



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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.)

CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL

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PRELIMINARY STATEMENT

PICA's Answering Brief on Appeal and Opening Brief on Cross-Appeal admittedly contains serious allegations regarding HP's conduct. As PICA made clear at trial,¹ PICA does not take lightly these accusations and would not have raised these arguments if it did not have clear evidence that HP: (1) suppressed crucial evidence; (2) sought to abuse the discovery process; and (3) attempted to defraud the trial court. Sifting through HP's hyperbole, adverbs, and *ad hominem* attacks, it is apparent that HP has no meaningful excuses for these serious violations.

HP has no excuse for allowing the very employees accused of wrongdoing to decide which documents would be subject to searching for the agreed upon ESI search terms. HP claims its suppression of evidence, all the way to ten days before trial, was just "advocacy." Finally, rather than admit and seek to mitigate the fact that it attempted to deceive the trial judge and the jury by introducing seizure statistics that it knew were inapplicable, HP continues to seek to mislead this Court. PICA stands by its arguments, as supported by its citations to the record, and this Court should ignore HP's attempt to avoid responsibility by claiming that PICA is merely slinging mud. The facts speak for themselves.

¹ A5142.

ARGUMENT

I. The Trial Judge Erred by Not Shifting PICA's Fees Under the Bad Faith Exception to the American Rule

HP acted in bad faith both before and during this litigation. After a three week trial and lengthy deliberations, the jury concluded that HP willfully and maliciously stole PICA's trade secrets and destroyed its most valuable asset – its reputation. Dutifully applying the jury instructions (that HP agreed to), the jury awarded PICA significant damages to try to remedy HP's pre-litigation conduct. There was, however, no adequate remedy for HP's bad faith litigation conduct.

Throughout this litigation, HP: (1) suppressed crucial documents; (2) repeatedly violated Court orders; (3) made blatant misrepresentations to the trial judge; (4) improperly coached its witnesses during depositions; (5) forced PICA to take all of its depositions before "finding" the most crucial documents (Kwasny's emails admitting to setting up PICA's channel management program and the ISMA/OSAC presentation demonstrating HP's unjust enrichment); (6) untimely moved to exclude the very evidence that it had withheld until ten days before trial; (7) sought to defraud the Court by presenting testimony that it knew was

demonstrably false; and (8) generally obstructed and abused the discovery process to try to escape liability for its pre-litigation conduct.²

Although the trial judge granted all of PICA's motions to compel and repeatedly admonished HP's counsel, the trial judge only sanctioned HP monetarily once before the trial. In his deposition, Kwasny (the recipient of PICA's trade secret) admitted that he had deleted the majority of his emails regarding PICA's program.³ PICA then sought information regarding HP's email retention policy. HP refused to provide the information and forced PICA to move to compel. In its briefing and argument, HP (the global technology company with over 300,000 employees) repeatedly claimed that it did not have a written e-mail retention policy.

HP made this representation, despite its own witnesses' testimony. In his deposition, Kwasny testified:

Q. Okay. I also just want to ask you some questions about HP e-mail protocol. A number of the e-mails today that I've used and I'm using were not produced to us by HP.

A. Okay.

Q. And we're not exactly sure why not. Does HP have a policy regarding e-mail retention?

A. I'm sure they do.

Q. Do you know what it is?

A. Not explicitly, no.⁴

² See Exhibit B to PICA's Answering Brief on Appeal and Opening Brief on Cross-Appeal.

³ BR5-8.

⁴ BR15.

Mr. Kwasny offered only a vague, unsubstantiated suggestion that “I'd say the general guidance from HP is don't save too much e-mail.”⁵

Kwasny's boss, Andy Binder, confirmed the email retention policy existed:⁶

Q. Since 1989, has Hewlett-Packard had a formal policy regarding email retention?

A. Yes. Well, I don't know if 1989, but I know, in recent history, they have, yes.

Q. In recent history, when do you believe that began?

A. I don't know.

Q. When email started?

A. Yeah.

Q. Early 2000s, maybe late '90s?

A. Probably.

Q. What is HP's policy regarding email retention?

A. Well, the dates, I don't know. *There is a certain -- a set amount of time that you have to retain emails, and then there is an expectation you don't retain them beyond that.*⁷

Binder even offered to provide a copy of HP's email retention policy, until HP's counsel began inappropriately objecting to his *answers* and coaching his responses.

Q. Do you have a copy of HP's email retention policy?

A. I can obtain --

MR. DIULIO: Objection, lacks foundation.

THE WITNESS: I can get one from the corporate site, yes.

Q. So there is actually a written policy?

MR. DIULIO: Objection, lacks foundation; assumes facts.

THE WITNESS: I don't know for sure. I would assume there is.

MR. LEE: Okay.

MR. DIULIO: If you're assuming, don't do that.

THE WITNESS: Don't do that.

⁵ BR16.

⁶ BR30-32.

⁷ *Id.* (emphasis added).

MR. DIULIO: Yes. If you know something, you can tell him the answer, but don't assume.

THE WITNESS: I don't know.

HP's counsel coached Binder into recanting his testimony

The Court's consideration of PICA's motion to compel culminated in the following representations from HP:

The Court: And is there any policy, written policy, within HP that says: Our e-mail retention policy is that we don't really have a policy?

Mr. Diulio: **There is no written document that says: Our e-mail policy is there is no policy. There's just an absence of a policy directing the retention of e-mails.**⁸

[...]

The Court: Well, what if they had asked for – they've asked for the e-mail retention policy, and the response was an affidavit.

Mr. Diulio: That's correct, Your Honor.

The Court: Not a policy

Mr. Diulio: **That's because there is no written e-mail retention policy.**⁹

Based on HP's representation that it *does not have a written e-mail retention policy*, the Court granted "PICA the permission to conduct a 30(b)(6) deposition regarding the details of that nonwritten e-mail retention policy."¹⁰

After spending significant time and effort preparing, PICA's counsel travelled from Wilmington to Irvine, California to depose an HP designee regarding HP's document retention policies and procedures. Within ten minutes, the witness confirmed the obvious, HP *does have a written e-mail retention policy*.

⁸ A8819-20.

⁹ A8821.

¹⁰ A8828.

Q. Do you know how Hewlett-Packard defines records?

A. Yes.

Q. How is that?

A. A record is a piece of data that is deemed a business historical record that could have current or future business need.

Q. Could those pieces of data be emails, for instance?

A. Yes.

Q. Does Hewlett-Packard currently have a policy regarding retention of records?

A. Yes.

Q. Is it a written policy?

A. Yes.¹¹

HP's witness also testified that HP employees receive that policy annually and have access to the written policy online.¹² In its efforts to obstruct PICA's rightful discovery requests, HP had blatantly sought to mislead the Court.

After HP forced PICA to go to great lengths to disprove HP's lies regarding its email retention policy, the trial judge awarded PICA its fees and costs associated with deposition. In the end, HP was able to delay PICA's discovery efforts significantly, and it only cost HP a little over \$23,000.¹³ Apart from this slap on the wrist, the trial judge did not shift any of PICA's other fees incurred in connection with its eight motions to compel before trial. The trial judge chose, instead, to admonish HP's counsel repeatedly that PICA was entitled to broad discovery with the issues to be narrowed through summary judgment.¹⁴ HP

¹¹ BR34-35.

¹² BR34-49.

¹³ BR50-51.

¹⁴ See A8809; A8828-29; A8833-35; A8844-45; BR53-54.

ignored the judge and continued to suppress evidence all the way to ten days before trial.

After trial, PICA moved to shift its fees under the bad faith exception to the American Rule. As outlined in PICA's Opening Brief on Cross-Appeal, the trial judge did not address the totality of HP's behavior and, instead, limited Her Honor's analysis and award to three specific discovery motions and a deposition. In the end, the trial judge's award, under Rule 37(b), amounted to shifting less than \$39,000 of PICA's fees.¹⁵ With all due respect to the trial judge, this insignificant award does nothing to either penalize HP for its bad faith conduct or discourage future litigants from engaging in the same tactics. Admonishments alone do not work where a company like HP is defending multi-million dollar claims and is represented by California attorneys that will most likely never appear before the trial judge again.

Vice Chancellor Laster recognized this unfortunate reality, in presiding over a recent discovery dispute:

I do think that we have seen an increase in discovery aggressiveness in Delaware in terms of withholding documents, in terms of unfounded or less-than-well-founded assertions of privilege, in terms of the type of strong tactics that became prevalent elsewhere. I'm not making this comment based on this case specifically. I think it's a trend. I think it's a trend because those are national trends. I think we have been fortunate they have been slower to come to our little neck of the world, and we have been fortunate that they

¹⁵ HP undoubtedly spent more money housing its trial attorneys and paralegals in the Hotel du Pont for the three week trial.

have been particularly slow to come to Chancery. We have been fortunate that we have repeat players in Chancery who further delay the advent of these types of problems. But I think they've gotten much more prevalent, regrettably.

I think that it is up to the litigants to police them, in the first instance, by making motions. And then I think, for better or for worse, the Court has to be more firm in addressing these types of problems. Because if you are not firm in addressing them, they keep getting worse.

I believe that because I think these problems are more prevalent, the kind of "I want you to do better next time" or "I want you to fix it" solution that worked in the '90s -- certainly worked in the '80s, worked in the '90s, worked a little bit of the time in the early aughts -- it's not so effective anymore.

What it means is that there do have to be more meaningful consequences.¹⁶

The trial judge, here, relied upon those types of admonishments that used to be sufficient to ensure compliance and good faith litigation practices in Delaware. In the end, HP ignored those admonishments and the trial judge failed to implement any meaningful consequences for HP's pervasive bad faith litigation tactics.

a. The Suppressed Smoking Gun Kwasny Emails

HP has yet to suffer *any* consequences for its 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.¹⁷ HP

¹⁶ BR102-03.

¹⁷ See 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.").

allowed its employees to decide what documents they deemed relevant *before* HP's counsel searched for the agreed upon ESI search terms.

The only reason PICA received the smoking gun emails from Kwasny is because HP was forced to produce documents from a separate employee that Kwasny identified for the first time as knowledgeable in his deposition, David Llamas. In opposing PICA's request for documents from Llamas, HP disparaged PICA's discovery as a "fishing expedition," "trawling," and a "side-show." For example, HP asserted:

PICA ignores the evidence and instead engages in a fishing expedition in a misguided attempt *to locate evidence of misappropriation that does not exist*. It is against this backdrop that PICA seeks documents related to Mr. Llamas, even though HP has already produced documents and made witnesses available for deposition, the sum of which confirmed unequivocally that HP has not implemented any program similar in any way to that proposed by Mr. Diaz. *Further discovery from Mr. Llamas would not alter the evidence*, as explained below, and is untimely.¹⁸

HP added: "PICA attempts to manufacture an excuse for its untimely requests in order to continue its fishing expedition for evidence of misappropriation that simply does not exist."¹⁹

The Court rejected HP's conclusions and compelled HP to produce Llamas's documents. HP produced a limited set of documents on April 21, 2014 – ten days after HP moved for summary judgment. Contrary to HP's unequivocal statements

¹⁸ BR115.

¹⁹ BR119.

regarding Llamas, HP produced for the first time the smoking gun emails from and to Kwasny, including but not limited to the following emails that warrant full inclusion in this brief:

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

From: Kwasny, Jeffrey

Sent: Wed Oct 26 05:58:06 2011

To: Kwasny, Jeffrey; Velez, Julio

Cc: Cozzolina, Robert L; Llamas, David

Subject: RE: ACF trading company

Importance: Normal

Hey Julio,

In discussing this solution with Andy, which he supports, he suggested that we might want to contact an independent distributor that may be willing to partner with us. In such a partnership, maybe we get permission to inspect product to determine who is dealing in counterfeit, and in turn we give this company a discount on HP products. Of course, all this would be done with a formal agreement.

Andy mentioned that he knows a guy who runs a company that buys cartridges from all over the world that might be willing to partner with us. We'd have to be careful even investigating this route because let's say this guy doesn't want to work with us, he may spread the word that HP is looking to covertly trade product to determine who might be selling counterfeit.

Just a thought – let me know if you are interested.

Jeff

From: Velez, Julio
Sent: Wed Oct 26 14:01:22 2011
To: Kwasny, Jeffrey
Cc: Cozzolina, Robert L; Llamas, David
Subject: RE: ACF trading company
Importance: Normal

Hi Jeff, we are pretty much ready to go with a UC company. HP legal wants to make sure that the Business unit is supportive of our project. I appreciate the suggestions from both you and Andy and we may want to look at that avenue in the future. Our UC company will support the Americas and possibly some Global investigations. We will make contact with potential targets initially via the net and then direct UC communications. If we receive counterfeit from the targets then the investigation will be initiated. Down the line as we become active in the UC company, we may want to partner with a company to take any genuine products we purchase off our hands. We will need to build a layer between the UC company and the company we partner with to protect the UC company identity and the operatives.

Regards,

Julio

The emails were all sent or received by HP's Jeff Kwasny, Julio Velez, and Bob Cozzolina, who were all duly designated records custodians, and the emails contain agreed upon ESI search terms.

HP's opposition brief asserts that:

Because of these e-mails' attenuated relationship to this case (the e-mails were created **18 months** after Diaz submitted his proposal to Kwasny, and they bear no relation to PICA or the front company proposed by Diaz), the Trial Court correctly recognized that HP's failure to "originally identif[y]"

Mr. Llamas (one of the recipients of the e-mails) as a witness “may well have been” because “HP legitimately didn’t think that he had any information.”

HP’s defense is meritless for several reasons. First, the time between HP’s receipt of PICA’s program and the emails discussing its implementation in the **Americas** region is not at all surprising. Kwasny told Diaz that HP was going to implement the program first in the **EMEA** region.²⁰ It is also not surprising that HP would wait to implement PICA’s program in PICA’s former region, until six months after HP terminated PICA in April 2011.²¹

Second, it is frivolous to suggest that there is no relation between PICA’s program and the trading company suggested in Kwasny’s emails. Even limiting PICA’s program to the two page document that Diaz provided to Kwasny, the relevance of Kwasny’s emails to PICA’s claims is undeniable.

PICA’s program utilized a durable front company that would only be used to gain information for later investigations²²:

As an aside, it is imperative that these reports and transactions of illicit product not be utilized as a catalyst for criminal and/or civil action so as not to reveal the true purpose of the front company. PICA Corporation recommends any intelligence gained from this activity should be corroborated by an independent/separate investigation which can be utilized in a judicial process.

Kwasny suggests the very same to Velez:

²⁰ A9072.

²¹ A8990.

²² A9067-71; B021-29.

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.

PICA’s front company would resell legitimate goods²³:

Legitimate genuine product secured through these transactions will be sold and reintroduced into the stream of commerce. Proceeds from the sale of genuine product will be utilized to fund additional commercial transactions creating a cycle of channel solicitation affording PICA and Hewlett Packard the largest sampling of managed channel partners in a given year. Small samples of the counterfeit product will be maintained/stored by PICA for evidentiary purposes; however, the bulk of these illicit products will be shipped to recycling centers to remove them from the stream of commerce. PICA can and will provide counterfeit packaging samples to HP to support their forensic tracking program.

Kwasny suggests:

In discussing this solution with Andy, which he supports, he suggested that we might want to contact an independent distributor that may be willing to partner with us. In such a partnership, maybe we get permission to inspect product to determine who is dealing in counterfeit, and in turn we give this company a discount on HP products. Of course, all this would be done with a formal agreement.

Andy mentioned that he knows a guy who runs a company that buys cartridges from all over the world that might be willing to partner with us. We’d have to be careful even investigating this route because let’s say this guy doesn’t want to work with us, he may spread the word that HP is looking to covertly trade product to determine who might be selling counterfeit.

PICA’s program would assist HP in catching its channel partners selling counterfeit or committing discount fraud²⁴:

²³ *Id.*

²⁴ *Id.*

Hewlett Packard utilizes an extensive channel management program in its go-to-market strategy; these channel partners push Hewlett Packard imaging supplies to end uses for the home, SMB and enterprise markets. These partners are often bound to Hewlett Packard through contractual relationships whereby they source the consumables directly from Hewlett Packard or from Hewlett Packard tier 1 distributors.

At times, some managed channel partners have introduced illicit and/or counterfeit product into the stream of commerce diluting not only Hewlett Packard's revenue but also their brand. To this end, Hewlett Packard desires to "police" the channel to ensure managed channel partners are abiding by contractual obligations and only sourcing and selling original imaging supplies to HP's end users. Hewlett Packard desires to audit these partners in a covert fashion so as not to impede or alter their partners' normal course of business.

Kwasny supports creating new "trading company" for the very same reasons:

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.

As demonstrated in PICA's Answering Brief on Appeal and Opening Brief on Cross-Appeal, PICA's program was unprecedented in the industry and HP had never even used a durable front company to gather leads, resell goods, or target their tier 1 and 2 channel partners (contractually defined as distributors and resellers). It is meritless to contend these emails were not relevant to PICA's claims.

Third, HP's citation to the trial judge's statement that HP's failure to "originally identif[y]" Mr. Llamas (one of the recipients of the e-mails) as a

witness “may well have been” because “HP legitimately didn’t think that he had any information” is irrelevant, if not misleading. For purposes of clarity, PICA will not criticize HP’s initial failures to identify Llamas as knowledgeable and produce his responsive documents. That, however, does not change the fact that HP knew that Kwasny, Velez, and Cozzolina were central figures in this action and purported to have produced all of their relevant documents. The parties spent millions of dollars and several years litigating this matter, only to find out after trial that HP’s entire document production was a sham.

But for HP’s allowing Kwasny, Velez, and Cozzolina to withhold documents, these emails would have been subject to a search for the agreed upon ESI search terms. They would have been identified by their reference to a “front company,” and a non-conflicted attorney would have undoubtedly determined these emails were discoverable. Instead, HP allowed its employees with clear conflicts of interest to limit the universe of documents subject to the search.

Based upon HP’s post-trial admission, it is not only possible but probable that these employees, who were accused of stealing PICA’s trade secrets, conspired to suppress these damning emails. Either they forgot to involve Llamas or he refused to suppress the documents. The only other possible explanation for why these documents were not produced is that HP’s counsel orchestrated the suppression. Either way, HP’s employees should have never been allowed to

control the document review and production process. As explained in *M & G Polymers USA, LLC v. Carestream Health, Inc.*: “Trial counsel’s blind reliance upon non-lawyer employees ... to make their own relevance and attorney-client or work product privilege determinations without proper attorney oversight was at best negligent and at worst intentionally calculated to hide the truth.”²⁵

Llamas was only marginally involved in the transactions at issue in this lawsuit, and it was mere luck that Llamas was copied on the smoking gun emails that HP eventually produced. At this point, there is no telling what else Kwasny, Velez, Cozzolina, or the other central malefactors suppressed.

HP’s appeal must be denied on these grounds alone. Otherwise, if this Court remands for a new trial, HP must be forced to re-search *all* of its custodians’ documents. At HP’s expense, the trial judge would need to appoint a special discovery master to oversee the document collection and review. If any other documents are uncovered, PICA would also need to be free to depose or re-depose any of HP’s witnesses regarding the suppressed evidence – all at HP’s expense.

²⁵ 2010 WL 1611042, at *66 (Del. Super.). Courts routinely sanction parties that allow their own employees to control the collection process, often referred to as “self-collection.” *See, e.g., Pension Committee of University of Montreal Pension Plan v. Banc of America Securities*, 685 F.Supp.2d 456, 461-62 (S.D.N.Y. 2010) *abrogated on other grounds by Chin v. Port Authority of New York & New Jersey*, 685 F.3d 135, 162 (2nd Cir. 2012)(rejecting *per se* liability for failing to institute a litigation hold); *Green v. Blitz U.S.A., Inc.*, 2011 WL 806011, at *11 (E.D. Tex.)(ordering sanctioned party to file a copy of the sanctions opinion with its first pleading or filing in every new lawsuit it was involved in) *vacated by agreement of the parties following settlement by Green v. Blitz U.S.A., Inc.*, 2014 WL 2591344, at *1 (E.D. Tex.); *Jones v. Bremen High School Dist.*, 228 WL 2106640, at *9-10 (N.D. Ill. 2010).

Even with these provisions, it would be unduly prejudicial to force PICA to relitigate this matter due to HP's failures to adhere to basic document collection protocols.

b. The Suppressed ISMA/OSAC Presentation and Unjust Enrichment Evidence

HP has no valid excuse for not producing the ISMA/OSAC presentation and related unjust enrichment evidence. First, HP asserts that PICA "had made no allegation regarding HP's SDF program." Second, HP asserts that it "could not initially locate the presentation, which was not on HP's document review platform." HP's first argument is demonstrably false and its second is simply unbelievable.

i. HP's "Scope Creep" Conception

From day one, as Kwasny requested, PICA's program was intended to uncover both channel partners selling counterfeit and exploiting HP's sales discount program. HP's claims to the contrary are part of its contrived argument that PICA's program has somehow changed. As shown in Exhibit A to PICA's Answering Brief on Appeal, HP's allegations are made from whole cloth. HP first raised its "scope creep" argument in its April 11, 2014 summary judgment motion.

HP claimed:

After the close of discovery, lacking any evidence that HP adopted any program resembling Mr. Diaz's proposal, PICA has changed course and seeks to expand the scope of its proposal...PICA now claims that the

proposal was meant to “provide HP with an understanding of whether the Channel Partners were fulfilling their contractual obligations.”²⁶

HP had found a quote from the *Savor* case that it wished to exploit at summary judgment. HP asserted that the “Court should reject PICA’s eleventh hour change of position because it ‘expands and contracts with each defense argument indicating that dispositive relief is appropriate.’”²⁷

The problem for HP, however, was the fact that it misrepresented to the Court that there had been some sort of change “after the close of discovery.” As PICA explained in its summary judgment opposition brief:

PICA’s Complaint and Amended Complaint assert that Diaz developed a program “to better police HP’s distribution channel.” ***During his discovery deposition***, Diaz explained the full scope of his proposal. The proposal: (1) “was to give HP a realistic window into the stream of commerce as to how their product moved by – by and through the channel;” (2) “was to be done to afford HP an opportunity to see if, in fact, the channel partner was adhering to contractual obligations;” (3) was to see “if, in fact, the channel was passing on discounts that were intended to be passed on to – to consumers or to other channel partners;” (4) “was, in essence, a business tool, not an investigative tool;” and (5) “did have some investigative by-products.”²⁸

The fact that this “scope creep” argument started with a misrepresentation that PICA’s description had changed “after the close of discovery” shows this argument’s true colors – it is nothing more than a concoction of HP’s attorneys.

²⁶ A1639.

²⁷ Citing *Savor*, 2004 WL 196569, at *9.

²⁸ A2621-22.

HP continued this litigation tactic in a motion *in limine* to exclude PICA's amended discovery responses. Despite the fact that HP itself had asked PICA to supplement its discovery responses and *despite the fact that PICA merely amended its interrogatory responses to include Diaz's deposition testimony*,²⁹ HP repeated its baseless assertion that PICA's trade secret changed after the close of discovery.³⁰ HP went so far as alleging that PICA waited to read HP's summary judgment brief and then "created," "manufactured," and even "*conjured up*" a new description of its channel management program.³¹ HP was going to make its "scope creep" argument regardless of its truth; HP continues that trend to date.

HP has always known that PICA's program was intended to uncover both counterfeit and fraud. HP also knew that it had benefited greatly from immediately tripling its test buys in its fraud program after receiving PICA's program. HP's

²⁹ Essentially cutting and pasting Diaz's deposition testimony verbatim, PICA added the following to its original description of the program as the "PICA Supply Chain Audit Program – described generally in the Confidential Managed Channel Audit proposal previously supplied to HP's counsel":

More specifically, PICA proposed, through numerous conversations between Rudy Diaz and Jeff Kwasny as well as several written documents, utilizing a front company or test purchase company to covertly purchase goods from HP's Channel Partners, as Rudy Diaz testified to in his deposition. Those test purchases would provide HP with an understanding of whether the Channel Partners were fulfilling their contractual obligations and would allow HP to make any necessary changes to its contracts with those Channel Partners. PICA's proposal, per HP's request, was offered to be a tool for the business side of HP's operations and was not intended solely to seek out counterfeit goods. There were, however, investigative by-products of PICA'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. The purpose was to give HP a realistic window into the stream of commerce as to how their product moved by and through the channel. A2497-98.

³⁰ A3319-3323.

³¹ A2482-86.

only hope was to try to suppress the evidence and hope that they could establish plausible deniability to avoid sanctions. The totality of the evidence demonstrates that HP's discovery obstructionism was a calculated, bad faith choice.

ii. It is Unbelievable that HP Could Not Find the ISMA/OSAC Presentation for Nine Months

HP asserts that it “could not initially locate the presentation, which was not on HP's document review platform.” This is problematic for two reasons. First, HP asks this Court to believe that it simply could not find any documents related to the ISMA/OSAC presentation for nine months. The Court need only consider the facts that: (1) PICA requested the documents less than one month after the actual presentation; (2) the very first page of the presentation contains the search terms “ISMA” and “OSAC”, as do countless emails concerning the presentation; and (3) HP eventually produced no less than ten separate draft versions of the ISMA/OSAC presentation. Even without considering that HP itself sells e-discovery solutions, it is unbelievable for HP to claim that it could not find even the final presentation slides from April 2013 to January 2014.

Second, HP's assertion that the presentation “was not on HP's document review platform” is further proof that HP failed to collect all of the necessary documents before searching for the agreed upon search terms. The conference was on March 19, 2013, and PICA requested the documents on April 11, 2013. HP agreed that its initial document collection would include the terms “ISMA” and

“OSAC.”³² The only reason HP would not have found the documents is because it allowed its conflicted employees to withhold documents from the search process.

It required eight motions for PICA to receive evidence relevant to HP’s unjust enrichment. HP did not produce some of that evidence until ten days before trial, and then moved to exclude that very evidence just days later.³³ The only reasonable interpretation of all of these facts is that HP purposefully withheld information that it knew was relevant and discoverable. The trial judge agreed that HP’s tactics were sanctionable but failed to consider and punish the totality of HP’s bad faith.

c. HP Sought to Defraud the Trial Court and Continues to Deceive

HP’s truth defense to the defamation claim hinges on the assertion that PICA seized \$5.5 MM of goods in 2010. That is demonstrably false and HP knows it. The 5.5 MM number is based upon metrics that did not go into effect until fiscal year 2011 – **after the Costa Rica training session**. HP’s interrogatory answers clearly state that “the revised evaluation metric...was implemented across all regions in or around **October 2010**” – one month after the training session.³⁴ The architect of the change to the new metrics, David Cooper, confirmed that the “old

³² A5166.

³³ HP continues this bad faith on appeal. It tries to excuse the timing of its *Daubert* motion by blaming PICA for not issuing its supplemental expert reports earlier. Those reports were updated to address the evidence that HP was producing on a sporadic basis in the two weeks before trial.

³⁴ B002-17.

metrics” were still in place through fiscal year 2010. After a PICA raid on August 23, 2010, Cooper requested the seized goods be valued under the new metrics “for [his] information only” because they were “being assessed this year on [the] old metrics.”³⁵

Despite its interrogatory response and despite the unequivocal statement from Cooper, HP doubles down and tells this Court that “[t]his is incorrect because vendors were being evaluated under both metrics in 2010.”³⁶ HP cites only to an August 6, 2010 internal *PICA* email “about how the program is to be run in the near future.”³⁷ After receiving the new metrics, PICA’s CEO was merely explaining the planned change to his regional managers. The email does not support HP’s assertion that the metrics were already in place and, regardless, could not possibly trump Cooper and HP’s own explanations of when the metrics became effective.

After HP’s counsel spent days to weeks preparing its witnesses, it was no coincidence that they came prepared to claim that PICA had only seized \$5.5 MM of goods in 2010. Even after trial, HP continues to rely on that assertion. There is clear and convincing evidence that HP’s witnesses and attorneys actively sought to introduce evidence that they knew was false.

³⁵ B030-35.

³⁶ HP Reply Brief at 10.

³⁷ AR20.

This is all part of HP's efforts to rewrite history and change what David Cooper and Bob Moore said at the Costa Rica training session. Those HP executives defamed PICA's performance, not just in 2010, but throughout its history with PICA.³⁸ Their intentions and message were clear – to further HP's plan to eliminate PICA, Cooper and Moore told PICA's competitors that PICA had been failing to do its job for years. Even if their words were susceptible to a different meaning, it is the jury's sole province to determine what they meant.³⁹ As this Court must, the jury rejected HP's *post hoc* attempts to change what Cooper and Moore said or meant.

Another prime example of HP's attempt to rewrite history is its repeated statement that PICA's CEO had "testified unequivocally that the purported 'harm' to PICA's reputation was the result of two events unrelated to any statements made in Costa Rica: (1) his decision to sue a customer (HP), and (2) PICA's loss of HP as a customer."⁴⁰ HP cites the following from its cross-examination of Volpi:

Q. [O]ne of the things you said is that your reputation has been harmed because you lost your biggest client. Do you recall that?

A. Well, I don't recall having said I lost my biggest client. I said that HP was at one point in my testimony our biggest client or one of our biggest clients.

Q. And didn't you say that your reputation has been harmed by the fact that people in the industry know that you've lost HP as a client?

A. Yes.

[...]

³⁸ A9156.

³⁹ See PICA's Answering Brief on Appeal at 22-23.

⁴⁰ HP Opening Brief at 23, Reply at 13.

Q. And you also said that your reputation has been harmed because you sued HP. Do you recall that?

A. Yes.

Q. And you're the person who decided that PICA would sue HP; right?

A. I did.⁴¹

HP tells this Court that its limited cross-examination about PICA's decision to sue HP is, somehow, an "admission" that PICA's reputation was not harmed by Cooper and Moore's comments. The testimony is clear and accurate. Suing a client was a cause of the harm to PICA's reputation. To claim that Volpi said anything more is meritless and ignores the testimony regarding the effects of PICA's competitors hearing Moore and Cooper's comments. The jury heard all of this testimony and determined that Cooper and Moore lied and that their lies ravaged PICA's business.

d. HP's Bad Faith Litigation Tactics Require a Significant Sanction

This Court should reverse the trial judge's abuse of discretion in failing to consider the totality of HP's conduct, under the bad faith exception to the American Rule. Given that the only reasonable conclusion is that HP purposefully suppressed relevant evidence throughout this litigation and knowingly introduced false evidence at trial, PICA requests that this Court reverse and remand with instructions to sanction HP in an amount equivalent to *at least* three-fourths of PICA's fees.

⁴¹ A8993-94.

This sanction should be in addition to any fees shifted pursuant to the trade secret statute. Sanctions of this type “serve three functions: a remedial function, a punitive function, and a deterrent function.”⁴² Although the harm to PICA caused by HP’s bad faith litigation tactics may have been partially remedied by the trial judge’s shifting some of PICA’s fees pursuant to the trade secret statute, HP has neither been punished nor deterred from repeating its litigation tactics. HP is as sophisticated and experienced of a litigant as any in the world, and Delaware’s courts must make clear that these types of discovery abuses are not welcome here.

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

It is a matter of first impression for this Court to determine the appropriate guidelines for a Superior Court judge to analyze a motion for exemplary damages after a jury finds willful and malicious misappropriation. The controlling statute, 6 *Del. C.* § 2003(b), allows: “If wilful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subsection (a) of this section.” The parties agree that, in a jury trial, the court (*i.e.*, the trial judge and not the jury) determines the amount of exemplary damages. The parties, however, disagree how the trial judge should make that determination.

⁴² *Beard Research, Inc. v. Kates*, 981 A.2d 1175, 1189 (Del. Ch. 2009).

PICA asks this Court to follow Judge Robinson’s analysis from the District Court’s holding in *Mattern & Associates, L.L.C. v. Seidel* that “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.”⁴³ Accordingly, the trial judge must award, at least, some exemplary damages.

To determine the exemplary damages amount, PICA suggests that the trial judge should not wade into fact intensive considerations – particularly after a three week trial. In response, HP cites only to the Court of Chancery’s *Agilent* case and pronounces that “in bench trials and jury trials alike, it is the court’s duty to thoroughly analyze the facts before reaching a determination about the amount of exemplary damages to award[.]”⁴⁴ *Agilent* does not include a single reference to jury trials and does not support HP’s assertion. In fact, no Delaware case supports HP’s assertion. It is a matter of first impression.

The better mechanism is that suggested by PICA. Where a jury (particularly one that has sat for three weeks and undergone lengthy deliberations) finds willful and malicious misappropriation, there should be a presumption in favor of

⁴³ 678 F. Supp. 2d 256, 272 (D. Del. 2010).

⁴⁴ HP Reply at 41 (citing *Agilent Technologies, Inc. v. Kirkland*, 2010 WL 610725, at *34 (Del. Ch.)).

awarding the full statutorily allowed amount. In opposition, HP argues that PICA’s suggestion “would run afoul of the well-established principle that a ‘high standard’ must be met before exemplary damages can be awarded.”⁴⁵ The case HP cites merely explains that, in the medical malpractice context, punitive damages are limited to cases where a plaintiff establishes “a conscious indifference to the decision’s foreseeable effect” and that “a finding of gross negligence does not satisfy this high standard.”⁴⁶ Here, PICA already met the applicable “high standard” by convincing the jury that HP’s misappropriation was both willful and malicious.

HP also suggests that PICA’s argument, that the trial judge abused her discretion by considering the amount of non-trade secret related compensatory damages in denying exemplary damages, contradicts “the tradition of Delaware Courts.”⁴⁷ HP cites *Agilent* and *Jardel Co. v. Hughes*.⁴⁸ *Agilent* is distinguishable because the Vice Chancellor, there, served as the fact finder and was able to make the fact intensive decisions. Nothing in *Jardel* suggests that a trial judge should consider whether a plaintiff has been adequately compensated.⁴⁹ The opposite is true, as this Court explained in *Jardel*:

⁴⁵ *Id.* at 40-41 (citing *Solway v. Kent Diagnostic Radiology Assocs., P.A.*, 2014 WL 704146, at *10 (Del. Super.).

⁴⁶ *Id.*

⁴⁷ HP Reply at 41.

⁴⁸ *Id.*

⁴⁹ *See generally Jardel Co., Inc. v. Hughes*, 523 A.2d 518 (Del. 1987).

Punitive damages are fundamentally different from compensatory damages both in purpose and formulation. Compensatory damages aim to correct private wrongs, while assessments of punitive damages implicate other societal policies. Though the injured plaintiff may receive the punitive damage award, to the extent the plaintiff has already been fully compensated by actual damages, an award of punitive damages is, in a real sense, gratuitous. *An award of punitive damages must therefore subsist on grounds other than making the plaintiff “whole.”*⁵⁰

This Court did not, as HP implies, suggest that punitive damages are “gratuitous” in the sense that they are improper where a plaintiff is already made whole. Exemplary damages serve a separate purpose, and the trial judge abused her discretion by denying exemplary damages based upon the compensatory damages award.

CONCLUSION

HP’s defense is simplistic: HP recants only its witnesses’ testimony claiming innocence and then declares victory. HP ignores both PICA’s direct and circumstantial evidence. It is well settled that PICA could prove its claims through circumstantial evidence. As Judge Slight explained regarding trade secret claims:

Rarely will the plaintiff in a misappropriation of trade secrets case discover the “needle” in his opponent’s “hay stack” of documents. Nor is it likely that plaintiff’s counsel will enjoy the “Perry Mason moment” when the defendant’s chief executive officer buckles under the weight of cross examination and admits that his company has misappropriated the plaintiff’s trade secret. Consequently, it is now well-settled that the plaintiff may prove misappropriation of trade secrets with circumstantial evidence.⁵¹

⁵⁰ *Id.* at 528 (emphasis added).

⁵¹ *Savor, Inc. v. FMR Corp.*, 2004 WL 1965869, at *8 (Del. Super.).

Despite HP's indefensible suppression efforts, PICA did find the "needle" in HP's "hay stack" and showed the jury Kwasny's emails to Velez implementing PICA's program. Nonetheless, HP claims that PICA did in fact need a "Perry Mason moment" wherein HP's witnesses admitted to not only receiving the program but willfully and maliciously stealing it. Given the fact that HP spent several days and weeks "preparing" each of its witnesses and even paid one for his testimony, there is no chance they were going to buckle on cross examination.⁵²

Despite HP's attempts to defraud the trial judge and jury by repeatedly introducing evidence that it knew was false, PICA proved its defamation claim. Two HP executives told PICA's competitors, who were eager to spread the word, that, for years: PICA had been failing miserably at its job of seizing counterfeit goods on behalf of HP; drastic measures were needed to rehabilitate the region; PICA was HP's worst performing vendor in the world; PICA was not meeting its targets; and that PICA provided no return on investment for HP. The speakers intended to harm PICA with their comments and succeeded in destroying PICA. Under well settled Delaware law and common law, the jury was allowed to award damages in an amount that would have normally resulted in these circumstances. Contrary to HP's entire argument, PICA did not have to introduce evidence that

⁵² Kwasny flew in from Switzerland a week and a half before trial and met with HP's counsel as much as possible in the five days before his testimony (A9372-73); Cozzolina spent at least twenty hours with HP's counsel and was paid \$5,000 (A9303); Moore spent a total of nine to ten hours preparing with counsel (A9415); and HP's trade secret expert spent fifteen to twenty hours with HP's attorneys (A9460).

anyone else heard the comments, decided not to do business with, or thought less of PICA as a result.

PICA established all of the necessary elements to its claims, the jury was properly instructed, and the jury's verdict is presumed to be correct. To reverse, this Court would need to conclude that it is clear that the verdict was the result of passion, prejudice, partiality, corruption, or that the jury disregarded the evidence or law. There is more than sufficient evidence to support the jury's award, and HP falls far short of proving the type of exceptional circumstances necessary to overcome this Court's enormous deference to jury verdicts.

This Court must deny HP's appeal and should reverse with instructions to: (1) award exemplary damages, without consideration of the compensatory damages; and (2) sanction HP for the totality of its bad faith tactics.

Respectfully submitted,

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