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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| ELENZA, INC., a Delaware corporation,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>ALCON LABORATORIES HOLDING CORPORATION, a Delaware corporation, and ALCON RESEARCH, LTD., a Delaware corporation,<br><br>Defendants-Appellees. | No. 287, 2017<br><br>On appeal from the Superior Court of the State of Delaware,<br>C.A. No. N14C-03-185 MMJ CCLD<br><br>[redacted]<br><br>PUBLIC VERISON FILED: October 20, 2017 |

**CORRECTED ANSWERING BRIEF OF APPELLEES ALCON LABORATORIES HOLDING CORPORATION AND ALCON RESEARCH, LTD.**

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## NATURE OF PROCEEDINGS

After an eight-day trial, a jury rejected claims brought by Elenza, Inc. against Alcon Laboratories Holding Corporation and Alcon Research, Ltd. (collectively, "Alcon"). The verdict ended more than three years of litigation that included four complaints and a trip from state to federal court and back again, as Elenza hunted in vain for legally and factually supported claims.

The dispute arose from an Elenza idea that proved too unreliable when tested in an initial clinical study. In 2010, Alcon and Elenza agreed to explore jointly Elenza's idea for a possible trigger for an electroactive intraocular lens ("EAIOL"). Scientists have been researching EAIOLs, automatically adjusting implanted lenses for treating cataracts, since the 1980s—without success. Among other problems, scientists have been unable to reliably trigger the EAIOL to shift focus. Elenza's idea—using pupil size as the trigger—did not withstand its first test. Alcon then exercised its contractual right not to further invest in Elenza, and ended their collaboration. Two years later, refusing to honor Alcon's right to say "no" to further investment, Elenza sued Alcon, alleging misappropriation of trade secrets and breaches of the parties' governing contract, the Stock Purchase Agreement ("SPA").

The Superior Court held on summary judgment that Elenza had failed to offer evidence supporting the required elements of its trade-secret claims. The



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court also held that Elenza's lost-profit-based damages were speculative because Elenza had no product, regulatory approval, or sales.

Elenza appeals the summary-judgment decision. But Elenza cannot identify record evidence sufficient to defeat summary judgment on either its trade-secret claims or its damages theory—because it does not exist. Elenza fails to address its own fact and expert witnesses' testimony establishing that Elenza does not have any trade secrets and, even if it did, Alcon did not misuse or disclose them. And Elenza ignores the overwhelming authority rejecting lost-profit-based damages for an unproven medical device.

Elenza appeals the jury's verdict for Alcon on the SPA-breach claims too. It asserts that *if* the Court reverses the trade-secret ruling, a new trial is warranted on those claims because they are "inextricably intertwined" with the dismissed trade-secret claims. Elenza argued the opposite below. Moreover, Elenza's new-trial demand is a challenge to an evidentiary ruling, yet Elenza makes no effort to meet the governing standard.

The summary-judgment ruling and the final judgment below should be affirmed in all respects.



[redacted]

## SUMMARY OF ARGUMENT

I. **Denied**. The Superior Court correctly held that Elenza failed to produce evidence sufficient to create a genuine issue whether Elenza's alleged trade secrets were (1) not generally known or readily ascertainable, (2) described with particularity, and (3) disclosed or misused by Alcon. Although Elenza states that it "advanced evidence sufficient to show that its product design was not known to anyone" (Br.2),[1] it does not support that assertion with evidence. Nor can it: Elenza's sole technical expert failed to assess whether the alleged secrets were known or ascertainable. And Elenza's witnesses testified that Alcon did not misuse or disclose Elenza information. The Superior Court held Elenza to its burden under the Delaware Uniform Trade Secrets Act—and Elenza fell short.

II. **Denied**. Following well-established law, the Superior Court rejected Elenza's lost-profit-based, enterprise-value damages. Courts routinely bar these damages in cases involving unproven medical technologies given the numerous developmental and regulatory hurdles before commercialization. The Superior Court concluded that at the time of Alcon's alleged conduct, Elenza had "no product," "no sales," and "no regulatory approval." Elenza does not dispute these facts and does not address the applicable law, which foreclose the damages.

III. **Denied**. Seeking a new trial, Elenza complains that the Superior

[1] "Br." means Elenza's opening brief before the Court.



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Court, in keeping with its summary-judgment ruling, excluded from trial evidence of alleged misappropriation (over Elenza's insistence that it was relevant to the remaining claims). Elenza does not attempt to meet the abuse-of-discretion standard for an evidentiary ruling. And contrary to its appellate position that everything is "inextricably intertwined," Elenza argued below that the tried SPA-breach claims were "wholly independent" of the dismissed trade-secret claims.

## STATEMENT OF FACTS

### A. EAIOLs.

The standard treatment for cataracts, a disease causing the eye's lens to become clouded, is to replace the clouded lens with an artificial lens. (B516.¶4.) Although standard artificial lenses are safe and effective, they have a downside: they focus only at one distance, and thus a cataract-surgery patient typically needs reading glasses. (B1060.13:6-11.) An EAIOL could theoretically resolve this by allowing a patient to see at multiple distances. (B388.¶22.)

To duplicate a natural eye, an EAIOL would need to automatically, and correctly, change focus based on where a patient was looking. That focus-change mechanism is called a "physiological trigger." Although scientists have researched many possible triggers since the 1980s (B388.¶25-398.¶40), no EAIOLs have been approved or sold.

### B. Alcon's Initial EAIOL Research.

Alcon is a leading ophthalmic company and the world's largest developer of artificial lenses. (B98.) In early 2009, Alcon began researching a potential EAIOL, initially addressing the triggers and components needed for the device and identifying potential partners with which Alcon could collaborate. (A75-88.) Alcon continued its initial research through 2010, having, among other things, "discussions with third parties." (B1065.32:2-8; *cf.* [redacted]



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**C. The Alcon-Elenza Relationship.**

In spring 2010, as Alcon was researching EAIOLs, Elenza approached it about developing an EAIOL that used pupil-size changes as the physiological trigger. (B1062.21:1-19.) Elenza theorized that those changes could tell the EAIOL at what distance a patient was trying to focus. (B1062.21:1-19.)

Alcon's research follows a "multiple-shots-on-goal strategy": assessing "numerous technologies" in "parallel" to increase the odds of success. (B1065.30:7-23.) Given this approach, Alcon agreed to investigate Elenza while continuing its internal research. The parties signed a non-disclosure agreement in May 2010, [redacted] and thereafter began due diligence.

Alcon quickly determined the pupil trigger was the greatest risk of Elenza's proposed EAIOL (B1064.26:11-27:19); both Alcon and Elenza recognized that many things other than distance affect pupil size: *e.g.*, noise, fatigue, certain emotions, light, and certain medications. (B78-79; B1047:5-1052:12.) Elenza's trigger thus would have to accurately determine where a patient was trying to focus, and correctly disregard the other factors affecting pupil size while doing so. (B1064.26:11-27:1.) If an EAIOL incorrectly switched focus, it could present a



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"major hazard" for the patient. (B1063.22:1-14.)

For Alcon, then, the pupil trigger "would have to work extremely well and reliably so that [Alcon] could trust it." (B1063.22:15-17) Elenza was aware of these apprehensions, telling a consultant that its trigger was a "major concern" for Alcon (B82) and recognizing that Alcon was considering other triggers "in case" Elenza's did not work (B86).

**1. The SPA.**

In February 2011, Alcon and Elenza (along with other investors) signed the SPA, through which Alcon purchased a first tranche of Elenza shares. (A257-327.) The SPA provided for the sale of a second tranche of shares at a later "Milestone Closing," which was subject to several conditions. (A263.) Most significantly, Elenza had to prove its pupil trigger was viable through a clinical study showing that Elenza could develop an algorithm that would reliably respond to pupil-size changes. (A303-04.) The study, Elenza noted, was a "risk-mitigation exercise" for its unproven trigger. (B124.)

The parties termed the benchmarks that Elenza's algorithm needed to meet the "Milestone." (A303-04.) The SPA tasked a Joint Development Committee, comprising three Elenza and three Alcon designees, with determining whether Elenza met the Milestone. (A264.) Elenza understood Alcon would conduct its own analysis of the clinical-study data and reach its own conclusion, through its



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Joint-Development-Committee membership, as to whether Elenza met the Milestone. (B1054:4-16; B122.)

The second-tranche investment was also conditioned on executing a Development Agreement and a Research License, drafts of which the SPA included. (A313-27.) The draft Research License explicitly recognized Alcon's "independent research" into EAIOLs (A317-23), and Elenza reported shortly after signing the SPA that Alcon was "exploring" other EAIOLs (B89). In fact, Elenza knew from the outset "that Alcon would pursue a different electro-active IOL in order to have 'two bites at the apple,'" and it believed Alcon was "free" to do so. (B102.) Elenza saw "advantages" to "having Alcon in the marketplace with a 'competitive device.'" (B87.)

Finally, the SPA included procedures for converting investors' shares in the event they declined to participate in the second-tranche financing—even if all conditions were met. (A264.) Elenza repeatedly acknowledged, including in its 2011 audited financial statements, that investors like Alcon had a "contractual right not to fund" the second tranche. (B207.)

### 2. The Clinical Study.

Elenza tested its trigger in 2011. In a November 2011 presentation, Elenza stated that "100% Achievement of the Milestone Requirement is <u>NOT</u> Possible." (B104.) It reported the same thing a month later, after analyzing all study data:



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"100% Achievement of the Milestone Requirement is NOT Technically Possible." (B171.)

Consistent with its right to independently assess the clinical study, Alcon undertook extensive data analysis. (B1068.43:22-44:6.) Based on that review, Alcon concluded that Elenza's trigger "would not be safe for a patient because it could switch focus at the wrong time and put them in a hazardous condition." (B1082.98:2-7.) Thus, at the December 2011 Joint Development Committee meeting, Alcon's members explained that Alcon had concluded Elenza's trigger was "not suitable" because it would "too often result in unstable and incorrect auto-focusing for the patient." (B190-91.) Alcon thus exercised its right not to make a second-tranche investment.

Contrary to its earlier statements, Elenza insisted in December 2011 that it met the Milestone. It presented that belief, but not Alcon's analysis, to its Board of Directors and Medical Advisory Board. (B1081.95:2-19.) Even so, Elenza's advisors did not uniformly accept Elenza's position. One Medical Advisory Board member volunteered that Elenza had not met the Milestone. (B192.) And the chairman of that Board testified that Alcon reasonably could have concluded Elenza did not meet the Milestone. (B373.184:7-23.)

### D. Other Funding.

Even had Alcon invested in the second tranche, Alcon's investment would



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have been insufficient to fund the many remaining activities necessary to commercialize Elenza's EAIOL. (B362.34:11-37:22.)

Elenza sought additional financing from December 2011 until approximately August 2013. Those efforts largely were unsuccessful. Indeed, two of Elenza's original investors declined further investment because they no longer were interested in early-stage companies like Elenza. (B208; B218.) And Elenza's Chief Technology Officer testified that one investor did not invest further after reviewing the clinical-study data. (A1382.159:15-25.) Elenza's Chief Executive Officer explained in July 2013 that he had "reached out to 63 venture funds over the past 18 months, and the most prevalent reason for 'passing' was because we do not yet have clinical data or revenues. Several others were simply no longer investing in 'PMA/Class III' devices because of the challenges with the FDA." (B220.) Elenza's consultant tasked with identifying potential investors could not recall a single investor who said they did not invest because of Alcon or a single conversation at which that was discussed. (A1447:11-16.)

### E. Alcon's EAIOL Research.

"Separate and independent" from Alcon's collaboration with Elenza, Alcon continued its own EAIOL research. (A613.37:7-10.) This research involved work covered by confidentiality agreements, meaning Alcon was not "at liberty to discuss [it] with anybody." (B1065.32:2-8.) Alcon never got to the point of



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fabricating even a prototype EAIOL with all of its components. (A640.145:19-25.) In 2014, Alcon management rejected a proposal for an EAIOL "proof of concept": how to "develop[] an integrated product that contained the subsystems [Alcon] had studied." (A622.71:3-624.81:7.)

In July 2014, Alcon and Google announced that Alcon was investing in Google's "smart lens" technology (not the other way around) "to address ocular [and non-ocular medical] conditions." (A528-30.) The Google-Alcon agreement contemplates three technologies, one of which is an EAIOL.

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Alcon filed several patent applications relating to EAIOLs, including two at issue in this litigation: US 2013/0229293 A1 ("Venkateswaran Application") (A435-44), and US 2014/0156000 ("Campin Application") (B211-217). There is no evidence Alcon reduced the ideas in those patents to a prototype and no evidence the Venkateswaran Application inventor worked with Elenza. Both applications became public *after* August 29, 2013, when most potential investors already had passed on Elenza. (B220.)

**F. This Action.**

Elenza's operative complaint at summary judgment asserted seven causes of action against Alcon: trade-secret misappropriation (Count I); breach of contract, alleging both breach of the SPA and breach of the non-disclosure agreement (II); breach of the implied covenant of good faith and fair dealing inherent in the SPA (III); intentional misrepresentation (IV); affirmative misrepresentation (V); misappropriation (VII); and conversion (VIII). (A675-88.) It sought two types of damages: *First*, the second-tranche investment Alcon and other SPA parties did not make (approximately $10.75 million). (A1696.) *Second*, "enterprise-value" damages, based on the profits Elenza allegedly failed to realize due to Alcon's



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conduct. (A1672-73.) Elenza's theory was that absent Alcon's alleged conduct, Elenza would have accomplished all the uncompleted steps necessary to commercialize its EAIOL: develop a final design, complete a prototype, turn the prototype into a product, secure a manufacturing facility, obtain regulatory approval, produce it in commercial quantities, and sell billions of dollars' worth of the product. (A1702-33.)

Elenza purported to identify its alleged trade secrets in a "Designation of Trade Secrets" (the "Designation"). (A691-700.) The Designation, which, Elenza explained, encompassed the trade secrets "at issue in this case" (A1628.10:21-11:2), listed information in nine technical areas. Elenza's technical expert failed to assess whether they were generally known or readily ascertainable. He admitted he did not "compare Elenza's confidential, proprietary information with the state of the art" (A2015.¶110) and saw "no need to make [that] comparison (A2012.¶106). Alcon's five technical experts detailed that the alleged trade secrets were known and ascertainable, including by looking at the scientific literature. (B383-718.)

Elenza asserted that Alcon disclosed the alleged secrets in presentations to Google and in the Venkateswaran and Campin Applications. Elenza also argued that Alcon misused them in Alcon's EAIOL research. During discovery, Elenza's Chief Technology Officer largely admitted the applications did not disclose the



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alleged trade secrets. (B931-37.) Elenza's technical expert also largely admitted that he could not identify any of them in Alcon's EAIOL research. (B931-51.)

### G. The Superior Court's Rulings and Trial.

#### 1. Summary Judgment.

On April 20, 2017, after briefing and argument by counsel, the Superior Court granted summary judgment on Elenza's trade-secret claims and its enterprise-value damages ("Op.").

The Superior Court outlined the four elements Elenza needed to prove to defeat summary judgment on its trade-secret claims and focused on two of them: (1) whether trade secrets existed and (2) whether Alcon misused or disclosed any trade secrets. (Op.5.) The court held that to prove a trade secret existed, Elenza had to show, among other things, "the information in question was not known or not readily ascertainable" and was defined with specificity. (Op.6.) It further explained that "[a]n expert witness is necessary to prove the presence of a trade secret." (Op.5.)

After detailing the parties' arguments and considering the record, the Superior Court held that Elenza had not "established a *prima facie* case, through expert testimony or other evidence, that Alcon used or disclosed any trade secret, defined with a reasonable degree of precision and specificity, that was not already known or readily ascertainable." (Op.6-8.) The court thus granted judgment for



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Alcon on Elenza's trade-secret-based claims (Counts I, IV-V & VII-VIII). (Op.8.)

The Superior Court also granted judgment on Elenza's enterprise-value damages. It explained that a plaintiff must prove the existence of damages with "reasonable certainty." (Op.12 (internal quotation marks omitted).) Based on Elenza having "no product, no sales, and no regulatory approval," the court held that Elenza could not meet that standard. (Op.12.)

**2. The Jury Rejects Elenza's Claims.**

Following summary judgment, two contract claims remained for trial: breach of the SPA, and breach of the implied covenant inherent in the SPA.

Alcon filed a motion *in limine* seeking to exclude reference to the alleged misappropriation of Elenza information. (B983-91.) Alcon argued that those references were irrelevant to the trial claims and would prejudice the jury's consideration of them. Elenza disagreed, asserting that Alcon's alleged misappropriation was relevant to the implied-covenant claim before the jury and to a claim for breach of the parties' non-disclosure agreement that purportedly survived summary judgment (because it was based on alleged "confidential information"). (B995-1004.)

The Superior Court excluded from trial references to alleged misappropriation of information. (Br.Ex.C.49:1-50:23.) Addressing Elenza's alleged non-disclosure-agreement claim, the court held:



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> I find that there is no difference in this case from the very beginning between trade secret and confidential information. *That this distinction, which is alleged by Elenza, is a new theory, which is contradictory of the position that Elenza has taken since the beginning of the case.*
>
> (Br.Ex.C.50:3-9 (emphasis added).)

The claim failed for the reasons the other trade-secret claims failed and thus was dismissed before trial. (Br.Ex.C.50:10-14; Br.Ex.B (agreed-on verdict form does not include non-disclosure-agreement breach claim).) Elenza does not contend that the Court should reverse that ruling and waives any argument about it.

At trial, Elenza presented testimony on its SPA-breach claims from seven fact witnesses and an expert. It cross-examined three Alcon witnesses. It repeatedly discussed Alcon's alleged "shadow" EAIOL research (*contra* Br.17)—including twenty-eight times during closing. And it offered the evidence purportedly showing its "technology had met all contractual requirements." (Br.11.) The jury disagreed and returned a verdict for Alcon.



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## ARGUMENT

### I. ELENZA CANNOT PROVE MISUSE OR DISCLOSURE OF A TRADE SECRET

Elenza had the burden of showing the existence of its alleged trade secrets and that Alcon disclosed or misused them. The Superior Court correctly ruled that Elenza could not establish a genuine issue of material fact "that Alcon used or disclosed any trade secret, defined with a reasonable degree of precision and specificity, that was not already known or readily ascertainable." (Op.8.)

#### A. Question Presented.

Did the Superior Court err in dismissing Elenza's trade-secret claims where Elenza failed to (1) offer evidence that its alleged secrets were not generally known or readily ascertainable, (2) define certain alleged secrets with specificity, and (3) offer evidence that Alcon misused or disclosed them? (A2136-60.)

#### B. Standard and Scope of Review.

The Court reviews a grant of summary judgment *de novo* to determine whether, "viewing the facts in the light most favorable to the nonmoving party," the party seeking judgment has established "there are no material issues of fact in dispute" and it is "entitled to judgment as a matter of law." *Smith v. Del. State Univ.*, 47 A.3d 472, 475-76 (Del. 2012). The Court "will not draw unreasonable inferences in favor of the non-moving party," or credit assertions "largely unsubstantiated by direct evidence and … replete with inconsistencies and



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improbabilities." *Id.* at 477-78.

### C. Merits of Argument.

#### 1. Elenza Has No Evidence that Its Information Meets the Definition of a Trade Secret.

The Superior Court, applying the Delaware Uniform Trade Secrets Act and Delaware authority, explained that to establish a trade secret, Elenza must show the alleged secrets "w[ere] not known or not readily ascertainable" and were defined with "with a reasonable degree of precision and specificity." (Op.6.) The court correctly held that Elenza did not have sufficient evidence to meet these elements.

##### *a. Elenza has no evidence that its alleged secrets were not generally known or readily ascertainable.*

A trade secret is information that "[d]erives independent economic value, actual or potential, from *not being generally known to, and not being readily ascertainable by proper means by*, other persons who can obtain economic value from its disclosure or use." 6 Del. Code § 2001(4) (emphasis added). Elenza thus was obligated to supply evidence proving that its "information is not generally known or readily ascertainable." *Universal Hosp. Servs., Inc. v. Henderson*, 2002 WL 1023147, at *4 (D. Minn.); *accord Triton Constr. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *21 (Del. Ch.), *aff'd*, 988 A.2d 938 (Del. 2010). Elenza does not try to offer this evidence on appeal, instead arguing for a standard that contravenes existing law and the facts of this case.



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i. Elenza failed to show that its alleged trade secrets were not generally known or readily ascertainable for the simple reason that the evidence was all to the contrary. It is "well-established" that if a technology "can be found in the public domain or public literature, it is considered to be generally known and readily ascertainable and thus[] cannot qualify as a trade secret." *Miles, Inc. v. Cookson Am., Inc.*, 1994 WL 676761, at *11 (Del. Ch.); *see also, e.g., Quantum Sail Design Grp., LLC v. Jannie Reuvers Sails, Ltd.*, 2015 WL 404393, at *6-7 (W.D. Mich.); *Callaway Golf Co. v. Dunlop Slazenger Grp. Ams., Inc.*, 318 F. Supp. 2d 205, 215 (D. Del. 2004). That is why courts require trade secrets to have "some novelty." *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476 (1974) (requiring "some novelty" because "that which does not possess novelty is usually known"); *Miles*, 1994 WL 676761, at *11; *Triton Constr.*, 2009 WL 1387115, at *21 n.131.

Elenza, however, made no effort to "prove" that its alleged secrets are "unascertainable from the public domain." *Miles*, 1994 WL 676761, at *11. Its sole technical expert admitted he did not assess "how Elenza's component[s are] different from what is in the prior art." (A2012.¶96; A2015.¶110.) In fact, he thought there "no need to make [that] comparison." (A2014.¶106.) He refused to consider whether the alleged trade secrets showed any novelty. (A2000.¶27.) And he did not establish that the alleged secrets could not be found in "the published



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literature," discovered "by independent invention," or observed "in public use or on public display"—facts that preclude a trade secret. *Miles*, 1994 WL 676761, at *12; *accord* Uniform Trade Secrets Act § 1 cmts. (1985). This is unsurprising, given Elenza's expert admitted he was not qualified in most of the fields encompassing Elenza's information. (*e.g.*, B835.21:16-19, B839.37:6-10, B849.76:18-22.) The expert did not and could not compare Elenza's information to what "can be found in the public domain." *Miles*, 1994 WL 676761, at *11; *accord Quantum Sail*, 2015 WL 404393, at *7-8. By not doing so, he could not establish that Elenza's information was not known or ascertainable.

Elenza's expert's admission is fatal because expert testimony is necessary "to prove the presence of a trade secret" in technically complex cases such as this one. (Op.5); *see Trident Prods. & Servs., LLC v. Canadian Soiless Wholesale, Ltd.*, 859 F. Supp. 2d 771, 779 (E.D. Va. 2012), *aff'd per curiam*, 505 F. App'x 242 (4th Cir. 2013); *Pepper v. Int'l Gaming Sys., LLC*, 312 F. Supp. 2d 853, 862 (N.D. Miss. 2004). Elenza makes no argument to the contrary. For good reason: "[I]n the absence of an expert witness … the fact-finder is in no position to evaluate issues such as [the alleged secret's] uniqueness or ease of formulation"—necessary elements for proving a trade secret. *Trident*, 859 F. Supp. 2d at 779. Put simply, without testimony from someone with that expertise, there is no evidence a factfinder can use to find that information was not known or ascertainable. That is



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the case here, and, for that reason, Elenza's trade-secrets claims are meritless.

Even if expert testimony were not required here, Elenza still would lack evidence demonstrating that its alleged secrets were not known or ascertainable. Elenza's effort on this point is *ipse dixit*: "There is no serious question that Elenza advanced sufficient facts to raise a jury question whether its design for an accommodative IOL was not generally known …." (Br.19.) That statement is unsupported, and Elenza's brief is devoid of the purported "sufficient facts" establishing that Elenza's technologies were not known or ascertainable.[2] Elenza asserts only that it "developed" numerous technologies, citing its Designation. (Br.5.) But even "stating that the information is confidential is insufficient." *Hot Stuff Foods, LLC v. Dornbach*, 726 F. Supp. 2d 1038, 1044 (D. Minn. 2010).

Although Elenza's failure to carry its burden was and is dispositive, additional record evidence below demonstrated why Elenza's "trade-secrets" theory was contra-factual. Alcon's five technical experts showed, within their respective fields, how Elenza's alleged secrets *were* known or ascertainable because they were in the scientific literature and reflected standard approaches.

[2] Elenza argued below that it had trade secrets because its Chief Technology Officer said so. Elenza rightly does not press that argument here given that he too admitted he never compared Elenza's information to the public domain. (*e.g.*, A1632.26:8-13, 1638.51:11-20.) Elenza downplays the consistent authority finding that known or ascertainable information is not a trade secret with the suggestion that Elenza's information is "different." (Br.29-32.) But missing is *evidence* supporting that point—which does not exist.



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(B383-718.) Elenza's expert does not even attempt to rebut Alcon's experts on this point. Other record evidence confirmed their conclusions as well.

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ii. Elenza chastises the Superior Court for failing to "acknowledge th[e] principle" that "even though each and every element of a plaintiff's Process is known to the industry, the combination of those elements may be a trade secret." (Br.24 (internal quotation marks and alterations omitted).) Elenza pressed that argument below—in vain, because it is inapplicable here. Although a combination of known elements may be a trade secret, the plaintiff nevertheless must show that the combination "differs in any material respect" from what is known, as Elenza's own cases confirm. *Quantum Sail*, 2015 WL 404393, at *6-8 (plaintiff did not establish that known elements created "'unique combination'"); *Merck & Co. v.*



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*SmithKline Beecham Pharm. Co.*, 1999 WL 669354, at *15-19 (Del. Ch.) ("The 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*." (emphasis added)). And as above, Elenza has no evidence creating a genuine issue that, either separate or combined, its alleged secrets are "unique"—"known in the industry."

Moreover, Elenza does not detail what "combination" of *known* elements created a "unique" whole, constituting its alleged secrets. *Cf. Savor, Inc. v. FMR Corp.*, 2004 WL 1965869, at *6 (Del. Super. Ct.) (plaintiff must identify "compilation" trade secret with "even greater specificity").[3] At one point, Elenza theorizes that its entire EAIOL, reflecting the "'choices' at 'various process steps,'" is a secret. (Br.25.) But its expert conceded that the "components or processes that might be used to fabricate an EA-IOL" are "easy to come by for one skilled in the art" (A1999.¶22), foreclosing the theory.

iii. Elenza contends that the Court should analyze the alleged secrets under a formulation it labels the "independent economic value … from not being generally known standard." (Br.21.) Alcon wins under that formulation too,

[3] This distinguishes Elenza from the plaintiffs in the combination cases it cites. (Br.26 n.90, 27-29 (*Beard Research, Inc. v. Kates*, 8 A.3d 573, 598 (Del. Ch. 2010); *Merck*, 1999 WL 669354, at *16-19; *Monovis, Inc. v. Aquino*, 905 F. Supp. 1205, 1228 (W.D.N.Y. 1994); *Miles*, 1994 WL 676761, at *12).)


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because it requires evidence that alleged secrets are not known or ascertainable.

Elenza's formulation:

> [T]o show that Elenza's innovations … qualify as 'trade secrets,' Elenza was required to show that 'they had independent economic value, with the potential to give Elenza some advantage *from not being generally known or readily ascertainable* ….'
>
> (Br.21 (quoting *Agilent Technologies, Inc. v. Kirkland*, 2010 WL 610725, at *18 (Del. Ch.) (emphasis added).)

This restates the Trade Secret Act's language, and in doing so invokes the not-known-or-ascertainable requirement Elenza cannot meet. Under Elenza's formulation, as under the Superior Court's test and the Trade Secret Act, a plaintiff must prove its alleged secrets were not publicly known. *Agilent*, from which Elenza derives its formulation, confirms as much. The court there found that the plaintiff proved trade secrets because the evidence showed they had "never been publicly disclosed," were "not readily ascertainable" from the literature, and could not all be found in "patents and scientific articles." 2010 WL 610725, at *19-21. Elenza has not made that showing.

Separately, Elenza contends that *Professional Investigating & Consulting Agency, Inc. v. Hewlett-Packard Co.*, 2014 WL 4627141 (Del. Super. Ct.) illustrates its proposed test. (Br.21-22.) But that case did not address whether the plaintiff established that the alleged secrets were not known or ascertainable because *the defendant had not challenged that element on summary judgment*.



[redacted]

2014 WL 4627141, at *2.  Moreover, the plaintiff's expert there testified that the alleged secrets "were unique at the relevant time and were not common 'best practices.'" *Id.*  Neither of those circumstances are found here.  *Professional Investigating* is inapposite (and highlights Elenza's failure of proof).

Elenza intimates that it can establish it has trade secrets by showing that Alcon invested in Elenza.  (Br.22-23.)  If that is Elenza's argument, it would relieve a plaintiff from having to independently prove alleged secrets were not known or ascertainable—which is inconsistent with Delaware law, and Elenza's own cases.  *See, e.g.*, *Agilent*, 2010 WL 610725, at *18 (separately assessing independent economic value and whether known or ascertainable).[4]

iv. Elenza embraces "policy" to rewrite the Trade Secrets Act to eliminate the not-known-or-ascertainable requirement.  It asserts that the purposes of trade-secret protection are "'maintaining standards of commercial ethics and encouraging innovation.'"  (Br.26-27 (quoting *Quantum Sail*, 2015 WL 404393, at *4).)  And it argues that these principles mean "public availability does not negate the existence of a trade secret."  (Br.26.)  The Trade Secrets Act flatly refutes that position—the not-known-or-ascertainable requirement would be surplusage if Elenza were correct.  So too does *Quantum Sail*, from which Elenza mines its

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[4] Elenza marries its incorrect legal argument with the assertion that Alcon considered Elenza's design a "game changer."  (Br.23.)  That statement was conditional:  The "technology will be a game changer if successful."  (A125.)



[redacted]

trade-secret policies. The court there held that the plaintiff did not have a trade secret because it failed to show how the information "differ[ed] in any material respect" from what was public. 2015 WL 404393, at *7-8; *cf. Kewanee Oil*, 416 U.S. at 476 (requiring "some novelty").[5] The Trade Secrets Act requires affirmative evidence that a plaintiff's alleged secrets were not known or ascertainable. Elenza points to no evidence satisfying this burden.

***b. Elenza failed to describe many of its alleged secrets with specificity.***

Elenza was required to "describe its trade secret[s] with a reasonable degree of precision and specificity," *Savor*, 2004 WL 1965869, at *6, to "separate" them "from matters of general knowledge in the trade or of special knowledge of persons skilled in the trade," *Dow Chem. Can. Inc. v. HRD Corp.*, 909 F. Supp. 2d 340, 346 (D. Del. 2012). Although Elenza does not dispute this obligation, it has not fulfilled it for Trade Secrets ¶2a, ¶2b, ¶2c, ¶3, ¶5b, ¶6, and ¶9, providing an independent ground for affirmance as to those alleged "secrets." (Op. 8.)

For those "secrets," Elenza offered only high-level descriptions with no

[5] Relying on *Monovis*, a non-Uniform-Trade-Secrets-Act case, Elenza contends that trade-secret law "places the burden on plaintiffs to show defendants *did not* obtain the information elsewhere." (Br.27-28.) Even if correct, it is incomplete. The Uniform Act first asks if the information in question is not known or ascertainable—*i.e.*, whether it is a trade secret at all. The Superior Court thus correctly required Elenza to "establish that the information in question was not already known" (Op.5)—which Elenza cannot, and did not, do.



[redacted]

detail in its Designation [redacted] *See generally* B952-72 (showing how Elenza failed to describe Trade Secrets ¶2a, ¶2b, ¶2c, ¶3, ¶5b, ¶6, and ¶9 with specificity). The absence of the specific information claimed as a trade secret is dispositive. *See, e.g.*, *Imax Corp. v. Cinema Techs., Inc.*, 152 F.3d 1161, 1166 (9th Cir. 1998).

Elenza counters that the Designation is irrelevant on summary judgment. (Br.36.) But it is the *only* description of the alleged secrets at issue (Elenza's expert's report, even if relevant, provides insufficient specificity), and thus the Superior Court correctly relied on it. *Dow*, 909 F. Supp. 2d at 347 (using interrogatories because that is where plaintiff described the alleged secrets). Elenza also points to the voluminous "presentations" it made to Alcon as providing the missing specificity. (Br.37.) Alluding to documents—particularly the hundreds of pages Elenza references—cannot supply specificity. *IDX Sys. Corp. v. Epic Sys. Corp.*, 285 F.3d 581, 584 (7th Cir. 2002). Trade Secrets ¶2a, ¶2b, ¶2c, ¶3, ¶5b, ¶6, and ¶9 lack specificity, along with their other failures.



[redacted]

*c. Elenza does not have a trade secret in its vendors.*

[redacted] courts reject such claims where, as here, a company's identity and capabilities are discoverable through "simple, public research." *Giles Constr., LLC v. Tooele Inventory Sol., Inc.*, 2015 WL 3755863, at *5 (D. Utah). Each of the companies Elenza identified has a public website, including before Elenza approached Alcon. (A2105-06; B1095-1105.) The Court can affirm the dismissal of Elenza's alleged vendors secret on this basis as well.

**2. Elenza Has No Evidence that Alcon Disclosed or Misused Any Trade Secret.**

Elenza also failed to show a genuine issue that Alcon disclosed or misused any alleged secret, as required by the Trade Secrets Act. 6 Del. Code § 2001(2). Elenza contends that Alcon disclosed the alleged secrets in two patent applications and in presentations to Google (Br.35) and misused them in its internal EAIOL research (Br.34-35). But Elenza had no evidence that created an issue of material fact on these issues. (Op.8.)

*a. There is no evidence Alcon disclosed a trade secret.*

The Superior Court, in a holding Elenza ignores, ruled that "[t]here is no genuine issue of material fact as to the disclosure of trade secrets." (Op.8.) Elenza's brief is devoid of record evidence that Alcon disclosed any alleged secret in the patent applications or Google presentations.



[redacted]

***Applications***. Elenza's Chief Technology Officer and expert testified that Alcon did not disclose fifteen of Elenza's eighteen alleged secrets in the applications. (B931-37.) The remaining three fare no better. As to two (and others), Elenza conceded that whatever trade-secret status they had *expired* (including because Elenza disclosed them, *contra* Br.32 n.109) *before* Alcon filed its applications on February 23, 2012 (Venkateswaran) and November 30, 2012 (Campin). (B931-37.) Alcon cannot have disclosed trade secrets that Elenza admits were not trade secrets at the time of the alleged disclosure. And as to one of them (¶8), at no time has Elenza alleged that Alcon disclosed it in an application. The chart below summarizes the evidence:

| **Alleged Secret** | **Elenza Testimony** | **Elenza Concession** | **Other** |
|---|---|---|---|
| ¶1a | (A1350.30:6-31:4; B834.17:10-22.) | No longer valid February 9, 2012. (A692.) | |
| ¶1b | (A1351.37:5-1353.43:20; B837.26:2-5.) | No longer valid February 9, 2012. (A693.) | |
| ¶1c | (A1351.37:5-1353.43:20; B837.26:2-5.) | | |
| ¶2a | (A1354.49:9-20; B839.34:20-24.) | | |



[redacted]

| Alleged Secret | Elenza Testimony | Elenza Concession | Other |
|---|---|---|---|
| ¶2b | (A1356.54:19-56:20; B842.47:24-48:10.) | | |
| ¶2c | (A1358.62:2-8; B844.54:7-13.) | | |
| ¶3 | (A1360.70:25-71:8; B846.63:8-11.) | | |
| ¶4a | | No longer valid December 29, 2011. (A695.) | |
| ¶4b | (A1364.87:25-88:15.) | | |
| ¶4c | | No longer valid December 29, 2011. (A695.) | |
| ¶4d | (A1368.103:13-17; B855.100:11-18.) | | |
| ¶5a | (A1369.108:2-6; B857.109:2-8.) | No longer valid February 9, 2012. (A697.) | |
| ¶5b | (A1370.111:2-13; B857.109:2-8.) | | |
| ¶6 | (A1371.115:20-116:6; B859.114:11-15.) | | |



[redacted]

| Alleged Secret | Elenza Testimony | Elenza Concession | Other |
|---|---|---|---|
| ¶7a | (A1374.127:6-128:18.) | | |
| ¶7b | (A1376.135:2-11.) | | |
| ¶8 | | | No disclosure allegation |
| ¶9 | (A1381.154:23-157:3.) | | |

Elenza does not address this evidence on appeal. Ignoring it, Elenza asserts in its "Statement of Facts" that Alcon's applications disclosed four alleged secrets: (1) [redacted] (Br.11-12.) The evidence establishes otherwise.

[redacted] Elenza argues that Alcon disclosed Elenza's [redacted] information in the Venkateswaran Application. But Elenza's expert testified he had no opinion Alcon did so (B867.149:23-868.150:3), which is dispositive, *Trident*, 859 F. Supp. 2d at 781. And Elenza's Chief Technology Officer stated that the [redacted] information in the Application *was* publicly available. (A1381.154:23-157:3.) Indeed, the Application explicitly took its list of [redacted] compounds from a 2004 electroactive-lens patent application. *Compare* A443.¶57, *with* B41.¶¶226-228.

[redacted] Elenza admitted that its alleged secrets in



[redacted]

[redacted] no longer were valid beginning February 9, 2012, and December 29, 2011, respectively. Alcon's applications were filed after February 9, 2012, and thus the disclosure allegations fail. Moreover, as to the purported disclosure of [redacted] technology (which Elenza did not argue on summary judgment), Elenza's witnesses testified that Alcon did not disclose that information in any application. (A1350.30:6-1353.43:20; B834.17:10-22, 837.26:2-5.)

Electroactive Lens: Elenza contends that Alcon disclosed Elenza's concept of applying a charge to an electroactive substance. But Elenza did not identify this as an alleged trade secret in its Designation and did not raise it on summary judgment; it also is wrong. Most EAIOLs require [redacted] and the concept dates publicly to the early 1980s. (B388.¶25-398.¶40.)

***Google Presentations***. Elenza contends that "Alcon employed confidential information extensively in its work with Google." (Br.35.) That is not an argument about disclosure, and Elenza does not offer specific evidence that its "secrets" appear in the Google presentations—the only disclosure to Google alleged.

The undisputed evidence, which Alcon marshalled below, forecloses Elenza's Google-presentation-disclosure theory. *First*, Elenza concedes that eight


[redacted]

of the eighteen alleged secrets expired before Alcon made the Google presentations. (B938-43.) *Second*, as to thirteen, Elenza's expert could not identify at his deposition evidence that Alcon disclosed them in the presentations—despite reviewing the presentations at the time.[6] (B938-43.) *Third*, as to two alleged secrets (¶2c & ¶7b), Elenza did not dispute Alcon's summary-judgment arguments that there was no evidence of disclosure. (Op.8.) The chart below summarizes the evidence:

| **Alleged Secret** | **Elenza Concession** | **Expert Failure** | **Other** |
|---|---|---|---|
| ¶1a | No longer valid February 9, 2012. (A692.) | (B938.) | |
| ¶1b | No longer valid February 9, 2012. (A693.) | (B938.) | |
| ¶1c | | (B939.) | |

[6] Because of the action's protective order, Elenza's expert was the only Elenza witness who could have done this analysis. In its "Statement of Facts," Elenza cites a single paragraph from that expert's report to support the assertion that the presentations "included many of the processes … Alcon learned" from Elenza. (Br.14.) But that paragraph discusses general concepts (1) Elenza never claimed as trade secret, (2) Elenza never addressed on summary judgment, and (3) that are not, and cannot be, trade secrets because they are known. For example, the paragraph references a "sleep mask" EAIOL recharger, but a 2009 patent disclosed that concept. (B50.¶17.) Finally, the paragraph *does not identify* the alleged concepts in any presentation; indeed, it does not mention disclosure at all.



[redacted]

| Alleged Secret | Elenza Concession | Expert Failure | Other |
|---|---|---|---|
| ¶2a | No longer valid June 5, 2012. (A694.) | | |
| ¶2b | | (B939.) | |
| ¶2c | | | Elenza did not dispute ¶2c not disclosed. (B939-40; Op.8.) |
| ¶3 | | (B940.) | |
| ¶4a | No longer valid December 29, 2011. (A695.) | | |
| ¶4b | | (B940.) | |
| ¶4c | No longer valid December 29, 2011. (A696.) | | |
| ¶4d | | (B941.) | |
| ¶5a | No longer valid February 9, 2012. (A697.) | (B941.) | |
| ¶5b | | (B941-42.) | |
| ¶6 | | (B942.) | |
| ¶7a | No longer valid May 24, 2012. (A698.) | | |



[redacted]

| Alleged Secret | Elenza Concession | Expert Failure | Other |
|---|---|---|---|
| ¶7b | | | Elenza did not dispute ¶7b not disclosed. (B942; Op.8.) |
| ¶8 | Any trade secret in the vendors Elenza asserts Alcon disclosed to Google—Front Edge Technology and The Technology Partnership—no longer valid December 29, 2011, and August 16, 2013, respectively. (A699) | | |
| ¶9 | | (B943.) | |

Elenza does not challenge this evidence on appeal.

Elenza asserts that Alcon provided Google with copies of certain Elenza slides. (Br.14.) [redacted]



[redacted]

[redacted]

***b. There is no evidence Alcon misused a trade secret.***

Elenza does not argue that Alcon misused any specific Elenza trade secret. Nor can it: Elenza's own admissions and the evidence foreclose that position, as Alcon established below. (B944-51.) Instead, Elenza contends there is "circumstantial evidence" of misuse. (Br.34-35.) Elenza misapplies that concept; and, moreover, the purported circumstantial evidence is not probative of misuse.

i. Although circumstantial evidence may prove misuse of trade secrets in some circumstances, Elenza cannot rely on it here. In Elenza's primary circumstantial-evidence case, the plaintiff offered evidence showing that its specific, actual trade secrets were part of the defendant's product. *See Merck*, 1999 WL 669354, at *13, *19; *accord Beard*, 8 A.3d at 597 ("Plaintiffs point to evidence that ASG put out a catalog that featured many of the same compounds in CB's catalog ...."). That evidence does not exist here. *Savor*, Elenza's other circumstantial-evidence case, found no misappropriation. 2004 WL 1965869, at *11.

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[redacted]



[redacted]

The circumstances of this case confirm why Elenza must identify how Alcon specifically misused Elenza's alleged secrets. Elenza shared them as part of due diligence. If Alcon's allowed access to them, and preexisting research in the same field, were enough to establish misuse, it would chill innovation. A company undertaking diligence in anticipation of a possible collaboration would have to cease forever its own research, or risk litigation. *See Omnitech Int'l, Inc. v. Clorox Co.*, 11 F.3d 1316, 1325 (5th Cir. 1994). Trade-secret law does not go that far. *See id.*

ii. In any event, Elenza's circumstantial evidence does not permit an inference that Alcon misused Elenza's alleged secrets:

*First*, Elenza asserts that Alcon [redacted]

Elenza provides the Court only part of the email containing that language and therefore misrepresents its contents. [redacted]

*Second*, Elenza strings together a chronology that it says proves misuse. It argues that although Alcon said it had [redacted]



[redacted]

after being introduced to Elenza it began an internal program. (Br.34.) But Elenza's narrative ignores that all Alcon commenced in 2010 was a program formalizing the EAIOL research it had started in 2009. And that program had not fabricated an EAIOL with all of its components even four years later. (A640.145:19-25.)

Elenza also observes that Alcon filed a patent application two years after first meeting with Elenza. (Br.35.) How this temporal fact is relevant is hard to grasp, particularly because there is no evidence Alcon reduced the application to a prototype. If anything, that it took Alcon years to file the application after allegedly misappropriating Elenza information forecloses any inference of misuse.

*Third*, Elenza contends the Alcon scientists who "reviewed Elenza's confidential information" also worked on Alcon's internal program. (Br.34-35.) Those scientists, some of whom were involved in Alcon's 2009 EAIOL research, were best positioned to undertake due diligence on Elenza. *Cf. Omnitech*, 11 F.3d at 1325. Elenza's theory appears to be that the overlap shows misuse because Alcon researched similar EAIOL components. But the fact two products sharing common features bear even a "substantial identity" does not establish misuse. *Savor*, 2004 WL 1965869, at *9. And Elenza's requested inference of causality is unavailable because Elenza concedes the "components or processes that might be used to fabricate an EA-IOL" are "easy to come by." (A1999.¶22.) Numerous



[redacted]

disclosures pre-dating the Elenza-Alcon relationship detail an EAIOL's components. (B388.¶25-398.¶40.)

### 3. Elenza's Other Trade-Secret-Related Claims Fail.

Elenza does not dispute that if the Court affirms the trade-secret ruling, the Court also should affirm the ruling dismissing Elenza's misrepresentation, conversion, and misappropriation claims.[8] Those claims fail for additional reasons, including because they are preempted.

The Trade Secrets Act "displaces conflicting tort … law of this State providing civil remedies for misappropriation of a trade secret." 6 Del. Code. § 2007. Here, Elenza's misrepresentation claims, which turned on alleged trade-secret disclosures in the Venkateswaran Application (A680-85), and its conversion and misappropriation claims, which alleged misuse of Elenza information (A686-88), are tort claims predicated on Elenza having trade secrets, as the Superior Court held (Br.Ex.C.50:3-9). The Act thus preempts them. *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 898 (Del. 2002); *Atl. Med. Specialists, LLC v. Gastroenterology Assocs., P.A.*, 2017 WL 1842899, at *15 (Del. Super. Ct.) ("'majority view'" is Act "precludes common-law claims based on misappropriation of business information"); *Ethypharm S.A. Fr. v. Bentley Pharm., Inc.*, 388 F. Supp. 2d 426,

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[8] Because Elenza has not argued that the Superior Court erred in dismissing its non-disclosure-agreement claim, that claim cannot be remanded no matter the Court's decision.



[redacted]

434 (D. Del. 2005) (fraud claim).

The claims fail for other reasons:

***Misrepresentation***. These claims alleged that Alcon (1) did not tell Elenza it filed the Venkateswaran Application disclosing Elenza's trade secrets (A680-82), and (2) misrepresented it did not disclose any Elenza trade secret when it had done so in the Application (A683-85). Because the undisputed evidence shows the Application does not disclose any alleged secret, the purported falsity underlying the misrepresentation claims does not exist.

***Conversion/Misappropriation***. These claims fail because they have the same elements and thus are duplicative. *Sustainable Energy Generation Grp., LLC v. Photon Energy Projects B.V.*, 2014 WL 2433096, at *14 (Del. Ch.). And whichever claim remains—to the extent the Trade Secret Act does not preempt it—would fail because it was based on the same facts as the dismissed non-disclosure-agreement claim. *Compare* A686-88, *with* A678. Those facts were "adequately addressed" by that claim and thus the tort claims cannot stand. *In re Crown-Simplimatic Inc.*, 299 B.R. 319, 326–27 (Bankr. D. Del. 2003).



[redacted]

## II. THE SUPERIOR COURT CORRECTLY REJECTED ELENZA'S LOST-PROFIT-BASED DAMAGES THEORY

In addition to the second-tranche funding it purportedly lost, Elenza sought enterprise-value damages, based on massive future profits it contends it would have realized but for Alcon's alleged conduct. (A1705-08.) Courts routinely bar these lost-profit-based damages in cases involving unproven medical technologies given the numerous developmental and regulatory hurdles before commercial success. *See, e.g.*, *Aronowitz v. Health-Chem Corp.*, 513 F.3d 1229, 1235, 1239 (11th Cir. 2008); *Microbix Biosystems, Inc. v. BioWhittaker, Inc.*, 172 F. Supp. 2d 680, 698 (D. Md. 2000), *aff'd per curiam*, 11 F. App'x 279 (4th Cir. 2001); *accord Callahan v. Rafail*, 2001 WL 283012, at *1 (Del. Super. Ct.) (rejecting discounted-cash-flow method Elenza used). Elenza faced those hurdles, as the Superior Court concluded: Elenza had "no product," "no sales," "no regulatory approval," and "no history" at the time of Alcon's alleged conduct. (Op.12.) Elenza does not dispute this evidence. The court followed well-established law in rejecting Elenza's theory.

### A. Question Presented.

Did the Superior Court err in rejecting Elenza's lost-profits-based damages where Elenza's future value was uncertain because Elenza had no income or sales and faced myriad developmental and regulatory hurdles before commercialization? (A2175-85.)



[redacted]

### B. Standard and Scope of Review.

The Court reviews this question *de novo*, consistent with the principles detailed in Part I.B.

### C. Merits of Argument.

#### 1. Elenza Cannot Prove Its Enterprise-Value Damages with Reasonable Certainty.

a. Courts generally reject damages based on alleged lost profits from an undeveloped product or new business. *See Aronowitz*, 513 F.3d at 1235, 1239; *Microbix*, 172 F. Supp. 2d at 698; *accord Amaysing Techs. Corp. v. Cyberair Commc'ns, Inc.*, 2004 WL 1192602, at *4–5 (Del. Ch.); *In re Heizer Corp.*, 1990 WL 70994, at *3 (Del. Ch.). In those circumstances, because there are "too many factors that may intervene" to stop a plaintiff from realizing profits, the plaintiff cannot prove it suffered lost-profit-based damages with the required reasonable certainty. *Callahan*, 2001 WL 283012, at *2. Courts apply this principle to unproven medical technologies given the numerous developmental and regulatory hurdles before commercial success. *See, e.g.*, *Aronowitz*, 513 F.3d at 1235, 1239; *Microbix*, 172 F. Supp. 2d at 698; *Medco Research, Inc. v. Fujisawa ISA, Inc.*, 1994 WL 719220, at *14 (N.D. Ill.).

Elenza does not even try to distinguish itself from the plaintiffs in these cases; and it cannot. Elenza's damages assume that Elenza would have finalized its EAIOL design, built a working EAIOL, and then "successfully secured a



[redacted]

manufacturing facility, obtained FDA approval, developed [the EAIOL] in commercial quantities, and marketed" the EAIOL. *Microbix*, 172 F. Supp. 2d at 698. Those are the kinds of hurdles courts have found yield impermissibly speculative damages—because failure at any one step would preclude profits. *See, e.g., id.*; *Aronowitz*, 513 F.3d at 1235, 1239; *Medco*, 1994 WL 719220, at *14. And they are the hurdles the Superior Court recognized Elenza faced when holding that Elenza's damages were "speculative." (Op.12.) Elenza has no evidence demonstrating it was reasonably certain to achieve each of the steps before commercialization,[9] and thus it cannot prove its enterprise-value damages as a matter of law. The Superior Court correctly prevented Elenza from seeking speculative, windfall damages.

b. Although the court in *PharmAthene, Inc. v. Siga Technologies, Inc.*, 2014 WL 3974167 (Del. Ch.) (Br.40–42) awarded lost-profit-type damages for an experimental vaccine, its reasons for doing so demonstrate why those damages are unavailable here.

Reaffirming the rule that a plaintiff must prove damages with reasonable certainty, *PharmAthene* relied on the unique facts before it to hold the plaintiff had

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[9] Elenza's own expert assumed that at the time of Alcon's alleged conduct, Elenza had [redacted] "likelihood of the successful commercialization" of its EAIOL. (A1725-26.) Thus, Elenza's own expert believed Elenza was *more likely to fail* than to successfully commercialize its product, no matter what Alcon did.


[redacted]

met its burden. 2014 WL 3974167, at *8. The vaccine there, which could treat "potential bioterrorism attacks," "did not [require] FDA approval" and was subject to "considerably less demanding" criteria. *Id.* at *11-12. More fundamentally, when the court awarded damages, the United States had *agreed to purchase the vaccine*, which "mitigate[d] or possibly eliminate[d]" the court's concern "that the drug might not generate any profits at all." *Id.* at *6.

Given those facts, the court held that the plaintiff proved the likelihood of realizing profits with reasonable certainty. *Id.* at *13. By contrast, Elenza requires FDA approval, in addition to needing to complete development and successfully market its EAIOL. Moreover, nothing in the record mitigates the likelihood that Elenza's EAIOL would *not* generate profits. Elenza cannot recover lost-profit-based damages because the evidence "leaves uncertain whether [it] would have made any profits at all." *Id.* at *8.

c. Elenza tries to circumvent the undisputed record by invoking the "wrongdoer" rule to argue that "'[w]hen the injured party has proven the *fact* of damages … less certainty is required of the proof establishing the *amount* of damages.'" (Br.41 (quoting *Siga Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1131 (Del. 2015)).) But that principle only applies *after* a plaintiff proves the existence of its damages with reasonable certainty. *See Siga*, 132 A.3d at 1131. Here, the evidence showed that Elenza could not prove its lost-profit-based



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damages existed at all, let alone with the required certainty. Elenza now offers that because the Superior Court sent two claims to trial, it "implicitly acknowledged that a reasonable jury could find … that Alcon caused damages to Elenza." (Br.42-43.) But the issue was not whether Elenza was entitled to seek damages of some kind at the contract trial (an effort the jury rejected on the merits), but rather whether Elenza was entitled to pursue speculative lost-profit-based damages. And on that question, the undisputed evidence demonstrated Elenza could not prove with reasonable certainty it would have realized *any* profits, regardless of any alleged Alcon conduct.

Elenza's position that "Alcon's own valuation of Elenza" gave the jury a basis to calculate the *amount* of damages (Br.44–45) is unavailing for the same reason. Alcon's calculation merely projected one measure of Elenza's value, *assuming* Elenza overcame the myriad development and regulatory hurdles before successfully commercializing a product. The valuation did not and, of course, could not establish Elenza was likely to (or even could) overcome those hurdles.[10]

[10] Elenza notes two transactions it says are "probative of Elenza's value." (Br.45.) But the products in the two transactions were not "similarly situated" to Elenza's EAIOL (Br.45): both had regulatory approval and one had significant sales. (A1734-35.) They thus are inapposite, *see Celebrity Cruises Inc. v. Essef Corp.*, 434 F. Supp. 2d 169, 182 (S.D.N.Y. 2006), as the Superior Court held (Op.13). Further, even if the transactions were probative of Elenza's *value*, they say nothing about the antecedent question whether Elenza established alleged lost-profit-based damages with the required certainty.



[redacted]

d. With no valid basis to resuscitate its enterprise-value damages, Elenza criticizes the Superior Court's reasoning. Elenza contends that the court rejected its damages theory because it found that calculating the amount of those damages would be difficult. (Br.40.) That is not what the court held. Instead, it concluded that because Elenza was a "relativity new company" with "no product," "no sales," "no regulatory approval," and "no history," lost-profit-based damages were "speculative" and thus unrecoverable (Op.12)—a conclusion consistent with well-established authority. Further, the court cited *Amaysing* which held it was "highly doubtful" a company with "undeveloped" technology could prove with "reasonable certainty" it would realize future profits. 2004 WL 1192602, at *4.[11]

### 2. No Admissible Evidence Connects Alcon's Alleged Conduct to Elenza's Alleged Damages.

Elenza's enterprise-value damages fail for the independent reason that the funding Elenza says should have come from Alcon—which allegedly Alcon did not provide due to its purported conduct (but which the jury found Alcon had no obligation to provide)—would not have fully funded Elenza's EAIOL development. This fact is undisputed (B362.34:11-37:22) and Elenza cannot

[11] Elenza downplays *Amaysing* because of its posture. (Br.42.) But *Amaysing* relied on *Heizer*, which rejected lost-profit damages for a start-up company with no commercial product, 1990 WL 70994, at *3, and *Callahan*, which rejected lost-profit damages where intervening factors could affect whether profits were realized, 2001 WL 283012, at *2. *Amaysing*, 2004 WL 1192602, at *4 n.30.


[redacted]

support the assertion that but for Alcon's conduct it would have realized profits.

Elenza ignores this dispositive fact and argues that Alcon's decision not to fund Elenza—Alcon's contractual *right*, as Elenza averred—created a "'stink' that scared away investors" who would have bridged the shortfall. (Br.43.) The only evidence of the purported "stink" Elenza offers is testimony from an Elenza consultant purportedly recounting what he heard from investors—hearsay that cannot create an issue of fact. *See, e.g.*, *Kennedy v. Giannone*, 527 A.2d 732 (table), 1987 WL 37799, at *1 (Del.). The consultant admitted he could not recall specific conversations or investors discussing any "stink." (A1447:11-16.)

Separately, Elenza argues that the Venkateswaran Application "prevented [potential investors] from investing" because investors believed Elenza lost "'exclusive hold on the technology.'" (Br.43.) But there is no record evidence of any potential investor making that statement. Rather Elenza's Chief Executive Officer purported to summarize what one investor, Abbott, said. (Br.13 n.50) And the undisputed evidence shows that Abbott passed on an investment *before* it knew about Alcon's applications. (B242.) Moreover, it is undisputed that over *sixty* other sophisticated investors decided not to invest in Elenza before August 2013 (when the Application became public). (B220.)[12]

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[12] The undisputed evidence also demonstrates the Application did not disclose trade secrets. (Part I.C.2.a, *supra*.)



[redacted]

## III. THERE IS NO BASIS FOR A NEW TRIAL

Elenza seeks a new trial on the jury-decided, SPA-breach claims, arguing only that if the Court reverses the Superior Court's trade-secret ruling, it must remand the jury-decided claims as well. That relief is unwarranted.

Elenza's theory is that the summary-judgment ruling "prevented" the jury from hearing evidence at trial that Alcon misappropriated Elenza information—which, Elenza contends, was relevant to the tried contract claims. (Br.47.) The Superior Court properly excluded that evidence through a direct evidentiary ruling: In a pre-trial motion-*in-limine* opposition, Elenza urged that evidence of misappropriation was relevant to its implied-covenant claim. The Court rejected that argument. (Br.Ex.C.49:22-50:14.) Elenza now challenges that ruling under the guise of demanding a new trial, but it has neither cited the controlling abuse-of-discretion standard nor attempted to meet it.

### A. Question Presented.

Did the Superior Court abuse its discretion by preventing Elenza from offering evidence of alleged misappropriation of information at trial when that evidence was irrelevant to the claims before the jury? (B995-1004.)

### B. Standard and Scope of Review.

The Court reviews Superior Court evidentiary decisions for abuse of discretion. *Wilmington Country Club v. Cowee*, 747 A.2d 1087, 1092 (Del. 2000).



[redacted]

### C. Merits of Argument.

1. Elenza has waived any challenge to the Superior Court's exclusion of misappropriation evidence (and thus its new-trial demand). Elenza does not address that evidentiary ruling, let alone contend the court abused its discretion in reaching it. The Court can dispose of Elenza's new-trial demand on this basis.

The Superior Court, in any event, did not abuse its discretion. Neither SPA-breach claim turned on alleged misappropriation of information.[13] Instead, as the pretrial stipulation reflects, those claims asked whether Alcon "breached [its] obligations to Elenza" when it "failed to participate in the second tranche of funding required by the SPA." (B1028; *accord* A678-79.) The Superior Court did not "exceed[] the bounds of reason" in holding that Elenza could not offer evidence of alleged misappropriation in a trial about Elenza's SPA-breach claims. *Charbonneau v. State*, 904 A.2d 295, 304 (Del. 2006).

2. Elenza's new-trial demand is meritless even on its own terms. Elenza argues that the Court should grant a new trial on the jury-decided claims if it reverses the trade-secret ruling because all of Elenza's claims are "inextricably tied" together. (Br.48.) Elenza took the *opposite* position below, arguing on summary judgment that the claims about the "second-tranche financing"—the jury-

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[13] Elenza suggests it also tried a claim alleging "that Alcon breached the NDA." (Br.48.) Not so. The Superior Court granted judgment on that claim before trial; it is irrelevant to Elenza's new-trial argument.



[redacted]

decided, SPA-breach claims—were “wholly independent” of the trade-secret claims. (B978.83:14-84:5.) Elenza was correct below; the Superior Court agreed (it permitted the SPA-breach claims to go forward as it dismissed the trade-secret claims); and Elenza is bound by its original position. *See Motorola Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 859-60 (Del. 2008).



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## CONCLUSION

For the foregoing reasons, Alcon respectfully requests the Court affirm the Superior Court's summary-judgment decision and the final judgment.

Respectfully submitted,

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