



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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HEWLETT-PACKARD COMPANY, )  
 )  
 ) No. 243, 2015  
 )  
 ) Defendant Below, )  
 ) Appellant/Cross-Appellee, ) Court Below: Superior Court of the  
 ) State of Delaware in and for New  
 vs. ) Castle County,  
 )  
 ) PROFESSIONAL INVESTIGATING ) C.A. No. N12C-06-196 MMJ CCLD  
 ) & CONSULTING AGENCY, INC., )  
 ) dba PICA, )  
 )  
 ) Plaintiff Below, )  
 ) Appellee/Cross-Appellant. )

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**APPELLEE'S ANSWERING BRIEF ON APPEAL AND CROSS-  
APPELLANT'S OPENING BRIEF ON CROSS-APPEAL**

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Dated: July 14, 2015

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## **NATURE AND STAGE OF PROCEEDINGS**

Great ideas and great reputations are both rare and hard earned. Plaintiff Below, PICA, earned a great reputation through a 32 year history of great ideas and hard work. PICA excelled in the small and highly competitive brand protection industry,<sup>1</sup> particularly in working for imaging supplies companies. PICA knew that its competitors would seek to destroy them at their first opportunity and worked to keep safe both its innovative ideas and its platinum reputation.

PICA and HP originally enjoyed a wonderful relationship, due to PICA's unprecedented successes. Around 2010, however, due to a shift in control at HP, HP decided it no longer wanted PICA. As PICA demonstrated at trial and the jury agreed, HP willfully and maliciously chose to exploit its size and power to steal PICA's closely held trade secrets and to destroy PICA's reputation in the process.

After HP rebuffed PICA's efforts to resolve this matter informally, PICA filed this action in the Superior Court's Complex Commercial Litigation Division, on June 22, 2012. PICA sought redress for HP's theft of PICA's trade secrets and HP's systematic, bad faith efforts to replicate, debilitate, and eliminate PICA. Caught red handed, HP determined early in this litigation to continue its bad faith treatment of

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<sup>1</sup> Brand protection companies work to protect companies' patents, trademarks, and copyrights by searching for and removing infringing products from the marketplace.

PICA, suppressing critical evidence and trying to rewrite history through their skilled team of three law firms and twelve attorneys. As the trial judge noted:

In response to eight separate motions to compel filed by PICA, the Court ordered HP to produce evidence HP previously had refused to disclose. Evidence relating to PICA's Channel Management Proposal was not produced until well after the close of discovery. Certain documents were not produced until 12 days prior to trial.

Also shortly before trial, PICA was obligated to travel to depose witnesses. PICA was prejudiced because this crucial trial-preparation period was disrupted by discovery that could have been taken months or even a year earlier. HP filed an untimely *Daubert* motion immediately prior to trial, arguing that PICA's expert testimony - concerning the much-delayed HP evidence - should be excluded. The Court denied the motion, and noted that it would be unduly disruptive to PICA to be required to draft a written response at that late date.<sup>2</sup>

HP's strategy failed entirely, as its efforts to suppress evidence familiarized the trial judge with the highly intricate, underlying facts and the parties' legal theories. By trial, the judge fully grasped the facts and law.

HP's only hope, at trial, was to minimize the value of the trade secrets it had admittedly stolen and to try to rewrite the history of its efforts to destroy PICA. HP's revisionist history relied, in part, on presenting evidence that HP and its attorneys knew was false. In the end, however, several HP witnesses refused to further HP's lies and admitted that HP's public comments about PICA were demonstrably false.

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<sup>2</sup> Exhibit F to HP's Opening Brief ("OB") at 24-25.

HP presented the same “all or nothing” defense at trial that it now presents to this Court. HP sought to paint PICA as a greedy, over-paid, disgruntled, former vendor that HP went so far as alleging had simply made up its claims against HP. The jury, however, rejected HP’s *arguments* and weighed the evidence – the most crucial of which HP makes no reference to in its Opening Brief. Far from a runaway or disinterested jury, the trial judge’s post-trial Opinion best summarizes the proceedings below:

Trial in this case lasted for 12 days. The jury was attentive and diligent throughout the trial, and conducted lengthy deliberations. The Verdict Sheet contained 20 detailed questions. The jury appeared to the Court to have a good understanding of the issues and evidence presented.

The Court finds that the jury's Verdict is reasonable and consistent with the evidence. Having weighed the evidence, the Court holds that the Verdict is one that a reasonably prudent jury could have reached. There is no reason to set aside the Verdict on the basis of passion, prejudice, partiality, corruption or disregard of the evidence or law. The jury's damages awards are not so grossly disproportionate to the injuries suffered that they shock the Court's conscience and sense of justice.<sup>3</sup>

HP asks this Court to overturn these factual and legal conclusions.

By the end of the three week trial, the trial judge had dismissed several of PICA’s claims, leaving to the jury PICA’s claims for: Misappropriation of Trade Secrets; Intentional Interference with Employment Relationships; Breach of the Duty of Good Faith and Fair Dealing; and Defamation. The jury found that HP had

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<sup>3</sup> *Id.* at 28-29.

not only misappropriated one of PICA's trade secrets but did so willfully and maliciously.<sup>4</sup> The jury also found in PICA's favor on the implied covenant and defamation claims. The jury awarded PICA a total of \$6,518,000.

After trial, PICA moved for exemplary damages and fees arising from the willful and malicious misappropriation and also moved to shift its fees under the bad faith exception to the American Rule. The trial judge declined to award exemplary damages, awarded PICA seventy five percent of its fees pursuant to the trade secret statute, and sanctioned, in part, HP for its discovery tactics. HP did not challenge the reasonableness of PICA's fees. This appeal followed.

HP's Opening Brief is full of sound and fury, in the end signifying nothing. HP does not even attempt to rebut *any* of the evidence presented at trial. HP, similarly, does not even attempt to address the well settled and controlling law that supports the jury's verdict. Instead, HP presents only conclusory (yet colorful) statements that PICA presented "*no evidence*" at trial – not that PICA presented insufficient evidence but that PICA presented "no evidence." To explain how PICA was able to survive numerous dispositive motions and a three week trial despite an alleged total lack of any evidence, HP unfortunately resorts to painting a picture that the trial judge was asleep at the switch and allowed PICA to introduce anything and everything it wanted. HP's arguments range from frivolous to dishonest.

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<sup>4</sup> The jury found that HP misappropriated another PICA trade secret but awarded no damages.

## **SUMMARY OF ARGUMENT**

PICA struggles to respond meaningfully to HP's Summary of Argument. HP lists eight arguments that do not coincide with the four actually presented in their brief. HP includes numerous, discrete issues within each of its eight arguments. Finally, HP's eighth numbered summary addresses an argument that HP addresses solely in a footnote on that page. PICA respectfully submits that it would not be helpful to this Court to attempt to respond to HP's "summaries." PICA DENIES all of HP's arguments for the reasons stated in the following Argument section.

### **On Cross-Appeal:**

1. The trial judge erred or, at least, abused her discretion by awarding PICA \$0.00 in exemplary damages. To satisfy the intent of Delaware's trade secret statute this Court should hold that, where the fact finder concludes that a defendant misappropriated a trade secret willfully and maliciously, the trial judge must award some amount of exemplary damages above \$0.00.

2. The trial judge abused her discretion by failing to address or consider HP's overall bad faith litigation tactics, in addressing PICA's motion to shift fees under the bad faith exception to the American Rule. The trial judge considered only HP's conduct with respect to three discovery motions and one deposition in a vacuum, under Rule 37. The totality of HP's bad faith conduct required a more significant fee award.

## STATEMENT OF FACTS

### **A. PICA Always Met or Exceeded HP's Expectations**

HP is a global company that sells printing supplies and hardware. A9055-56. HP owns approximately seventy percent of that market. *Id.* When HP sells a printer and that printer runs out of ink, there are only three things to replace the empty cartridge: an original HP replacement product; a cartridge that has been legitimately refilled by a third-party; or a counterfeit cartridge. *Id.* HP's biggest competitor in the market is counterfeit. *Id.* HP loses hundreds of millions of dollars annually to counterfeiting, and is therefore highly motivated to reduce its market share. A9070.

PICA is a small Ohio corporation with over thirty years of experience as a brand protection, loss prevention, risk management, and security company. A8956. In 2004, HP hired PICA to manage exclusively HP's anti-counterfeiting ("ACF") program in Latin America (the "LAR"). A8958-5. From 2004 through 2010, PICA always met or exceeded HP's objective and subjective expectations – HP does not deny this. At trial, HP's Vice President of Global Security Services, Bob Moore, explained how HP evaluated its ACF vendors and confirmed that there was no way to characterize PICA's performance as poor from 2004 through 2010:

Q. Hewlett-Packard evaluates its anti-counterfeit vendors pursuant to metrics or goals; right?

A. Yes.

Q. And they are metrics or goals that are assigned to them by Hewlett-Packard; right?

A. Regionally, yes.

Q. Okay. But it's someone at Hewlett-Packard that assigns those goals?

A. That's correct, yeah. We're looking -- going back to the return on investment, we're looking at that, yes.

Q. Okay. And up until 2010 the metrics were based on the belief that component parts were far more valuable metric than a finished good metric; right?

A. There was more emphasis on component parts, yes.

Q. Okay. And you'll agree that PICA always achieved or exceeded the metrics that had been given to them by Hewlett-Packard; right?

A. PICA performed well.

***Q. And so there is no way to characterize PICA's performance as poor, is there?***

***A. No.***

[ . . . ]

Q. Given that PICA was the sole vendor in ACF from 2004 to 2010 in Latin America, wouldn't it be accurate to say that given that the market share in Latin America was below five percent, that PICA had done a pretty amazing job?

A. Yeah. I don't think that any remarks I have made are calling into question the performance of PICA up until 2010.

Q. Okay. And I'm not saying that you did. I'm just confirming. They were doing a good job in the region?

A. Yeah. I mean, that's the reason why we wanted to sign them up to another contract.

A9263-65. PICA's direct supervisor, Bob Cozzolina, similarly could not deny that PICA always hit or exceeded the benchmarks HP set. A9321-22.

### **B. HP Promised More Work for PICA's Support in a Lawsuit**

From 2004-10, PICA and HP were not only business partners but codefendants in a lawsuit brought by the vendor that PICA had replaced, M. Morgan Cherry & Associates ("MMCA"). A8966-75. Unbeknownst to PICA, HP was involved in a dispute with MMCA over the ownership of information, personnel, and informants. *Id.* In 2006, MMCA sued HP, PICA, and PICA COO Rudy Diaz.

In part, MMCA alleged that its investigators, themselves, were trade secrets and that HP unlawfully provided the identities of those investigators to MMCA's replacement – PICA. *Id.* PICA knew that the claims against it were frivolous. *Id.*

HP, however, needed PICA's assistance and assured PICA that it could just "ride the coattails" of HP's defense. *Id.* HP promised PICA that its cooperation would ensure a lengthy relationship with HP. *Id.* PICA agreed to assist HP, despite the fact that PICA could have presented a more effective defense alone.

Supporting HP's defense proved extremely costly. *Id.* PICA CEO Vincent Volpi repeatedly met with HP's Jeff Kwasny and Andy Binder, who were responsible for funding the HP ACF program. *Id.* Kwasny and Binder were unaware of the costs PICA was incurring in the MMCA litigation. *Id.* Both were sympathetic to PICA's situation and recognized PICA's unmatched success in LAR. *Id.*

In recognition of PICA's support in the MMCA litigation, HP promised more work outside the ACF program -- specifically, supply chain work auditing HP's channel. *Id.* The work was worth millions of dollars annually, and PICA continued to support HP's preparation for the early 2010 trial. *Id.*

HP appeared ready to fulfill its promises, when Kwasny hired PICA's Rudy Diaz as a consultant to review HP's entire ACF program's effectiveness. *Id.*; A9060-63. Diaz completed that consultation, which gave him full access to HP's ACF programs. *Id.* Pleased with Diaz's work, HP then sought Diaz's assistance with



another topic outside of HP's ACF operations. A9063. HP needed a better way to police its channel to ensure that its distributors, which HP calls channel partners, were complying with their contractual agreements. A9063-66. Diaz had numerous, extensive conversations with Kwasny regarding HP's channel and HP's prior efforts to police or manage its channel partners. *Id.*

HP offers significant discounts to those channel partners that HP believes can sell a significant amount of HP products. *Id.* Those channel partners are contractually obligated to pass those discounts on to the consumers or the lower tier distributors. *Id.* HP's partners are also contractually obligated to sell only authentic HP products. *Id.* Before asking for Diaz's insight, HP had been conducting some "audits" in HP's Europe Middle East Africa (EMEA) region. *Id.* Those audits consisted of a trained HP representative visiting a channel partner and requesting to review their inventory. *Id.* Those audits were supposed to be unannounced but were often announced well before hand. *Id.* Based on those audits' failures, HP needed Diaz to create a better way to police and understand the movements of HP's products. *Id.*

In 2009 to early 2010, Diaz created an extraordinary way for HP to manage its channel and to ensure that its partners were abiding by their contracts. A9067-71. Diaz proposed establishing an unprecedented, fully back stopped, self-sustaining, "front" or "trading" company that would make a sufficient number of test buys in the channel to give HP the window into its channel that it previously and admittedly

lacked. *Id.* These “test purchases” would provide HP with an understanding of whether HP’s partners were fulfilling their contractual obligations and would allow HP to make any necessary changes to its contracts with those partners or further investigate them. *Id.* Diaz’s proposal was intended to be a compliance tool for the business side of HP’s operations and was not intended solely to seek out counterfeit goods. *Id.* There were, however, investigative byproducts of Diaz’s proposal, and, if the test purchases demonstrated that a channel partner was selling counterfeit goods, that information would be passed along to the security side of HP’s business. *Id.* There were numerous benefits to Diaz’s proposal, and HP expressed great interest in not only the novel business application of auditing HP’s contractual relationships with its channel partners but also in the prospect of catching counterfeit goods. *Id.*

Diaz provided his plan to HP, only after HP agreed that it was PICA’s confidential property and that only PICA would implement the proposal and Diaz’s ideas. A9067. Diaz provided his proposal to HP through extensive discussions with Kwasny and through several written documents. A9071-75. The written versions were, by no means, intended to limit his proposal. *Id.* Kwasny loved Diaz’s proposal and it appeared HP was standing by its promises of supply chain work. *Id.*

Meanwhile, Volpi met again with Binder regarding the MMCA litigation. A8966-75. With trial looming, Volpi raised the possibility of no longer supporting HP’s defense to focus on its own defense, which would have proven detrimental to

HP through the introduction of evidence that MMCA (and thereby HP) had violated the Foreign Corrupt Practices Act. *Id.* It was also clear that HP needed PICA and its witnesses for its defense. *Id.* HP again promised work. *Id.*

Nonetheless, PICA concluded that it needed to stop supporting HP and present a defense that, although detrimental to HP, would best serve PICA. *Id.* PICA's lawyers notified HP. *Id.* Binder immediately called PICA. *Id.* In addition to the promised work, Binder offered to pay PICA \$400,000 for some of its litigation fees and costs, and Volpi accepted. *Id.* PICA continued to support HP's defense and, in fact, PICA agreed to allow HP to control PICA's witnesses and defenses. *Id.* Despite HP's assurances that it would not settle without PICA, HP did just that. *Id.* PICA was thereafter left to pay a nuisance settlement amount of \$20,000. *Id.*

### **C. Having Used PICA to Settle, HP Moved to Replicate and Eliminate PICA**

Little did PICA know, but the MMCA settlement marked a turning point in the PICA-HP relationship. After using PICA to settle with MMCA, HP began working to replicate, debilitate, and replace PICA. At trial, PICA introduced several days of testimony regarding HP's bad faith efforts, which focused on: (1) learning PICA's confidential ACF methods through installing a competitor as PICA's "manager"; A8962-64, A8979-80 (2) convincing PICA's personnel to leave PICA to join other HP vendors; A8985-88; A9662-9670 (3) stealing PICA's channel

partner proposal;<sup>5</sup> (4) purposefully disrupting PICA's cash flows; (5) replacing PICA with those unqualified vendors that either received inappropriate access to PICA's confidential methods or that hired the PICA personnel that HP convinced to leave PICA; A9680-93 (6) stringing along PICA as long as possible to allow PICA's replacements to gain footing; A8989-92 and (7) repeatedly disparaging PICA in front of its competitors and clients. A8983-85; A9094-97. HP's executives orchestrated these efforts all while joking amongst themselves that: "PICA can GAFT [Go and Fuck Themselves]." B568-69; A9323-24.

Page limitations make it impossible to explain all of the instances of HP's bad faith that PICA proved during the three week trial to establish HP's overall bad faith.<sup>6</sup> To repeat what the jury heard, PICA would need to explain thousands of pages of testimony and exhibits. PICA will focus on the two most detrimental incidents of HP's bad faith: HP's theft of PICA's program and HP's defamation.

#### **D. HP Stole PICA's Channel Management Program**

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<sup>5</sup> A8975-79, A9038, A9071-72, A9074, A9080-83, A9131, A9394-97, B040-44, B570-80.

<sup>6</sup> PICA's entire claim for breach of the implied covenant of good faith and fair dealing depended on establishing that HP's intentions shifted from satisfying its obligations to PICA in good faith to choosing to exercise its contractually provided discretion in bad faith. *See CC Finance LLC v. Wireless Properties, LLC*, 2012 WL 4862337, at \*4 (Del. Ch.)(holding that "the implied covenant is particularly important in contracts that defer a decision at the time of contracting and empower one party to make that decision later" and that "the party exercising discretion must do so in good faith.") Regardless of whether this Court agrees with that statement of the implied covenant, it remains that the jury made the factual determination that HP shifted to acting in bad faith in 2010.

It is best to consider: (1) HP’s channel management efforts *before* receiving PICA’s program; (2) the major elements of PICA’s program; and (3) HP’s channel management efforts *after* exploiting PICA’s know-how.

<b>HP Before</b>	<b>PICA’s Program</b>	<b>HP After</b>
Never used bullet-proof front company <sup>7</sup>	Bullet-proof front company <sup>8</sup>	HP starts using bullet-proof front company <sup>9</sup>
Never resold legitimate product bought by front company <sup>10</sup>	Resell legitimate product bought by front company <sup>11</sup>	HP starts reselling legitimate product bought by front company <sup>12</sup>
Never used front company for sole purpose of gathering information <sup>13</sup>	“Imperative” that transactions only used to gain leads and not be used in criminal or civil actions <sup>14</sup>	Creates front company for “the exclusive purpose of gaining leads for follow-on investigations, not for the purpose of using the information itself to pursue [any] counterfeiters.” <sup>15</sup>
Limited number of test buys to discover channel partner fraud <sup>16</sup>	Significant increase in test buys was “critical” to success <sup>17</sup>	HP <b>tripled</b> the number of test buys it was making to discover channel partner fraud <sup>18</sup>

<sup>7</sup> A9068-69.

<sup>8</sup> *Id.*; B021-29;

<sup>9</sup> B036-39, B45-60; HP went to great lengths to get this new type of front company approved by its legal department. As PICA proposed, HP first used this type of front company in HP’s EMEA region. *Id.*

<sup>10</sup> A9401-02.

<sup>11</sup> A9067-71; B021-29

<sup>12</sup> A9401-02; A9394-95; B570-80.

<sup>13</sup> A9067-71; B021-29

<sup>14</sup> *Id.*

<sup>15</sup> A9394-95; B570-80.

<sup>16</sup> B001 (B001 is a demonstrative exhibit used at trial summarizing voluminous information from two spreadsheets that do not print well and are not necessary for this appeal. PICA’s counsel will provide electronic versions, if requested).

<sup>17</sup> A9068-69; B021-29

<sup>18</sup> B001.

<p>HP “struggled” to manage and had “little insight” into its channel, including “how does illicit product impact the market and where does it impact the market and by whom”<sup>19</sup></p>	<p>Business tool intended to create window into stream of commerce and flow of HP products<sup>20</sup></p>	<p>HP gives presentation demonstrating new understanding of exactly the issues it previously failed to understand and touting saving incurred in the three years after it received PICA’s program<sup>21</sup></p>
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It is, of course, not insignificant that Jeff Kwasny (the program’s recipient) *admitted to PICA that they were going to implement its program starting in EMEA*. A9072.

HP’s flagrant misappropriation was a compelling example of the fact that, after the MMCA settlement, HP no longer sought to satisfy its agreements with PICA. HP sought to steal PICA’s ideas and methods and destroy PICA in the process.

**E. HP Defamed PICA**

As part of its efforts to steal PICA’s methods and employees and to destroy PICA, HP forced PICA to bring as many of its key employees as possible to a September 2010 training session in Costa Rica. A8982; A9043-44; A9090. HP forced PICA to bring even personnel from two programs that HP knew it planned to terminate the week after the training. *Id.* For the first time in PICA’s history with HP, HP also invited some of PICA’s “competitors” to the training session.<sup>22</sup>

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<sup>19</sup> A9131.

<sup>20</sup> A9067-71; B021-29

<sup>21</sup> A9080-83; A8977-78.

<sup>22</sup> These “competitors” were in fact comprised of: (1) the company that HP had recently installed as PICA’s manager – granting them unprecedented access to PICA’s methods; and (2) a loose

At the training, HP's Chief Security Officer, Bob Moore, and HP's Global Anti-counterfeiting Director, David Cooper, gave speeches. A8983-84. Moore spoke first and told the audience that "LAR region was one of the poorest performing regions in the world and that they were there to make these dramatic changes that would help to recover [PICA's] standing and performance in the LAR." A8984-85. He "disparaged the activity in the region" and "claimed that the region was doing very poorly and that they were going to get [PICA] on track." A9094-95.

Cooper spoke second and told the audience the following about PICA: (1) "[they] are the worst performing region in the world, [they] have a lot of issues, there's been bad management, [they] need to change and introduce new processes and procedures;" and (2) "you guys have done a horrible job and we're here to rehabilitate you and rehabilitate the region and to introduce . . . competitors because you aren't doing your jobs." *Id.* Cooper further said that the Latin America region was the most poorly managed region. It was not meeting its results. It did not provide a return on investment for Hewlett-Packard." *Id.* Cooper's comments were, "directed specific[ly] to PICA. He made comments about poor management in the program. And it wasn't specific to just the current year." A9156.

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organization of unqualified, unlicensed investigators that were meeting each other for the first time in Costa Rica. A8962-65, A8979-80, A8982; A9680-93.

Moore based his criticisms on information he purportedly received from Cooper regarding PICA's performance in 2010,<sup>23</sup> but, when he was confronted at trial about criticizing PICA's performance through the time of the September 2010 training program, he admitted that "there [was] no way to characterize PICA's performance as poor." A9263-65. According to Moore, PICA was, in fact, doing such a great job that they "wanted to sign them up to another contract." *Id.*

Cooper also admitted that he made his comments criticizing PICA's performance without even investigating PICA's actual performance under the metrics (targets assigned by HP) in place at the time. A9917, A9938-39. When confronted with Cooper's admission at trial, Moore agreed that Cooper's comments were "inappropriate." A9266-67. Moore also agreed that "[t]here were ... many representatives from multiple vendor Companies" in the audience. A9266.

PICA knew exactly what these other vendors were going to do with the fact that HP had just harshly criticized its performance. PICA knew that the brand protection industry is a small community (especially small in Latin America) and that PICA's competitors would enjoy spreading the word about PICA's alleged "poor performance." A8958, A8982, A8992; A9102. HP's comments came at a time when, PICA was "at the top of [their] [game] on brand protection, [they] were headed for the moon, [they] were consolidating the imaging supply industry."

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<sup>23</sup> A9260-61.



A8992. In the end, PICA went from being on path to make \$625,000 a year in profit in 2010 to losing over \$132,000 in 2011. B061-567.

**F. PICA’s Counsel Never “Conceded PICA had no Proof of Misappropriation When it Filed its Lawsuit”**

HP closes its “fact” section by claiming that: “In closing argument PICA’s counsel conceded PICA had no proof of misappropriation when it filed its lawsuit.” OB at 13. HP manipulates a poorly worded or poorly transcribed sentence into some type of grand admission.<sup>24</sup> HP ignores that PICA had the very best evidence of misappropriation at the time it filed this lawsuit – Jeff Kwasny admitted to Rudy Diaz that they were going to implement PICA’s program in-house or through another vendor. Most plaintiffs do not have such compelling evidence at the time of filing a complaint. Though HP did its best (or worst) at trying to hide the evidence in this matter, they were eventually forced to produce the HP emails and files proving that Kwasny meant what he said – HP was going to implement PICA’s program:

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<sup>24</sup> This Court should also consider HP’s claim regarding the ISMA/OSAC presentation: “The Trial Court rejected all of HP’s repeated objections to PICA’s elaborate use of this irrelevant document based entirely on one of the slides’ reference to ‘test buys,’ which is undisputedly not a trade secret.” OB at 12-13. HP provided no citations to the record because it never objected. A review of the pages HP cited for PICA’s use of the presentations shows, instead, that HP’s counsel had “no objection” to its introduction into evidence and use at trial. A8977.

From: Kwasny, Jeffrey  
Sent: Wed Oct 26 05:39:53 2011  
To: Velez, Julio  
Cc: Cozzolina, Robert L; Llamas, David  
Subject: ACF trading company  
Importance: Normal

Hello Julio,

Pursuant to our conversation yesterday, I support the implementation of a new or existing cartridge trading company for the purpose of gaining leads on organizations that may be trading in counterfeit goods. I am aligned with you that this "front" company should serve the exclusive purpose of gaining leads for follow-on investigations, not for the purpose of using the transaction information itself to pursue and counterfeiters.

I support this concept for multiple reasons: 1) will allow us to find companies that are trading in counterfeit in the US and potentially other more developed countries —where traditionally it is hard to find otherwise 2) focus will be on distributors and resellers that sell to unknowing parties — such as governments and large institutional customers.

Let me know if you need my support or additional support from the business in getting this off the ground.

Cheers,  
Jeff

B570-71; see also B572-580. According to HP, not even the recipient of PICA's program taking definitive steps to implement significant parts of PICA's program is evidence of misappropriation. HP's brief is silent on this fact as well as all of the other facts cited above.

## **ARGUMENT**<sup>25</sup>

### **I. HP Ignores and Seeks to Rewrite Well Settled Defamation Law**

#### **a. Questions Presented**

(1) Whether this Court should abandon centuries of common law precedent allowing a Plaintiff defamed in its professional capacity to recover presumed damages, which are distinct from special damages and do not require the level of proof asserted by HP; and (2) whether this Court should reverse its prior precedent holding that, even if the statements at issue were opinion statements, the jury shall nonetheless determine whether they were defamatory when they can be interpreted as implying the existence of an undisclosed defamatory factual basis.

#### **b. Standard and Scope of Review**

The well settled standard for analyzing a motion for a new trial follows:

A jury's verdict is given enormous deference, and, absent exceptional circumstances, the amount of damages awarded by a jury is presumed to be correct. On a motion for a new trial, the Court will only set aside a verdict as insufficient if it is clear that the verdict was the result of passion, prejudice, partiality, corruption, or if it is clear that the jury disregarded the evidence or law. As long as there is a sufficient evidentiary basis for the amount of the award, the jury's verdict should not be disturbed by a grant of a new trial as to damages.

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<sup>25</sup> PICA objects to HP's numerous arguments that are not fully and fairly briefed. HP purports to challenge collectively the trial judge's summary judgment decision and her post trial decisions. HP does not distinguish the evidence and argument presented to the trial judge at summary judgment versus the trial proceedings and post trial arguments. Nor does HP distinguish the applicable review standards. HP has waived these arguments. *See Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1264 (Del. 2012)(citation omitted).

Juries have significant discretion to determine the appropriate measure of an award. The jury's verdict is presumed to be correct and sustainable unless it is so grossly disproportionate to the injuries suffered so as to shock the Court's conscience and sense of justice. This only occurs where the evidence preponderates so heavily against the jury verdict that a reasonable juror could not have reached the result. Thus, wherever there is any margin for a reasonable difference of opinion in the matter, the Court should yield to the verdict of the jury.<sup>26</sup>

This well settled principle “gives recognition to the exclusive province of the jury.”<sup>27</sup>

In reviewing the trial judge's denial of HP's Rule 50 motion, the ultimate question is whether “under any reasonable view of the evidence the jury could have justifiably found for [the non-moving party].”<sup>28</sup> “[B]arring exceptional circumstances, a trial judge should not set aside a jury verdict on such ground unless, on a review of all the evidence, the evidence preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result.”<sup>29</sup>

### **c. Merits of Argument**

#### **i. HP Ignores the Majority of the Defamation Evidence**

HP claims PICA's defamation claim is limited to “three defamatory statements: (1) that the LAR region was ‘poorly performing,’ (2) that the LAR region

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<sup>26</sup> *Cooke v. Murphy*, 2014 WL 3764177, at \*2 (Del.)(quotations and citations omitted).

<sup>27</sup> *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979).

<sup>28</sup> *Mazda Motor Corp. v. Lindahl*, 706 A.2d 526, 530 (Del. 1998); *see also Noel v. Rodriguez*, 2013 WL 6917135 (Del. Super.).

<sup>29</sup> *Himes v. Liu*, 2008 WL 4147579 (Del. Super.), *citing Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979), *aff'd by Himes v. Gabriel*, 972 A.2d 312 (Del. 2009).

was ‘poorly managed,’ and (3) that the return on investment in the LAR region was the lowest in the world.”<sup>30</sup> HP’s summary mischaracterizes the statements.

Volpi testified that Moore (CSO) asserted that the “LAR region was one of the poorest performing regions in the world and that they were there to make these dramatic changes that would help to recover our standing and performance in the LAR.”<sup>31</sup> Cooper (global ACF director) stated that: (1) “we are the worst performing region in the world, we have a lot of issues, there's been bad management, we need to change and introduce new processes and procedures;” and (2) “you guys have done a horrible job and we're here to rehabilitate you and rehabilitate the region and to introduce . . . competitors because you aren't doing your jobs.”<sup>32</sup>

Rudy Diaz testified that Moore “disparaged the activity in the region. He claimed that the region was doing very poorly and that they were going to get us on track.”<sup>33</sup> Cooper then “echoed those sentiments and went far beyond that, saying that the Latin America region was the most poorly managed region. It was not meeting its results. It did not provide a return on investment for Hewlett-Packard.”<sup>34</sup>

As shown below, this testimony that PICA had failed to meet its assigned

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<sup>30</sup> OB at 15.

<sup>31</sup> A8984-85.

<sup>32</sup> *Id.* HP argues that the comments were short or brief, but as Volpi testified: “Q. Mr. Thomas asked you some questions about Mr. Moore and Mr. Cooper moving on to other subjects quickly after you confronted them. Do you remember that? A. Yes. Q. But at that point, had the damage been done? A. Absolutely.” A9044.

<sup>33</sup> A9094-95.

<sup>34</sup> *Id.*

benchmarks alone eviscerates HP's arguments. Diaz added that Cooper's comments were, "directed specific[ly] to PICA. He made comments about poor management in the program. And it wasn't specific to just the current year."<sup>35</sup>

**ii. HP Ignores this Court's Binding Decisions in Both *Ramunno v. Cauley* and *Kanaga v. Gannett Co.***

HP tells only half the story regarding the protections afforded to "expressions of opinion." HP fails to address this Court's holding in *Ramunno v. Cawley* that even opinion statements may be defamatory where they "impl[y] the existence of an undisclosed defamatory factual basis."<sup>36</sup> The jury was instructed on this well settled law; HP did not object and, in fact, agreed that the jury should be so instructed. Nonetheless, HP now ignores this controlling law.

HP also ignores this Court's holding in *Kanaga v. Gannett Co.* that, unless the "ordinary" person would necessarily conclude that the statement at issue "was being offered [as] pure conjecture[,]" then "these issues are for the jury."<sup>37</sup> Indeed, the U.S. Supreme Court limits its protections to "statements that cannot *reasonably* [be] interpreted as stating actual facts about an individual."<sup>38</sup> The District Court for the S.D.N.Y. created a useful test for the fact/opinion dichotomy:

If the statement can only have one meaning, then the court determines whether that meaning is defamatory. If it is also susceptible to a meaning that is not

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<sup>35</sup> A9156.

<sup>36</sup> 705 A.2d 1029, 1036 (Del. 1998).

<sup>37</sup> 687 A.2d 173, 181 (Del. 1996).

<sup>38</sup> *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990)(emphasis added)(citations omitted).

defamatory, then the trier of fact must determine in what sense the words were used and understood. If a plaintiff fails to identify a plausible defamatory meaning for a statement, then the claim may be dismissed.<sup>39</sup>

Contrary to HP's claims that "statements describing performance in subjective terms" are never defamatory, the test is whether the statements are susceptible to *any* defamatory meaning. Where the answer is yes, the jury determines in what sense the words were used and understood. Therefore, courts routinely allow defamation claims for statements about a plaintiff's professional performance.<sup>40</sup>

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<sup>39</sup> *Haugh v. Schroder Investment Management North America Inc.*, 2003 WL 21136096, at \*2 (S.D.N.Y.) (citations omitted); *see also Kahn v. Bower*, 232 Cal. App. 3d 1599, 1608 (Cal. App. 1 Dist. 1991) ("[T]he court must first determine as a question of law whether the statement is reasonably susceptible of a defamatory interpretation; if the statement satisfies this requirement, it is for the jury to determine whether a defamatory meaning was in fact conveyed to the listener or reader. Similarly, it is a question of law for the court whether a challenged statement is reasonably susceptible of an interpretation which implies a provably false assertion of actual fact. If that question is answered in the affirmative, the jury may be called upon to determine whether such an interpretation was in fact conveyed.") (citations omitted).

<sup>40</sup> *See, e.g., Greschner v. Becker*, 2015 WL 685156, at \*3 (D. Ariz.) ("The article states that Hummingbird's 'technical capabilities were lacking,' and that 'Hummingbird ... struggled to get government work.' These statements are capable of defamatory meaning because they have the potential to cast Plaintiff's business competency, acumen and the viability of his company in a negative light. Moreover, they are sufficiently factually based and their falsity has been adequately alleged."); *Greenly v. Sara Lee Corp.*, 2008 WL 1925230, at \*8 (E.D. Cal.) ("Although accusations of 'faking or incompetence' when made by laymen might indeed constitute mere opinion, similar accusations by superiors or qualified professionals published to co-employees 'carry a ring of authenticity and reasonably might be understood as being based on fact.' ... Where ... the allegedly [defamatory] remarks could have been understood by the average [person] in either sense, the issue must be left to the jury's determination.") (citations omitted); *Mackroy-Snell v. Lake Wales Charter Schools*, 2006 WL 2864317, \*6 (M.D. Fla.) ("Upon a review of Plaintiff's Complaint, the Court concludes as a matter of law that the alleged defamatory statement, if proven false, is actionable *per se*. Plaintiff has alleged that LWCS board members stated publicly that 'Plaintiff was terminated for poor job performance', when in fact Plaintiff had performed all requisite job duties properly and effectively. If proven, such statement could be injurious to Plaintiff's trade or profession. Of course, this is a fact that must be proven."); *Stiner v. University of Delaware*, 243 F. Supp. 2d 106, 116 (D. Del. 2003) ("Construing the facts in favor of plaintiff and assuming his allegations are true, the court concludes that listing plaintiff as 'academically unqualified' may have a defamatory meaning in that it would tend to harm the reputation of plaintiff in the

Here, Moore and Cooper were introduced and spoke in their official HP capacities. The audience would have believed they had facts to support their statements. At trial, PICA presented Cooper's testimony admitting that his comments were baseless.<sup>41</sup> Moore, also, confirmed the comments were false:

Q. Hewlett-Packard evaluates its anti-counterfeit vendors pursuant to metrics or goals; right?

A. Yes.

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community or to deter third persons from associating or dealing with him."); *Haugh*, 2003 WL 21136096, at \*2 ("[A] reasonable reader could interpret the statement as implying Haugh caused SIMNA's decline by her poor performance. While part of the chain of events leading to plaintiff's firing was Dobson's forming that opinion, the statement can be read to imply that there are hard facts backing up that opinion."); *Barakat v. Matz*, 648 N.E.2d 1033, 1042 (Ill. App. 1 Dist. 1995)("In the present case, we find that the challenged statements constitute statements of fact or, at the very least, mixed expressions of fact and opinion which are actionable. Defendant's uninvited remarks stated that defendant 'had patients from [plaintiff] before;' that defendant 'found nothing wrong with his patients;' that plaintiff's 'practice was a joke;' that plaintiff was not 'any good as a doctor;' and that plaintiff's 'opinion wasn't any good.' Defendant's comments clearly and directly concern plaintiff's professional conduct and character and as such can be viewed as statements of fact. Moreover, the statements obviously imply an underlying factual basis which could be verified, i.e., previous patients from plaintiff which were examined by defendant."); *Gill v. Hughes*, 227 Cal. App. 3d 1299, 1309 (Cal. App. 5 Dist. 1991)("The statement that plaintiff 'is an incompetent surgeon and needs more training' implies a knowledge of facts which lead to this conclusion and further is susceptible of being proved true or false. The fact that an evidentiary hearing was held regarding plaintiff's surgical technique and judgment supports this conclusion. Since the statement implies that plaintiff is generally disqualified for his profession, it is defamatory if it is false. Consequently, the trial court erred in finding this statement was not defamatory because of being an 'opinion.'"); *Kahn*, 232 Cal. App. 3d at 1609 ("The real question is whether this premise—that plaintiff was 'incompetent'—is susceptible of an interpretation which makes it 'provably false.' The assertion may, on its face, approach the outer limits of vagueness and subjectivity. However, we believe it is reasonably susceptible of a provably false meaning. For example, in the context of the letter as a whole it might be reasonably understood to convey the meaning that in the situations in which defendants observed plaintiff, she showed so little ability to perform the duties of her position that her occupancy of it was deleterious to the children in her care, made it impossible for WCCC to economically provide services to those children, or both. A jury could decide whether that premise is true or false. Therefore the statements conveying an imputation of incompetence appear actionable as against the objection that they lack the requisite factual content.").

<sup>41</sup> A9926-29.



Q. And they are metrics or goals that are assigned to them by Hewlett-Packard; right?

A. Regionally, yes.

Q. Okay. But it's someone at Hewlett-Packard that assigns those goals?

A. That's correct, yeah. We're looking -- going back to the return on investment, we're looking at that, yes.

Q. Okay. And up until 2010 the metrics were based on the belief that component parts were far more valuable metric than a finished good metric; right?

A. There was more emphasis on component parts, yes.

Q. Okay. And you'll agree that PICA always achieved or exceeded the metrics that had been given to them by Hewlett-Packard; right?

A. PICA performed well.

***Q. And so there is no way to characterize PICA's performance as poor, is there?***

***A. No.***<sup>42</sup>

[ . . . ]

Q. Given that PICA was the sole vendor in ACF from 2004 to 2010 in Latin America, wouldn't it be accurate to say that given that the market share in Latin America was below five percent, that PICA had done a pretty amazing job?

A. Yeah. I don't think that any remarks I have made are calling into question the performance of PICA up until 2010.

Q. Okay. And I'm not saying that you did. I'm just confirming. They were doing a good job in the region?

A. Yeah. I mean, that's the reason why we wanted to sign them up to another contract.<sup>43</sup>

When confronted with Cooper's comments, Moore agreed that his comments regarding PICA's performance in front of PICA's employees and competitors ***were inappropriate***.<sup>44</sup> Cozzolina also confirmed that Cooper's comments regarding PICA's seizure statistics were ***objectively false***:

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<sup>42</sup> A9263-64.

<sup>43</sup> A9265.

<sup>44</sup> A9267; *see also* A9305. HP George Guillery was "visibly upset" by the defamation. A9094.

Q. And you also testified when I deposed you that there was no way to say that PICA's performance was poor because they'd always met or exceeded their goals, right?

A. Yes, sir.

Q. So when David Cooper said that PICA's performance was poor, that was false, right?

A. No. I think, and if we bring it back to return on investment and if you take the amount of money that was spent in the program and you divide it by the seizures, it wasn't what was expected.

*Q. Okay. And we've heard a lot about this return on investment ratio, but PICA's performance was evaluated based on the metrics that Hewlett-Packard assigned to them, right?*

A. Yes, sir.

*Q. And they always hit those metrics?*

A. Hit or actually exceeded, yes.

*Q. So it would be false to say that the performance was poor?*

A. In seizure statistics, yes, it would be false to say they were poor[.]<sup>45</sup>

Moore and Cooper said that, based on seizures, PICA was performing poorly, to the point that the region and its management needed to be overhauled. Contrary to HP's representation that "no one from HP said *anything* about PICA not meeting its seizure goals in the past," Diaz explained that Cooper explicitly said that PICA had failed to meet its targets.<sup>46</sup> The jury was instructed that statements of opinion cannot sustain a defamation claim and, in the end, rejected HP's *post hoc* attempts to change what Moore and Cooper said and meant.

### **iii. HP's Truth Defense is an Attempt to Defraud the Court**

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<sup>45</sup> A9321-22.

<sup>46</sup> This is in addition to the fact that the general comments about alleged "poor performance" could have only been interpreted as relating to PICA's counterfeit seizures. It is no over-simplification to say that PICA had one job: seizing counterfeit. HP assigned targets or "metrics," PICA always "met or exceeded them," and HP's own witnesses testified it was inaccurate and inappropriate to criticize PICA's performance.

HP misrepresented key facts and induced its witnesses to provide false testimony in its attempt to prove that HP's defamatory comments were true. As noted above, Moore and Cooper stated that PICA "did not provide a return on investment for Hewlett-Packard" or that PICA's ROI was the worst in the world. HP's attempt to justify these comments relies entirely on applying seizure valuation metrics, which were not effective until fiscal year 2011, to PICA's seizures made in fiscal year 2010. In short, there was a significant change in the way HP valued counterfeit goods. Before 2011, HP encouraged vendors to seize component parts to catch the counterfeit before it hit the shelves and assigned significant value to component parts. Effective in fiscal year 2011 – *after the Costa Rica training session*, HP moved from focusing on component parts to finished goods.

HP misrepresented to the jury both when the new metrics were actually implemented and the value of goods PICA seized in 2010.<sup>47</sup> HP told the jury that PICA had seized only \$5.3 to 5.5 MM of goods in 2010. HP knew, however, that those numbers were based on metrics that were not implemented until fiscal year 2011. HP averred in discovery: "the revised evaluation metric...was implemented

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<sup>47</sup> It is unquestionably improper to present fraudulent evidence. *See Johnson v. Preferred Professional Ins. Co.*, 91 A.3d 994, 1011-14 (Del. Super. 2014).

across all regions in or around **October 2010**.<sup>48</sup> Cooper confirmed before the training that they were “being assessed this year on [the] old metrics.”<sup>49</sup>

Nonetheless, HP led its witnesses to claim that PICA was already being reviewed under the new metrics in September 2010.<sup>50</sup> HP led Moore to say:

Q. This is dated June 29th and it references the new seizure metrics. And it was sent to Mr. Volpi and Rudy Diaz; right?

A. Yes.

Q. And it says: "Not certain you were made aware, but IPG and Global Security have reviewed the previous seizure calculation methods and have agreed on a new formula to calculate values. The new formula accords more weight to the seizure of finished goods." Do you see that?

A. Yes.

Q. Does that refresh your memory as to when this new program of looking at the final product would have been implemented?

A. Yes. It does on two levels. My earlier testimony was that that decision I knew was a joint decision, it wasn't a unilateral decision made by Dave Cooper. And this now gives me a timeline.

**Q. So that was June, July -- roughly mid year; right?**

**A. Yes.**<sup>51</sup>

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<sup>48</sup> B002-17.

<sup>49</sup> B030-35.

<sup>50</sup> See A9338 (“Q. And how is the program doing today under your leadership, Mr. Velez? A. This is one of my best years, we've actually seized about \$19.5 million in supplies this year. Q. \$19 million in ink and toner this year? A. That is correct. Q. And remind me, how much did PICA seize in 2010? A. In 2010 I believe they were around \$5.3 million. Q. So since PICA stopped working for HP, your seizures of ink and toner have gone from 5.5 million to around 19 million; is that accurate? A. That is correct.”).

<sup>51</sup> A9272-73; see also A9261 (“Q. Do you have any knowledge, independent of what Mr. Cooper told you, as to what the ratios of return of investment were at that time? A. Yes. I've seen documents that show that the -- as I said earlier, the investment in Latin America was for the program, ACF program, was 2.5 million in 2010 and I am aware that we seized \$5.5 million in the region that year. . . . Q. Now the 5.5 was under the new metrics when you're looking at the new metric? A. Yes.”)

The email Moore referenced states that the new metrics “will in no way affect [PICA’s] % seizure goals for FY10.”<sup>52</sup> HP’s “truth” defense is untruthful.

Regardless, the evidence is unrebutted that PICA was on track to meet its goals even under the new metrics. Diaz testified:

Q. You always met your metrics prior to the change-over in that metric; correct?

A. Yes, even after.

Q. Would PICA have met its metric under the new metric?

A. Absolutely. Even without inventory terms, we were on track to make it.<sup>53</sup>

Diaz also explained that:

From 2005 to 2011, ... PICA had facilitated the seizure of \$368 million of counterfeit product. That's not our number. That's HP's number. They paid us \$16 million over the course of those six years or six-plus years for that activity. Simple math tells you that the return on investment for the relationship that HP had with PICA was 23 to 1.<sup>54</sup>

Diaz knew that, as of the time of the Costa Rica training, the global ROI was only 20 to 1.<sup>55</sup> In Diaz’s words, simple math shows that a 23-1 ROI cannot be the worst, where the global ROI was only 20-1. HP’s truth defense also ignores the facts.

#### **iv. HP’s New Trial Argument Misstates the Law and Ignores the Evidence**

There is no evidence that the jury did anything improper in following the jury instructions, which HP agreed to, and in awarding PICA \$5.5 MM. The evidence

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<sup>52</sup> B018-20.

<sup>53</sup> A9042.

<sup>54</sup> A9143.

<sup>55</sup> A9137.

demonstrated that prominent HP executives defamed PICA *per se* in front of PICA’s employees and, more importantly, PICA’s competitors. In fact, HP’s own witnesses agreed that the defamatory comments were inappropriate.<sup>56</sup>

### **1. HP Seeks to Reverse Centuries of Cases Awarding *Per Se* Damages**

Delaware law provides that “[o]ne who is defamed in [his profession] might never know the extent of a lost opportunity to relate to and associate with others, because he could be avoided without knowing the reason and without having a chance to rebut the defamation.”<sup>57</sup> Even where there is no evidence of “actual damage,” the jury is allowed to award “such general compensatory damages as would reasonably compensate the plaintiff for the harm which normally would result from such defamation and wrong done to his reputation, good name and fame, and for any mental suffering caused thereby.”<sup>58</sup>

Delaware is not alone in awarding presumed or humiliation damages.<sup>59</sup> As the U.S. Supreme Court explained:

The rationale of the common-law rules has been the experience and judgment of history that “proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the

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<sup>56</sup> A9109-9111; A9840.

<sup>57</sup> *Spence v. Funk*, 396 A.2d 967, 970 (Del. 1978). Delaware Courts have presumed damages for slander *per se*, since at least 1916. *Pleasanton v. Kronemeier*, 97 A. 11, 12 (Del. Super. 1916)(citing Newell on Slander and Libel, 647, 648, § 13.) (“Where no evidence is offered as to damages, the jury are in no way bound to give nominal damages only; they may give such substantial damages as will compensate the plaintiffs for such defamation.”).

<sup>58</sup> *Stidham v. Wachtel*, 21 A.2d 282, 283 (Del. Super. 1941)

<sup>59</sup> In 2013, the Iowa Supreme Court helpfully compiled a string citation, in *Bierman v. Weier*, that demonstrates the broad acceptance of presumed damages. 826 N.W.2d 436, 455-56 (2013).

circumstances of publication, it is all but certain that serious harm has resulted in fact.” As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.<sup>60</sup>

The Seventh Circuit further explained that: “Under that doctrine, presumed damages is an estimate, however rough, of the probable extent of actual loss a person had suffered and would suffer in the future, even though the loss could not be identified in terms of advantageous relationships lost, either from a monetary or enjoyment-of-life standpoint.”<sup>61</sup> That Court agreed with the Tenth Circuit’s conclusion that “[a]scertainment of presumed general damages is difficult at best and unavoidably includes an element of speculation.”<sup>62</sup>

As the U.S. Supreme Court noted, the “common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss.”<sup>63</sup> HP’s attempts to apply broad language from unrelated tort laws misses the mark, and its argument that PICA somehow failed to prove that HP proximately caused the presumed damages is entirely illogical.

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<sup>60</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760-61 (1985)(quoting and citing W. Prosser, *Law of Torts* § 112, p. 765 (4th ed. 1971) and Restatement of Torts § 568, Cmt b, p. 162 (1938)).

<sup>61</sup> *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1138 (1987)(citations and quotations omitted).

<sup>62</sup> *Id.* at 1139-40 (quoting *Sunward Corporation v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 538 (10th Cir. 1987)).

<sup>63</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

In *McCune v. Neitzel*, the Nebraska Supreme Court rejected arguments similar to HP's.<sup>64</sup> There the defendant argued that because the plaintiff “failed to present any evidence that other individuals thought any less of him or had a lower opinion of him because of the remarks she made, she was entitled to have her motions for directed verdict granted.”<sup>65</sup> The Court explained, however, that “in a suit for slander *per se*, no proof of any actual harm to reputation or any other damage is required for the recovery of either nominal or substantial damages. By definition, statements constituting slander *per se* are unambiguous in their defamatory meaning and do not require proof of extraneous facts.”<sup>66</sup> That Court also restated the well settled principle that “one who puts a libel or slander in circulation is liable for any subsequent publications that are the natural consequence of his or her act.”<sup>67</sup>

HP decries the fact that neither PICA's economist nor PICA itself introduced any specific evidence of injury. Having chosen to forego special damages, however, PICA was not allowed to introduce the type of evidence HP claims was missing. As the Seventh Circuit explained, “an attempt to show specific pecuniary loss, while still electing the presumption of general damages, is under certain circumstances

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<sup>64</sup> 457 N.W.2d 803, 810 (1990).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* (citations and quotations omitted).

<sup>67</sup> *Id.* The defendant could not defend on the basis that the comments were originally made in private and only to one individual. *Id.*



impermissible.”<sup>68</sup> That Court reversed the lower court’s dismissal of the plaintiff’s claims for “failure to show specific pecuniary harm.”<sup>69</sup>

The Tenth Circuit explained further: “In considering presumed general damages it is usually permissible, as a matter of background only, to show a general decline in sales and a general diminution of profits without the necessity of naming particular customers or proving why customers are not purchasing the plaintiff’s product.”<sup>70</sup> That court, however, concluded that the plaintiff:

impermissibly crossed the line between presumed general damage and proof of special damage. The jury was led to infer that the “lost profits” were proximately caused by the credit reports, and represented special damages resulting from those reports. Thus, Sunward attempted to accomplish indirectly what it openly and consciously elected not to do directly, that is prove that the credit reports caused it identifiable pecuniary loss. Presumed general damages must be approached in an entirely different and, by definition, more general manner.<sup>71</sup>

The Court reversed and remanded and explained that: “When the plaintiff elects to pursue only the presumption of general damages, the presentation of a damage argument must also be general, however frustrating that may be to all concerned.”<sup>72</sup>

Finally, the Court noted that there is necessarily “some risk in a jury determination (estimation) of presumed damages.”<sup>73</sup> HP’s argument violates these principles.

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<sup>68</sup> *Brown & Williamson*, 827 F.2d at 1140.

<sup>69</sup> *Id.*

<sup>70</sup> *Sunward*, 811 F.2d at 539.

<sup>71</sup> *Id.* at 541.

<sup>72</sup> *Id.* at 541-42.

<sup>73</sup> *Id.*

Finally, HP’s claim that the U.S. Supreme Court has “held that defamation damages that are not tied to actual injury are inconsistent with the First Amendment and, thus, are unconstitutional” is unsupported.<sup>74</sup> HP cites *Gertz v. Robert Welch Inc.*,<sup>75</sup> but nothing in that opinion supports HP’s broad claim that presumed damages are unconstitutional. At most, the Court limited presumed damages to cases where the defendant acted with “knowledge of falsity or reckless disregard for the truth.”<sup>76</sup> Here, Moore spoke recklessly and Cooper knowingly.<sup>77</sup> HP’s legal arguments are meritless. To hold otherwise, would require abandoning centuries of precedent and an entire elimination of presumed damages.

## **2. HP Waived its Arguments Against Presumed Damages**

HP proposed instructing the jury on humiliation damages, as follows:

### **DEFAMATION HUMILIATION DAMAGES**

The law does not furnish any fixed standards by which to measure such damages, and counsel are not permitted to argue that a specific sum would be reasonable. In deciding upon a reasonable sum, you must be governed by the evidence in the case and by the purpose of a damages award: fair and reasonable compensation for harm wrongfully caused by another. You may use your own experience and judgment in determining what is fair and reasonable.

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<sup>74</sup> OB at 27.

<sup>75</sup> OB at 27 n.7 (citing 418 U.S. 323, 349 (1974)).

<sup>76</sup> *Gertz*, 418 U.S. at 349.

<sup>77</sup> HP objected to including any requirement to show recklessness in the jury instructions.

Similarly, at trial, HP agreed that the jury was allowed to determine the appropriate amount of humiliation damages.<sup>78</sup> HP cannot possibly now object to the law.

### **3. PICA Never Admitted that it Sustained No Damages**

PICA knew that it would struggle to establish special damages at trial, due to its unwillingness to drag its other clients into the litigation. PICA chose to pursue only *per se* damages. HP seeks to mislead this Court by claiming that: “PICA freely admitted both before and during trial that it had sustained no economic damages as a result of the alleged slander and was seeking only ‘humiliation damages.’”<sup>79</sup> Far from admitting a lack of harm from HP’s defamatory comments, the pages cited by HP demonstrate that PICA stated:

PICA has not conceded that it has not suffered any actual harm as HP erroneously argues. PICA simply agrees that it will not present any evidence of economic damages. As such, if the jury concludes that it is more likely than not that PICA has been defamed, then PICA will be entitled to an amount of humiliation damages as decided by the jury.<sup>80</sup>

The record is clear.

### **4. The Jury Reasonably Awarded PICA \$5.5 MM**

*At trial*, HP’s sought to inflame the jury by portraying PICA and, particularly, its CEO, Volpi, as greedy and overpaid. HP did so by repeatedly stressing that HP

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<sup>78</sup> HP agreed that “the jury gets to decide the amount” and that it’s “really up to the jury what the amount is.” A9451.

<sup>79</sup> OB at 9.

<sup>80</sup> A4925.

had paid PICA over \$16 MM in six years and by gratuitously referring to Volpi's "ranch" in Bogota, Colombia. In reality that "ranch" was nothing more than "a \$50,000 piece of dirt in the middle of nowhere."<sup>81</sup> Now, after the jury rejected HP's contrived "return on investment" defense, HP claims it shocks the conscience to award PICA anything, let alone a third of the \$16 MM HP repeatedly cited.

HP's strategy started with their opening statement:

It's my turn now to tell you what the evidence here will really show, which is quite a bit different from what you just heard. Back in 2004, HP gave PICA the opportunity to become one of many anti-counterfeiting investigative agencies that HP uses around the world. Starting in 2004, PICA worked for HP for six years doing anti-counterfeiting work down in Latin America. And during that time, they were paid about sixteen million dollars for the work that they did for HP.<sup>82</sup>

HP then referenced Volpi's "ranch":

In July of 2010, Mr. Cozzolina goes down to Bogota, Colombia to meet with PICA to have his first face-to-face meeting with them after taking over as their supervisor. He went to Bogota because PICA has an office there and because Mr. Volpi, the CEO, has a ranch down in Bogota, Colombia.<sup>83</sup>

HP's counsel then ended: "In conclusion, Ladies and Gentlemen, in 2010, after being paid millions of dollars by HP for six years, PICA was asked to work with some new HP people and to adjust how it did its work."<sup>84</sup>

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<sup>81</sup> A8992-93.

<sup>82</sup> A8934.

<sup>83</sup> A8941.

<sup>84</sup> A8947.

HP continued this strategy in its cross and direct examinations.<sup>85</sup> HP gratuitously asked Mr. Volpi about hosting his former HP manager Carl Risheim:

Q. Had him to your ranch in Bogota?

A. Yes.<sup>86</sup>

HP's Jeff Kwasny also *happened* to reference Mr. Volpi's ranch:

Q. And did the PICA folks invite you to spend some time with them while you were there?

A. Oh, yes. I mean, I got to meet Rudy and Vince, and, you know, we had a good time, too. I remember [] going to Vince's ranch. It was a good experience. He had a beautiful ranch, horses, servants that served us dinner. I was pretty impressed.

Q. A nice event?

A. Very nice.<sup>87</sup>

In its closing, HP returned to its storyline:

Unfortunately, you shouldn't have been asked to do this, because this was a case that should never have been filed in the first place. What happened here was that after having HP as its biggest and best customer for six years, and after getting \$16 million from Hewlett-Packard, PICA refused to cooperate with some changes that HP wanted to make and chose not to keep working with HP.<sup>88</sup>

HP cannot dispute that, *at trial*, it tried to inflame the jury by convincing them HP paid PICA *a lot* of money for its services - \$16,000,000 over six years. HP cannot, *now*, cry foul when the jury awarded \$5.5 MM for destroying PICA's reputation.

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<sup>85</sup> HP asked Volpi: "Q. And over those six years HP paid PICA for its work millions of dollars; correct? A. Yes. Q. About \$16 million; correct? A. That's your number and I'm sure it's correct." A8995.

<sup>86</sup> A9004.

<sup>87</sup> A9363. In truth, HP paid for the referenced event, including the food and servants. A9397-98.

<sup>88</sup> A9510.

It is not surprising that the jury would conclude that the effect of making those false statements in front of PICA's employees and competitors would be that PICA would have suffered at least \$5.5 MM in damages. Volpi testified that: (1) the brand protection industry is a small community;<sup>89</sup> (2) the brand protection industry in Latin America is especially small;<sup>90</sup> and (3) PICA's competitors enjoy talking about PICA's relationship with HP.<sup>91</sup> He also explained that PICA was previously "at the top of our [game] on brand protection, we were headed for the moon. We were consolidating the imaging supply industry."<sup>92</sup> Delaware law presumes damages because PICA "might never know the extent of a lost opportunity to relate to and associate with others, because [PICA] could be avoided without knowing the reason and without having a chance to rebut the defamation."<sup>93</sup> Based on the evidence and their own experience and judgment, the jury concluded that \$5.5 MM was fair and reasonable to compensate PICA for the probable consequences of HP's statements.

HP relies on PICA's net income between 2008 and 2012. HP notes that PICA's net income over those five years was \$154,000. HP, however, ignores the fact that PICA spent hundreds of thousands of dollars a year on attorneys' fees to

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<sup>89</sup> A8958.

<sup>90</sup> A8982.

<sup>91</sup> A8958.

<sup>92</sup> A8992.

<sup>93</sup> *Spence*, 396 A.2d at 970.

help defend HP in the MMCA litigation.<sup>94</sup> Between 2008 and 2012, PICA spent over \$879,000 on attorneys' fees. HP also ignores that, *after* HP defamed PICA in September 2010, PICA lost over \$132,000 in 2011.

But for HP's defamation, the jury could have reasonably concluded that PICA would have continued to make profits above and beyond its 2010, \$415,000 net income. PICA incurred over \$210,000 in attorneys' fees in 2010, and the jury could have concluded that PICA was on path to make \$625,000 a year – or more, given that PICA was “at the top of their game,” “headed for the moon,” and “consolidating the imaging supply industry.” PICA worked 32 years to get to that position.

PICA's competitors like to talk about PICA's relationship with HP. Diaz noted,

It's a small industry. The investigative corporate security consulting arena is extremely small. It's even smaller than the legal arena, I would imagine. Word gets around. And it certainly did for us. And, unfortunately, there are – this behavior, this conduct really -- really impacted our ability to even win business from other clients. And it -- again, the impact cannot be understated to us. And not just from a financial standpoint in terms of lost revenues and lost profits, but we're a small business. We're a small company. We certainly exist to make money, but we're also a family business.<sup>95</sup>

Based on the evidence and their own experiences and judgment, the jury could have reasonably concluded that having HP tell PICA's competitors that PICA was performing poorly and failing to meet their targets set PICA back over ten years.

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<sup>94</sup> HP also ignores that PICA is an S-Corporation that is not driven by making a bottom line profit, which the IRS treats as if the profit had been passed on to the shareholders.

<sup>95</sup> A9102.

\$5.5 MM is by no means shocking, and HP falls far short of meeting its burden to show that the evidence preponderates so heavily against the jury verdict that a reasonable juror could not have reached the result. HP points to no exceptional circumstances and the jury's verdict must be given enormous deference.<sup>96</sup> For over one hundred and thirty years, Delaware has protected the jury's role in determining defamation damages. "As to the measure of damages in such cases it has been ruled by high authority that of all the cases left to a jury in that respect, none is more emphatically left to their sound discretion than an action for defamation."<sup>97</sup>

Because PICA has shown that the jury reasonably awarded \$5.5 MM, HP's citations to other cases remitting smaller or larger amounts are irrelevant.<sup>98</sup> Not only are those cases outdated, they involved fact intensive reviews of the awards. Here, the trial judge reasonably found support for the award, and the size of the award alone is no reason for this Court to interject itself into a fact intensive inquiry. If this Court thinks it relevant to compare PICA's award to others around the country, PICA

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<sup>96</sup> See, e.g., *Kanaga v. Gannett Co., Inc.*, 1998 WL 729585, at \*13 (Del. Super.) ("[T]he media defendants seek to have this Court infringe upon the jury's function.").

<sup>97</sup> *Croasdale v. Tantum*, 1880 WL 2694, at \*1 (Del. Super.).

<sup>98</sup> Similarly irrelevant is HP's assertion that no published Delaware decision has awarded a corporation humiliation damages. First, HP never objected to PICA pursuing humiliation damages before trial. Second, Delaware regularly follows the Restatement (Second) of Torts, which explains: "A corporation for profit has a business reputation and may therefore be defamed in this respect. Thus a corporation may maintain an action for defamatory words that discredit it and tend to cause loss to it in the conduct of its business, without proof of special harm resulting to it." § 561, cmt. b.; see also *Bay Tobacco, LLC v. Bell Quality Tobacco Products, LLC*, 261 F. Supp. 2d 483, 501 (E.D. Va. 2003) (awarding presumed damages to a corporation); *Brown & Williamson*, 827 F.2d 1119 (same); *Nanavati v. Burdette Tomlin Memorial Hosp.*, 645 F.Supp. 1217, 1250 (D. N.J. 1986) (same).



suggests that this Court consider *Blaine Larsen Processing, Inc. v. Hapco Farms, Inc.*<sup>99</sup> In *Blaine Larsen*, the Idaho District Court awarded \$5 MM to a potato company.<sup>100</sup> The Court found it persuasive that the defamed plaintiff was a leading company in a competitive industry where reputation was integral.<sup>101</sup>

Fifteen years after the *Blaine Larsen* decision, it is not shocking for a similarly situated company to receive a comparable award. As described above, PICA was a leader in the brand protection industry and its reputation for doing great work for HP was integral to its success. HP destroyed PICA's reputation and business by giving PICA's competitors the ammo they needed to steal PICA's work. There is no evidence that the jury did anything other than compensate PICA for the harm that the jury determined would have likely resulted from HP's defamatory comments. To require more would ignore the bedrock principle that "[o]ne who is defamed in [his profession] might never know the extent of a lost opportunity to relate to and associate with others, because he could be avoided without knowing the reason and without having a chance to rebut the defamation."<sup>102</sup> The trial judge considered all of this and did not abuse her discretion.

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<sup>99</sup> 2000 WL 35539979, at \*11 (D. Idaho).

<sup>100</sup> *Id.* at \*13.

<sup>101</sup> *Id.* at \*12.

<sup>102</sup> *Spence*, 396 A.2d at 970.

## **II. HP Willfully and Maliciously Misappropriated PICA's Channel Management Program**

### **a. Question Presented**

Whether the trial judge correctly applied Delaware precedents holding that: (1) a trade secret may consist of a novel combination of public elements; (2) using a trade secret as a starting point or guide in developing a process is misappropriation; (3) the crux of trade secret misappropriation is an abuse of trust; (4) misappropriation may be proven through circumstantial evidence; and (5) the existence of a trade secret is a question of fact for determination by the jury.

### **b. Standard and Scope of Review<sup>103</sup>**

PICA relies on its Standard and Scope of Review stated in § I(B).

### **c. Merits of Argument**

HP mischaracterizes PICA's trade secret, fails to address the extensive evidence that HP used PICA's trade secret, and ignores the controlling law. At bottom, PICA used its extensive experience and knowledge to create a novel program that combined numerous elements in an unprecedented manner. HP received the program through a misrepresentation that it would abide by the precondition that only PICA would implement the program. HP then explicitly told

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<sup>103</sup> HP's second argument, again, disregards the differences between the evidence presented regarding and the standards controlling their various motions. By attempting to lump everything under one purported argument (and a footnote), HP has not fully and fairly briefed its arguments.

PICA that it was going to implement the program in-house or through another vendor, and the trial evidence proved that HP did in fact exploit PICA's know-how in making material changes to its programs. That is misappropriation.

**i. Delaware Law Protects Novel Combinations of Known Processes**

For decades, Delaware has recognized that: “A plaintiff alleging misappropriation of trade secrets need not prove that every element of a method, technique or process is unascertainable from the public domain” and that “[t]he overall combination of the principles and details used to make the product can qualify as a trade secret.”<sup>104</sup> As Chancellor Chandler explained, “[t]he combination of steps into a process is a trade secret, even if all the component steps are known, so long as it is a ‘unique process which is not known in the industry.’”<sup>105</sup> Delaware law protects novel combinations of albeit known elements because it takes expertise to make the choices of which elements to combine and how.<sup>106</sup>

On cross-examination, HP's trade secret expert agreed with this concept:

Q. Is water a trade secret?

A. Not to my knowledge.

Q. Is sugar a trade secret?

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<sup>104</sup> *Miles Inc. v. Cookson America, Inc.*, 1994 WL 676761, at \*11 (Del. Ch.)(citations omitted).

<sup>105</sup> *Merck & Co., Inc. v. SmithKline Beecham Pharmaceuticals Co.*, 1999 WL 669354, at \*15 (Del. Ch.)(quoting *Salsbury Labs., Inc. v. Merieux Labs., Inc.*, 735 F. Supp. 1555, 1569 (M.D. Ga. 1989), *aff'd*, 908 F.2d 706 (11th Cir. 1990); *see also Miles*, 1994 WL 676761, at \*11).

<sup>106</sup> *Id.* (“[T]he choice of individually known components and techniques to create a working manufacturing process is often, as here, a difficult undertaking. Where at individual steps of a process there are a variety of alternatives, the choice made through much effort of specific ingredients, materials, conditions, and steps in an actual, working process constitutes a trade secret.”); *see also Agilent Technologies v. Kirkland*, 2010 WL 610725, at \*18-21 (Del. Ch.).

A. Not to my knowledge.

Q. Is carbonation a trade secret?

A. Again, I'm not aware that it is.

Q. Is putting all those things together to make a sugary, fizzy, delicious drink called Coca-Cola, is that a trade secret?

A. Well, the process and the perhaps other ingredients is a trade secret.

Q. So each individual component is not a trade secret. You put them all together and you come up with an end product, trade secret; right?

A. Right.<sup>107</sup>

HP focuses only on the elements and not the combination of those elements.

## **ii. Misappropriation Occurs Where a Defendant Merely Uses the Trade Secret as a Starting Point or Guide in Developing a Process**

HP also ignores the well settled principle that: “Misappropriation of a trade secret occurs even in such cases, where a trade secret acts as a starting point for improvements, or a guide by which pitfalls may be avoided.”<sup>108</sup> That a defendant need not copy a trade secret word for word speaks to the heart of trade secret law.

Unlike patent or copyright laws, the crux of trade secret misappropriation is not in preventing others from copying an idea or process. As the Tenth Circuit explained, “[t]he breach of a duty of trust or confidence ‘is the gravamen of such trade secret claims.’”<sup>109</sup> The Second Circuit agrees:

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<sup>107</sup> A9470.

<sup>108</sup> *Agilent*, 2010 WL 610725, \*22 (Del. Ch.); *see also Merck*, 1999 WL 669354, at \*19-20.

<sup>109</sup> *Gates Rubber Co. v. Bando Chemical Industries, Ltd.*, 9 F.3d 823, 847-48 (1993)(citing *Computer Associates International, Inc. v. Altai, Inc.*, 982 F.2d 693, 717 (2d Cir. 1992); *Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655, 660 (4th Cir. 1993); *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1090 n. 13 (9th Cir. 1989); Restatement of Torts § 757 cmt. a (1938); *see also Chris-Leef General Agency, Inc. v. Rising Star Ins. Inc.*, 2011 WL 5039141, at \*4 (D. Kan.); *SCR-Tech LLC v. Evonik Energy Services LLC*, 2011 WL 3209080, at \*13 (N.C. Super.).

Plaintiffs do not assert, indeed cannot assert, a property right in their development such as would entitle them to exclusive enjoyment against the world. Theirs is not a patent, but a trade secret. The essence of their action is not infringement, but breach of faith. It matters not that defendants could have gained their knowledge from a study of the expired patent and plaintiffs' publicly marketed product. The fact is that they did not. Instead they gained it from plaintiffs via their confidential relationship, and in so doing incurred a duty not to use it to plaintiffs' detriment. This duty they have breached.<sup>110</sup>

As that Court explained: “Where defendants obtain secret information by means of a confidential relationship, they shall be held accountable for its use to their own advantage at the expense of the rightful possessor.”<sup>111</sup> The Eighth Circuit agrees:

Moreover, by labeling certain wrongful, if not actually otherwise illegal, acts “improper,” trade secret law plays an important role in regulating commercial behavior. If the law forces businesses to take extreme measures to protect themselves against all forms of commercial espionage not otherwise unlawful, “the incentive to invest resources in discovering more efficient methods of production will be reduced and with it the amount of invention.” Our analysis is consistent with the stated purposes of trade secret protection: (1) maintaining commercial morality, and (2) encouraging innovation.<sup>112</sup>

“[T]he doctrine of trade secret law is an attempt to enforce morality in business.”<sup>113</sup>

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<sup>110</sup> *Franke v. Wiltschek*, 209 F.2d 493, 495 (1954); *see also Monovis, Inc. v. Aquino*, 905 F. Supp. 1205, 1227-28 (W.D.N.Y. 1994).

<sup>111</sup> *Id.*

<sup>112</sup> *Pioneer Hi-Bred Intern. v. Holden Foundation Seeds, Inc.*, 35 F.3d 1226, 1239 n.42 (1994)(citations omitted); *see also Quantum Sail Design Group, LLC v. Jannie Reuvers Sails, Ltd.*, 2015 WL 404393, at \*3-4 (W.D. Mich. 2015)(Michigan UTSA)(“The policies embodied in a claim for misappropriation of trade secrets include maintaining standards of commercial ethics and encouraging innovation. The essence of the wrong is the breach of confidence, the betrayal of the trust placed in the recipient.”); *accord Advanced Fluid Systems, Inc. v. Huber*, 28 F. Supp. 3d 306, 322 (M.D. Pa. 2014)(Pennsylvania UTSA); *Trandes*, 996 F.2d at 660 (Maryland UTSA).

<sup>113</sup> *Abbott Labs. v. Norse Chem. Corp.*, 147 N.W.2d 529, 533 (WI 1967).

HP's argument that it only implemented parts of PICA's program that, *alone*, were not trade secrets is meritless. *Sanirab v. Sunroc* forecloses HP's argument:

A product built from entirely generally known elements is protectable as a trade secret. **The value of a trade secret would be lost if a defendant could obtain the information, learn thereby the important choices made by the trade secret owner at various points in development, use the information gained for its benefit, and avoid liability by then saying that the particular information used is published.**<sup>114</sup>

HP's brief is silent on this controlling law.<sup>115</sup>

HP's citation to the *Savor* case also misses the mark. In that case, the plaintiff had no evidence that the defendant even received the trade secret.<sup>116</sup> Having seen defendants' product and thought it similar to their own, the plaintiff merely believed it must have been stolen.<sup>117</sup> The Court held only that, where the plaintiff claimed only that defendants had an opportunity to misappropriate the secret, that plaintiff needed to also demonstrate a substantial similarity.<sup>118</sup> This is logical but does not apply to a case like this where the defendant *admitted* to stealing the idea.

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<sup>114</sup> See 2002 WL 1288732, at \*3 (Del. Super.). The Court further explained "While a defendant's product can be different, the use of trade secret know-how provides a guide, charting the way through the many problems and decisions and a springboard to the solution of the problems. Courts are skeptical of an independent derivation defense where, after being exposed to the trade secret, the defendant has a purportedly epiphanic episode. Whether trade secrets were generally known or readily ascertainable and whether a plaintiff took reasonable precautions to protect their secrecy is a question of fact." *Id.*

<sup>115</sup> Instead, HP makes the unsupported claim that "use of one component of an alleged process...is not enough to prove misappropriation." OB at 31.

<sup>116</sup> *Savor, Inc. v. FMR Corp.*, 2004 WL 1965869, at \*9 (Del. Super.).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

The test, here, is not one of substantial similarity but whether HP's changes to its brand protection program were substantially derived from HP's access to PICA's trade secret. "A process developed with 'explicit reference' to the trade secrets is substantially derived from the trade secrets."<sup>119</sup> A company's use of another's "know-how in resolving its problems and finalizing its [own] process" derived from a trade secret is misappropriation.<sup>120</sup>

**iii. HP Misappropriated PICA's Trade Secret**  
**1. PICA's Overall Program was a Trade Secret**

PICA's expert testified that PICA's program was "very innovative" and combined investigative techniques in an unprecedented manner that would have afforded HP both significant savings and insight into its distribution channel.<sup>121</sup> HP did not challenge PICA's expert's qualifications,<sup>122</sup> and HP does not challenge his overall opinion that the program as a whole was unprecedented.

HP proclaims that PICA "did not introduce a shred of evidence that its MCA proposal had *any economic value whatsoever, actual or potential.*"<sup>123</sup> HP's hyperbole lacks merit. "Trade secrets have actual or potential independent economic value if a competitor cannot produce a comparable product without a

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<sup>119</sup> *Merck*, 1999 WL 669354, at \*19.

<sup>120</sup> *Id.* at \*22.

<sup>121</sup> A9172-75.

<sup>122</sup> The Court lacks "the technical expertise to evaluate on its own whether the information plaintiff claims is secret is, in fact, not generally known in the industry" and must defer to the experts. *Savor*, 2004 WL 1965869, at \*6-7.

<sup>123</sup> OB at 32.

similar expenditure of time and money.”<sup>124</sup> “[T]he choice of individually known components and techniques to create a working [] process” may demonstrate that a process has independent economic value.<sup>125</sup>

Diaz testified that: (1) he relied on his twenty plus years of experience in creating the program; (2) he spent several months creating it; and (3) others could not have created it without doing the same.<sup>126</sup> PICA established its trade secret.<sup>127</sup>

## **2. HP Used and Benefited from PICA’s Trade Secret**

HP represents that “there was *no evidence* that HP made any changes to its ACF or SDF programs as a result of the MCA proposal.”<sup>128</sup> HP ignores the overwhelming circumstantial evidence and does not even address the smoking gun emails wherein the very recipient of PICA’s program took steps to implement it.<sup>129</sup> At best, HP’s argument is frivolous.

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<sup>124</sup> *Nucar Consulting, Inc. v. Doyle*, 2005 WL 820706, \*5 (Del. Ch.)(citing *Miles*, 1994 WL 676761, at \*10); see also *Agilent*, 2010 WL 610725, at \*20-21 (“it is important to remember that the statutory definition of trade secret includes ‘information’ that ‘[d]erives independent economic value, actual or *potential*, from not being generally known...’)(emphasis in original).

<sup>125</sup> *Agilent*, 2010 WL 610725, at \*20 n.195 (quoting *Merck*, 1999 WL 669354, at \*15).

<sup>126</sup> A9070-71. Both Diaz and Faulconer also testified regarding the economic benefits of the program. A9066, A9070; A9175.

<sup>127</sup> “[I]t is generally recognized that the existence of a trade secret is a question of fact for determination by the jury.” *Savor*, 2004 WL 1965869 at \*6-7 (citations and quotations omitted). HP’s arguments to the contrary are ironic, given that at trial HP itself claimed the amount of revenue it lost to counterfeiting was a “trade secret” as were the details of HP’s packaging “boxes and bags.” A9909-10; A9349.

<sup>128</sup> OB at 34.

<sup>129</sup> “Misappropriation of trade secrets may be proven by circumstantial evidence, and more often than not, plaintiffs must construct a web of perhaps ambiguous circumstantial evidence from which the trier of fact may draw inferences which convince him that it is more probable than not that



In violation of 6 *Del. C.* § 2001,<sup>130</sup> HP used PICA’s program as a starting point or guide and made material changes to its counterfeiting and fraud operations. First, it is significant that Kwasny asked Diaz to create a new solution because HP’s own efforts to monitor its channel were failing.<sup>131</sup> HP knew that some were introducing counterfeit and defrauding its rebate program, but HP needed a better way to catch these people.<sup>132</sup> PICA provided a comprehensive solution, and HP chose to implement individual, crucial parts of PICA’s program. But for receiving PICA’s program and insights, HP would not have made the changes it implemented.

PICA proved HP’s misappropriation through, at least, the following:

- 1) Kwasny (the recipient) said they were going to implement it;<sup>133</sup>
- 2) Kwasny said he “loved the idea” and was going to run it first in EMEA;<sup>134</sup>
- 3) Smoking gun internal HP emails admitting the following:
  - a. HP planned a “new or existing cartridge trading company for the purpose of gaining leads on organizations that may be trading in counterfeit goods”;<sup>135</sup>
  - b. the trading company was going to focus on PICA’s suggested targets;<sup>136</sup>

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what plaintiffs allege happened did in fact take place.” *Merck*, 1999 WL 669354, at \*20 (quotations omitted).

<sup>130</sup> Delaware’s Uniform Trade Secret Act (“DUTSA”).

<sup>131</sup> A9063-66.

<sup>132</sup> *Id.*

<sup>133</sup> A9071-72, B040-44.

<sup>134</sup> A9071-72.

<sup>135</sup> B570-80.; A9394-97.

<sup>136</sup> *Id.* Kwasny stated that the “focus will be on distributors and resellers” which are defined terms at HP referring to the Tier 1 and Tier 2 channel partners PICA told HP to focus on targeting.

- c. the “front” company would “serve the exclusive purpose of gaining leads for follow-on investigations” just as PICA proposed;<sup>137</sup>
  - d. Kwasny’s boss, Andy Binder, supported the program;<sup>138</sup>
  - e. HP executives repeatedly discussed reselling goods, as PICA suggested;<sup>139</sup>
  - f. the concept was novel and needed approval from their legal department;<sup>140</sup>
- 4) Kwasny admitted on cross-examination that “there were some similar nuances” between PICA’s program and HP’s “trading company”;<sup>141</sup>
- 5) After receiving PICA’s program, HP demonstrably took the following steps:
- a. HP tripled the number of test buys it was making;<sup>142</sup>
  - b. HP increased its budget to support the steps PICA suggested;<sup>143</sup>
  - c. HP installed new investigators in the same regions PICA suggested;<sup>144</sup>
  - d. HP used PICA’s new, unprecedented kind of front company;<sup>145</sup>
  - e. HP started reselling genuine goods purchased in test buys;<sup>146</sup>
- 6) HP bragged at a trade show about its recent successes from PICA’s program:

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> A9394-95.

<sup>142</sup> B001.

<sup>143</sup> A9423-24, A9752

<sup>144</sup> *Id.*

<sup>145</sup> JX-42, 53, and 54

<sup>146</sup> A9401-02; A9394-95; B570-80.

a. HP described its successes and insights that it did not have before receiving PICA's program and could only have come from PICA's program;<sup>147</sup>

b. HP's presentation did not suggest any similar results *before* receiving PICA's program and conspicuously provided only data for the years *after*.<sup>148</sup>

For HP to not even address *any* of this evidence, warrants rejecting HP's appeal.

It was also telling that HP did not introduce *any* documents suggesting that it was a mere coincidence that HP made these changes after receiving PICA's program. HP introduced no emails, no cost calculations, no business plans – nothing. HP wanted the jury (and now this Court) to just take its word for it.

### **3. PICA Took Reasonable Steps to Protect its Trade Secret**

HP agreed to the preconditions that: (1) it was PICA's proprietary information; (2) HP would keep it confidential; and (3) only PICA would implement the program.<sup>149</sup> PICA also marked all of its outlines of the program as "PICA Confidential."<sup>150</sup> HP's claim that PICA needed a "nondisclosure agreement" is

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<sup>147</sup> A9080-83; A8977-78; A9131 ("I can tell that you HP had a hard time with the channel that was unmanaged. They really had a hard time. You know, I got great insight when I was with HP working with Peter Hunt. Peter Hunt is a dear friend of mine. He was actually responsible for managing the sales and discount fraud and the hardware fraud and counterfeit, I think up until 2009. And we spent many, many days talking about exactly how little insight HP had into that part of the channel. It's . . . It's something they struggled with a long time. They get better at it. Clearly they got better at it from the slide deck.").

<sup>148</sup> *Id.*; *see also* A9038 ("I would just suggest that you look at the actual PowerPoint and how it's set up and the periods of time that are involved, 2010 to 2012, you look at the elements, the silos, how they are doing it. Ask yourself how are they doing it if they're not doing it this way.").

<sup>149</sup> A9066-67; *see also* A8963

<sup>150</sup> A9074.

meritless,<sup>151</sup> as is its claim that PICA did not object to HP's misappropriation.<sup>152</sup> The jury decided this fact question in PICA's favor.<sup>153</sup>

#### **4. HP's Claim That PICA Somehow Changed its Trade Secret is a Remnant of its Failed Litigation Strategy**

As HP's suppression efforts failed, PICA was able to compare its program with the changes HP made internally after receiving PICA's program. HP, then, concocted an argument that PICA had changed its trade secret.<sup>154</sup> Highlighting and focusing on the similarities is by no means a shifting trade secret.<sup>155</sup> If the Court is inclined to consider HP's chart of purported changes, PICA submits its own chart disproving HP's claims.<sup>156</sup> The trial judge rejected HP's fact intensive claims and did not abuse her discretion.

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<sup>151</sup> *Beard Research, Inc. v. Kates*, 8 A.3d 573, 590 (Del. Ch. 2010) (“DUTSA does not require, however, any showing that a former employee had a written employment contract or nondisclosure or noncompetition agreement to prove liability for misappropriation of a trade secret.”)

<sup>152</sup> Diaz told Kwasny that he was incredibly disappointed, and explained that PICA “tried initially to work through the business through a number of conversations and e-mails spearheaded by Vince directly. And when we didn't get any traction there, we submitted a standards-of-business conduct complaint, which is a tool that HP affords its employees and its vendors when -- when these employees or vendors perceive they may have been wronged by Hewlett-Packard. Unfortunately, we never got any resolution when we utilized that tool.” 10/9/14, at 237:10-240:8, 252-53.

<sup>153</sup> *See Sanirab*, 2002 WL 1288732 at \*3 (“[W]hether a plaintiff took reasonable precautions to protect their secrecy is a question of fact.”).

<sup>154</sup> HP repeatedly claimed that PICA's program had somehow changed *after discovery closed*, despite Diaz's extensive discovery deposition testimony. *Compare* A2481-90 *with* A3317-30.

<sup>155</sup> *See SmithKline Beecham Pharmaceuticals Co. v. Merck & Co.*, 766 A.2d 442, 447-48 (Del. 2000) (“Merck's initial disclosure described its entire process as a protectable trade secret. Then, following discovery, it narrowed that broad trade secret claim to fit the particular aspects of the production process Merck claimed were misappropriated by SmithKline. SmithKline was initially put on notice through Merck's broad disclosure but was subsequently informed well in advance of trial of the specific aspects of the trade secret Merck believed SmithKline misappropriated. It cannot be said Smith Kline was prejudiced in any way.”).

<sup>156</sup> *See* Exhibit A to PICA's Brief.

### **III. The Actual Evidence Supports the Trade Secret Damages Award**

#### **a. Question Presented**

Whether this Court must affirm an award supported by both the facts and law.

#### **b. Standard and Scope of Review**

PICA relies on the Standard and Scope of Review stated above in § I (B).

#### **c. Merits of Argument**

##### **i. PICA's Actual Losses**

HP seeks to create new law holding that, when a defendant receives a trade secret through the misrepresentation that only the plaintiff would implement the trade secret, the plaintiff cannot recover the profits it would have received but for the misappropriation. This is illogical and would not fulfill DUTSA's intent. As the Restatement (Third) of Unfair Competition explains: "The courts have recognized the need for flexibility in formulating monetary remedies in order to achieve both compensatory and restitutionary objectives. The plaintiff is generally entitled to recover any proven pecuniary loss attributable to the appropriation of the trade secret."<sup>157</sup> PICA established at trial that it was a precondition that only PICA would run its program, and PICA is entitled to its lost profits.<sup>158</sup>

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<sup>157</sup> Section 45 (1995); *see also University Computing Co. v. Lykes*, 504 F.2d 518, 538 (5th Cir. 1974) ("[E]very case requires a flexible and imaginative approach to the problem of damages. ... [C]ases reveal that most courts adjust the measure of damages to accord with the commercial setting of the injury, the likely future consequences of the misappropriation, and the nature and extent of the use the defendant put the trade secret to after misappropriation.")

<sup>158</sup> A9066-67.

## ii. HP's Unjust Enrichment

HP's argument that PICA introduced "no evidence" of unjust enrichment depends entirely on its assertion that misappropriation only occurs through word for word copying or implementation. That is not the law.<sup>159</sup> HP also suggests that PICA's economist needed to weigh the evidence and reach his own conclusion regarding causation. Again, that is not the law, as damages experts are allowed to presume that the plaintiff will otherwise establish 100% causation.<sup>160</sup>

## iii. PICA is Entitled to its Lost Profits and HP's Unjust Enrichment

DUTSA provides that a plaintiff is entitled to recover *both* its lost profits and the defendant's unjust enrichment.<sup>161</sup> The *Agilent* post trial opinion demonstrated

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<sup>159</sup> See § II(C)(ii) above.

<sup>160</sup> *Beard Research, Inc. v. Kates*, 8 A.3d 573, 613-614 (Del. Ch. 2010) ("Plaintiffs proved through other witnesses and evidence that Defendants engaged in certain misconduct and that Plaintiffs suffered damages as a result; this suffices to show causation. A damages expert focuses on quantifying the damages suffered, which is what Jones attempted to do here."); *accord RMD, LLC v. Nitto Americas, Inc.*, 2012 WL 5398345, at \*10 (D. Kan.); *U.S. Accu-Measurements, LLC v. Ruby Tuesday, Inc.*, 2013 WL 1792463, at \*4-5 (D.N.J.); *Univac Dental Co. v. Dentsply Intern., Inc.*, 2010 WL 844507, at \*2-4 (M.D. Pa.); see also *Wholesale Partners, LLC v. MasterBrand Cabinets, Inc.*, 2014 WL 435129, at \*1 (E.D. Wis.) ("As a damages expert, Bernatowicz is 'entitled to presume causation (a prerequisite to recovery which will have to be established by evidence other than [the expert's] testimony).'" (quoting *CRST Van Expedited, Inc. v. J.B. Hunt Transport, Inc.*, 2006 WL 2054646, at \*4 (W.D. Okla.)); *Manpower, Inc. v. Insurance Co. of Pennsylvania*, 732 F.3d 796, 807-08 (7th Cir. 2013); *Tuf Racing Products, Inc. v. American Suzuki Motor Corp.*, 223 F.3d 585, 591 (7th Cir. 2000) ("***The principle of Daubert is merely that if an expert witness is to offer an opinion based on science, it must be real science, not junk science. Tuf's accountant did not purport to be doing science. He was doing accounting.*** From financial information furnished by Tuf and assumptions given him by counsel of the effect of the termination on Tuf's sales, the accountant calculated the discounted present value of the lost future earnings that Tuf would have had had it not been terminated. This was a calculation well within the competence of a C.P.A.") (emphasis supplied).

<sup>161</sup> 6 *Del. C.* § 2003(a).

this principle by awarding the plaintiff both: (a) the profits it would have made had the defendants *not* taken the trade secret; and (b) the unjust enrichment damages that existed only in the world where the defendants *did* take the trade secret.<sup>162</sup> PICA lost \$300,000 in profits from HP's theft, *and* HP received \$700,000 in unjust profits.<sup>163</sup> The jury was properly instructed, and their fact finding must stand.<sup>164</sup>

#### **iv. HP Waived its Meritless Argument Regarding PICA's Closing**

HP claims PICA invited the jury to speculate in its closing argument. HP did not object at trial. By failing to object contemporaneously, HP waived this argument.<sup>165</sup> HP now attempts to shoehorn its legal argument for judgment as a matter of law regarding the sufficiency of PICA's damages evidence into some type of continuing objection to all comments related to damages. This cannot be.

HP asserted in moving for a directed verdict that PICA introduced "no evidence" of unjust enrichment related to HP's anti-counterfeiting program. PICA responded by noting that: (1) HP's Jeff Kwasny told PICA that implementing its

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<sup>162</sup> See 2010 WL 610725, at \*23-31.

<sup>163</sup> Awarding unjust enrichment damages and lost profits is supported by "the theory that 'an intending tortfeasor should not be prompted to speculate that his profits might exceed the injured party's losses, thus encouraging commission of the tort.'" *Great American Opportunities, Inc. v. Cherrydale Fundraising, LLC*, 2010 WL 338219, at \*27, n.303 (Del. Ch.)(quoting *Nat'l Merch. Corp. v. Leyden*, 348 N.E.2d 771, 775-76 (Mass. 1976)).

<sup>164</sup> The jury was instructed: "These two approaches to damages—PICA's losses and HP's gains—are different in some respects, but also may overlap. However, the law does not permit a plaintiff to recover twice for the same damages. Thus, you may include as damages both PICA's lost profits and HP's gain only if and to the extent that they do not overlap in this way." A9536.

<sup>165</sup> See *General Motors Corp. v. Grenier*, 981 A.2d 531, 541 (Del. 2009); *Koutoufaris v. Dick*, 604 A.2d 390, 400 (Del. 1992).

program would save HP, at least, \$10 MM;<sup>166</sup> (2) HP suppressed all of the damages evidence in bad faith; and (3) HP, as the wrongdoer in a trade secrets case, bears all of the risk of uncertainty in damages calculations<sup>167</sup>.<sup>168</sup> The trial judge correctly held that PICA had sufficient evidence to establish the damages, despite an inability to pinpoint them with mathematical certainty.<sup>169</sup> HP does not challenge this holding, but instead a comment in closing.

HP challenges PICA's accurate explanation that the jury is responsible for determining the ultimate number to assign to HP's unjust enrichment. As this Court has explained: "Juries need not award a plaintiff either everything requested by the complaint or nothing. Presented with appropriate facts, a jury may find that a

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<sup>166</sup> "A plaintiff will occasionally come up with profit projections made by the defendant before there was any dispute between them. ... The courts universally hold defendant's projections admissible and tend to give them substantial deference." *Dunn Recovery of Damages* (6th ed. 2005) § 5.18 at 426; *accord Galloping, Inc. v. QVC, Inc.*, 27 F. Supp. 2d 466, 468 (S.D.N.Y. 1998); *Sir Speedy, Inc. v. L & P Graphics, Inc.*, 957 F.2d 1033, 1038 (2d Cir. 1992); *S & K Sales Co. v. Nike, Inc.*, 816 F.2d 843, 852 (2d Cir. 1987); *Care Travel Co., Ltd. v. Pan American World Airways, Inc.*, 944 F.2d 983, 994 (2d Cir. 1991); *Super Valu Stores, Inc. v. Peterson*, 506 So. 2d 317, 330 (Ala. 1987).

<sup>167</sup> *Agilent*, 2010 WL 610725, at \*24 ("Given that cases of this kind present a variety of uncertainties at the remedial stage about what might have happened had the defendants not breached their contractual duties and not stolen trade secrets, the remedy I implement necessarily involves some degree of imprecision and depends on assumptions that are arguable. The law recognizes this reality by enabling trial courts to shape remedies that...impose the burden of uncertainties on the wrongdoers.").

<sup>168</sup> A9494-95.

<sup>169</sup> *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (U.S. 1931)("It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.").



defendant should pay for some, but not all, of the harm plaintiff suffered.”<sup>170</sup> Based on HP’s pre-litigation calculations of its benefits from using PICA’s program in its anti-counterfeiting program, PICA sought at least \$10 MM. In turn, HP argued for \$0. PICA accurately stated that it was for the jury to decide the actual amount. HP’s claim that PICA’s expert needed to comment on these damages remains meritless.<sup>171</sup>

#### **v. HP’s *Daubert* Motion was Untimely and Meritless**

HP withheld damages evidence until ten days before trial. Four days before trial, HP moved to exclude the very evidence that it had just given to PICA – despite the fact that the evidence, connecting HP’s test buys to savings, that HP calls speculative *came from an affidavit that HP told the Court would connect HP’s test buys and savings*.<sup>172</sup> The trial judge correctly held that PICA’s economist was allowed to presume that PICA would establish causation.<sup>173</sup> Given that HP filed its *Daubert* motion only four days before trial due to its bad faith tactics, the trial judge also correctly denied HP’s motion as untimely. HP’s appeal is meritless.

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<sup>170</sup> *Streetie v. Progressive Classic Ins. Co.*, 2011 WL 6307823, at \*2 (Del.).

<sup>171</sup> *See Vianix Delaware LLC v. Nuance Communications, Inc.*, 2010 WL 3221898, \*7 (Del. Ch.) (“As for the absence of any testimony on Vianix’s behalf from a damages expert, I find plausible Vianix’s protestations about the difficulty, if not the impossibility, of finding a damages expert who could have testified helpfully on the quantification issues in this case. While the absence of such evidence may limit the award Vianix ultimately receives, I find that there is sufficient evidence to support at least some damages award in this case. Thus, I reject Nuance’s contention that any award of damages would be unduly speculative.”).

<sup>172</sup> At an August 21, 2014 hearing on sanctioning HP for its failure to provide a 30(b)(6) witness regarding HP’s Sales and Discount Fraud savings, HP explicitly offered to provide an affidavit linking test buys and savings. A8874-75.

<sup>173</sup> *See supra* n. 239.

#### **IV. The Court Correctly Awarded PICA its Reasonable Attorneys' Fees**

##### **a. Question Presented**

Whether the trial judge correctly applied 6 *Del. C.* § 2004, which provides that where “wilful and malicious misappropriation exists, the court may award reasonable attorney's fees to the prevailing party.”

##### **b. Standard and Scope of Review**

“The trial court is granted broad discretion in awarding attorneys’ fees. ‘Absent a clear abuse of discretion, this Court will not reverse the award.’”<sup>174</sup>

##### **c. Merits of Argument**

HP, again, ignores all of the misappropriation evidence and the evidence of HP’s bad faith efforts to replicate, debilitate, and replace PICA.<sup>175</sup> HP cites only its own witnesses. The jury’s weighing of the three weeks of evidence must stand.

HP’s assertions regarding PICA’s fees are also meritless. HP’s chart: equates the drafting of a single interrogatory with the presentation of a motion to compel; does not even highlight all of the related discovery; and is misleading. The trial judge knew the history of the litigation and that PICA spent at least 75% of its time pursuing its trade secret claim.

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<sup>174</sup> *Reserves Management, LLC v. American Acquisition Property I, LLC*, 2014 WL 823407, at \*6 (Del.) (quoting *Johnston v. Arbitrium Handels AG*, 720 A.2d 542, 544 (Del. 1998)).

<sup>175</sup> See *supra* § II(C)(iii).

## V. A Trial Judge Must Award Exemplary Damages After a Jury Finds Willful and Malicious Misappropriation

### a. Question Presented

Whether, after a jury finds willful and malicious misappropriation, a trial judge fulfills DUTSA's statutory intent of preventing and punishing willful and malicious misappropriation of trade secrets by awarding no exemplary damages.<sup>176</sup>

### b. Standard and Scope of Review

This Court reviews “a trial judge’s interpretation of a statute *de novo*[,]”<sup>177</sup> “but ‘[d]eterminations of fact and application of those facts to the correct legal standards ... are reviewed for an abuse of discretion.’”<sup>178</sup> This Court recognizes:

[A]n abuse of discretion can occur in “three principal ways: when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.”<sup>179</sup>

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<sup>176</sup> Raised below at A5589-94.

<sup>177</sup> *Freeman v. X-Ray Assocs., P.A.*, 3 A.3d 224, 227 (Del. 2010) (citing *Dambro v. Meyer*, 974 A.2d 121, 129 (Del. 2009)).

<sup>178</sup> *SIGA Technologies, Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 341 (Del. 2013)(quoting *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999)).

<sup>179</sup> *Homestore, Inc. v. Tafeen*, 886 A.2d 502, 506 (Del. 2005)(quoting *Kern v. TXO Production Corp.*, 738 F.2d 968 (8th Cir. 1984)).

### c. Merits of Argument

The jury found willful and malicious misappropriation. Pursuant to 6 *Del. C.* § 2003(b): “If wilful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award[.]”<sup>180</sup>

The trial judge erred by not awarding PICA exemplary damages. As Delaware’s District Court noted in *Mattern & Associates, L.L.C. v. Seidel*, “it is axiomatic that exemplary damages provide a valuable function above and beyond compensatory damages in the punishment and deterrence of unlawful conduct” and “[a]llowing [defendants] to act willfully and maliciously without additional penalty would render ineffective DUTSA’s proscription against exactly this type of behavior.”<sup>181</sup> This Court should hold that, where a jury finds willful and malicious misappropriation, it is legal error not to award *some* exemplary damages.

This Court should also hold that the trial judge abused her discretion in awarding \$0.00 in exemplary damages by: (1) making the fact intensive determination that the jury’s compensatory damages award adequately compensated the plaintiff; and (2) considering the amount of non-trade secret related *compensatory* damages the jury awarded, in denying *exemplary* damages.

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<sup>180</sup> *Black’s Law Dictionary* explains that “exemplary damages” are synonymous with “punitive damages,” which are intended to “to punish and thereby deter blameworthy conduct.” (Abridged 7th ed. 1999) 322, 470.

<sup>181</sup> 678 F. Supp. 2d 256, 272 (D. Del. 2010).

The trial judge relied on *Agilent*, in concluding that PICA had been adequately compensated for HP's misappropriation.<sup>182</sup> *Agilent* is distinguishable because it was a Court of Chancery case wherein the Vice Chancellor served as the fact finder and was able to make the fact intensive decisions of whether a plaintiff has been adequately compensated or a defendant adequately punished. The *Agilent* trial judge reviewed the exhibits, gauged the witnesses' credibility, and weighed the evidence.

In a jury trial, the judge's calculation of exemplary damages should start with a presumption that it is appropriate to award the maximum statutorily allowed amount.<sup>183</sup> The trial judge should then consider any mitigating factors requiring a smaller award. Appropriate mitigating factors include circumstances where the Court has enjoined the misappropriation or where the plaintiff, itself, has unnecessarily complicated or prolonged the litigation.<sup>184</sup> Even in a jury trial, the judge would have all of the facts necessary to weigh similar factors.

PICA respectfully requests that this Court reverse the trial judge's award of \$0.00 in exemplary damages and remand to allow the trial judge to determine in the first instance whether there are non-fact intensive reasons to award less than the full amount allowed by DUTSA.

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<sup>182</sup> Exhibit F to OB at 20-22.

<sup>183</sup> See, e.g., *W.L. Gore & Associates, Inc. v. Wu*, 2006 WL 2692584, at \*6 (Del. Ch.); *EDIX Media Group, Inc. v. Mahani*, 2006 WL 3742595, at \*15 (Del. Ch.).

<sup>184</sup> See, e.g., *Great American Opportunities, Inc. v. Cherrydale Fundraising, LLC*, 2010 WL 338219, at \*28-29 (Del. Ch.)

## **VI. The Trial Judge Failed to Weigh All of HP's Bad Faith Tactics**

### **a. Question Presented**

Whether suppressing crucial evidence until as late as twelve days before trial, obstructing rightful discovery requests, coaching witnesses, misrepresenting facts to the Court, and violating serial orders compelling discovery responses requires fee shifting under the bad faith exception to the American Rule.<sup>185</sup>

### **b. Standard and Scope of Review**

This Court reviews “a trial court’s denial of litigation expenses under the bad faith exception to the American Rule for abuse of discretion.”<sup>186</sup>

### **c. Merits of Argument**

HP misappropriated PICA’s channel management program. To avoid liability, HP resorted to suppressing: (1) smoking gun emails about the misappropriation; and (2) evidence of HP’s unjust enrichment. PICA requested seventy five percent of its attorneys’ fees, pursuant to Superior Court Rules 16(f), 37(b), and the bad faith exception to the American Rule. The trial judge awarded PICA its fees associated with three *specific* motions and a deposition, pursuant to Rule 37(b). The trial judge, however, abused her discretion by failing to address or consider HP’s *overall* bad faith litigation tactics. The attached timeline of HP’s

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<sup>185</sup> Raised below at A5139-62.

<sup>186</sup> *Lawson v. State*, 91 A.3d 544, 548-49 (Del. 2014).

discovery violations, which PICA presented to the trial judge, can only lead to the conclusion that HP acted in bad faith to hide crucial evidence regarding HP's use of PICA's trade secret and HP's resulting unjust enrichment.<sup>187</sup>

HP is a highly sophisticated litigant that sells e-discovery tools and advice.<sup>188</sup> Nonetheless, HP will ask this Court to believe that it simply could not find any of the requested documents. Regarding the ISMA/OSAC documents, the Court need only consider that: (1) PICA requested the documents twenty three days after the presentation; (2) the first page of the presentation contains the search terms "ISMA" and "OSAC", as do countless emails concerning the presentation; and (3) HP eventually produced ten separate draft versions of the presentation.

Regarding the smoking gun emails from Kwasny (the recipient of PICA's trade secret), HP made a stunning post trial admission that it allowed the very same employees who were accused of the underlying misdeeds to decide what documents they turned over to HP's counsel.<sup>189</sup> HP allowed its employees to decide what documents they deemed relevant *before* HP searched for the agreed upon ESI search terms. This is not a valid defense, as counsel are required to supervise discovery and cannot blindly trust the client's employees – particularly those accused of the

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<sup>187</sup> See Exhibit B to PICA's Brief.

<sup>188</sup> A7577-7621.

<sup>189</sup> A6605 "HP's alleged failure to produce the document earlier in discovery was the result of the HP employees who turned over their documents for production justifiably not recognizing this document as having anything to do with PICA or its claimed trade secret."

underlying misdeeds.<sup>190</sup> HP's post trial admission suggests that it is highly likely that it suppressed even more documents. The judgment should stand on these grounds alone. If this Court remands for a new trial on the trade secret claim, there would also need to be a full inquiry into HP's document production.

HP systematically withheld non-privileged, relevant documents that were responsive to PICA's requests for production and would have been easily found by the agreed upon ESI search terms. HP's bad faith tactics inhibited PICA from fully preparing its claims. The most recognizable example was forcing PICA to depose Kwasny without the crucial emails, wherein he suggested using PICA's program.<sup>191</sup>

The trial judge abused her discretion by failing to consider the totality of HP's conduct, under the bad faith exception to the American Rule. The trial judge erred by viewing the three motions and one deposition in a vacuum, under Rule 37. Given that the only possible conclusion is that HP purposefully suppressed relevant

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<sup>190</sup> See *M & G Polymers USA, LLC v. Carestream Health, Inc.*, 2010 WL 1611042, at \*66 (Del. Super.)

<sup>191</sup> HP's tactics continued through trial. For example, on October 20, 2014, HP called Bob Moore as witness to testify regarding PICA's program and the ISMA/OSAC presentation. PICA objected that HP had failed to identify Moore as knowledgeable about PICA's program and that Moore merely introduced that actual ISMA/OSAC presenter, Peter Hunt. HP's counsel repeatedly represented to the Court that Moore gave a presentation at the conference. The Court denied PICA's objection, and, within minutes of HP's direct examination, Moore testified that he merely introduced Peter Hunt and did not give any presentation. Compare A9245-48 with A9259.



evidence throughout this litigation, PICA requests that this Court reverse and remand with instructions to shift *at least* three-fourths of PICA's fees.<sup>192</sup>

## **VII. CONCLUSION**

HP's assertion that PICA presented "no evidence" to support any of its claims is frivolous. HP misstates the record and the law. This Court should affirm the trial judge's post trial decision, denying HP's motions for judgment as a matter of law or for a new trial, on the basis of and for the reasons assigned by the trial judge in her March 23, 2015 Opinion. This Court should, however, reverse the trial judge's decision denying PICA exemplary damages and remand with instructions to consider in the first instance whether any non-fact intensive mitigating factors warrant awarding PICA any less than the full statutorily allowed amount. If this Court reverses the trial judge's shifting of PICA's attorneys' fees pursuant to the trade secret statute, this Court should also reverse and shift PICA's fees pursuant to the bad faith exception to the American Rule. If this Court decides a new trial is necessary, that trial should be limited to determining only damages.<sup>193</sup>

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<sup>192</sup> Because HP also unnecessarily taxed the trial court's resources, PICA also suggests that HP should be ordered to pay an award to the court. *See Beck v. Atlantic Coast PLC*, 868 A.2d 840, 857 (Del. Ch. 2005).

<sup>193</sup> *See, e.g., Pennington v. Scioli*, 2011 WL 3568266, at \*5 (Del. Super.) ("In this case, the issues are clearly severable because the jury has already determined liability. There is no reason to upset that verdict. A new trial on the limited issue of damages will promote justice without prejudicing either party. Plaintiffs will be entitled to present their entire case to a jury in order to prove damages. Defendant is not prejudiced by retrial of the limited issue of damages because he has already had a full and fair opportunity to contest liability. This retrial presents him with the opportunity to convince the jury that Plaintiffs are entitled to only nominal damages.").

Respectfully submitted,

Dated: July 14, 2015

**COOCH AND TAYLOR, P.A.**

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