



IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEVIN MCLAREN, :
 :
 Appellant, : No.: 376,2023
 :
 v. : Trial Court Below:
 :
 SMASH FRANCHISE PARTNERS, : **Court of Chancery**
 LLC, : **Vice Chancellor J. Travis Laster**
 : **C.A. No.: 2020-0302-JTL**
 Appellee. :

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. THE COURT OF CHANCERY FAILED TO ADDRESS MCLAREN’S REPEATED REQUESTS FOR ATTORNEYS’ FEES PRESENTED PRIOR TO FINAL JUDGMENT.

A. McLaren Fairly and Continually Presented His Request for Fees to the Trial Court.

Smash admits that McLaren requested attorneys’ fees pursuant to the Delaware Uniform Trade Secrets Act (“DUTSA”) in the Joint Pre-Trial Stipulation and Proposed Order (“Pre-Trial Order”). It discounts that request, however, and many other fee requests in various pleadings to argue that McLaren waived his right to appeal this issue and “did not fairly present a request below.” Appellee’s Answering Brief (“Ans. Br.”) at 21- 22.

“In determining whether an issue has been fairly presented to the trial court, this Court has held that the mere raising of the issue is sufficient to preserve it for appeal.” *Watkins v. Beatrice Cos.*, 560 A.2d 1016, 1020 (Del. 1989) (citation omitted). McLaren met this requirement. Throughout this action, McLaren and the other defendants raised the issue multiple times in the Court of Chancery, including in the Pre-Trial Order and the Pre- and Post-Trial briefings. A0728-29; A0614-18, A0625; A0894-0898. The trial court was aware of these requests, recognizing in its July 14, 2023 Memorandum Opinion that “Perri, McLaren, and Dumpster Devil sought their attorneys’ fees and costs under DUTSA. . . .” B00561.

Smash nonetheless posits that McLaren’s individual request for fees in the Pre-Trial Order was not enough because defendants’ pre- and post-trial briefings did not repeat the fee request in a manner specific to McLaren. Ans. Br. at 20-21. Smash does not point to any statement by the trial court or any other court sharing Smash’s unique view. Nor does it argue why it is not enough that the Answering Post-Trial Brief and many other pleadings below defined “Defendants” consistently to include McLaren, and that before final judgment “Defendants” spent pages and pages of argument supporting and reiterating their request. *See, e.g.*, A0718; A0845.¹

Smash also fails to cite a single case supporting its contention that McLaren must have repeated these requests on an individual basis. Nor does it cite any case stating that McLaren must have done so again separately even after making the request in the Pre-Trial Order and then repeating the request and analyzing the issue in subsequent briefs. Smash’s cited cases speak only to an appellant’s need to address the issue in a pre- or post-trial brief before a final judgment. These cases agree, unsurprisingly, that it is not enough to make such a request *only* in a pretrial order. *See Pope Invs. LLC v. Marilyn Abrams Living Tr.*, 2018 WL 3472191, at *1, n.3 (Del. July 18, 2018); *Braga Inv. & Advisory, LLC v. Yenni Income Opportunities*

¹ Smash even referred to the fact that “*Defendants* submitted a post-trial answering brief and “again raised a *collective claim* for fees under DUTSA and presented the same arguments as they did in their Pre-Trial Brief. Ans. Br. at 12 (emphasis supplied).

Fund I, L.P., 2020 WL 5416516, at *2 (Del. Ch. Sep. 8, 2020). But that is not the situation here; McLaren and the other defendants argued the merits of their request thoroughly in their Pre-and Post-Trial Briefs – in addition to the relief requested in the Pre-Trial Order.

Smash also argues the trial court did not fail to rule upon McLaren’s repeated requests because the September 8, 2023 Order and Final Judgment (“Final Judgment”) states “[e]ach party will bear its own fees and costs.” Ans. Brief at 19; B00625. This argument fails to consider the timing and context of the court’s Memorandum Opinion and the Final Judgment based on that Opinion.² Quite simply, at the time of both documents, counsel knew and certainly the trial court was aware McLaren no longer was a party to the case; months earlier, the court had granted the motion to dismiss McLaren as a defendant in the action. B00554-56. Its subsequent Memorandum Opinion thus stated “by the time of trial Kevin McLaren was longer a defendant on any claims. . . .” B00563. The Final Judgment’s statement about each party bearing its own fees and costs does not apply to McLaren because the court previously had ruled McLaren no longer was a defendant/party to the case.

² In desperation, Smash argues that the Final Order was “negotiated.” At the time the Final Order was drafted, the parties were advised to draft an order that was consistent with the Chancery Court’s Memorandum Opinion. The parties were not free to draft an order inconsistent with the opinion.

This also applies to the trial court's statement in its Memorandum Opinion that "each side will bear its own costs," because the court contemporaneously clarified that "neither [remaining] claim named McLaren as a defendant" and that "[t]he court has entered judgment for McLaren and dismissed him from the case." B00559. McLaren was neither a "side" nor a "party" at the time of the statements on which Smash relies. Further indication of the trial court's mindset may be found in the fact the Memorandum Opinion only evaluated remaining defendant Todd Perri's request for fees under DUTSA, not McLaren's. B00620.

Smash also argues that McLaren's appeal presented arguments that were not made to the trial court. Smash claims that McLaren never presented evidence that he did not receive any supposedly confidential information from Todd Perri. Ans. Br. at 22. This is simply not true. As set forth in his Opening Brief, McLaren testified at trial that the first time he saw Perri's notes was in discovery, and that Perri kept all his due diligence to himself. He further testified that all the relevant information he had regarding the industry and Smash came primarily from the internet and direct conversations with equipment manufacturers. McLaren's Second Corrected Opening Brief ("McLaren's Opening Brief") at 16; A0825-26, at 281:24-282:2, A0828, at 286:2-21. This was not new evidence presented for the first time on appeal. It was presented to the trial court and likely contributed to the court's conclusion that "the record showed that McLaren did not join in Perri's deceitful

conduct.” B00563. McLaren made similar, even more direct assertions when responding to Smash’s questions in his June 2020 deposition. McLaren’s Opening Brief at 26.³

McLaren, separately and as one of the collective defendants, fairly presented below all the theories on which he relies in this appeal. However, even assuming McLaren had not raised certain additional facts supporting those theories, that does not change the conclusion regarding his fair presentation. The Court has stated a litigant is not permitted to raise in the Court, for the first time “an entirely new theory” of his case. However, “where the argument is merely an additional reason in support of a proposition that was urged below, we find no reason why, in the interest of a speedy end to litigation, the argument should not be considered.” *Robino-Bay Court Plaza, LLC v. W. Willow-Bay Court LLC*, 985 A.2d 391 (Del. 2009) (citations omitted).

B. McLaren Never Waived His Right to Attorneys’ Fees.

Smash argues alternatively that McLaren “expressly disclaimed his entitlement to DUTSA fees in post-trial briefing” and “admitted he was not entitled

³ The transcript of the June 2020 deposition was admitted at trial. In total, the evidence demonstrates that as early as June 2020, Smash knew that McLaren testified under oath that he did not receive any alleged trade secrets from co-defendant Todd Perri. This was a critical element of its misappropriation claim against McLaren, but despite this, Smash continued to pursue its claim against him.

to fees under DUTSA.” Ans. Br. at 2, 28. This argument is surprising given the repeated, expansive briefing on the collective Defendants’ entitlement to fees. Smash never before referenced or intimated that McLaren made such a significant waiver. Neither did the trial court. Rather, as stated above, the court’s final opinion stated that “Perri, McLaren, and Dumpster Devil sought their attorneys’ fees and costs under DUTSA.” B00561.

Further, McLaren’s supposed relinquishment of his rights would have been a waiver, not a disclaimer.⁴ A waiver requires a clear intentional unequivocal relinquishment of a known right. *See Manti Holdings, LLC v. Authentix Acquisition Co.*, 261 A.3d 1199, 1210 (Del. 2021) (the facts relied on to prove waiver must be unequivocal). No such evidence exists, and a waiver should not be implied on such an important issue.

Instead, Smash points to Defendants’ Answering Post-Trial brief asserting that although McLaren “was not named in a count that provides for statutory fee shifting, he is nonetheless entitled to an award of fees. . . .” A0898. This statement was not a waiver in any respect. It resulted from the drafting complexities arising

⁴ “Waiver” is the voluntary relinquishment of a known right or conduct such as to warrant an inference to that effect and a willingness to refrain from enforcing those rights. *Del. Express Shuttle v. Older*, 2002 WL 31458243, at *10 (Del. Ch. Oct. 23, 2002). “Disclaimer” is a refusal to take responsibility for someone’s else’s claim. or denial of responsibility or liability. *See* www.law.cornell.edu.wex/disclaimer.

from Smash's abandonment of the DUTSA claim, Defendants' subsequent request to have McLaren dismissed from the DUTSA claim, the fact that the trial court had not yet ruled on the dismissal request for fees and the resulting confusion regarding McLaren's status. It was an alternative request under the trial court's equity powers if McLaren was no longer able to recoup his attorneys' fees under DUTSA. At worst, this statement was inartful, but it certainly was not an express waiver of McLaren's rights to attorneys' fees. Moreover, the attorneys' fees argument in the Post-Trial Brief began with the title "*Defendants* should be awarded their attorneys' fees" and ended with the words "*all Defendants* should be awarded their attorneys' fees." A0894, 898 (emphasis supplied).

McLaren was not precluded from seeking attorneys' fees, and never waived his right to appeal this issue. The trial court's failure to address his argument was an abuse of discretion.⁵

⁵ Smash tries to distinguish the statement in *Bringhurst v. Harkins* that an abuse of discretion means a failure to exercise a sound reasonable and legal discretion. *Bringhurst v. Harkins*, 32 Del. 324, 330, 122 A. 783, 786 (1923). Smash finds it significant that the case was about a request for a new trial, not about a fee application. As the cliché states, that is a distinction without a difference.

II. THE UNREBUTTED EVIDENCE OF SMASH’S SUBJECTIVE AND OBJECTIVE BAD FAITH ENTITLES MCLAREN TO ATTORNEYS’ FEES

A. Smash’s Claim Was Objectively Specious; Smash Never Was Able to Identify True Trade Secrets and Maintained the Claim Even After the Trial Court Highlighted, and Smash Never Remedied, the Claim’s Fatal Flaws.

DUTSA authorizes an attorneys’ fee award if a claim is made in bad faith. Bad faith consists of objective speciousness and subjective bad faith and objective speciousness exists where the action superficially appears to have merit but lacks supporting evidence. *Incyte v. Flexus Biosciences, Inc.*, 2019 WL 2361535, at *2 (Del. Super. Ct. May 7, 2019). Smash’s claim of misappropriation was objectively specious in that it lacked supporting evidence from beginning to end.

In his Opening Brief, McLaren highlighted the facts and supporting cases warranting a finding of objective speciousness of Smash’s DUTSA claim. McLaren’s Opening Brief at 24-28. Smash does not contest the presented facts but wonders why McLaren’s Brief did not address the lower court’s citation to *Research & Trading Corp. v. Pfuhl*, 1992 WL 345465, at *1 (Del. Ch. Nov. 18, 1992). Ans. Br. at 36, 38. The answer is because the trial court cited *Pfuhl* only for the proposition that a plaintiff’s mere dropping of a claim in the later stages of litigation is “not sufficient to find bad faith.” B00621. That may be true, but that was not Smash’s singular flaw. Smash’s conduct was significantly more persistent and worthy of sanctions than the plaintiff’s in *Pfuhl*.

In *Pfuhl*, an employer was a company that was technically based and dependent on its intellectual property. Senior executives left and formed a competing company and solicited business directly from the plaintiff's customers and suppliers with whom the defendants had dealt regularly; there was a basis originally for the plaintiff's claim of misappropriation. When the plaintiff later dropped its DUTSA claim, the departed employees sought attorneys' fees. The court denied the request because throughout the litigation, plaintiff's claim was colorable, "had some force" because of the nature of plaintiff's business and the importance of its intellectual property, and there was nothing in the record to suggest the claims were advanced in bad faith. *Pfuhl*, 1992 WL 345465, at *16.

That is not the factual posture of this case. Here, from the beginning to the end, Smash tried to claim virtually every aspect of its business was a trade secret, never identified information that was truly a trade secret, and repeatedly changed what it believed was its trade secrets. It was never able to even articulate or pin down the information it alleged defendants misappropriated, particularly McLaren who had no connection to Smash and never received information from Smash. In oral argument on Smash's motion for a preliminary injunction, the trial court called the alleged confidential information more like an "elevator pitch," and agreed that Smash's CEO's testimony as to the alleged secrets "almost became . . . every single

item about his business.” It also stated, “I don’t think you can claim that the whole thing is confidential. . . .” A0430-31.

When in August 2020, the Court of Chancery ruled against Smash’s motion, it stated explicitly that Defendants “did not . . . acquire legally protected information that could support the type of broad preliminary injunction that Smash seeks,” and that the alleged trade secrets were “not specific enough to reveal critical information about Smash.” The court twice repeated that the information “does not qualify as trade secrets. . . .” B00335; B00363; B00364. The trial court also characterized the alleged trade secrets as “not secret at all,” “publicly available,” and “relatively obvious,” lacking the status of true trade secrets. B00363; B00365. The court concluded as follows:

All of the information that the defendants received was publicly available, freely shared by Smash’s franchisees, or provided by Smash without taking adequate precautions to protect its confidentiality. The information was primarily designed to convince interested entrepreneurs to purchase a franchise, and it reflected the type of information that one would see in a detailed sales pitch. It was specific enough to attract prospective franchisees, but not specific enough to reveal critical information about Smash.

B000335. The trial court also stated unequivocally that even assuming Smash had protectable trade secrets, it “did not take reasonable steps to protect their secrecy,” another critical element of its DUTSA claim. B00366. *See 6 Del. C. § 2001(4)(b)*. From the beginning, Smash had not met the most basic elements of the DUTSA claim.

That ruling put Smash on notice of the severe deficiencies in its DUTSA claim and its unlikeliness to succeed, but Smash never provided any further evidence to buttress its claim. To the contrary, Smash admitted in November 2020 that it already had identified all the information it claimed was confidential and disclosed to any of the defendants. A0616, A0712. Smash never supplemented this response. In short, Smash’s claim (through three separate complaints and almost three years) relied entirely on the same information the trial court found woefully deficient back in August 2020. Smash’s speculative claim was shown to be just that, mere speculation. It lacked evidentiary support from beginning to end.⁶

Smash ignored the total lack of evidence supporting its amorphous mutating claim and continued to pursue the claim against its new competitor after it no longer had any basis to do so or any reason to believe that the claim could succeed, particularly against McLaren. *See also* n.3, *supra*. That distinguishes it entirely

⁶ Smash also relies on the trial court’s conclusion that Smash started out with a “genuine” belief that the information it imparted to Perri constituted trade secrets. The court cited no record evidence to support its belief. Ironically, in its initial complaint, Smash believed that the publicly filed Franchise Disclosure Document was considered trade secret information. But even giving Smash the benefit of the doubt about the claim at the outset, it could no longer have had a genuine belief about the claim’s viability after the court’s preliminary rejection of its trade secret claim and Smash’s admission that it could not provide any further evidence in support. *See Cherokee Chem. Co. v. Frazier*, 2022 WL 2036305, at *4 (C.D. Cal. Apr. 27, 2022) (initial belief in the claim not enough to preclude finding of objective speciousness).

from *Pfuhl* and constitutes objective speciousness. *See Zoppas Indus. de Mexico, S.A. de C.V. v. Backer EHP Inc.*, 2023 WL 7530247, at *1 (D. Del. Nov. 13, 2023) (plaintiff “understood its claims were objectively specious by the close of fact discovery”); *AWP, Inc. v. Safe Zone Servs., LLC*, 2022 WL 2910023, at *4-6 (W.D. Ky. July 22, 2022) (the court found claim objectively specious where it was overly vague, overly inclusive and never showed misappropriation); *Cypress Semiconductor Corp. v. Maxim Integrated Prods., Inc.*, 236 Cal. App. 4th 243, 260, 264, 186 Cal. Rptr. 3d 486, 501, 504 (2015) (“under the ‘objectively specious’ standard, it is enough for defendants to point to the absence of evidence of misappropriation in the record” particularly when nothing submitted in or after the complaint lent “any color to the naked assertion” of misappropriation).⁷ The court erred because no evidence ever existed to support its finding.

⁷ Smash also highlights the trial court’s statement that the claim was not “frivolous.” Ans. Br. at 36. But “frivolous” is a substantially different term than “specious.” *See FLIR Sys., Inc. v. Parrish*, 174 Cal. App. 4th 1270, 1278, 1283, 95 Cal. Rptr. 3d 307, 314 (2009). “A claim is legally frivolous where it is ‘based on an indisputably meritless legal theory.’” *Jones v. Hay*, 2019 Del. Super. LEXIS 5280, *2 (Nov. 25, 2019) (citations omitted). Speciousness is a looser standard and a specious claim, unlike a frivolous one, is superficially meritorious. *See Black’s Law Dictionary* 1529 (9th ed. 2009) (defining “specious” as “[f]alsely appearing to be true, accurate, or just”). A claim can be objectively specious regardless of whether it is frivolous. *See Direct Techs., Ltd. Liab. Co. v. Elec. Arts, Inc.*, 836 F.3d 1059, 1071 (9th Cir. 2016)) (“a specious claim ‘may superficially appear to have merit,’ so attorneys’ fees may be proper even if the claim is not frivolous.”).

B. Smash’s Claim Was Made in Subjective Bad Faith; Smash Brought and Maintained it for Improper Purposes and Maintained It Longer After Its Fatal Flaws were Exposed.

Subjective bad faith may be inferred by evidence indicating Smash filed the action to harass or harbored an improper motive. *See Incyte Corp*, 2019 WL 2361535, at *2. “Similar inferences may be made where the plaintiff proceeds to trial after the action’s fatal shortcomings are revealed by opposing counsel.” *Id.* (citing *FLIR Sys., Inc*, 174 Cal. App. 4th at 1278, 95 Cal. Rptr. 3d at 315). *See Contract Materials Processing v. Kataleuna GmbH Catalysts*, 222 F. Supp. 2d 733, 745 (D. Md. 2002) (“The ‘knowing persistence in an invalid claim’ demonstrates subjective bad faith.” (citation omitted)). Smash met all these criteria and more.

The trial court’s Memorandum Opinion did not address Smash’s subjective bad faith despite it having been raised in multiple pleadings. But the court’s separate summary itself provided a clear judgment: “Smash pursued an aggressive lawsuit that made overblown claims in an effort to destroy a nascent competitor.” B00561. The court even called Smash’s lawsuit a “gambit.” *Id.* These conclusions are a pure distillation of subjective bad faith and McLaren’s Opening Brief provides the supporting evidence of Smash’s bad faith and improper motives at pages 29-32. *See also Sanimax LLC v. Blue Honey Bio-Fuels, Inc.*, 2020 WL 2529225, at *7 (May 19, 2020) (finding subjective bad faith because action filed against departing employee “was basically retribution,” the plaintiff had been put on notice earlier that under

prevailing caselaw, there was not a viable claim, and plaintiff continued to pursue claim although it never produced any proof of misappropriation); *Degussa Admixtures, Inc. v. Burnett*, 277 F. App'x 530, 535-36 (6th Cir. 2008) (fees awarded when plaintiff's own shortcomings led it to file trade secrets action to restrain competition and avoid losing market share). Coupled with Smash's maintaining of the claim despite knowing early on that it had no trade secrets and that even if it had, it failed to protect them, McLaren demonstrated Smash's bad faith.

Smash does not claim that McLaren failed to present substantial evidence of subjective bad faith. Rather, it argues that some of the evidence of bad faith that McLaren's brief listed is new and should not be considered by the Court because it was not fairly presented. Ans. Br. at 23. Smash appears to be referring to multiple emails from Smash and its agents evidencing Smash's bad faith. Ans. Br. at 23. In one such email, Smash's CEO states that Smash would "relentlessly work to put Dumpster Devil out of business." *Id.* But that statement came directly from one of the Joint Trial Exhibits submitted to the trial court – JTX 186. Another email, from Smash's franchise agent, states "Dumpster Devil won't be around very long. We have filed a very aggressive lawsuit against [Dumpster Devil] and are going after them with full force." That too is taken directly from another Joint Trial Exhibit – JTX 166.

Smash also claims to have been blindsided by Defendant's assertions in its Opening Brief that "Smash used the litigation as a weapon against Dumpster Devil" and "publicized the lawsuit and used it to scare customers away from Dumpster Devil." McLaren's Opening Brief at 30. That was not new evidence, that was merely argument, one based on another Joint Trial Exhibit – JTX 172. Smash did not object to any of these exhibits and the Joint Pre-Trial Order states that "[a]ny exhibit as to which no Party has made an objection . . . will be in evidence and can be cited to, and relied on by the Court. . . ." Pre-Trial Order at § C.4. All of the evidence was fairly presented to the trial court.

The Court typically defers to a lower court's factual findings if the "findings are supported by the record and the conclusions are the product of an orderly and logical deductive process." *William Penn P'ship v. Saliba*, 13 A.3d 749, 756 (Del. 2011). This did not occur here. McLaren provided ample evidence (confirmed by the trial court's own words) that Smash's claim was objectively specious and that it acted in bad faith. The court's final determination to the contrary (a conclusion that was applied only as to Todd Perri's request) constituted a clearly erroneous assessment of the evidence and an improper unreasonable application of law to fact. It failed to follow the natural reasonable conclusions that the court should have

derived from its own previous findings and instead placed a pox on McLaren's house as well as Perri's.⁸

⁸ Early on, and based on a very limited record, the Vice Chancellor decided Perri and McLaren's conduct was "disingenuous and underhanded," that they "embarked on a campaign of deception" and that "[t]here is no question that Perri's behavior was duplicitous and egregious." B00335, 343, 376. This initial assessment appears to have influenced the Vice Chancellor throughout - even though Mr. Perri's participation in Smash's marketing forums was fully within the bounds of the law. *See McLaren's Opening Brief* at 7-14, 33-36.

III. THE APPEAL OF A FINAL JUDGMENT PRESERVES ALL INTERMEDIATE RULINGS MADE BY THE COURT OF CHANCERY.

A. McLaren is Not Foreclosed from Appealing the Trial Court’s Denial of Defendant’s Motion for a Protective Order

Smash argues that McLaren’s appeal of the Discovery Order should be dismissed based on the failure to include that Order in the Notice of Appeal. Ans. Br. at 41-42. In support, Smash cites a single case –which in turn cited Article IV, § 11 of the Delaware Constitution. *See Tromwell v. Diamond Supply Co.*, 91 A.2d 797, 802 (Del. 1952). *Tromwell* involved an appeal of a Superior Court decision, not a Court of Chancery Decision. Article IV, § 11 has separate provisions for appeals from the Superior Court and the Chancery Court. *Compare* Art. IV, § 11(1)-(3) *with* § 11(4). Section 11(4) provides jurisdiction “[t]o receive appeals from the Court of Chancery and to determine finally all matters of appeal in the interlocutory or final decrees and other proceedings in chancery.”

Smash fails to cite the controlling statute – 10 *Del. C.* § 144, which provides:

A failure to appeal from an interlocutory order, judgment or decree of the Court of Chancery or Superior Court shall not bar a party from making any objection to such interlocutory order, judgment or decree on appeal from the final order, judgment or decree.

Furthermore, Smash failed to cite controlling authority from the Delaware Supreme Court. *See McCollum v. Blenheim Homes, L.P.*, 1998 WL 700180, at *1 (Del. 1998) (“The McCollum’s notice of appeal from final order in case No. 317, 1998 has preserved for this Court’s review all intermediate rulings made by the Court of

Chancery in the case below. *See* 10 *Del. C.* § 144.”); *Robinson v. Meding*, 52 Del. 578, 582, 163 A.2d 272, 274 (Del. 1960).

The notice of appeal of the final judgment permits the Court to review all intermediate rulings, including the sanctions ruling at issue in the case.

B. The Chancery Court Abused its Discretion in Awarding Smash its Costs and Attorneys’ Fees in Connection with the Discovery Order.

Basic discovery principles are applicable to trade secret cases as with any other case, but with one additional twist that is critical to the appeal of this issue:

Where, as here, a plaintiff in a trade secret case seeks to discover the trade secrets and confidential proprietary information of its adversary, the plaintiff will normally be required first to identify with reasonable particularity the matter which it claims constitutes a trade secret, before it will be allowed (given a proper showing of need) to compel discovery of its adversary’s trade secrets.

Engelhard Corp. v. Savin Corp., 505 A.2d 30, 33 (Del. Ch. 1986) (granting defendant’s motion for protective order). *See Xerox Corporation v. International Business Machines Corporation*, 64 F.R.D. 367, 371-72 (S.D.N.Y. 1974); *Struthers Scientific & Int. Corp. v. General Foods Corp.*, 51 F.R.D. 149, 154 (D. Del. 1970); *Data Gen. Corp. v. SCI Sys.*, 1978 WL 22033, at *1 (Del. Ch. Nov. 27, 1978).

In *IQVIA, Inc. v. Veeva Sys.*, the United States District Court, relying upon *Engelhard*, found two responses to interrogatories to be insufficient to identify with reasonable specificity the trade secrets the plaintiff was seeking to protect. In answer to Interrogatory No. 33, IQVIA gave the response:

IQVIA's Complaint makes clear the basis for the filing of this Action, and the factual statements contained in the Complaint relating to Veeva's theft of trade secrets are incorporated in this response. IQVIA further incorporates its responses to Interrogatory Nos. 16, 19, 20, 21, 22, 25, 26 and 27. Further, Veeva disclosed, among other things, information to IQVIA regarding Veeva's data management practices, the design of Veeva's CRM and MDM applications, the structure and operation of Veeva technical support and development processes, Veeva's staffing practices, and the integration of employees within facilities across functions and roles during the course of the various discussions among the representatives of Veeva and IQVIA from late 2013 through 2016, some of which were confirmed by the Ernst & Young Assessment.

IQVIA, Inc. v. Veeva Sys., 2022 WL 17990836 (D.N.J. Dec. 29, 2022).

Finding this response insufficient, the court reversed the recommendation of the special discovery master, and ordered IQVIA to

fully respond, with precision and specificity to Veeva's Interrogatory Nos. 33 and 35 in support of its misappropriation claims. This will put Veeva on notice of the nature of its claims and enable the Court to determine the proper scope of discovery and focus on discovery central to the parties claims and defenses.

Id. at *34-35.

As in *IQVIA*, Smash's responses to interrogatories were both vague and consisted of categories of secrets rather than the secrets themselves. The Chancery Court's summary dismissal of Defendants' Motion for Protective Order gives no reason why it believed that the disclosure was adequate. Clearly, it was not, and the Court's failure to give a reason as to why it believed the disclosures were adequate is itself an abuse of discretion. A0425-426. The Court also expressed its opinion

that the motion “was more tactical than warranted. It treats the case as if the only claim, and even the main claim was for trade secrets.” *Id.* Neither *Engelhard* nor *SmithKline Beecham* turned on whether the trade secrets claim was the only, or even the lead, claim in the lawsuit.

Engelhard Corp. sued Savin Corp. for breaching a confidentiality agreement and for violations of the Delaware Trade Secrets Act. *Engelhard supra*, 505 A.2d at 31. *SmithKline Beecham* involved a DUTSA claim filed against it by Merck and SmithKline Beecham’s counterclaims for interference with contract or prospective business relations. *SmithKline Beecham Pharms. Co. v. Merck & Co.*, 766 A.2d 442 (Del. 1999). Thus, the court’s assumption, without any evidence or explanation, that the motion was “tactical” because there were other claims, constitutes both an abuse of discretion and an error of law.

CONCLUSION

For the reasons and authorities set forth in the Opening and Reply Briefs of Appellant Kevin McLaren, Appellant respectfully requests that the Court reverse the denial of McLaren's request for attorneys' fees, and that it reverse its decision denying Defendants' Motion for Protective Order and sanctioning Defendants for failure of discovery.

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