuant to Section 5 below are satisfied in respect of the Milestone Closing, then any Purchaser failing to participate in the Milestone Closing to the full extent set forth on the Schedule of Purchasers of their commitment following achievement of the Milestone will have all Shares converted to shares of Series A-1 Preferred Stock of the Company at a conversion rate of one to one.

Alcon argues that the SPA expressly recognizes that an investor could decline to participate in the second tranche investment stage – even if ELENZA achieved all conditions necessary for that investment. Alcon contends that the SPA contained an exclusive remedy, the downgrade of investor's stock, if this were to occur.

ELENZA asserts that the remedy set forth in Section 2.1(g) is not exclusive. ELENZA identifies other remedies and claims that are not barred by the SPA. ELENZA also argues that even if Section 2.1(g) did provide a remedy for breach of contract, ELENZA never exercised that remedy.

Section 7.9 of the SPA provides: "The Company [ELENZA] and Alcon shall in good faith negotiate and finalize the Development Agreement . . . and the Research License . . . ."

ELENZA argues that Alcon breached the SPA by failing to negotiate a research license and development agreement. Alcon argues that Section 7.9 of the SPA precludes ELENZA from asserting its claim that Alcon failed to negotiate and

finalize the research license and development agreement.

The Court must consider whether the SPA required second tranche financing by Alcon, in order to determine whether summary judgment on the breach of contract claims is appropriate. The Court finds that there are genuine issues of material fact pertaining to the breach of contract claims. There is a genuine issue of material fact as to whether ELENZA met the Milestone. There also is a genuine issue of material fact as to whether Alcon fraudulently induced ELENZA to execute the Clarification Agreement by failing to disclose Alcon's "shadow program."

ELENZA also contends that Novartis is liable for breach of contract based on a theory of agency.

> "The determination of whether an agency relationship exists is normally a question of fact." The relevant factors to consider include "the extent of control, which, by the agreement, the master may exercise over the details of the work;" "whether or not the one employed is engaged in a distinct occupation or business;" and "whether or not the parties believe they are creating the relation of master and servant . . . ."[10]

ELENZA argues that Novartis was the parent and controller of Alcon following the merger with Alcon in April of 2011. ELENZA asserts that Novartis has benefitted from Alcon's improper actions. As a result, ELENZA contends that Novartis is liable because Alcon is Novartis' agent or alter ego, and that the

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[10] *WaveDivision Holdings, LLC v. Highland Capital Mgmt., L.P.*, 49 A.3d 1168, 1177 (Del. 2012) (citations omitted).

corporate veil should be pierced.

The Court finds that there is a genuine issue of material fact as to whether Alcon acted as an agent for Novartis.

Damages

Alcon argues that ELENZA's theory of damages is impermissibly speculative. ELENZA retained a damages expert to opine on ELENZA's damages. ELENZA's expert's sole measure of damages is ELENZA's "enterprise value" as of December 15, 2011, which he calculates as $473.7 million. Alcon contends this number is speculative because there are too many unknowns involved to reasonably reach that conclusion.

ELENZA's expert reaches the $473.7 million valuation as purported lost profits from the sale of ELENZA's not-yet-existent EAIOL into perpetuity. To verify his numbers, the expert compared the voided sale between ELENZA and Alcon with two comparable sales. In 2008, Bausch & Lomb acquired Eyeonics, which had developed an accommodating IOL, for $393.0 million. In 2009, Abbott Labs acquired Visiogen, which had also developed an accommodating IOL, for $400.0 million.

ELENZA makes several arguments about why its lost enterprise value is correct. First, ELENZA used Alcon's own valuation of ELENZA to calculate the lost enterprise value. ELENZA contends that Alcon's own damages expert conceded that ELENZA's enterprise value constituted the cash flow model used by

Alcon. ELENZA also argues that material issues of fact regarding causation exist, rendering summary judgment inappropriate.

Delaware Courts are reluctant to award lost enterprise damages to companies with little to no history of profits. For example, in *Amaysing Technologies Corporation v. Cyberair Communications, Incorporated,*[11] plaintiff sought to invoke equitable jurisdiction because, as a young company, it could not prove adequate damages at law.[12] Defendant contended that there were adequate means at law to determine plaintiff's damages, citing a statutory appraisal case.[13] The Court of Chancery disagreed, holding:

> In an appraisal action, the court is obligated to determine a fair market value for the stock at issue using any techniques or methods which are generally considered acceptable in the financial community. In a breach of contract action, however, ATC would have the burden of proving its damages to a reasonable certainty. With its technology still undeveloped, ATC's ability to prove lost profits damages would be highly doubtful.[14]

ELENZA is a relatively new company. It has no product, no sales, and no regulatory approval. It is difficult for a Court to estimate the reasonableness of damages for a company with no history. Attempting to do so would be speculative.

ELENZA erroneously relies on comparing its potential deal with Alcon to

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[11] *Amaysing Techs. Corp. v. Cyberair Commc'ns, Inc.*, 2004 WL 1192602 (Del. Ch.).
[12] *Id.* at *4.
[13] *Id.* (citations omitted).
[14] *Id.*

the Bausch & Lomb and Abbott Labs acquisitions. Both acquisitions involved companies that made profits prior to their respective sales. Further, both companies either had FDA approval or had products already in the market. ELENZA has none of these. ELENZA's expert admitted it would not have approval until 2016.

The Court finds that under the circumstances presented in this case, lost enterprise damages are not legally recoverable.

CONCLUSION

Alcon's Motion for Summary Judgment is hereby **GRANTED IN PART** and **DENIED IN PART.** The Court finds that ELENZA has failed to present sufficient evidence upon which a reasonable factfinder could find disclosure of trade secrets. The Court grants summary judgment as to the misrepresentation, conversion, and misappropriation claims because the Court finds that there are no genuine issues of material fact pertaining to the disclosure of any trade secrets. However, the Court finds that there is a genuine issue of material fact as to the existence of a "shadow program." Further, the Court finds that there are genuine issues of material fact relating to the breach of contract claims. These include whether the Milestone was met and whether Alcon fraudulently induced ELENZA to execute the Clarification Agreement by failing to disclose its "shadow program." The Court finds that lost enterprise damages are not recoverable.

Novartis' Motion for Summary Judgment is hereby **DENIED.** The Court finds that there is a genuine issue of material fact as to Alcon's agency relationship with Novartis.

IT IS SO ORDERED.

The Honorable Mary M. Johnston