

No. 25-____

IN THE
Supreme Court of the United States

TRINSEO EUROPE GMBH,
Petitioner,
v.

KELLOGG BROWN & ROOT, L.L.C.; STEPHEN HARPER,
also known as STEVE HARPER; STEVE HARPER
CONSULTING, INCORPORATED; POLYCARBONATE
CONSULTING SERVICES, INCORPORATED,
Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Trinseo Europe GmbH sued under the Defend Trade Secrets Act alleging the theft of 10 trade secrets, all relating to one system that has always been licensed as an integrated package. Trinseo offered trial testimony supporting \$130 million in damages but did not artificially divide up that valuation per trade secret. After trial, a jury found misappropriation of some but not all the alleged secrets (four of 10) and awarded some but not all the alleged damages—approximately \$77 million of the \$130 million requested.

Importing a patent-law practice that it conceded was an “imperfect overlay,” the district court vacated the damages award in a post-trial judgment as a matter of law ruling. App.86. It determined that because Trinseo had not undertaken “strict apportionment,” App.52-53—apportioning damages per trade secret or prescribing a methodology to do so—the jury had *no* legally sufficient basis to attribute damages to the four misappropriated secrets it ultimately found. The Fifth Circuit took issue with the district court’s labeling of its approach as “strict,” but endorsed the same position: Absent a per-trade-secret apportionment showing or methodology, a damages award will amount to “speculation” with “no basis” as a matter of law. App.18, 23. Trinseo thus received no damages, not \$77 million, for the proven theft of its secrets.

The question presented is:

Whether, where a jury finds misappropriation of some but not all alleged trade secrets, the jury’s damages award has no legally sufficient basis unless the trial evidence apportioned damages per trade secret or prescribed a methodology to do so.

**PARTIES TO THE PROCEEDING AND
CORPORATE DISCLOSURE STATEMENT**

Petitioner Trinseo Europe GmbH was the plaintiff in the U.S. District Court for the Southern District of Texas and the appellant in the U.S. Court of Appeals for the Fifth Circuit. Respondents Kellogg Brown & Root, LLC (“KBR”), Stephen Harper, Steve Harper Consulting, Inc., and Polycarbonate Consulting Services, Inc. were defendants and appellees below.

Trinseo Europe GmbH is a wholly owned subsidiary of Trinseo PLC, a publicly traded company with the ticker symbol TSE. No publicly held corporation owns 10% or more of Trinseo PLC’s stock. Investment funds associated with M&G PLC, a publicly traded company on the London Stock Exchange, own 10% or more of Trinseo PLC’s stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Trinseo, S.A. v. Harper, et al.*, No. 20-0478 (S.D. Tex.) (post-trial motion for judgment as a matter of law on damages granted on September 11, 2024; judgment entered on September 11, 2024; motion for new trial on damages denied on November 13, 2024).
- *Trinseo Eur. GmbH v. Kellogg Brown & Root, L.L.C., et al.*, No. 24-20460 (5th Cir.) (judgment affirmed on January 21, 2026; petitions for rehearing and rehearing *en banc* denied on March 4, 2026).

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PETITION FOR A WRIT OF CERTIORARI

Trinseo Europe GmbH (“Trinseo”) respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit’s opinion (App.1-41) is reported at 165 F.4th 399. The district court’s opinion granting judgment as a matter of law on damages to Respondents and vacating the jury’s damages award (App.43-104) is unreported.

JURISDICTION

The Fifth Circuit entered its judgment on January 21, 2026 (App.1), and denied rehearing and rehearing *en banc* on March 4, 2026 (App.42). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Defend Trade Secrets Act, 18 U.S.C. § 1836(b)(3)(B), provides that “[i]n a civil action brought under this subsection with respect to misappropriation of a trade secret, a court may ... award—

- (i) (I) damages for actual loss caused by the misappropriation of the trade secret; and
- (II) damages for any unjust enrichment caused by the misappropriation of the trade secret that is not addressed in computing damages for actual loss; or
- (ii) in lieu of damages measured by any other methods, damages caused by the misappropriation measured by imposition of liability for a reasonable royalty for the misappropriator’s unauthorized disclosure or use of the trade secret.”

INTRODUCTION

After years of litigation and a nearly three-week trial, a unanimous jury held Respondents liable for stealing four Trinseo trade secrets and awarded Trinseo approximately \$77 million in damages. The district court found abundant evidence of liability, but *no* evidentiary basis for a remedy. The upshot of that ruling was that a *proven* theft of multiple trade secrets led to not a single dollar in damages.

Under this Court’s settled damages principles, juries need not prove damages with “mathematical precision.” *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 590 (1974). For nearly 50 years, moreover, a “flexible and imaginative approach” has defined courts’ treatment of trade secret damages—flexibility grounded in the recognition that trade-secret owners who fall victim to theft should not be left without a remedy

simply because of the difficulties in computing the value of stolen knowledge. *University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 538-39 (5th Cir. 1974). Those difficulties are at their apex where, as here, one integrated product implicates multiple trade secrets whose per-trade-secret values cannot be neatly parsed.

The Fifth Circuit below endorsed an approach to trade secret damages that is the antithesis of flexible. Trinseo alleged the theft of 10 trade secrets, all relating to one system—its best-in-the-industry polycarbonate (“PC”) manufacturing technology. It was undisputed at trial that throughout history, PC technology has been licensed, sold, and valued as “an entire package,” not by its components *à la carte*. App.86-87. The jury found liability on some but not all of Trinseo’s alleged trade secrets—four of the 10—and awarded some but not all of Trinseo’s requested reasonable royalty and unjust enrichment damages. That jury, moreover, had been specifically instructed that any damages it awarded should “reflect the value attributable to the misappropriated technology, and no more.” C.A.App.7556. Nonetheless, the district court ruled, and the Fifth Circuit affirmed, that the \$77 million award amounted to a “guessing game” because Trinseo had not apportioned its damages on a per-trade-secret basis. App.64. That is, they required a “strict apportionment” of damages, App.52-53, as the evidentiary baseline to sustain any award. Because Trinseo’s damages estimates pertained to the entire package of PC technology, rather than individual valuations of the four trade secrets, the award was deemed infirm as a matter of law.

That “strict apportionment” overlay does not derive from the text of the Defend Trade Secrets Act

(“DTSA”), which, to the contrary, expressly contemplates both reasonable royalty and unjust enrichment damages for misappropriation. *See* 18 U.S.C. §§ 1836(b)(3)(B)(i)(II), (ii). Instead, the Fifth Circuit derived the approach from patent-law principles and decisions of the Federal Circuit. Indeed, the Fifth Circuit deepened a circuit split by aligning itself with the Federal Circuit, which has repeatedly vacated jury awards where the trial evidence attributed unapportioned value to a greater number of alleged trade secrets than were ultimately left standing. The Fifth Circuit expressly distanced itself from the Sixth and Ninth Circuits, both of which have upheld jury awards against similar apportionment critiques and taken a more flexible, deferential approach to their evidentiary bases. It also set itself apart from the Third Circuit, which has declined to recognize any categorical requirement of per-trade-secret damages apportionment. All these lower-court divisions are already well-ventilated. They have outsized commercial significance, given the predominance of trade secret claims in the Fifth and Ninth Circuits. And they are producing drastically different outcomes on near-equivalent facts—alternately precipitating the wholesale vacatur or reinstatement of jury awards—underscoring the need for this Court’s review.

Certiorari is all the more warranted because the strict-apportionment approach is neither workable nor just. Whatever the extent of the practice in patent cases, where each patent is described in a discrete patent well in advance of trial, it is a manifestly “imperfect overlay” in trade secrets cases. App.86. The line between trade-secreted and non-trade-secreted information is a jury question, and a trade-secret owner cannot know until the verdict what secrets the jury will find. That means that where, as here,

individually valuating trade secrets is not possible, the strict-apportionment approach boxes trade-secret owners into an “all-or-nothing” predicament: They need the jury to find *all* their alleged trade secrets to recover anything, or they recover nothing. App.33. The only way to avoid that predicament would be to concoct per-trade-secret valuations out of thin air, or preemptively estimate damages for permutations of secrets in the hopes that one might correspond with what the jury ultimately finds. This makes no remedial sense. It produces arbitrary windfalls for proven thieves and renders the survival of a jury award a crapshoot.

More fundamentally, many jury awards will not survive under the strict-apportionment approach endorsed below. Engaging in fine-grained parsing of the correspondence between the jury’s award and the underlying evidence deviates from how we treat the judgment of the jury in every other context, and runs roughshod over bedrock principles of deference to a jury’s reasonable inferences and damages approximations. The Seventh Amendment does not countenance plucking out trade secret jury awards for this uniquely searching scrutiny. This Court should grant the petition and reverse.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Trinseo owns trade-secreted intellectual property, including drawings, designs, and specifications, pertaining to its “best in the industry” manufacturing process for polycarbonate—a tough, synthetic thermoplastic used to create everyday items including eyeglass lenses, light fixtures, and medical devices. App.2-3, 44.

The Dow Chemical Company (“Dow”), the prior owner of Trinseo’s PC technology, first began developing its novel manufacturing process in the 1950s, investing hundreds of millions of dollars to refine the process over 15 years. C.A.App.9587:23-9588:17, 9611:22-9613:20, 10667:6-22, 13753:3-8. The Dow-developed process has two phases. The first is a “wet” chemical processing phase that requires five sequential stages to yield a distinctive, high-quality virgin PC “flake”—distinct from the PC powder produced by competitors. The second is a “dry” chemical compounding phase that results in extruded PC pellets that manufacturers further incorporate into their products. App.2-3.

Dow opened its inaugural PC manufacturing plant in 1985 in Freeport, Texas. App.3. It later licensed its PC technology to joint ventures, including one with LG Chemical to construct a state-of-the-art facility in South Korea—the “LG Plant”—widely regarded as the world’s finest. The LG Plant’s PC manufacturing trains produced over \$160 million in licensing fees for Dow and later Trinseo. C.A.App.11567:14-11568:9.

In 2010, Dow sold its PC business, including its intellectual property, to an entity called Styron, later renamed Trinseo. App.3.

In 2013, Respondent KBR approached Trinseo about licensing its PC technology. App.5. KBR sought to offer Chinese clients a licensing package to design, build, and operate PC manufacturing plants, but lacked the know-how and time to develop a package on its own. C.A.App.11070:11-21, 11102:21-11103:14. Trinseo, however, discontinued talks in early 2014, after it decided to cease wholesale licensing to avoid injecting more capacity into the market and driving

down long-term profitability. App.6; C.A.App.11074:4-13.

Undeterred, KBR in 2016 learned of Stephen Harper and his so-called “Tech Team” of fellow retired Dow employees. App.3, 6. Unbeknownst to Trinseo, a member of Harper’s team had stolen a trove of Dow materials regarding the LG Plant. App.4; C.A.App.10710:9-11. Also unbeknownst to Trinseo, Harper’s team had, from 2012 to 2016, used stolen drawings for the LG Plant design—marked “Dow-Confidential”—to help a Chinese company design its first PC plant. App.4-5; C.A.App.10651:20-10652:21. As Harper acknowledged, “everyone wanted LG.” C.A.App.10690:11-22. Harper and his team reaped more than \$5 million in “consulting” fees. C.A.App.11833:9-11834:24.

Needing help “to successfully deliver a working plant,” KBR partnered with Harper and his team for assistance in developing what KBR deemed its “PCMAX” licensing package. App.6-7; C.A.App.14465. KBR paid \$1.325 million for Harper’s team to prepare a PC plant preliminary design package that Harper admitted was based on the stolen drawings, brazenly sending pictures of those drawings to KBR to prove he was using the “real thing.” App.6-7; C.A.App.10722:8-12, 10881:15-24.

KBR, meanwhile, traded on Trinseo’s reputation, marketing its PCMAX package as a “Dow-type” PC technology and describing it as “related to Dow/Trinseo PC technology” that “Dow/Trinseo implemented” at the LG Plant and elsewhere. App.6-7; C.A.App.14476, 49975. Those efforts were successful. KBR sold two PCMAX packages to two Chinese companies—Cangzhou in 2017 and Pingmei in 2018—

earning nearly \$59 million. C.A.App.50158, 14104:14-14106:10.

B. Procedural Background

1. Congress enacted the DTSA in 2016 to strengthen federal protection for trade secrets, which it recognized as among “any company’s most valuable property.” H.R. Rep. No. 114-529, 114th Cong., 2d Sess. 2 (2016). The DTSA’s central purpose was to establish “a single, national standard for trade secret misappropriation with clear rules and predictability for everyone involved,” H.R. Rep. No. 114-529, at 6; S. Rep. No. 114-220, 114th Cong., 2d Sess. 14 (2016), and foster “uniformity among the States,” 162 Cong. Rec. H2032 (daily ed. April 27, 2016).

The DTSA drew largely from the Uniform Trade Secrets Act (“UTSA”), a model statute for states created in 1979 to “codif[y] the basic principles of common law trade secret protection, preserving its essential distinctions from patent law.” Unif. Trade Secrets Act, Prefatory Note, at 2 (Unif. L. Comm’n, amended 1985). Chief among those distinctions was the flexible approach to damages for misappropriation. The DTSA preserves multiple remedial options, permitting a trade-secret owner to recover not just “damages for actual loss caused” by misappropriation, but also “a reasonable royalty for the misappropriator’s unauthorized disclosure or use” of the secret and damages for “unjust enrichment caused by the misappropriation” that is not addressed in the actual loss computation. 18 U.S.C. §§ 1836(b)(3)(B).

2. In February 2020, Trinseo sued Harper and his consulting entities (“Harper Respondents”) in the Southern District of Texas, alleging misappropriation

under the DTSA and related claims. Trinseo later added Respondent KBR.

Before trial, KBR moved under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 589 (1993), to exclude Trinseo’s damages expert, Thomas Pastore, arguing that Pastore was required to but did not apportion damages per trade secret. The district court rejected the motion, paving the way for the jury to hear from Pastore. C.A.App.6140-41 n.4.

A three-week trial commenced in January 2024. Trinseo alleged misappropriation of 10 trade secrets related to its PC technology, and sought reasonable royalty and unjust enrichment damages. Pastore testified to approximately \$80 million in reasonable royalty damages from KBR, and testified that KBR and the Harper Respondents were unjustly enriched by approximately \$44.92 million and \$5.53 million, respectively. C.A.App.11826:6-11827:5, 11831:20-11834:24; *see also Lucent Tech., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1324 (Fed. Cir. 2009) (reasonable royalties reflect what defendant wrongfully obtained, based on the supposed result “had [the plaintiff and defendant] successfully negotiated an agreement just before infringement began”); *Motorola Sols., Inc. v. Hytera Commc’ns Corp.*, 108 F.4th 458, 471, 490 (7th Cir. 2024) (unjust enrichment reflects a thief’s illegal gain measured by “defendant’s profits caused by the misappropriation” of the secret).

After Trinseo rested, Respondents moved for judgment as a matter of law (“JMOL”) pursuant to Federal Rule of Civil Procedure 50(a), again contending that Trinseo was required to but did not apportion damages per trade secret. C.A.App.12679:23-12680:7, 7340, 7383-84, 7424-29. The court denied the motion. C.A.App.12685:24-25.

Respondents then presented witnesses, including their own damages expert, David Leathers. Leathers criticized Pastore's computations and estimated reasonable royalty damages for all the alleged secrets to fall instead between \$3 and \$4.3 million. C.A.App.13683:14-16.

Agreed-upon jury instructions prescribed that any reasonable royalties “must reflect the value *attributable to the misappropriated technology, and no more,*” and that “[w]hen determining a Defendant's net profits for unjust enrichment, you should consider *only profits caused by trade secrets misappropriated by the Defendant.*” C.A.App.7556-57 (emphases added). Jurors were advised that damages “must be based on evidence and not on speculation or guesswork” and that the jury was “to determine an amount that will fairly compensate each party for the harm it has proven.” C.A.App.7525-26. Although KBR had proposed an instruction that damages be awarded on a per-trade-secret basis—contending yet again that Trinseo was required to but did not apportion damages per trade secret—the court “overruled” the objection. C.A.App.6484-87, 7557-58, 13392-93.

After nearly three days of deliberations, the jury returned a verdict. The jury found four of the 10 alleged secrets, and found all four had been misappropriated.¹ App.9, 45; C.A.App.7546, 7549-52. The jury awarded Trinseo approximately \$77 million in damages: \$50 million in reasonable royalty

¹ The four trade secrets were the (i) process control strategy and concepts and control algorithms; (ii) phosgene reactor design and associate pressure vessel containment; (iii) continuous plug flow oligomerization reactor inside pressure vessel containment (with static mixer design); and (iv) steam devolatilization process. All relate to the “wet side” of the PC manufacturing process.

damages from KBR, \$21.21 million in unjust enrichment damages from KBR, and \$5.48 million in unjust enrichment damages from the Harper Respondents—some but not all of Pastore’s estimates of \$80 million, \$44.92 million, and \$5.54 million, respectively. App.9, 45; C.A.App.7557-58.

Nearly eight months later, on September 11, 2024, the district court granted Respondents’ post-trial JMOL motion on damages pursuant to Rule 50(b). App.43-44. In granting JMOL on this go-round, notwithstanding its prior decisions to allow the matter to go to the jury, the district court emphasized that the jury’s liability findings were “clearly supported” by “an abundance of evidence.” App.50. It entered a permanent injunction against any future use of the trade secrets, finding that “there was certainly evidence that [Trinseo’s] trade secrets had value” and that Respondents had “caused ... irreparable injury” to Trinseo. App.100, 105. On damages, the district court acknowledged that the Fifth Circuit had not yet “encountered a case involving apportionment in trade secret cases.” App.58. Nonetheless, it was persuaded by the “policies articulated by ... Federal Circuit cases” to apply patent-law apportionment principles to the trade-secrets context, and interpreted them for the first time to specifically require “evidence that apportionments value per trade secret” or a methodology for the jury to do so. App.58-60, 64, 88. It thus vacated the \$77 million award as “speculative and unsupported”—ignoring evidence that supported that figure, *see infra* n.3—and entered a take-nothing judgment. App.88. Trinseo moved for a new trial on damages in light of the ruling, which the district court summarily denied on November 13, 2024. C.A.App.8422.

3. The Fifth Circuit affirmed. It similarly acknowledged that it had “never explicitly adopted patent law’s apportionment principles in the trade secret context.” App.13. It too proceeded to import those principles and interpreted them for the first time to require a trade-secret owner to “individually value each alleged trade secret” (or the specific jury-found group of secrets) or “provide a methodology for the jury” to do so.” App.18 n.10. It too divined this approach from “persuasive” Federal Circuit decisions vacating jury awards upon purported failures to apportion damages per trade secret, and professed itself unmoved by contrary decisions of the Sixth and Ninth Circuits. App.15. The Fifth Circuit sought to minimize the district court’s own characterization of its approach as “strict apportionment,” dismissing the “passing use of the term” as having been employed just “twice.” App.17-18; *but see* App.52 (district court noting, then refuting, contention that “strict apportionment is not required”); App.53 (noting, then refuting, questions as to the “applicability” of “strict apportionment” to trade secrets); App.57, 64, 88-89 (describing its conception of apportionment as “strictly mandated,” “restrictive,” and “harsh”). But it squarely endorsed the same strict approach: Absent the aforementioned apportionment, any damages award amounts to mere “speculation” with “no basis” as a matter of law. App.18, 23.

REASONS FOR GRANTING THE PETITION

The decision below arises out of a post-trial, post-verdict JMOL ruling that vitiated the jury's damages determination wholesale, presenting a uniquely clean vehicle to resolve an important issue of law that has divided lower courts. An exhaustive trial produced "an abundance of evidence" of theft. App.50. Clear statutory language entitled Trinseo to reasonable royalty and unjust enrichment damages, both of which the jury awarded. And agreed-upon jury instructions limited the jury's award to only those damages that reflected "the value attributable to the misappropriated technology, and no more." C.A.App.7556. The jury did its part. Yet the district court, which disputed none of these points, zeroed out the jury's approximately \$77 million award based on Trinseo's purported failure to apportion damages at trial.

The district court based its ruling on a strict-apportionment approach drawn from patent law. At a high level, that principle means that any damages awarded should reflect the value attributable to the misappropriated technology—just as the jury here was instructed. But the courts below went substantially further, divining an inflexible command to present a showing or methodology of per-trade-secret damages. They held that, absent such a showing or methodology, any damages award is bereft of a legally sufficient basis whenever the jury, as here, finds some but not all of the alleged secrets. By this token, Trinseo was out of luck because the jury ultimately found four misappropriated trade secrets while Trinseo's damages model included more than four.

Whatever the merits of strict apportionment in the patent context—where every patent is described, formally qualified, and known well before trial—it

does not translate to the trade-secrets context, where what is and is not a trade secret is typically determined by the jury. Making jury awards rise or fall on the happenstance of whether damages valuations *at trial* corresponded to the precise number and permutation of trade secrets ultimately found by the jury *after trial* makes little sense. It is all the more confounding where, as here, multiple secrets often relate to a single, integrated system whose value *cannot* be apportioned per trade secret. And it defies the commands of the Seventh Amendment, ratcheting up the “basis” ordinarily required to sustain a jury’s reasonable inferences and damages approximations, to which courts have long deferred. This Court should rectify the arbitrary and aberrational approach adopted below before it metastasizes further.

I. The Courts of Appeals Are Divided Over Whether Trade Secret Damages Must Be Apportioned on a Per-Trade-Secret Basis

The decision below expands and sharpens a circuit split over the apportionment of damages in cases involving multiple trade secrets. That well-documented disarray reflects differing approaches to examining jury damages awards in trade-secret cases nationwide, including in districts with some of the heaviest trade-secret dockets. Those differing approaches, moreover, can be determinative of the very viability of jury awards for trade-secret owners who rightfully take trade secret claims to trial and win, yet whose damages valuations at trial may not have neatly corresponded to the trade secrets ultimately found by the jury.

1. The Fifth Circuit below endorsed the strictest view of apportionment on the map. Both the Fifth Circuit and district court squarely imported patent-

law apportionment principles to require owners of trade secrets to “individually value each alleged trade secret” or “provide a methodology for the jury to do so.” App.18 n.10; *accord* App.64 (requiring “evidence that apportions value per trade secret” or a “methodology” for the jury to “do so itself”). By this view, whenever a jury finds liability on some but not all the alleged trade secrets, a damages award can only be sustained upon evidence that “allocate[s] value per trade secret” and thereby allocates value to the particular group of jury-found secrets. App.83; *see also* App.84 n.24 (faulting Trinseo’s expert for not parsing out reasonable royalty damages based on “individual trade secrets”); App.90 (requiring “evidence apportioning damages per trade secret”); App.100 (“Trinseo failed to pinpoint that value on a per-secret basis”). Absent a per-trade-secret showing or methodology, the Fifth Circuit reasoned, the jury is left to engage in “speculation” and any damages award would have “no basis” as a matter of law. App.18, 23; *accord* App.64, 83 (“the jury is left to play a guessing game” and any award would have “no evidentiary basis”).

The Fifth Circuit quibbled with labeling this approach “strict apportionment,” brushing off the district court’s “passing use” of that very label. App.18. The district court, however, meant what it said. The jury here found liability on four of the 10 trade secrets Trinseo alleged, and awarded damages of approximately \$77 million of the \$130 million Trinseo requested. Yet the district court jettisoned that award wholesale, deeming this “harsh consequence” compelled as a matter of law. App.88. It maintained that Trinseo was required to, but did not, “place a dollar value to each individually alleged trade secret” and each secret’s “percentage of the total value of the PC package.” App.51. It categorically required such

apportionment even as it *conceded* that it was all but impossible here, where the trade secrets were never sold individually. App.86. It then concluded that there was *no* legally sufficient evidentiary basis, even drawing reasonable inferences in favor of the verdict, that could sustain the damages award.

The district court below subjected the jury's chosen award to a near-mathematical level of scrutiny. When Trinseo claimed that the jury *did* apportion damages by awarding some but not all the estimated damages, accounting for the reduction from 10 alleged secrets to four, the district court disagreed. The district court reasoned that, even if so, there was no "*convincing explanation* for why the jury reduced liability for the claimed trade secrets *by 60%* (from 10 to 4 secrets) yet reduced the requested damages figure *by only 37.5%*," not "*by 60%*." App.53-54 & n.8 (emphases added). In effect, it deemed the apportionment insufficiently proportional by parsing percentage deltas.

Nor did it stop there: The district court further opined that even if a jury were to "award[] 1/3 of the damage figure after finding liability on only one out of three alleged trade secrets," this "might be fine if there were testimony that each trade secret was equally valuable *but would be unsupportable absent such evidence*." App.64-65 (emphasis added). By the district court's logic, even a *proportional* reduction might not pass muster unless the evidence attributed *equal* value per trade secret. Vanishingly few jury awards could survive the exacting level of scrutiny applied by the district court and affirmed by the Fifth Circuit.

2. The Fifth Circuit expressly aligned itself in this regard with the Federal Circuit. In decisions that the Fifth Circuit found "persuasive," the Federal Circuit has "vacated damages awarded by juries due to failure

to apportion in trade secret cases.” App.13, 15. In *Texas Advanced Optoelectronic Solutions, Inc. v. Renesas Electronics America, Inc.*, 895 F.3d 1304, 1310 (Fed. Cir. 2018) (“TAOS”), for instance, a jury awarded damages for three misappropriated trade secrets, but the Federal Circuit affirmed only one of the three liability findings. The Federal Circuit noted that the plaintiff’s expert had “assigned all profits to the misappropriation of all [three] trade secrets” and “did not explain which of the trade secrets contributed to what amount of profit to be disgorged” or “distinguish among [the three] grounds.” *Id.* at 1317. “On this record,” the Federal Circuit reasoned, there was “no basis” to conclude that the sole remaining trade secret “support[ed] the entire award.” *Id.*

Similarly, in *O2 Micro International Ltd. v. Monolithic Power Systems, Inc.*, 221 Fed. App’x 996 (Fed. Cir. 2007), the Federal Circuit summarily affirmed the district court’s vacatur of a jury’s damages award and JMOL ruling for the defendant. The plaintiff’s expert had offered an unapportioned unjust-enrichment figure for 11 asserted secrets. The jury found five secrets to have been misappropriated but awarded unjust enrichment damages for just one, so-called “Trade Secret 1.” *O2 Micro Int’l Ltd. v. Monolithic Power Sys., Inc.*, 399 F. Supp. 2d 1064, 1076 (N.D. Cal. 2005), *aff’d per curiam*, 221 Fed. App’x 996 (Fed. Cir. 2007). The district court vacated the award for lack of damages evidence specific to Trade Secret 1. It acknowledged testimony describing Trade Secret 1 as the “heart” of the technology and, in the context of all 11 alleged secrets, as driving 75-90% of the “importance.” *Id.* at 1077. But it dismissed such testimony as “fail[ing] to provide the necessary reasonable basis for the jury to apportion unjust enrichment damages.” *Id.* As the district court concluded,

and the Federal Circuit agreed, the evidence as to Trade Secret 1 did not sufficiently justify “award[ing] *seventy-five percent* of the [requested] amount of unjust enrichment damages for all trade secrets” to Trade Secret 1 alone. *Id.* at 1076-77 (emphasis added).

3. By contrast, other circuits have adopted a more flexible, deferential approach to damages awards in cases similarly involving multiple trade secrets and distanced themselves from *TAOS* and *O2 Micro*. The Sixth Circuit in *Caudill Seed & Warehouse Co. v. Jarrow Formulas, Inc.*, 53 F.4th 368, 375, 377, 388-90 (6th Cir. 2022), declined to disturb an award after the jury found misappropriation on four of six alleged trade secrets. Although the plaintiff’s damages model assumed misappropriation of all six alleged secrets, the Sixth Circuit declined to overturn the award as a matter of law. Because the jury had downward-adjusted from the expert’s unapportioned estimate, the Sixth Circuit saw “no mismatch between the expert’s testimony and the ultimate damages award.” *Id.* at 393. Emphasizing its “broader view” of the “evidence that can support a trade-secrets damages award,” the Sixth Circuit underscored the premium on “flexib[ility].” *Id.* at 389-90; *see also id.* at 390 (refusing to “import ... rigid reasoning into the malleable context of trade secrets”). The Sixth Circuit also highlighted testimony about one trade secret that particularly drove Caudill’s research and development expenses—testimony that gave the jury more “options” in valuating that one secret and in reaching its award. *Id.* at 389-90.

Meanwhile, the Ninth Circuit in *EchoSpan, Inc. v. Medallia, Inc.*, reversed and reinstated a jury’s award after it was initially vacated for a purported failure to apportion per-trade-secret damages. No. 24-4751,

2025 WL 3046753, at *1 (9th Cir. Oct. 31, 2025). EchoSpan went to trial on nine alleged trade secrets pertaining to one integrated product, and requested unjust enrichment damages totaling \$23.4 million. *Id.* at *2. The jury found liability on one of the nine, and awarded \$11.7 million—roughly half the requested award. The district court then granted JMOL to Medallia, finding that there was no evidence permitting the jury to apportion value to the one secret and excise the value of the eight non-secrets.

Respondents below had invoked *EchoSpan*’s district court ruling as presenting a case “exactly like” Trinseo’s, C.A.Dkt.134 at 30, but abandoned the analogy after the Ninth Circuit reversed that very ruling—reinstating the award the district court had wrongly vacated. The Ninth Circuit held that the district court had “erred in assuming the jury did not apportion.” *EchoSpan*, 2025 WL 3046753, at *1. Emphasizing that courts must draw all reasonable inferences in favor of the verdict and that awards need not be mathematically precise, the Ninth Circuit held that the \$11.7 million award could be viewed as the jury’s effort “to approximate the share of total unjust enrichment attributable to the misappropriat[ed]” secret. *Id.* at *2. The record, moreover, included total unjust-enrichment evidence, testimony about secrets that were the main drivers of value, and explanations of how the alleged secrets contributed to and interacted within the product. *Id.* As the Ninth Circuit explained, “the drawing of legitimate inferences from the facts are jury functions, not those of a judge,” so the jury “did not have to either *completely* discount or *completely* credit” that testimony; it could reasonably have come out in between. *Id.* (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)) (emphases added).

The Third Circuit has also rejected across-the-board per-trade-secret apportionment. In *Sabre GLBL, Inc. v. Shan*, 779 Fed. App'x 843 (3d Cir. 2019), the Third Circuit dismissed the argument that trade-secret owners must “prove the amount of damages attributable to each trade secret ... allegedly misappropriated,” and declined to read *TAOS* to establish otherwise. *Id.* at 852.

The cases on the more flexible side of the split arise against the backdrop of foundational principles of deference to jury damages determinations. As this Court has made clear, juries need not prove damages with “mathematical precision” and “must be allowed a fair latitude to make reasonable approximations.” *Sea-Land Servs.*, 414 U.S. at 590; *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) (“[I]t will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.”). Courts routinely hold in trade-secret cases that damages approximately “within the range permitted” by the evidence—though they may not precisely accord with any single estimate or piece of testimony—fall within the jury’s province. *Russo v. Ballard Med. Prods.*, 550 F.3d 1004, 1018 (10th Cir. 2008) (Gorsuch, J.); *see also id.* (juries often “f[i]nd the truth to lie somewhere in between ... extremes suggested by the evidence”). Any uncertainty going “to the extent of the damage,” not “the fact of damage,” should not preclude an award, lest this approach “deny all relief to the injured person, and thereby relieve the wrongdoer.” *Story Parchment*, 282 U.S. at 562-63 (emphases added); accord Melvin F. Jager, 2 Trade Secrets Law § 7:20 & n.68 (Oct. 2021) (“Where the fact is certain, the uncertainty as to the amount will not prevent damages from being assessed.”).

What is clear is that the same cadre of cases is being consistently marshaled for and against strict apportionment. *E.g.*, App.13-22 (analogizing to *TAOS* and *O2 Micro*; distinguishing *Caudill* and *EchoSpan*); *Caudill*, 53 F.4th at 389 (distinguishing *TAOS* and *O2 Micro*); *EchoSpan*, 2025 WL 3046753, at *2 (distinguishing *O2 Micro*); *Sabre GLBL*, 779 Fed. App'x at 852 (distinguishing *TAOS*); *see also EchoSpan, Inc. v. Medallia, Inc.*, No. 22-CV-01732-NC, 2024 WL 3431337, at *8-9 (N.D. Cal. July 2, 2024) (distinguishing *Caudill*; analogizing to *O2 Micro*). The lines of demarcation are widely recognized. Consequently, juries can expect verdicts to be heeded in some districts and nullified in others, with courts vacillating from broad deference to near-mathematical scrutiny of their evidentiary bases. With near-equivalent facts producing drastically different outcomes based on nothing more than the forum of suit, the resulting uncertainty breeds gamesmanship and—as this case demonstrates—profoundly arbitrary and unjust results. *See infra* Part II.

The circuits implicated, moreover, have outsized commercial significance, given the predominance of trade secret claims in the Fifth and Ninth Circuits. According to one study of trade secret litigation between 1990 and 2019, “[f]ederal district courts in Texas alone were responsible for nearly 20% of trade secret decisions,” and “following the enactment of the DTSA California and Texas saw the most DTSA filings.” Jeffrey Mordaunt, Neil Eisgruber & Joshua Swedlow, *Trends in Trade Secret Litigation Report 2020*, Stout, LLC, 10, 13 (2020); *see also* Ivan Moreno, *Trade Secret Filings Hit Record High in 2025, Report Finds*, Law360 (Jan. 28, 2026), <https://www.law360.com/articles/2433237/trade-secret-filings-hit-record-high-in-2025-report-finds> (C.D. Cal. “lead[s] all [trade

secret] court filings from 2023 through 2025”). Meanwhile, trade-secret cases continue to climb. In 2025 alone, 1,500 cases were filed in federal district courts, Lex Machina, *Trade Secret Litigation Report 2026*, 5 (LexisNexis 2026), <https://law.lexmachina.com/help/published-reports>, as the nation’s inventors and intellectual property owners increasingly fend off foreign threats that prioritize theft over innovation. At this crucial time, only this Court is well-positioned to bring the uniformity and predictability that Congress intended with the DTSA to this commercially vital area of law.

II. The Decision Below Is Wrong On the Merits and Raises Issues of Exceptional Importance

The precedent set below is also deeply problematic. Strict apportionment renders the viability of trade secret damages awards contingent on an inflexible, highly specific evidentiary baseline. Satisfaction of that baseline, moreover, turns on the happenstance of whether a product or system is even amenable to *à la carte* valuations and whether the damages evidence at trial neatly corresponded to the trade secrets ultimately found by the jury. This regime not only sharply curtails congressionally-envisioned remedies for the proven theft of trade secrets, but it curtails them arbitrarily. More fundamentally, it invites intrusive judicial second-guessing of jury verdicts that flouts the commands of the Seventh Amendment and bedrock principles of deference.

A. A Strict-Appportionment Approach to Trade Secret Damages Is Unworkable

The DTSA lends no support for conditioning recovery of damages on strict apportionment. The statute

expressly provides for both reasonable royalty and unjust enrichment damages for proven misappropriation. *See* 18 U.S.C. §§ 1836(b)(3)(B)(i)(II), (ii). Here, Trinseo established misappropriation, proved that its trade secrets had value, and was awarded both types of damages envisioned by the statute. Those damages were then gutted by the Fifth Circuit’s engrafting of a stringent limitation that Congress did not enact.

The Fifth Circuit and district court instead drew support for their strict-apportionment rule from “patent law cases” and “policies articulated by the Federal Circuit.” App.12, 88. But whatever the merits of importing the general patent-law apportionment concept² that damages “must reflect the value attributable to the infringing features of the product, and no more,” *Finjan, Inc. v. Blue Coat Systems, Inc.*, 879 F.3d 1299, 1309-10 (Fed. Cir. 2018), categorical imposition of a strict-apportionment requirement is a poor fit for the trade-secrets context. *See* App.86 (“Patent law is perhaps an imperfect overlay.”).

Patents are public, discrete, and defined through a formal process. “[T]o receive patent protection, any claimed invention must be novel ... nonobvious ... and fully and particularly described.” *Bilski v. Kappos*, 561 U.S. 593, 609 (2010); *see also* 2 Callmann on Unfair Competition, Trademarks & Monopolies § 14:27 & n.52 (4th ed.). Trade secrets, by contrast, protect a broader range of technologies, covering commercially

² Even in the patent context, courts have “never required absolute precision in applying the principles of apportionment.” *Bio-Rad Labs, Inc. v. 10X Genomics Inc.*, 967 F.3d 1353, 1377 (Fed. Cir. 2020); *see also, e.g., Pavo Sols. LLC v. Kingston Tech. Co.*, 35 F.4th 1367, 1380 (Fed. Cir. 2022) (“[W]hen a sufficiently comparable license is used as the basis for determining the appropriate royalty, further apportionment may not necessarily be required.”).

valuable information that is not publicly known given the required efforts to maintain secrecy. Because trade-secret owners define trade secrets based on what they view as worth protecting, the contours are less ascertainable. The dividing line between trade secrets and non-secrets—unlike that between patented and non-patented features—is ordinarily a jury question, clarified through litigation and settled only upon the jury’s verdict. *See* Kevin McElroy & Lindsey Fisher, *Trends in Trade Secret Litigation Report Volume 3*, Stout, LLC, 23 (2024) (42% of cases studied included multiple types of trade secrets, including some that “overlap”).

Those features underscore that a strict-apportionment approach carries, as acknowledged below, inordinately “harsh consequence[s]” in trade secrets cases. App.88. Given the less ascertainable bounds of a trade secret, it is not at all uncommon for what the company deems protected to deviate from what the jury finds. Trade-secret owners are particularly at risk of facing the predicament where the jury finds some but not all of the alleged trade secrets. And because it is unknowable until a verdict which secrets a jury will find, the damages evidence they present at trial will often not correspond precisely to the number and permutation of jury-found secrets.

These complexities are only compounded by the fact that “[d]amages in trade secrets cases are difficult to calculate.” *Mid-Michigan Computer Systems, Inc. v. Marc Glassman, Inc.*, 416 F.3d 505, 510 (6th Cir. 2005). Because trade secrets derive value from their confidentiality, owners rarely license them at all—and do so even more rarely when the trade secrets are embedded within an integrated system or process. Here, even the district court recognized that “in the

industry, the *entire PC package* ... was the product.” App.86 (emphasis added). “[I]t was not ten individual trade secrets that were misappropriated” but rather “an entire PC manufacturing plant design,” and “PC packages are purchased or licensed in their entirety,” not through “sales of individual trade secrets within the package.” *Id.* Even KBR’s own expert knew of no contrary example. C.A.App.13723:1–8. Yet strict apportionment would dictate that victims of theft undertake the often-impossible exercise of retroactively isolating per-trade-secret values even where, as here, the market values the secrets as a package. See, e.g., *EchoSpan*, 2025 WL 3046753, at *2 (alleging multiple secrets pertaining to one “360-degree review product”). Requiring evidence *that does not exist* is problematic on its face. It also flies in the face of the “flexible and imaginative approach” courts have long taken to trade secret damages—an approach rooted in the recognition that “each case [should be] controlled by its own peculiar facts and circumstances,” rather than subject to categorical dictates. *University Computing Co.*, 504 F.2d at 538 (citation omitted).

Trinseo’s “all-or-nothing” predicament, App.33—where it had to prevail on everything or recover nothing—was thus a predicament of the lower courts’ creation, not its own. Trinseo bundled its damages for the PC package as a whole not because of some strategic “gamble,” as the Fifth Circuit suggested, but because of undisputed market realities about how PC technology is licensed and purchased. *Id.* The putative alternative—ginning up per-trade-secret valuations in the face of those realities—would have run headlong into *Daubert* reliability issues. At bottom, there is virtually nothing trade-secret owners can do to avoid an “all-or-nothing” predicament. They cannot see into the future and tailor their damages

evidence to secrets the jury will later find. They cannot alter market realities of their product. Even if they wanted to whittle down the number of trade secrets they allege, or gamble on subsets of secrets a jury might ultimately find—for instance, proffering one expert to speak to how trade secrets 1, 3, and 5 were value-drivers of the product, and another to speak to trade secrets 2, 4, and 6—these choices would remain fraught with risk. Any jury’s deviation from that number or permutation of secrets could still, under the Fifth Circuit’s approach, leave an award at risk and consequent theft unpunished. Moreover, proffering multiple narratives on damages to preemptively account for multiple potential verdicts would generate confusion, muddy the presentation of evidence, and needlessly prolong trials.

Nor is implementation of strict apportionment at all straightforward. The Fifth Circuit’s rigid approach demands correspondence between the trade secrets valuated and the trade secrets ultimately found, whereby damages for *four* secrets can only be sustained by valuations corresponding to those four secrets, while valuations of *more than four* render any award speculative. But countless variations will abound. What if there were valuations as to *four* secrets, and the jury found *three* secrets but awarded an inexplicable amount untethered to the valuations? What if there were valuations available as to *three* secrets, but the jury found *four* and awarded proportionally more than the three valuations combined? What if the plaintiff provided valuations as to *two* secrets, the defendant proffered that *two other* secrets had zero value, and the jury found *four* secrets and attributed value to all four? What if there were valuations of four secrets and the jury found four but included a different fourth secret? Ultimately, per-

trade-secret valuations do not ensure close correspondence between the evidence and the award, and conversely, such correspondence can be gleaned absent valuations of every secret. More broadly, juries' thought processes are not readily decipherable—precisely why courts have long considered jury verdicts through a more flexible lens, rather than micromanaging their inputs or parsing their outputs.

At bottom, the strict-apportionment approach is neither workable nor just, and this Court should not hesitate to correct course. Drawing on an inapt analogy to patent law, it portends drastic consequences for proven victims of trade secret theft and substantial windfalls for proven thieves who profit from stolen knowledge. This is not a coherent regime. Because there is little a trade-secret owner can do *ex ante* to ensure that damages evidence corresponds to the number and permutation of trade secrets later found by the jury, strict apportionment effectively leaves the very prospect of recovering damages to fate, contravening the congressional intent behind the DTSA. The losers are American companies—companies that invest heavily to innovate and develop valuable technologies to benefit consumers and create jobs—who pursue trade-secret thieves in court, prevail in hard-fought trials, and secure damages from a jury only to see them nullified. The only winners are trade-secret thieves who are incentivized to steal trade secrets with impunity. No remedial purpose is served by permitting the decision below to stand and perpetuate still more arbitrary results.

B. The Decision Below Invites Aberrational Intrusions on the Province of the Jury

More fundamentally, the strict-apportionment approach invites fine-grained judicial parsing of jury determinations and their underlying bases that is fundamentally at odds with our legal traditions and the commands of the Seventh Amendment. By ratcheting up the evidentiary baseline to sustain jury damages awards, it sets a markedly low bar to overturn them—and threatens the overturning of any number of jury damages awards issued, as here, after diligent consideration by properly-instructed juries.

As this Court has said, “[t]he right of trial by jury is of ancient origin, characterized by [William] Blackstone as ‘the glory of the English law’ and ‘the most transcendent privilege which any subject can enjoy.’” *Dimick v. Schiedt*, 293 U.S. 474, 485 (1935). The Seventh Amendment commands that “[i]n Suits at common law, ... the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” U.S. Const. amend. VII.

Indeed, respect for jury pronouncements is so engrained that courts have cautioned against questioning the award even where verdicts are contradictory. *See, e.g., McElrath v. Georgia*, 601 U.S. 87, 97 (2024) (“[I]nconsistency in a verdict is not a sufficient reason for setting it aside.”); *United States v. Powell*, 469 U.S. 57, 69 (1984) (upholding jury verdicts that “cannot rationally be reconciled,” acquitting defendant of predicate offense but convicting on compound offenses); *Dunn v. United States*, 284 U.S. 390, 393-94 (1932) (holding that “[c]onsistency in the verdict is not necessary” as “the verdict may have been

the result of compromise, or of a mistake on the part of the jury,” and “verdicts cannot be upset by speculation or inquiry into such matters.”). Nor do we require jury determinations to hew precisely to underlying evidence. *Cf. Russo*, 550 F.3d at 1018 (Gorsuch, J.) (juries often “f[i]nd the truth to lie somewhere in between ... extremes suggested by the evidence”). As this Court warned long ago, “courts should be slow to impute to juries a disregard of their duties” and to attempt to stand in their shoes. *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 484-85 (1933).

Against that backdrop, this Court has underscored damages assessment as a core jury prerogative—one in which juries can “make a just and reasonable estimate of the damage based on relevant data,” including “probable and inferential” evidence. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946); *see also Story Parchment*, 282 U.S. at 563 (“[I]t will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference”). Where the *fact* of damage is established, as here, juries receive “fair latitude to make reasonable approximations” of the *extent* of that damage. *Sea-Land Servs.*, 414 U.S. at 590; *see also Eastman Kodak Co. of NY v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927) (“Damages are not rendered uncertain because they cannot be calculated with absolute exactness.”).

After a three-week trial, the “attentive and thorough” jury below, App.50, saw fit to unanimously award Trinseo \$77 million in damages based on its view of the harm done to Trinseo and the wrongful profits Respondents reaped. The Fifth Circuit and district court, however, nullified that award. The jury

had been instructed to only award damages that reflected the value attributable to the misappropriated trade secrets, and do so based only on evidence, not speculation or guesswork. Rather than reasonably inferring that the jury heeded those instructions and that \$77 million was the value it attributed to the misappropriated secrets, the courts presumed the opposite—that the award *did* amount to speculation and guesswork, and that the \$77 million improperly reflected value attributable to more than the four secrets. Instead of drawing all inferences in favor of the award, the courts aggressively second-guessed it. At times, the scrutiny approached near-mathematical levels of exactitude, as when, in rejecting Trinseo’s own interpretation that the jury *had* apportioned value to just the four secrets, the district court reasoned that the jury “reduced liability for the claimed trade secrets by 60%” yet “reduced the requested damages figured by *only* 37.5%.” App.53-54 & n.8 (emphases added).

That scrutiny further extended to the discussion of the award’s potential evidentiary bases. In other cases, courts have pointed to testimony about secrets that disproportionately drove the value of a product or process to uphold damages figures even absent per-trade-secret apportionment. *See, e.g., EchoSpan*, 2025 WL 3046753, at *2. Here, the Fifth Circuit strained to minimize analogous testimony about value-drivers. It acknowledged that *two* of the four jury-found secrets were said to “‘form[] the heart or the core of the value’ of Trinseo’s PC technology.” App.22. Yet it reasoned that the same expert testified that “*other, non-trade secret components* were [also at] the heart or core” and observed that a *different* expert had provided differing analysis about “core” components as well. *Id.* It should have been immaterial, however, that the expert *also* testified about non-secrets, or that *another* expert

provided inconsistent testimony. This was transparent “weighing of the evidence”—a function constitutionally reserved for the jury, not the Fifth Circuit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (“Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge....”); *Reeves*, 530 U.S. at 152-53 (faulting lower court for “disregard[ing]” half of the supposedly contradictory statements that “favor[ed]” the non-movant in a JMOL ruling). And it was emblematic of the unduly inflexible conception below of what evidence could support the jury’s actions. *Cf. e.g.*, App.64-65 (opining that even awarding “1/3 of the damage figure after finding liability on only one out of three alleged trade secrets” would be “unsupportable” absent “testimony that each trade secret was *equally valuable*”) (emphasis added).

In fact, there was a multitude of ways that the jury could have settled on its \$77 million figure. Having whittled down the number of trade secrets by 60%, the jury could have correspondingly whittled down the damages requested yet applied a *less-than-60%* reduction given the outsized value of the two value-drivers. There was also ample record evidence that supported the jury’s \$77 million figure.³ Instead, the

³ Testimony established that the two trains licensed to Cangzhou and Pingmei were \$25 million per train, totaling the \$50 million in reasonable royalties. C.A.App. 13655:14–17, 21–23. The jury could alternatively have reached that figure from evidence about the 2013 and 2014 negotiations between Trinseo and KBR; the midpoint of their competing valuations was \$250 per ton, which, when multiplied by 200,000 metric tons, totaled \$50 million. C.A.App.7814. Meanwhile, the jury’s \$21.2 million in unjust enrichment damages approximated Pastore’s estimate for either Cangzhou or Pingmei. *See* C.A.App.11831-32 (esti-

court drew inferences *against* the jury’s award. For instance, the district court acknowledged other damages evidence beyond Pastore’s testimony that the jury might have relied on to reduce damages from \$130 million to \$77 million. It inexplicably maintained, however, that the jury still improperly intended the \$77 million to reflect damages “representing *all ten* trade secrets.” App.54 n.8. (emphasis added). But a reasonable inference in *favor* of the verdict, and one consistent with the jury instructions, would have been that the reduced figure of \$77 million reflected the reduced number of trade secrets—and thus reflected that the jury had properly apportioned value to the four misappropriated secrets alone. The courts below did not afford the jury any such deference.

It makes little sense to single out trade secrets jury awards for this level of granular scrutiny. The Federal Circuit’s penchant for overturning patent-case jury verdicts has long drawn ire. *See* Pet. at 26, *Finesse Wireless LLC v. AT&T Mobility LLC*, No. 25-953 (filed Feb. 6, 2026) (pending petition for certiorari calling out the pattern of “uniquely intrusive appellate review of jury verdicts in patent cases”). Judges and commentators have faulted the Federal Circuit for effectively carving out a patent-law exception to the Seventh Amendment where, “notwithstanding any trial level activity,” the Federal Circuit “will do pretty much what it wants under its *de novo* retrial.” *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 993 (Fed. Cir. 1995) (Mayer, J., concurring in the judgment) (citation omitted); *see also Becton, Dickinson & Co. v. Tyco Healthcare Grp., LP*, 616 F.3d

mating unjust enrichment of \$22.9 million for Cangzhou and \$22 million for Pingmei). All this evidence supported the jury’s award, yet it went unmentioned below.

1249, 1266 (Fed. Cir. 2010) (Gajarsa, J., dissenting) (criticizing colleagues’ “search of perfection in the jury verdict” which “fails to allow the jury to perform its proper function”). The Fifth Circuit’s decision below only compounds that perceived pattern, importing a specific point of patent-law practice to extend the “search of perfection in the jury verdict” to trade secret jury awards going forward. *E.g.*, John Marsh, *Three More Mammoth Trade Secret Verdicts Fail to Survive Appeal*, Bailey Cavalieri: The Trade Secret Litigator (Feb. 10, 2026), <https://www.tradesecretlitigator.com/2026/02/three-more-mammoth-trade-secret-verdicts-fail-to-survive-appeal-the-trade-secret-litigator-reads-the-tea-leaves-part-i/> (listing instances of large trade secret verdicts being recently overturned).

Finally, the wholesale vacatur of the jury’s damages award here—after Trinseo’s years of litigation, “abundan[t]” proof of misappropriation, and “certain[] evidence that the trade secrets had value,” App.50, 100—was particularly egregious because it was premised on a requirement that the Fifth Circuit acknowledged it had “never explicitly adopted.” App.13; *see also* App.58 (“the Fifth Circuit does not appear to have encountered a case involving apportionment in trade secrets cases”); App.94 n.33 (addressing what might happen “in the event that the Fifth Circuit determines that apportionment by trade secret is not required to support an unjust enrichment award”). In similar circumstances, other courts have not hesitated to recognize the unfairness to parties whose damages presentation at an initial trial implicated legal issues that the relevant circuit had yet to decide. *See Syntel Sterling Best Shores Mauritius Ltd. v. TriZetto Grp., Inc.*, No. 15 Civ. 211, 2024 WL 1116090, at *8 (S.D.N.Y. Mar. 13, 2024) (recognizing that “[v]acating the entirety of the

jury’s ... damages” based on legal error “in effect, penalizes TriZetto for presenting a theory of damages that had yet to be addressed by the Second Circuit and had been accepted by the Seventh Circuit”); *Syntel Sterling Best Shores Mauritius Ltd. v. TriZetto Grp.*, No. 15 Civ. 211, 2024 WL 4553894, at *2 (S.D.N.Y. Oct. 23, 2024) (remanding for a new trial on damages because “[p]enalizing TriZetto with no compensatory damages for relying on a colorable theory in an unclear area of law would be a serious injustice and disrespect the jury’s view”); *see also Versata Software, LLC v. Ford Motor Co.*, No. 2024-1140, 2026 WL 1449851, at *5 (Fed. Cir. May 22, 2026) (remanding for a new trial on damages after “partially vacat[ing] the district court’s JMOL zeroing out the jury’s damages award”); *Cartel Asset Mgmt. v. Ocwen Fin. Corp.*, 249 Fed. App’x 63, 82 (10th Cir. 2007) (remanding for a new trial on damages because “interests of justice require [that plaintiff] have a chance to correct its evidentiary shortcomings before reducing the jury’s award to only \$1 nominal damages”).

At minimum, the Fifth Circuit and district court before it erred in denying Trinseo a new trial on damages, App.32, CA.App.8422, after declaring for the first time that a per-trade-secret showing or methodology is required to sustain any damages award as a matter of law. Trinseo was penalized for taking a colorable position on strict apportionment—namely, that it was not required—that was, and is, supported by other circuits’ caselaw, on an issue concededly unresolved by the Fifth Circuit at the time. The interests of justice demand that Trinseo at least be afforded an opportunity to prove its damages anew under the newly-minted apportionment regime set forth by the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted. If this Court does not grant plenary review, it should summarily reverse the judgment below.

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June 2, 2026

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[FILED: January 21, 2026]

No. 24-20460

TRINSEO EUROPE GMBH,
Plaintiff—Appellant / Cross-Appellee,
versus

KELLOGG BROWN & ROOT, L.L.C.; STEPHEN HARPER,
also known as STEVE HARPER; STEVE HARPER
CONSULTING, INCORPORATED; POLYCARBONATE
CONSULTING SERVICES, INCORPORATED,
Defendants—Appellees / Cross-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:20-CV-478

Before SMITH, STEWART, and RAMIREZ, *Circuit Judges.*
IRMA CARRILLO RAMIREZ, *Circuit Judge:*

After a jury found that the defendants misappropriated Trinseo Europe GmbH's (Trinseo) trade secrets and awarded it more than \$75 million in damages, the district court granted the defendants' motions for judgment as a matter of law and vacated the damages award. It also granted summary judgment on Trinseo's alternative misappropriation of confidential information

2a

claims, denied Trinseo's motion for a new trial, and entered a permanent injunction. We AFFIRM.

I

A

In the 1960s, The Dow Chemical Company (Dow) started developing a new process for manufacturing polycarbonate (PC). PC is a material known for its high heat tolerance, optical clarity, and high-impact strength. It is used to produce items such as eyeglass lenses, lighting fixtures, medical devices, and bullet-proof glass. Dow's PC manufacturing process was based on an "interfacial" process, as distinct from a "melt" process. Its PC plants encompassed a chemical processing side called the "wet" side, and a compounding side called the "dry" side. The wet side is the part of the plant that makes the physical PC in a "flake" form. On the dry side, those flakes are combined and melded with necessary additives to create the actual product—a "pellet"—which is sold to manufacturers that then incorporate the PC into their products.

The wet side (or chemical processing side) includes five sequential stages. The first stage combines carbon monoxide and chlorine gas in the "Phosgene Reactor" to make phosgene gas. The phosgene gas is combined with other chemicals in the "Oligomerization Reactor," and the resulting solution goes through another reactor and a series of centrifuges to yield PC molecules dissolved in methylene chloride. The solution then moves into the "Steam Devolatilization Process," where the PC molecules are first combined with a thermal stabilizer. Then, the PC molecules are agglomerated together while being separated from the methylene chloride solvent solution using a specially designed nozzle, a "snake" apparatus, and other equipment. At this point in the process, a wet flake is

formed. The flake is then sent through a series of dryers and transported to the compounding side (i.e., the dry side) for later extrusion into pellet form. The entire process is controlled by the “Process Control Strategy.”

Dow first employed its PC manufacturing process in 1985 at its inaugural plant in Freeport, Texas. In 1991, Dow opened another PC manufacturing plant in Germany. Dow then licensed its technology to produce PC through two joint ventures: one with Sumitomo in Japan and one with LG in South Korea. In 2010, Dow sold its entire PC business and technology under the name “Styron” to a private equity company. In 2014, the private equity company changed the name of the business from Styron to Trinseo.

1

Stephen Harper (Harper) worked as a chemical engineer for Dow for 23 years, until his retirement in 1999. He worked on Dow’s PC technology during the 1980s and helped develop the Freeport plant. Harper started consulting in the PC industry, and in 2007, he presented information about Dow-type PC technology to, and ultimately created a PC plant design package for, a Chinese company. In 2009, an American engineering firm hired Harper as a consultant. To help with the project, Harper formed Stephen Harper Consulting, Inc. (SHC) and hired a team of former Dow employees known as the “Tech Team.”¹ Harper and the Tech Team created a process design package (PDP) that the American engineering firm could use to

¹ The core Tech Team group comprised Harper, William Davis, Bryce Koslan, Richard Kirk, and Chip Melton, but other former Dow employees would also play minor roles.

develop an engineering design package for a Chinese client.²

In August 2011, the Stratford Research Institute (SRI) published a report titled “Polycarbonate via Dow Phosgenation Process.” This report was based in part on information gleaned from Harper and the Tech Team while they were working on SHC’s 2009 project. Trinseo asked SRI to withdraw the report because it “contain[ed] highly confidential, proprietary, and non-public, trade secret information.” SRI promptly pulled the report from its website. Trinseo also inquired with SRI about the sources for the report, and SRI responded that the information came from “patents, public documents[,] and various consultants.” Trinseo collaborated with SRI on a revised report that was published in November 2011.

In 2012, SHC agreed to provide an American engineering services broker, Prime 3 Group (Prime 3), PC technology and technical support in licensing the technology to other clients. In March 2013, SHC entered into another agreement with Prime 3 to provide a basic engineering design plan for a PC plant for Luxi Chemical Group (Luxi) in China. In April 2013, Enex International (Enex)—a Texas-based technology firm—became the provider of engineering

² A PDP is a “first level” document that describes the PC plant, its processes, and its equipment. In other words, a PDP is a “controlling document that embodies or describes the [PC] technology.” A PDP is a “lead-in” to a basic engineering design plan (BEDP), which “contains all of the information that’s required to do [a] detail[ed] design” of the plant and explains “exactly where in the process instrumentation needs to be” In essence, the BEDP creates “what the plant looks like physically.” It is also the package that is given to the “final engineering company.”

services and detailed designs for the Luxi project. SHC continued to act as the technology provider.

Luxi told Harper it wanted a copy of Dow's LG plant design to help create a similar plant. Harper obtained a copy of Dow's LG plant drawings—which were marked “confidential”—from Tech Team member Chip Melton (Melton), who had retained the drawings after his employment with Dow ended. Harper used the drawings for the Luxi plant, which became operational in 2016. In 2017, Harper dissolved SHC and changed the company's name to PCS.

Kellogg Brown & Root, LLC (KBR) approached Trinseo in September 2013 in hopes of licensing its Dow-developed PC technology. Those discussions continued into May 2014, when KBR and Trinseo executed a nondisclosure agreement. During their negotiations, Trinseo learned about “ex-Dow employees rumored to be practicing outside confidentiality boundar[ies].” Certain Trinseo employees, including longtime employee Jerry Duane (Duane), were assigned to “work together” with KBR to investigate the issue. But there was never a substantive investigation. Instead, Trinseo relied on “a standing instruction” with its employees in China “to report back anything . . . that might be relevant to the company.” Employees never “reported anything back about [the] potential of ex-Dow employees consulting.”

In September 2014, Trinseo hosted several former Dow employees, including Harper, for the official closure of the Freeport plant. As Harper recalls, during that event he told Duane that “he was doing some consulting with a bunch of old polycarbonate guys from the [1980s].” As Duane recalls, Harper did not

“link his consulting activities to consulting in polycarbonate.” Duane also did not “make the connection” that Harper might be part of the rumored ex-Dow employees Trinseo assigned him to investigate with KBR.

Ultimately, KBR and Trinseo did not execute a licensing deal—Trinseo decided to stop licensing its PC technology to avoid “get[ting] additional interfacial [PC] into the market.”³ But KBR continued to look for a licensing partner. In 2015, KBR identified Enex—which had worked on the Luxi project—as a potential partner. In 2016, Enex granted KBR a license to use its PC technology. KBR then began marketing its “PCMax” package, advertising it as “Dow-type” PC technology.

Enex later connected KBR to Harper and the Tech Team. After meeting with them in May 2017, KBR was “convinced” that the Tech Team was “well qualified to fill in the gaps” KBR had “regarding the PC technology[,] . . . including final product formulations.” In June 2017, PCS agreed to provide KBR “technical assistance in support of a two-day sales workshop that KBR had scheduled with LG Chemical.” Ultimately, LG never entered into a license agreement with KBR.

In September 2017, PCS and KBR began negotiating an amendment to their agreement. Harper told KBR he intended to develop a PDP based on the

³ In 2014, Trinseo started dwindling down what remained of its PC business. Dow had already sold its interest in the LG joint venture in 2010. Trinseo then closed the Freeport plant and exited the joint venture with Sumitomo. By 2017, the only remaining Trinseo PC production facility was the plant in Germany. Trinseo has not since substantively engaged in the PC industry, except that in November 2024, it executed a PC licensing deal with a company in India.

LG plant design. In October 2017, KBR secured its first PCMax licensing agreement with a Chinese company, Cangzhou. In November 2017, PCS entered an amended agreement with KBR to provide consulting services. KBR continued to market its PCMax technology as “related to Dow/Trinseo PC technology.”

In May 2018, a member of the Tech Team emailed Duane, who was planning to retire soon, and stated that if Duane was “interested in doing some [PC] consulting work, [he] should contact Steve Harper.” The email further stated that Harper and others had worked on a PC project in China several years prior, and that Harper had been “having discussions with KBR” regarding a “PC project for another Chinese client.” In June 2018, KBR signed a license agreement to develop a PC plant in China for a new client, Pingmei.

B

On February 12, 2020, Trinseo filed its original complaint against Harper, SHC, and PCS (collectively, the “Harper Defendants”). It filed a second amended complaint adding several claims and defendants, including KBR, on January 11, 2022. Relevant to this appeal, Trinseo alleged that the Harper Defendants and KBR misappropriated ten of Trinseo’s trade secrets in violation of the Defend Trade Secrets Act (DTSA): (1) the Process Control Strategy and Concept and Control Algorithms (Process Control Strategy), (2) Raw Materials Specifications/Composition, (3) the Phosgene Reactor Design and Associated Pressure Vessel Containment (Phosgene Reactor), (4) the Continuous Plug Flow Oligomerization Reactor Inside Pressure Vessel Containment (Oligomerization Reactor), (5) the Thermal Stabilizer Addition System, (6) the Steam Devolatilization Process, (7) the Polymer

Solution Atomizer Nozzle, (8) the Snake Design, (9) Polycarbonate Product Composition, Formulations, or Recipes, and (10) Negative and Positive Knowledge. Trinseo also alleged, in the alternative, misappropriation of confidential information under Texas law, but the district court found the claims were preempted by the Texas Uniform Trade Secrets Act (TUTSA) and granted summary judgment.

Approximately a year before trial, KBR moved to exclude the opinions of Trinseo's damages expert, Thomas Pastore (Pastore). KBR specifically argued that Pastore was required to apportion damages between the misappropriated features and non-misappropriated features of Trinseo's PC technology. On November 30, 2023, the district court granted KBR's motion in part. As to KBR's apportionment argument, the district court noted that, in the Fifth Circuit, "the proper measure of damages in cases of trade secret appropriation is determined by reference to the analogous line of cases from patent law," which require apportionment "when the accused technology does not make up the entirety of the accused product." The district court stated that "Trinseo appear[ed] willing to gamble that it [could] convince the jury that the allegedly misappropriated trade secrets provided all of the value of KBR's end usage/product," but if Trinseo did not, "Pastore's testimony [would] be totally undermined." It concluded that although Trinseo's "all-or-nothing approach" could fail, the approach did not "render Pastore's opinions inadmissible."

Trinseo presented Pastore's testimony to support its damages model at trial. Pastore's estimation of damages was premised on the purported misappropriation of all ten alleged trade secrets. Pastore did not individually value each of the alleged trade secrets or any specific

combination of trade secrets, nor did he provide a method for the jury to do so.

Out of the ten trade secrets alleged, the jury found only four—the Process Control Strategy, Phosgene Reactor, Oligomerization Reactor, and Steam Devolatilization Process—actually qualified as trade secrets. The jury further found that the defendants misappropriated all four of these secrets. The jury awarded Trinseo \$50 million in reasonable royalty damages and \$21,206,132 in unjust enrichment damages against KBR; \$0.00 in unjust enrichment damages against Harper; \$2,930,817 in unjust enrichment damages against SHC; and \$2,549,706 in unjust enrichment damages against PCS. The jury also found by a preponderance of the evidence that Harper is responsible for the conduct of SHC and PCS. Finally, the jury rejected the Harper Defendants’ and KBR’s limitations defenses.⁴

After trial, all defendants moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(b). The district court found that the jury’s liability and affirmative defense findings were supported by the evidence. As to damages, it found that—as in patent law—“apportionment is generally required in trade secrets cases involving multiple alleged trade secrets.” According to the district court, “to protect itself in the event that the jury finds liability on some, but not all, alleged trade secrets, a plaintiff must provide either (1) evidence that apportions value per trade secret, or (2) evidence that provides some

⁴ Specifically, the jury found by a preponderance of the evidence that Trinseo had not discovered, nor should have discovered through the exercise of reasonable diligence, (1) Harper’s first alleged misappropriation before February 12, 2017, or (2) KBR’s first alleged misappropriation before November 27, 2017.

methodology or guidance for how the jury may do so itself.” It determined that “Trinseo’s failure to apportion [its trade secret damages], combined with the jury’s failure to find liability on all ten alleged trade secrets [was] fatal.” As a result, the district court granted judgment as a matter of law and vacated the reasonable royalty and unjust enrichment damages against KBR and the Harper Defendants.⁵

In the same order resolving the Rule 50(b) motions, the district court granted Trinseo’s motion for a permanent injunction. It subsequently entered an order enjoining KBR and the Harper Defendants from using Trinseo’s trade secrets. The district court then entered a final, take-nothing judgment against Trinseo. Trinseo moved for a new trial on damages, which the district court summarily denied.

Trinseo, KBR, and the Harper Defendants filed timely appeals. The parties first challenge different aspects of the district court’s resolution of the motions for judgment as a matter of law. Trinseo also appeals the district court’s denial of a new trial on damages, and argues the district court erroneously determined that Trinseo’s misappropriation of confidential information claims were preempted by TUTSA.⁶ Finally,

⁵ As to the unjust enrichment award against KBR, the district court made a “contingent alternative finding” that, in the event this court found apportionment was not required, the jury’s award was otherwise unsupported by the evidence. On this basis, the district court granted KBR’s request for remittitur and reduced the award to \$10.5 million. We need not address the district court’s alternative finding because, as discussed below, the district court properly vacated the damages based on Trinseo’s failure to apportion.

⁶ Trinseo presents a myriad of other issues on appeal. It asks the court to resolve the “open question” of whether the jury’s response to the unjust enrichment question is “merely advisory”

KBR asserts the district court abused its discretion in granting a permanent injunction.

II

Trinseo argues the district court erred in granting judgment as a matter of law and vacating the damages awarded by the jury. KBR and the Harper Defendants challenge the district court's decision to sustain the jury's liability and affirmative defense findings.

We review decisions on Rule 50(b) motions for judgment as a matter of law de novo, "apply[ing] the same legal standard as the district court." *Baisden v. I'm Ready Prods., Inc.*, 693 F.3d 491, 498 (5th Cir. 2012). "A party is only entitled to judgment as a matter of law on an issue where no reasonable jury would have had a legally sufficient evidentiary basis to find otherwise." *Apache Deepwater, L.L.C. v. W&T Offshore, Inc.*, 930 F.3d 647, 653 (5th Cir. 2019) (citing FED. R. CIV. P. 50(a)(1)). "[B]ut our standard of review with respect to a jury verdict is especially deferential." *Olibas v. Barclay*, 838 F.3d 442, 448 (5th Cir. 2016) (citation modified). We draw all reasonable inferences in the light most favorable to the verdict. *Westlake Petrochemicals, L.L.C. v. United Polychem, Inc.*, 688 F.3d 232, 239 (5th Cir. 2012).

A

Trinseo argues the district court erred in relying on patent law apportionment principles to nullify the jury's reasonable royalty and unjust enrichment awards against KBR and the Harper Defendants.

and challenges the district court's contingent grant of a remittitur. If a new trial is granted, Trinseo also challenges certain evidentiary rulings by the district court. Given our decision below, we need not address any of these issues.

Alternatively, it asserts there is sufficient evidence to support the jury's award even under patent law apportionment rules. We disagree on both points.

The DTSA sets forth available damages with respect to trade secret misappropriation. 18 U.S.C. § 1836(b)(3)(B). First, courts may award “damages for actual loss caused by the misappropriation of the trade secret” and “damages for any unjust enrichment caused by the misappropriation of the trade secret that is not addressed in computing damages for actual loss.” *Id.* § 1836(b)(3)(B)(i). Alternatively, courts may award “the damages caused by the misappropriation measured by imposition of liability for a reasonable royalty for the misappropriator’s unauthorized disclosure or use of the trade secret.” *Id.* § 1836(b)(3)(B)(ii).

As this court has long held, “[i]t seems generally accepted that ‘the proper measure of damages in the case of a trade secret appropriation is to be determined by reference to the analogous line of cases involving patent infringement’” *Univ. Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 535–38 (5th Cir. 1974) (quoting *Int’l Indus., Inc. v. Warren Petroleum Corp.*, 248 F.2d 696, 699 (3d Cir. 1957)) (reviewing numerous patent cases to determine how damages should be assessed in the trade secret context). Looking to patent law cases, it is well-established that “[w]hen the accused technology does not make up the whole of the accused product, apportionment is required.” *See Finjan, Inc. v. Blue Coat Sys., Inc.*, 879 F.3d 1299, 1309 (Fed. Cir. 2018). In other words, a patentee “must in every case give evidence tending to separate or apportion the defendant’s profits and the patentee’s damages between the patented feature and the unpatented

features” *Garretson v. Clark*, 111 U.S. 120, 121 (1884) (citation modified).

Although we have never explicitly adopted patent law’s apportionment principles in the trade secret context, we outlined the same general principles in *University Computing*. See 504 F.2d at 537–539. Specifically, we observed that reasonable royalty damages in trade secret cases should yield “an *apportionment* of profits based on an approximation of the *actual value of the infringed device* to the defendant.” *Id.* at 537 (emphasis added). A plaintiff may also recover “the full total of [a] defendant’s profits or some *apportioned* amount designed to *correspond to the actual contribution the plaintiff’s trade secret made* to the defendant’s commercial success.” *Id.* at 539 (emphasis added). In short, trade secret damages—whether measured by a reasonable royalty or lost profits—must, like patent damages, “reflect the value attributable to the infringing features of the product, and no more.”⁷ See *Finjan*, 879 F.3d at 1309 (quoting *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1226 (Fed. Cir. 2014)) (applying apportionment principles in a patent law case).

Applying apportionment rules similar to those outlined in *University Computing*, courts have vacated damages awarded by juries due to failure to apportion in trade secret cases. See, e.g., *Tex. Advanced Optoelectronic Sols., Inc. v. Renesas Elecs. Am., Inc.*, 895 F.3d 1304 (Fed. Cir. 2018) [hereinafter *TAOS*]; *O2 Micro Int’l Ltd. v. Monolithic Power Sys., Inc.*, 399 F.

⁷ Recognizing the emphasis *University Computing* places on apportionment, Trinseo concedes that the “patent-law concept [of apportionment] is not necessarily inconsistent with how this Court conceived of damages in trade secret misappropriation cases.”

Supp. 2d 1064 (N.D. Cal. 2005), *aff'd*, 221 F. App'x 996 (Fed. Cir. 2007). In *TAOS*, for example, the jury found the defendant misappropriated three trade secrets and awarded disgorgement damages. 895 F.3d at 1310. On appeal, the Federal Circuit affirmed the jury's liability finding as to only one of the trade secrets. *Id.* at 1312–15. Because the plaintiff “did not explain which of the trade secrets contributed to what amount of profit to be disgorged” and instead “assigned all profits to the misappropriation of all trade secrets,” however, the Federal Circuit found “no basis to conclude that the [one] remaining” trade secret “support[ed] the entire award.” *Id.* at 1317. As a result, it held that the “monetary award for trade secret misappropriation must be vacated because [the court had] determined that misappropriation liability here can properly rest on only one of the three grounds that [the plaintiff] presented to the jury. [The plaintiff's] calculation of monetary relief did not distinguish among those grounds.” *Id.*

Likewise, in *O2 Micro*, the jury determined that the plaintiff had established eleven trade secrets, but only five were misappropriated by the defendant and only one unjustly enriched the defendant. 399 F. Supp. 2d at 1069. Prior to trial, the district court had warned the plaintiff “of the dangers of bundling all of its alleged trade secrets damages together.” *Id.* at 1076. Regardless, the plaintiff's expert only “provided the jury with a damages calculation based on an assumption that all of the trade secrets were misappropriated.” *Id.* Because the expert did “not provide a reasonable basis for the jury to apportion damages,” the court concluded there was no “reasonable basis for the jury to determine the amount that [the defendant] was unjustly enriched based upon its misappropriation of [one trade secret].” *Id.* at 1077. “After the jury

concluded that [the defendant] did not misappropriate all of [the plaintiff's] trade secrets," the court reasoned that the "expert testimony regarding damages for misappropriation of all trade secret[s] was useless to the jury." *Id.* The district court then granted the defendant's motion for judgment as a matter of law as to the jury's unjust enrichment award. *Id.*

The reasoning in *TAOS* and *O2 Micro* is consistent with the apportionment principles outlined by this court in *University Computing*, and we find it persuasive.⁸ They also reflect the commonsense notion

⁸ Although *TAOS* and *O2 Micro* were in the same procedural posture as this case, we note that several district courts have applied the same apportionment principles when resolving motions for summary judgment and to exclude expert testimony. *See, e.g., Alcatel USA, Inc. v. Cisco Sys., Inc.*, 239 F. Supp. 2d 660, 671 (E.D. Tex. 2002) (granting summary judgment on the plaintiff's state law trade secret claims because the plaintiff "fail[ed] to apportion the value of its alleged trade secrets" and instead "attempt[ed] to attribute every penny of . . . [its] technology to the value of its alleged trade secrets"); *LivePerson, Inc. v. [24]7.AI, Inc.*, No. 17-CV-01268-JST, 2018 WL 6257460, at *2 (N.D. Cal. Nov. 30, 2018) ("[The expert's] opinion must be excluded because he does not apportion trade secret misappropriation damages among particular alleged trade secrets, and offers no methodology for the jury to calculate trade secret misappropriation damages on fewer than all of the 28 alleged trade secrets in the case."); *Int'l Med. Devices, Inc. v. Cornell*, No. 20CV3503CBMRAOX, 2023 WL 4295157, at *5 (C.D. Cal. Feb. 13, 2023) (precluding an expert from "testifying that the jury should award the entire \$15.4 million lump-sum royalty if the jury found that only one [out of four] of Plaintiffs' alleged trade secrets has been misappropriated"); *Ford Motor Co. v. Versata Software, Inc.*, No. 15-11624, 2018 WL 10733561, at *11 (E.D. Mich. July 9, 2018) (excluding an expert's testimony regarding trade secret damages because he "failed to apportion [the plaintiff's] alleged damages on a trade-secret-by-trade-secret basis" and so, "if the jury were to conclude that [the defendant] misappropriated less than all of [the plaintiff's] trade secrets . . . , then [the expert's] damages

that trade secret damages must be tied to the defendant's wrongful conduct—i.e., the misappropriation. Here, Trinseo presented damage estimations that assumed misappropriation of all ten alleged trade secrets. But the jury found only four trade secrets were misappropriated by KBR and the Harper Defendants. Because Trinseo had “bundl[ed] all of its alleged trade secrets damages together,” the jury did not have a reasonable basis to award damages based on the misappropriation of only four trade secrets.⁹ See *O2 Micro*, 399 F. Supp. 2d at 1076; *TAOS*, 895 F.3d at 1317.

Trinseo urges us to look instead to the Sixth Circuit's decision in *Caudill Seed & Warehouse Co. v. Jarroo Formulas, Inc.*, 53 F.4th 368 (6th Cir. 2022), which Trinseo asserts rejected *O2 Micro* and *TAOS*. But *Caudill distinguished O2 Micro* and *TAOS*,

calculation would not assist the jury in calculating damages and could only serve to confuse them”). This was the context in which the district court in this case first faced the apportionment issue, as KBR moved to exclude Pastore's opinions based on failure to apportion. Although the district court denied the motion to exclude on this basis, it warned Trinseo that it's its “all-or-nothing approach” to damages was a “gamble.” It further put Trinseo on notice that Pastore's testimony would be “totally undermined” if Trinseo failed to obtain a verdict on all ten alleged trade secrets.

⁹ Trinseo argues *O2 Micro* is not instructive because the district court ultimately awarded reasonable royalty damages. But the district court in *O2 Micro* determined that the plaintiff's “reasonable royalty estimate” was not “plagued with the same problem as its unjust enrichment damages award” because there was expert testimony “that the parties in a hypothetical negotiation would agree to a \$900,000 paid-up reasonable royalty for any one group of trade secrets.” 399 F. Supp. at 1077–78. The expert also testified that the trade secrets found by the jury “would be an example of a group of trade secrets.” *Id.* at 1078. Trinseo did not present similar evidence.

emphasizing that the expert did not take an “all-or-nothing approach” and “gave the jury options” that “allowed the jury to calculate the value” of one trade secret “even while finding no misappropriation of” other trade secrets. 53 F.4th at 389. Trinseo’s expert did not give the jury similar options.

Trinseo also relies on *Bishop v. Miller*, 412 S.W.3d 758 (Tex. App.—Houston [14th Dist.] 2013, no pet.), arguing it represents a “flexible, non-categorical” approach to trade secret damages. In *Bishop*, the defendant argued the plaintiff’s expert’s “damages calculations were unreliable because he failed to provide separate values for each of the items the jury found to be [the plaintiff’s] trade secrets and instead provided only one value for misappropriation.” 412 S.W.3d at 777–78. The court rejected that argument, however, because the jury found that the plaintiff “owned a *compilation trade secret* comprised of some or all of the thirteen items listed in the jury charge.” *Id.* at 778 (emphasis added). The jury in this case was not presented with a question regarding compilation trade secrets.

Finally, Trinseo argues that the district court’s so-called “strict apportionment” requirement—a term that the district court used twice in its 48-page order—conflicts with the flexible approach to trade secret damages adopted in *University Computing*. See 504 F.2d at 535. First, although this court has endorsed a flexible approach to trade secret damages, that does not disturb the settled principle that “[e]stimation of damages . . . should not be based on sheer speculation.” See *Metallurgical Indus. Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1208 (5th Cir. 1986); *Alcatel*, 239 F. Supp. 2d at 669 (“While the Court recognizes that some degree of speculation is inherent in calculating a suppositious

licensing agreement between two parties that has never occurred, this hypothetical construct, however, must contain some degree of certitude.”). Allowing damages to be awarded for the misappropriation of *four* trade secrets based on an estimation that presumed misappropriation of *ten* trade secrets lends itself to such speculation. Second, despite its passing use of the term, the district court did not create a novel “strict apportionment” theory. Nor do we.

Rather, we hold that, like in patent law cases, trade secret misappropriation damages must reflect the value attributable to the information or technology that is misappropriated by the defendant. It follows that, where a plaintiff alleges *multiple* trade secrets, the jury must have a reasonable basis to award damages attributable only to the information or technology that actually qualifies as a trade secret.¹⁰ Trinseo failed to present evidence that would allow the jury to do so in this case.

2

Trinseo next argues that, even if apportionment principles apply in this case, the district court should have accepted the jury’s reasonable royalty award under either the “built-in apportionment” theory or

¹⁰ There are many ways a plaintiff could “apportion” damages. Given that “every case requires a flexible and imaginative approach to the problem of damages,” we need not give an exhaustive list of ways a plaintiff may do so. *See Univ. Computing*, 504 F.2d at 538. But a few possible methods come to mind. For instance, a plaintiff could individually value each alleged trade secret. A plaintiff could also value a *group* of trade secrets. Alternatively, a plaintiff could provide a methodology for the jury to calculate the value of a particular trade secret or group of trade secrets.

“entire market value” exception.¹¹ Trinseo also argues that the jury’s verdict should be sustained because the four trade secrets it found were the “heart, core, and driver of the demand for Trinseo’s PC manufacturing technology.”

a

KBR argues that Trinseo has forfeited its “built-in apportionment” argument. “A party forfeits an argument by failing to raise it in the first instance in the district court—thus raising it for the first time on appeal—or by failing to adequately brief the argument on appeal.” *Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021). We have discretion, however, to consider an issue raised for the first time on appeal where “it is a purely legal matter and failure to consider the issue will result in a miscarriage of justice.” *Id.* at 398 (quoting *Essinger v. Liberty Mut. Fire Ins. Co.*, 534 F.3d 450, 453 (5th Cir. 2008)).

Here, Trinseo concedes it failed to raise its “built-in apportionment” argument in the district court. The issue is also not a “purely legal matter,” as Trinseo admits that it “has both legal and factual aspects.” *See id.* “Nor is there manifest injustice to correct here” given that “nothing prevented” Trinseo from raising its “built-in apportionment” argument in responding to KBR’s motion for judgment as a matter of law. *See id.* at 399. There is “no principled basis” to address Trinseo’s forfeited “built-in apportionment” argument. *See id.* at 398.

¹¹ Trinseo does not rely on the “built-in apportionment” rule or entire market value exception in the context of the jury’s unjust enrichment awards. Even so, our analysis below would apply to the unjust enrichment awards with equal weight.

KBR also argues Trinseo has waived its arguments regarding the entire market value exception. Where an appellant “fail[s] to challenge the district court’s finding of waiver,” the appellate court is “precluded from reaching the arguments” the district court found waived. *XL Specialty Ins. Co. v. Kiewit Offshore Servs., Ltd.*, 513 F.3d 146, 152 (5th Cir. 2008).

Although the district court in this case provided an in-depth analysis of the entire market value exception on the merits, it also found Trinseo waived the issue. Specifically, the district court stated:

It is worthwhile to examine Trinseo’s position on the entire market value rule in the broader context of the litigation. Trinseo did not request a jury instruction or question pertaining to any interpretation of the entire market value rule. In fact, it specifically argued *against* including KBR’s proposed instruction on the issue. At the January 22nd charge conference, KBR requested an instruction on the entire market value rule[.] . . . Trinseo objected, arguing that patent jury instructions cannot be so easily thrown into a trade secret case[] Consequently, the Court did not include, and Trinseo did not request, an instruction on the entire market value based on either line of cases. Thus, it waived its application.

Trinseo has challenged the district court’s conclusion on the merits, but it makes no mention of the district court’s finding of waiver. Trinseo’s failure to do so precludes this court from now addressing the entire market value issue. *See id.*

Finally, KBR argues Trinseo’s “heart, core, and value driver” argument is another “thinly veiled entire-market-value-rule argument,” which the district court correctly held was waived and wrong on the merits.

It is unclear how Trinseo’s “heart, core, and value driver” argument differs in any meaningful respect from the entire market value rule, which is “a narrow exception” to the apportionment requirement that “allows for the recovery of damages based on the value of an entire apparatus containing several features, when the feature patented constitutes the basis for customer demand.” *LaserDynamics, Inc. v. Quanta Comput., Inc.*, 694 F.3d 51, 67 (Fed. Cir. 2012) (citation modified). The only case Trinseo cites that applied a version of the “heart, core, and value driver” concept did so under the assumption that apportionment was required. See *EchoSpan, Inc. v. Medallia, Inc.*, No. 24-4751, 2025 WL 3046753, at *1 (9th Cir. Oct. 31, 2025) (unpublished). In *EchoSpan*, the district court vacated the jury’s unjust enrichment award because the jury found the defendant misappropriated only one out of nine alleged trade secrets and the plaintiff “did not apportion this relief on a trade-secret-by-trade-secret basis.” *Id.* The Ninth Circuit acknowledged that, “[i]n a highly technical context, apportionment testimony may be essential to provide a reasonable basis for a jury to value a defendant’s gain.” *Id.* at *2 (distinguishing *O2 Micro*). But in *EchoSpan*, the plaintiff’s “trade secrets could be explained in lay terms” and the jury heard evidence regarding “the relative importance” of the jury-found trade secret to the “system’s commercial value.” *Id.* at *2. Indeed, the jury heard that *only* that jury-found secret was the “‘core’ tool that ‘enables everything.’” *Id.* As a result,

the jury in *EchoSpan* “could determine from the evidence which alleged trade secrets would drive the most value” in the defendant’s product. *Id.*

This case, which presents highly technical trade secrets, is markedly different from *EchoSpan*. Here, the jury found four trade secrets: the Process Control Strategy, Phosgene Reactor, Oligomerization Reactor, and Steam Devolatilization Process. At trial, Trinseo’s expert testified that the Oligomerization Reactor and Steam Devolatilization Process were *among* the alleged trade secrets that “form[ed] the heart or the core of the value” of Trinseo’s PC technology. That very same expert testified that *other, non-trade secret components* were the heart or core of the PC technology, including the “thermal stabilizer,” “steam nozzle,” and “atomizing nozzle.” A different expert opined that “the oligomerization and agglomeration were the core and the key elements, especially the snake, the nozzles, [and] the thermal stabilizer.” This testimony contrasts with the testimony in *EchoSpan*, i.e., that *only* the jury-found secret was the “core” of the system. *See id.* Importantly, Trinseo also presented no evidence or methodology that would have allowed the jury to ascribe any particular value to the jury-found trade secrets. Pastore admitted he offered no opinion that would allow the jury to award a “royalty value for” a particular “share” of a misappropriated trade secret if the jury did not “find that each and every trade secret” identified by Trinseo “was in fact misappropriated by KBR.”

* * *

In sum, Trinseo was required to present evidence that would have allowed the jury to award a reasonable royalty that reflects “an apportionment of profits based on an approximation of the actual value

of the infringed device to the defendant,” or an “apportioned amount” of the defendants’ profits “designed to correspond to the actual contribution the plaintiff’s trade secret made to the defendant’s commercial success.” *See Univ. Computing*, 504 F.2d at 537, 539. This rule is consistent with the “analogous line of cases involving patent infringement,” *id.* at 535 (quoting *Int’l Indus.*, 248 F.2d at 699), which require apportionment “[w]hen the accused technology does not make up the whole of the accused product.” *Finjan*, 879 F.3d at 1309. Because Trinseo only presented damage estimates that assumed misappropriation of ten alleged trade secrets, the jury had no basis for awarding damages based on the misappropriation of only the four trade secrets it found. The district court did not err in vacating the jury’s award of damages against KBR and the Harper Defendants.

B

KBR argues the district court erred in denying judgment as a matter of law on the jury’s findings of liability for trade secret misappropriation. We disagree.

1

KBR contends there is legally insufficient evidence that Trinseo’s information qualified as “trade secrets ” as that term is defined by the DTSA.

Under the DTSA, information constitutes a “trade secret” where (1) “the owner thereof has taken reasonable measures to keep such information secret,” and (2) “the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.” 18 U.S.C. § 1839(3).

First, KBR asserts Trinseo did not take reasonable measures to keep its information a secret, citing four instances that purportedly put Trinseo on notice that its PC technology was publicly disclosed, and which Trinseo did nothing to address. The first instance cited by KBR occurred in August 2011, when SRI published a report regarding Dow's PC technology. Second, in May 2014, Trinseo heard about rumored ex-Dow employees "practicing outside confidentiality boundar[ies]." Third, in September 2014, during the Freeport plant closure, Harper told Duane that he was doing consulting work with former Dow employees. Finally, in May 2018, a member of the Tech Team told Duane he should contact Harper if he was interested in PC consulting work.

For each event cited by KBR, Trinseo has pointed to competing evidence in the record. As to the SRI report, Trinseo immediately requested a withdrawal, inquired about sources, and worked with SRI to create a revised report that did not contain protected information. In addition, Trinseo assigned employees to work with KBR to investigate the rumored ex-Dow employees. It also had a "a standing instruction" with its employees in China to report back relevant information. Duane and Harper's brief meeting at the Freeport plant shows only that Trinseo was on notice that Harper was doing consulting work; there is no evidence suggesting Trinseo was on notice that Harper was using trade secrets. Indeed, Duane testified that Harper did not mention anything about "providing technology" and that consulting alone did not have cause for concern. And Trinseo sent a demand letter to Harper to stop misappropriating Trinseo's PC technology a year after Duane received an email stating that Harper's

consulting involved PC. Viewing the evidence in the light most favorable to the verdict, the jury had sufficient evidence to conclude that Trinseo took reasonable measures to protect its trade secrets.

b

Second, KBR argues that Trinseo's trade secrets were "generally known" because Harper had circulated them in the PC industry for years before KBR acquired the technology. "Secrecy is a relative term. The information may be known to several persons and yet still be secret if third parties would be willing to pay for a breach of trust in order to ascertain it." *Taco Cabana Int'l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1125 (5th Cir. 1991) (citation modified); *see also Reingold v. Swiftships, Inc.*, 126 F.3d 645, 650 (5th Cir. 1997) (holding that information derived economic value from not being generally known where "it would have been extremely expensive and time consuming for anyone to duplicate the [trade secret information] through independent designing, planning, and construction or by reverse engineering").

It is true that long before KBR used Trinseo's trade secrets, the Harper Defendants had been disclosing that information by using the LG plant drawings. But the jury heard testimony that the ten claimed trade secrets were not "generally known or publicly disclosed." Duane also testified he did not think it would be possible for any engineer to "readily ascertain" Trinseo's trade secrets "without spending much time, effort[, or expense." Indeed, Trinseo presented evidence suggesting KBR did not believe it could complete its PCMax technology without the trade secret information held by the Harper Defendants. In short, even though the trade secrets may have been "known to several persons" due to the

Harper Defendants' disclosures, "third parties" like KBR were still "willing to pay for a breach of trust in order to ascertain [them]." *See Taco Cabana*, 932 F.2d at 1125 (citation modified). As a result, the jury had sufficient evidence that the Process Control Strategy, Phosgene Reactor, Oligomerization Reactor, and Steam Devolatilization Process were not generally known.¹²

2

KBR also asserts there is legally insufficient evidence that it misappropriated Trinseo's technology, attacking different components of the evidence for each of the four trade secrets the jury found. As to the Process Control Strategy, KBR contends there was no evidence that the Tech Team had access to this information. KBR also asserts there is insufficient evidence of misappropriation of the Phosgene Reactor because the jury heard Duane testify KBR did not *use* this technology in its PCMax design. Finally, KBR argues that the jury heard testimony that it either did not acquire or did not use certain elements of the

¹² KBR's other arguments on this issue are also without merit. As to the Process Control Strategy, KBR argues that Trinseo failed to sufficiently define this secret because the jury heard testimony that no particular hardware or software was misappropriated. But the jury heard ample evidence describing the Process Control Strategy. For example, Duane defined it as the PC plant's "rules . . . of operation" and as an "overview" of how the plant runs. KBR also argues that testimony that certain *components* of the Phosgene Reactor, Oligomerization Reactor, and Steam Devolatilization Process had been publicly disclosed is fatal to Trinseo's trade secret claims. But the jury heard testimony that numerous *other* non-disclosed elements comprised these trade secrets. Viewing this evidence in the light most favorable to the verdict, a reasonable jury could find Trinseo's secrets were not generally known.

Oligomerization Reactor and Steam Devolatilization Process.

A defendant can misappropriate a plaintiff's trade secret under the DTSA by:

(A) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(B) disclosure or use of a trade secret of another without express or implied consent by a person who—

(i) used improper means to acquire knowledge of the trade secret;

(ii) at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was—

(I) derived from or through a person who had used improper means to acquire the trade secret;

(II) acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the use of the trade secret; or

(III) derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret or limit the use of the trade secret; or

(iii) before a material change of the position of the person, knew or had reason to know that—

- (I) the trade secret was a trade secret;
and
- (II) knowledge of the trade secret had
been acquired by accident or mistake[.]

18 U.S.C. § 1839(5).

Here, KBR ignores the competing evidence regarding its misappropriation for each secret found by the jury. For instance, Duane testified that KBR did not have access to one particular software component of the Process Control Strategy, but that “there were elements of the process control strategy that were included in the process design” used by KBR. There was also testimony that KBR *acquired*, rather than *used*, the Phosgene Reactor technology from the Tech Team. *See id.* And, as described above, the evidence at trial suggested the Oligomerization Reactor and Steam Devolatilization Process comprised numerous elements other than what was publicly disclosed. The jury also heard testimony that KBR acquired the Oligomerization Reactor design, which “was translated from the PDP into [KBR’s] eventual engineering.” The same is true of the Steam Devolatilization Process. Weighing the evidence in the light most favorable to the verdict, we find that the jury could reasonably conclude that KBR misappropriated the Process Control Strategy, Phosgene Reactor, Oligomerization Reactor, and Steam Devolatilization Process.

* * *

Because sufficient evidence exists for the jury to reasonably conclude that some of Trinseo’s information qualified as trade secrets and that KBR misappropriated those secrets, the district court did not err in denying KBR’s motion for judgment as a

matter of law concerning liability for trade secret misappropriation.

C

The Harper Defendants argue that the district court erred in denying judgment as a matter of law with respect to the jury's "alter ego" and statute of limitations findings. Again, we disagree.

1

As to the alter ego issue, the jury found "by a preponderance of the evidence that Stephen Harper is responsible for the conduct of" both SHC and PCS. The Harper Defendants argue there was insufficient evidence for the jury to reach this conclusion, and that the district court erred in finding otherwise. But the district court determined it did not need to address the alter ego issue, instead granting the Harper Defendants' motion for judgment as a matter of law only on the issue of apportionment.

Notably, the jury was charged with answering the alter ego question only *if* it awarded damages as to SHC and PCS. Because we affirm the district court's decision to vacate the damages awarded against the Harper Defendants, we need not address the alter ego issue.

2

Next, the Harper Defendants argue the district court erred in denying judgment as a matter of law on their limitations defense. Specifically, they assert that accrual of the limitations period under the DTSA does not require that Trinseo knew the *identity* of the misappropriator—it only requires that Trinseo knew of the *misappropriation*, which occurred by 2014.

The DTSA provides that claims must be brought within three years of “the date on which the *misappropriation* with respect to which *the action would relate* is discovered or by the exercise of reasonable diligence should have been discovered.” 18 U.S.C. § 1836(d) (emphasis added). In order for a claim to accrue under the DTSA, the plaintiff must have discovered the “misappropriation” as that term is defined in the statute. As discussed, the DTSA defines “misappropriation” as “acquisition of a trade secret of another *by a person who knows or has reason to know* that the trade secret was acquired by improper means.” *Id.* § 1839(5)(A) (emphasis added). Alternatively, misappropriation is defined as “disclosure or use of a trade secret of another . . . *by a person who*” (1) “*used improper means* to acquire knowledge of the trade secret”; (2) “*knew or had reason to know*” the trade secret was acquired or derived by particular means; or (3) “before a material change of the position of the person, *knew or had reason to know* that” that “the trade secret was a trade secret” *and* the “knowledge of the trade secret had been acquired by accident or mistake.” *Id.* § 1839(5)(B) (emphasis added).

The question here is whether Trinseo discovered, or should have discovered, the “misappropriation with respect to which [this] action would relate” before February 12, 2017. *See id.* § 1836(d). The Harper Defendants assert that three events triggered the limitations period: (1) the August 2011 SRI report, (2) the May 2014 meeting with KBR wherein Trinseo learned about “ex-Dow employees rumored to be practicing outside confidentiality boundar[ies],” and (3) the Freeport plant closure in 2014 where Harper told Duane about his consulting practice.

First, although the 2011 report may have put Trinseo on notice that SRI potentially acquired trade secret information, the evidence establishes that Trinseo quickly asked SRI to take the report down, asked about the sources, and collaborated on a revised report that did not include proprietary information. SRI told Trinseo the information was from “patents, public documents[,] and various consultants,” but did not disclose the identity of those consultants. Giving deference to the jury’s verdict, there is sufficient evidence that the SRI report did not cause Trinseo to discover the “misappropriation with respect to which the action” against Harper “would relate.” *See id.* In other words, the jury could reasonably conclude Trinseo did not discover “acquisition of a trade secret . . . by a person who knows or has reason to know that the trade secret was acquired by improper means” or “disclosure or use of a trade secret . . . by a person who” either “used improper means to acquire knowledge of the trade secret” or “knew or had reason to know” the knowledge of the trade secret was derived or acquired under the circumstances prescribed by the statute. *See id.* § 1839(5).

Second, although Trinseo learned about unidentified ex-Dow employees potentially practicing outside *confidentiality* boundaries in May 2014, this does not establish as a matter of law that Trinseo learned about the *trade secret misappropriation*—as defined by the DTSA—that gave rise to Trinseo’s lawsuit against Harper. Trinseo and KBR also agreed to work together to investigate the rumored ex-Dow employees, and Trinseo had a standing instruction with its employees in China “to report back relevant information.” At bottom, the Harper Defendants dispute whether Trinseo’s efforts give rise to “reasonable diligence”—a

question of fact that was properly left to the jury. *See Margolies v. Deason*, 464 F.3d 547, 553 (5th Cir. 2006).

Third, there is competing evidence with respect to Harper and Duane’s conversation during the closure of the Freeport plant. Harper testified he told Duane he was engaged in PC consulting, but Duane recalled that Harper only mentioned consulting—not *PC* consulting. A reasonable jury could conclude that a former employee’s consulting work did not trigger a duty to investigate. *See Aspen Tech., Inc. v. M3 Tech., Inc.*, 569 F. App’x 259, 264 n.9 (5th Cir. 2014) (“[T]he limitations period does not begin to run until a plaintiff knew or should have known ‘that it was wrongfully injured,’ and there is nothing ‘wrongful in and of itself’ for employees to ‘leave their employ and compete with their former employers.’” (quoting *Pressure Sys. Int’l, Inc. v. Sw. Rsch. Inst.*, 350 S.W.3d 212, 217 (Tex. App.—San Antonio 2011, pet. denied))).

The jury had a reasonable basis for concluding that Trinseo did not discover, nor could have discovered through the exercise of reasonable diligence, Harper’s first alleged misappropriation before February 12, 2017. The district court did not err in denying judgment as a matter of law on the Harper Defendants’ limitations defense.

III

Trinseo asserts that the district court erred in denying its motion for a new trial on damages, arguing that the district court retroactively applied new rules of law by requiring apportionment.

“A district court has discretion to grant a new trial under Rule 59(a) of the Federal Rules of Civil Procedure when it is necessary to do so ‘to prevent an injustice.’” *Seibert v. Jackson Cnty.*, 851 F.3d 430, 438

(5th Cir. 2017) (quoting *United States v. Flores*, 981 F.2d 231, 237 (5th Cir. 1993)). The district court’s decision is reviewed for abuse of discretion. *Id.* “[R]eview of the denial of a motion for new trial is especially deferential.” *Thompkins v. Belt*, 828 F.2d 298, 302 (5th Cir. 1987).

By the time Trinseo tried its case, this court had long held that “the proper measure of damages in the case of a trade secret appropriation is to be determined by reference to the analogous line of cases involving patent infringement” *Univ. Computing*, 504 F.2d at 535 (quoting *Int’l Indus.*, 248 F.2d at 699). *University Computing* also cited general apportionment principles. *Id.* at 537, 539. KBR raised the apportionment rule in a motion to exclude expert testimony approximately one year before trial. In addressing KBR’s argument, the district court expressly warned Trinseo—more than a month before trial and multiple times thereafter—that its “all-or-nothing approach” was a “gamble” and that the testimony of Trinseo’s expert would be “totally undermined” if Trinseo failed to obtain a verdict on all ten of its alleged trade secrets. Trinseo has not shown that the district court abused its discretion by denying its motion for new trial. Nor has it shown that its decision to take the all-or-nothing approach in the face of longstanding precedent and the district court’s warning warrants a new trial to prevent injustice.

IV

Next, Trinseo appeals the district court’s summary judgment ruling on its misappropriation of confidential information claims, arguing that TUTSA does not

preempt claims asserted in the alternative to trade secret claims.¹³

We review the grant of summary judgment de novo. *Smith v. Reg'l Transit Auth.*, 827 F.3d 412, 417 (5th Cir. 2016). Summary judgment is proper “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). “A genuine dispute as to a material fact exists when, after considering the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, a court determines that the evidence is such that a reasonable jury could return a verdict for the party opposing the motion.” *Haverda v. Hays Cnty.*, 723 F.3d 586, 591 (5th Cir. 2013).

The Texas Supreme Court has not addressed the extent to which TUTSA preempts misappropriation of confidential information claims premised on the same information as misappropriation of trade secret claims, so we “must make an ‘*Erie* guess’ as to how it would do so.” *Brand Servs., L.L.C. v. Irex Corp.*, 909 F.3d 151, 157 (5th Cir. 2018) (footnote omitted) (quoting *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 206 (5th Cir. 2007)); see also *Erie R.R. Co. v.*

¹³ In the alternative, Trinseo asks this court to certify the question of whether TUTSA preempts common law claims for misappropriation of confidential information to the Texas Supreme Court. Because there is persuasive authority from state appellate courts that provide guidance on the issue presented, we decline to do so. See *Associated Mach. Tool Techs. v. Doosan Infracore Am., Inc.*, 745 F. App'x 535, 538 (5th Cir. 2018) (unpublished) (“We have at times, but not invariably, applied certain factors in deciding whether to certify: (1) the existence of sufficient sources of state law; (2) the degree to which considerations of comity are relevant; and (3) practical limitations.”).

Tompkins, 304 U.S. 64 (1938). We first look to the “primary sources of law—here, [TUTSA]—and then to the decisions of state intermediate courts.” *Brand Servs.*, 909 F.3d at 157.

A

TUTSA “displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret,” except that the statute does not preempt “contractual remedies,” “criminal remedies,” or “other civil remedies that are not based upon misappropriation of a trade secret.” TEX. CIV. PRAC. & REM. CODE ANN. § 134A.007. TUTSA defines a “trade secret” as “all forms and types of information” where (1) “the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret,” and (2) “the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.” *Id.* § 134A.002(6). As with the Uniform Trade Secrets Act (UTSA), TUTSA provides it “shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.” *Id.* § 134A.008.

In *Brand Services*, this court interpreted the preemption provision in the Louisiana Uniform Trade Secrets Act (LUTSA), which is substantively identical to TUTSA’s preemption provision, to determine whether a common-law conversion claim for confidential information was preempted. 909 F.3d at 158–59; *compare* LA. STAT. ANN. § 51:1437 *with* TEX. CIV. PRAC. & REM. CODE ANN. § 134A.007. We held that “the plain text of LUTSA would preclude a civilian law conversion claim

involving confidential information that qualifies as a trade secret under LUTSA.” *Brand Servs.*, 909 F.3d at 158. But given that “courts have come to varying conclusions about the [UTSA’s] preemption provision’s intended scope,” this court found it necessary to “look to intermediate state court decisions” to determine whether claims premised on confidential information that is *not* a trade secret are also preempted. *Id.* Because “Louisiana appellate courts have twice held that LUTSA does not preempt where non-trade secret information was at issue,” we held “LUTSA does not preempt civilian law claims for conversion of information that does not constitute a trade secret under LUTSA.” *Id.* at 159.

Like LUTSA, TUTSA preempts claims premised on misappropriation of a trade secret and does not preempt “civil remedies that are *not* based upon misappropriation of a trade secret.” TEX. CIV. PRAC. & REM. CODE ANN. § 134A.007 (emphasis added). But the text does not answer the question of whether a plaintiff can plead misappropriation of confidential information in the alternative to a trade secret claim, where both claims are admittedly premised on the same information. And, as noted in *Brand Services*, “courts interpreting their respective states’ versions of the [UTSA] have not uniformly applied UTSA’s preemption provision.” 909 F.3d at 158. Under these circumstances, it is appropriate also to look to Texas intermediate court decisions. *See id.*

B

Texas intermediate courts have consistently held that “a common law claim is preempted by TUTSA when the gravamen of the claim duplicates a TUTSA claim.” *Reynolds v. Sanchez Oil & Gas Corp.*, No. 01-18-00940-CV, 2023 WL 8262764 at *16 (Tex App —

Houston [1st Dist.] Nov 30, 2023 no pet.) (finding that breach of fiduciary duty claims were preempted to the extent based on misappropriation of trade secrets *and* confidential information); *see also Super Starr Int'l, LLC v. Fresh Tex Produce, LLC*, 531 S.W.3d 829, 843 (Tex. App.—Corpus Christi–Edinburg 2017, no pet.) (holding that breach of fiduciary duty claims premised on confidential and proprietary information were preempted because they “duplicate[d] [the plaintiff’s] alleged violation of [TUTSA]”); *Title Source, Inc. v. HouseCanary, Inc.*, 612 S.W.3d 517, 533 (Tex. App.—San Antonio 2020, pet. denied) (vacating a jury’s fraud finding and holding the claim was preempted to the extent the “foundation” of the claim was “an assertion that [the defendant] misappropriated [the plaintiff’s] trade secrets”); *Coe v. DNOW LP*, 718 S.W.3d 338, 354–55, 369–70 (Tex. App.—Houston [14th Dist.] 2025, pet. filed) (holding that a civil conspiracy theory of trade secret liability, as well as fiduciary duty claims premised on trade secret misappropriation, were preempted). In other words, TUTSA “preempts claims that rely on the same facts as a trade-secret-misappropriation claim” *Coe*, 718 S.W.3d at 353.

In determining whether a claim is preempted, Texas courts look to “the substance of the facts alleged rather than to the way a claim is pleaded.” *Id.* at 355. For instance, even where a claim is premised on “confidential information” rather than trade secrets, that claim is preempted if “as pleaded” by the plaintiffs, “the confidential and proprietary information at issue . . . falls within TUTSA’s definition of a trade secret.” *Reynolds*, 2023 WL 8262764, at *18. “[A]s the Supreme Court of Texas has recognized in other contexts, ‘the law should not reward artful pleading.’” *Coe*, 718 S.W.3d at 354 (quoting *Pitts v. Rivas*, 709 S.W.3d 517, 525 (Tex. 2025)).

Here, Trinseo asserted its misappropriation of confidential information claims in the “alternative” and based those claims entirely on the information that it alleged constituted trade secrets. Looking to the substance of the claims, Trinseo alleged that it used the confidential information in its business, which provided “an opportunity to obtain an advantage over competitors.” Trinseo further asserted that it “owned this confidential information and took reasonable steps under the circumstances to keep that information substantially secret.” A Texas intermediate court has determined that nearly identical allegations “show[ed] that even the confidential and proprietary information at issue . . . derives independent economic value from not being generally known or readily ascertainable by proper means and is the subject of reasonable efforts to maintain its secrecy.” *See Reynolds*, 2023 WL 8262764, at *18 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 134A.002(6)). In other words, “as pleaded” by Trinseo, even the information that it alleges is confidential “falls within TUTSA’s definition of a trade secret.” *See id.* And regardless of the labels chosen by Trinseo, the substance of its common law claims “duplicate” its trade secret claims. *See Super Starr*, 531 S.W.3d at 843. Because Trinseo’s misappropriation of confidential information claims “rely on the same facts as [its] trade-secret-misappropriation claim[s],” those claims are preempted by TUTSA. *See Coe*, 718 S.W.3d at 353.

The district court did not err in granting summary judgment on Trinseo’s misappropriation of confidential information claims.

V

Finally, KBR appeals the district court’s grant of a permanent injunction, arguing that Trinseo failed to

establish the necessary elements to obtain injunctive relief.

A grant of a permanent injunction is reviewed for abuse of discretion. *Young Conservatives of Tex. Found. v. Smatresk*, 73 F.4th 304, 308 (5th Cir. 2023). “The district court abuses its discretion if it ‘(1) relies on clearly erroneous factual findings . . . , (2) relies on erroneous conclusions of law . . . , or (3) misapplies the factual or legal conclusions when fashioning its injunctive relief.’” *Spirit Aerosystems, Inc. v. Paxton*, 142 F.4th 278, 284 (5th Cir. 2025) (quoting *BNSF Ry. Co. v. Int’l Ass’n of Sheet Metal, Air, Rail & Transp. Workers – Transp. Div.*, 973 F.3d 326, 333–34 (5th Cir. 2020)). “The district court’s order is entitled to deference, but we review de novo any questions of law underlying the decision.” *BNSF Ry. Co.*, 973 F.3d at 334.

To obtain a permanent injunction, a plaintiff must establish:

- (1) that it has suffered an irreparable injury;
- (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

As to the first factor, Trinseo has demonstrated it will suffer harm by the continued use of its trade secrets. For example, Trinseo presented evidence that it decided to slow down its PC licensing efforts to avoid “get[ting] additional interfacial [PC] into the market”

because doing so may have an “effect on the market.” But KBR plans to continue putting Dow-like PC technology in the market by opening additional plants. This threat of disclosure constitutes irreparable harm.¹⁴ See *Heil Trailer Int’l Co. v. Kula*, 542 F. App’x 329, 336 (5th Cir. 2013) (unpublished) (noting that, under Texas law, the threat of trade secret disclosure constitutes irreparable injury).

As to the second factor, KBR argues Trinseo had an adequate remedy at law because monetary damages would sufficiently compensate for Trinseo’s injuries caused by KBR’s misappropriation. But ample evidence at trial showed KBR intended to continue licensing its PCMax technology. A monetary remedy would not be adequate to protect Trinseo from that future harm.

For the balance of hardships, KBR complains about costs or inconvenience associated with complying with an injunction. But “when the potential harm to each party is weighed, a party can hardly claim to be harmed where it brought any and all difficulties occasioned by the issuance of an injunction upon itself.” *Texas v. United States*, 809 F.3d 134, 187 n.203

¹⁴ KBR argues Trinseo has not demonstrated irreparable harm because it delayed seeking injunctive relief until after trial and because Trinseo long ago exited the PC business. Delay in seeking an injunction may be one factor that weighs against granting an injunction, but it is not determinative. See *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1193 (5th Cir. 1975) (finding that the movant’s three-month delay in seeking injunctive relief “is not determinative of whether relief should be granted”). Regardless, Trinseo contemplated seeking injunctive relief from the beginning of its lawsuit, as its second amended complaint includes a request for a permanent injunction. Trinseo also has not wholly exited the PC market, as evidenced by its November 2024 PC licensing deal with a company in India.

(5th Cir. 2015) (citation modified) (quoting *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 728 (3d Cir. 2004)). And Trinseo presented evidence that KBR's continued trade secret misappropriation is harmful because it devalues Trinseo's PC technology.

On the final factor, protection against the misappropriation of trade secrets serves the public interest. *See Aspen Tech.*, 569 F.App'x at 273 (affirming the grant of a permanent injunction in a trade secret case in part because "it was in the interest of public policy to prohibit the sale and use of [the defendant's] products . . . that were derived from the improper misappropriation of trade secrets"). It serves the public interest to protect against KBR's further misappropriation of Trinseo's secrets.

The district court did not abuse its discretion in granting the permanent injunction.

* * *

The district court's judgment is in all respects AFFIRMED.

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[FILED: March 4, 2026]

No. 24-20460

TRINSEO EUROPE GMBH,
Plaintiff—Appellant / Cross-Appellee,
versus

KELLOGG BROWN & ROOT, L.L.C.; STEPHEN HARPER,
also known as STEVE HARPER; STEVE HARPER
CONSULTING, INCORPORATED; POLYCARBONATE
CONSULTING SERVICES, INCORPORATED,
Defendants—Appellees / Cross-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:20-CV-478

ON PETITION FOR REHEARING
AND REHEARING EN BANC

Before SMITH, STEWART, and RAMIREZ, *Circuit Judges*.*

PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P.40 and 5TH CIR. R.40), the petition for rehearing en banc is DENIED.

* Judge Priscilla Richman, did not participate in the consideration of the rehearing en banc.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[ENTERED: September 11, 2024]

CIVIL ACTION NO. 4:20-CV-0478

TRINSEO, S.A.,

Plaintiff,

v.

STEPHEN HARPER, *et al.*,

Defendants.

SEALED ORDER

The Court issues this Order following a jury trial in the above-styled matter. Plaintiff Trinseo Europe GmbH's ("Trinseo" or "Plaintiff") brought this lawsuit under the Defend Trade Secrets Act ("DTSA") alleging misappropriation of ten trade secrets related to polycarbonate manufacturing ("PC"). Trinseo sued Defendant Kellogg Brown & Root, LLC ("KBR"), Defendants Steve Harper, Steve Harper Consulting, Inc. ("SHC"), Polycarbonate Consulting Services, Inc. ("PCS") (collectively, the "Harper Defendants"), and Defendants William Davis and Polycarbonate Resins Consulting, LLC ("PRC") (collectively, the "Davis Defendants"). Upon considering the parties' respective post-trial motions, the Court hereby AFFIRMS the jury's finding of liability as to KBR and the Harper Defendants, VACATES the jury's award of \$50,000,000.00 in reasonable royalty damages against

KBR, VACATES the jury's award of \$21,206,132.00 in unjust enrichment damages against KBR, and VACATES the jury's award of \$5,480,523.00 against the Harper Defendants. The Court will enter a separate take-nothing Final Judgment and will also enter a Permanent Injunction in separate orders.

I. Trial

After twelve days of trial and nearly three days of deliberation, the jury returned a unanimous verdict. (Doc. No. 321).

Evidence. There was evidence that clearly established that the Harper Defendants and KBR used confidential PC manufacturing drawings from the Dow Chemical Company ("Dow"). While primarily originating at Dow, that intellectual property eventually became Trinseo's, and at all pertinent times relating to the allegations herein, it remained Trinseo's intellectual property. These Dow drawings, designs, and specifications made up Dow's plant design package for PC manufacturing that was generally believed to be the best in the industry at the time it was created. The evidence demonstrated that various portions of this PC package design were taken by former employees without Dow's or Trinseo's permission. Also without permission, the Harper Defendants knowingly used the PC information in consulting and KBR used the PC information in designing their own PC manufacturing package ("PCMax"), which it ultimately licensed in two Chinese projects—Cangzhou and Pingmei. There is little to no doubt that Trinseo established liability in terms of misappropriation; the real question is whether that misappropriation caused Trinseo any damage and whether Trinseo has proved its damages as required by law.

Liability. The jury found that only four out of Trinseo's ten claimed trade secrets were in fact trade secrets. Specifically, the jury found the following to be trade secrets: (1) Process control strategy and Concepts and Control Algorithms, (2) Phosgene Reactor Design and Associated Pressure Vessel Containment, (3) Continuous Plug Flow Oligomerization Reactor Inside Pressure Vessel Containment (with static mixer design), and (4) Steam Devolatilization Process.¹ The jury further found that KBR and the Harper Defendants had misappropriated these four trade secrets, while finding that the Davis Defendants had not misappropriated any trade secrets.

Damages. As for compensatory damages against KBR, the jury awarded \$50,000,000.00 in reasonable royalty damages and \$21,206,132.00 in unjust enrichment damages. As for compensatory damages against the Harper Defendants, the jury awarded \$0 against Steve Harper, personally, \$2,930,817.00 against SHC, and \$2,549,706.00 against PCS in unjust enrichment damages. The jury did, however, find that Steve Harper was personally responsible for the conduct of SHC and PCS. The jury did not award any exemplary damages against any defendant.

Defenses. Finally, the jury did not find that either of the alleged affirmative defenses barred recovery. Specifically, the jury did not find that Trinseo discovered, or should have discovered through the exercise of reasonable diligence, the misappropriation

¹ By contrast, the following six claimed trade secrets were found *not* to be trade secrets: Raw materials Specifications/Composition, Thermal Stabilizer Addition System, Polymer Solution Atomizer Nozzle, "Snake" Design, Polycarbonate Product Composition, Formulas, or "Recipes," and Negative and Positive Knowledge.

before the statute of limitations ran, and the jury likewise did not find that the doctrine of laches applied.²

II. Pending Motions

After Trinseo had rested, Defendants filed several Motions for Judgment as a Matter of Law. (Docs. Nos. 292, 295, 300). Defendants argued the merits of these motions outside the presence of the jury. The Court overruled the motions and permitted the case to continue. Defendants then put on their evidence. After the Defendants rested and after three days of deliberation, the jury returned its verdict and was dismissed. The parties engaged in extensive briefings regarding the effect of the jury's findings. In total, there are five pending post-trial motions, each with responses, replies, and sur-replies. The pending motions are: 1) KBR's Motion for FRCP 50(b) Judgment as a Matter of Law and Motion for FRCP 52(c) Judgment on Partial Findings (Doc. No. 326); 2) Harper Defendants' Motion for FRCP 50(b) Judgment as a Matter of Law and Motion for FRCP 52(c) Judgment on Partial Findings (Doc. No. 334); 3) KBR's Alternative Motion for New Trial or Remittitur (Doc. No. 350); 4) Trinseo's Motion for Entry of Final Judgment (Doc. No. 328); and 5) Trinseo's Motion for Entry of Permanent Injunction (Doc. No. 330). The Court will, to an extent, address the motions in the order listed above; however, many of these motions discuss overlapping issues. For example, the issue of apportionment is a common thread. While

² It is uncertain whether the common law doctrine of laches applies to claims for misappropriation under the DTSA. The Court notes that in submitting the question to the jury, it made no determination regarding whether the defense was, in fact, viable. Given that the jury answered the question "no" as to each Defendant, the Court need not reach this question.

the Court will address each essential issue raised by the motions, it will not necessarily do so in the order in which the parties raised them.

III. Legal Standards

a. Judgment as a Matter of Law

Judgment as a matter of law is appropriate if there is no “legally sufficient evidentiary basis” for “a reasonable jury . . . to find for the party on that issue” on which it prevailed at trial. Fed. R. Civ. P. 50(a); *Laxton v. Gap Inc.*, 333 F.3d 572, 577 (5th Cir. 2003). “Evidence is legally insufficient where the facts and inferences point so strongly and overwhelmingly in favor of the moving party that reasonable jurors could not arrive at a contrary verdict.” *N. Cypress Med. Ctr. Operating Co. v. Aetna Life Ins.*, 898 F.3d 461, 473 (5th Cir. 2018) (internal quotes and citation omitted).

Courts “accord great deference to the jury’s verdict when evaluating the sufficiency of the evidence.” *Thomas v. Tex. Dep’t of Crim. Just.*, 220 F.3d 389, 392 (5th Cir. 2000). The court “must examine the evidence as a whole,” *MultiPlan, Inc. v. Holland*, 937 F.3d 487, 494 (5th Cir. 2019), and “draw all reasonable inferences in the light most favorable to the verdict,” *Allstate Ins. v. Receivable Fin. Co.*, 501 F.3d 398, 405 (5th Cir. 2007) (internal quotes and citation omitted). In that light, the court asks whether the state of proof is such that reasonable and impartial minds could reach the conclusion the jury expressed in its verdict.” *Am. Home Assur. Co. v. United Space All., LLC*, 378 F.3d 482, 487 (5th Cir. 2004) (same). In doing so, the court must “credit[] the non-moving party’s evidence and disregard[] all evidence favorable to the moving party that the jury is not required to believe.” *Apache Deepwater, L.L.C. v. W&T Offshore, Inc.*, 930 F.3d 647,

653 (5th Cir. 2019) (same). It “may not make credibility determinations or weigh the evidence, as those are jury functions.” *Fairchild v. All Am. Check Cashing, Inc.*, 815 F.3d 959, 966 (5th Cir. 2016) (same).

b. Motion for New Trial

Rule 50 also provides that a party “may include an alternative or joint request for a new trial under Rule 59.” Fed. R. Civ. P. 50(b); *Long v. Shultz Cattle Co.*, 881 F.2d 129, 132 (5th Cir. 1989) (An alternative motion for a new trial “may be granted even if the moving party is not entitled to judgment as a matter of law.”). Rule 59(a) provides that a court may grant a new trial “for any reason for which a new trial has heretofore been granted in an action at law in federal court.” Fed. R. Civ. P. 59(a)(1)(A). Though undefined by the Rule, a district court may grant a new trial if, for example, it finds that “the verdict was against the weight of the evidence,” or “the damages awarded were excessive.” *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 888 F.3d 753, 784 (5th Cir. 2018) (brackets, internal quotes, and citation omitted). “A motion for a new trial should not be granted unless the verdict is against the great weight of the evidence, not merely against the preponderance of the evidence.” *Dahlen v. Gulf Crews, Inc.*, 281 F.3d 487, 497 (5th Cir. 2002).

The decision to grant or deny a motion for a new trial, including the determination of whether a verdict is against the great weight of the evidence, is a question committed to the district court’s sound discretion. *Six Dimensions, Inc. v. Perficient, Inc.*, 969 F.3d 219, 230 (5th Cir. 2020); *Foradori v. Harris*, 523 F.3d 477, 503–04 (5th Cir. 2008). This discretion is even broader when the district court denies, rather than grants, such a motion. *Compare Cates v. Creamer*, 431

F.3d 456, 460 (5th Cir. 2005) (“Where a motion for a new trial is granted, we scrutinize that decision more closely,” because “the broad discretion allowed to the trial court is tempered by the deference due to a jury” (internal quotes and citation omitted)), *with Whitehead v. Food Max of Miss., Inc.*, 163 F.3d 265, 269 (5th Cir. 1998) (“It goes without saying that review of the denial of a new trial motion is more limited than when one is granted. The denial will be affirmed unless, on appeal, the party that was the movant in district court makes a clear showing of an absolute absence of evidence to support the jury’s verdict, thus indicating that the trial court had abused its discretion in refusing to find the jury’s verdict contrary to the great weight of the evidence.” (internal quotes and citation omitted)).

IV. Analysis

a. KBR’s Motion for FRCP 50(b) Judgment as a Matter of Law and Motion for FRCP 52(c) Judgment on Partial Findings (Doc. No. 326)

In its omnibus 46-page motion, KBR manages to raise an inordinate number of issues with the trial. While the Court appreciates KBR’s thoroughness, it finds some of these issues more meritorious than others and will only address those. Broadly speaking, KBR objects that there is legally insufficient evidence to support the jury’s finding of liability, reasonable royalty compensatory damages, and unjust enrichment compensatory damages, and that the jury’s findings on the statute of limitations and laches defenses were contrary to the evidence.

i. Objections Regarding Jury's Liability Findings: Trade Secret Status, Misappropriation, Statute of Limitations Defense, and Laches Defense

The Court first addresses what it considers to be KBR's *least* meritorious objections—those regarding the jury's findings on liability. These include the jury's finding of the trade secret status and misappropriation of the four found trade secrets, the inapplicability of the statute of limitations defense, and the inapplicability of the laches defense, assuming it is a permitted defense. As noted above, the Court must draw all inferences in the light most favorable to the verdict. The presentation of testimony and exhibits in this case was extensive and time-consuming, and the jury was attentive and thorough. Moreover, the Court previously denied KBR's motion for summary judgment on many of the same issues it now raises (for instance, that Trinseo did not take reasonable measures to protect its trade secrets). (Doc. No. 238). Having heard evidence at trial, and having reviewed the trial transcript and exhibits, the Court finds that the jury's liability determinations and affirmative defense determinations are clearly supported by evidence.³ In fact, these findings are supported by an abundance of evidence. The Court therefore denies KBR's motion as to its objections regarding the jury's finding of trade secret status, the jury's finding of misappropriation of those trade secrets, and the jury's finding that the affirmative defenses (statute of limitations and laches) did not bar Trinseo's claims.

³ See Trinseo's Response Brief (Doc. No. 354, 34-58) for its recounting of the specific supporting evidence refuting KBR's challenges.

ii. Objections Regarding Jury's Reasonable Royalty Award

The heart of KBR's objections, however, cannot be so easily addressed. These objections concern the jury's award of compensatory damages, both reasonable royalty damages and unjust enrichment damages, and whether those two awards are supported by appropriate evidence. Both in pretrial proceedings and at trial, Trinseo took an all-or-nothing approach to its damages models; it provided one lump sum for damages related to its entire PC technology package that included all ten alleged trade secrets.⁴ Trinseo did not divide up the value of its PC package per trade secret or otherwise provide evidence that would enable the jury to place a dollar value to each individually alleged trade secret.⁵ Moreover, Trinseo did not provide a method for calculating the percentage of the total value of the PC package that would be attributable to each trade secret.⁶ Prior to trial, the

⁴ Thomas Pastore, Trinseo's damages expert, testified on cross examination: "I have not done an individual valuation of each of the trade secrets." (Jan. 17 p.m. at 158:10-11).

⁵ Q: "So if the jury is trying to find out what the value of Trinseo's alleged snake design trade secret is all by itself, they can't take your word for it, right?" A: "I've not done that. I've not done a separation of value. Trinseo doesn't sell a la carte its trade secrets." (Pastore cross examination, Jan. 17 p.m. at 155:24-156:5).

⁶ Q: "I want the jury to understand whether or not you're offering them any opinion that would allow them if they don't find that each and every trade secret that Mr. Duane identified as a trade secret was in fact misappropriated by KBR, how are they supposed to determine a smaller amount of [damages] for that share of the trade secrets? You don't offer any opinion like that, do you Mr. Pastore?" A: "I don't have that opinion at this time." (*Id.* at 157:3-11).

Court warned Trinseo that this approach would be a gamble, given that the jury could find (and subsequently did find) less than all ten trade secrets to have been misappropriated, in which case any damage figure may be unsupported. *See* (Doc. No. 224).

This is exactly what happened at trial. The jury rejected six of Trinseo's alleged trade secrets and found that only four of the ten were in fact trade secrets that had been misappropriated. While a jury, like the one here, may be properly instructed to award damages only for those trade secrets that it found to have been misappropriated, a proper instruction cannot automatically protect the jury's award if the jury had no evidentiary basis to reduce or apportion that award to account for four out of ten alleged trade secrets. That is what happened in this case. Now, the parties dispute whether, and to what extent, apportionment is required in a trade secrets case like this one, in which the jury finds liability on some but not all of the alleged trade secrets. KBR argues that apportionment is required unless the "entire market value" exception applies, and that Trinseo failed to provide the proof needed to invoke this exception to apportionment. Consequently, the jury's reasonable royalty award is unsupported by evidence. By contrast, Trinseo argues that strict apportionment is not generally required and/or that it otherwise satisfied the entire market value exception⁷ to apportionment.

⁷ Though Trinseo does not actually use the term "entire market value" rule in its briefings until the sur-reply to KBR's Motion for New Trial/Remittitur, Trinseo presents arguments and cases that implicate the rule. The Court will therefore refer to Trinseo's arguments using this phrase as it is the legally correct characterization of its arguments. Moreover, the Court will address certain arguments and cases raised in the New

Consequently, the jury's reasonable royalty award is supported by evidence.

At a high level of generality, KBR argues that the jury's award is wholly unsupported by evidence because the only evidence of damages pertained to Trinseo's entire PC technology package, rather than the individually alleged trade secrets contained therein. KBR maintains that apportionment is required in patent and trade secret cases alike to prevent an unjust award and to ensure that the plaintiff is compensated only for the misappropriated technology and nothing more. Consequently, it maintains that any attempt by the jury to isolate damages for only four trade secrets was necessarily guesswork. Finally, KBR argues that there is a well-defined exception to the apportionment rule, called the entire market value rule (which allows a plaintiff to recover damages on the entire product rather than just the patented/trade-secreted portion only when the patented/trade-secreted portion drives consumer demand for the entire product), and that Trinseo failed to satisfy the requirements of this rule. Specifically, KBR contends that there is no (or insufficient) evidence that any of the four found trade secrets drove the entire consumer demand for the PC package, given that the jury heard evidence that *other* alleged trade secrets (which were not found to be trade secrets) were the "value drivers" and the "core" of the technology.

Meanwhile, Trinseo does not appear to believe that strict apportionment (as discussed in patent cases) has obvious applicability in a trade secret context like this one. It maintains that the reasonable royalty award is

Trial/Remittitur briefing in this section so as to address all issues related to apportionment at once.

appropriate because there was evidence that, in a hypothetical negotiation, Trinseo would only license its entire PC package and would not sell the trade secrets *a la carte*. It further argues that the jury selected a reasonable royalty figure that was 37.5% lower than its expert Thomas Pastore's \$80 million figure.⁸ Thus, it maintains that the Court should assume that the jury followed the instructions and reduced its damages figure (from the figure suggested by Pastore) to account for its finding that only four out of the ten alleged trade secrets were trade secrets that had been misappropriated. At the same time, Trinseo argues that the entire market value exception is more elastic, and that in cases where the trade-secreted portion is so closely integrated with the entire product such that it is impossible to isolate its value, the plaintiff is permitted to recover on the entire product. Even under the more rigid entire market value rule, though, Trinseo contends that there is sufficient evidence that two of the four found trade secrets—the Oligomerization Reactor and the Steam Devolatilization system—satisfy the rule. Finally, Trinseo argues that the fact that the jury heard evidence that *other* alleged

⁸ This conclusion is totally speculative. Nevertheless, even if one were to accept the premise, there does not appear to be any convincing explanation for why the jury reduced liability for the claimed trade secrets by 60% (10 to 4) yet reduced the damage figure by only 37%. It does not appear that the jury applied a clean fraction (i.e. by reducing Pastore's damage figure by 60%). If the jury reduced its damages based on its partial liability finding (as it was instructed to do), then that reduction was arbitrary. Moreover, Pastore's \$80 million figure was not the only reasonable royalty number in evidence, though. It is possible that the jury considered these other royalty estimations and decided that a lower number was more reasonable. Under this scenario, the jury would have awarded Trinseo damages representing all ten trade secrets despite finding liability on only four.

trade secrets were also valuable is irrelevant because the Oligomerization Reactor and the Steam Devolatilization systems are “combination” trade secrets that encompass those other “value drivers.”

As the summaries above show, the parties disagree about both the law and the facts at most every step of the analysis. Before addressing the parties’ arguments regarding the evidence presented at trial, the Court must first resolve the parties’ disputes regarding whether apportionment is required and what exactly the contours of the entire market value rule are. Accordingly, the Court begins its analysis with a careful examination of the law.

Controlling Law

The Defend Trade Secrets Act (“DTSA”), 18 U.S.C. § 1836, clearly outlines the various forms of damages that a court may award.

In a civil action brought under this subsection with respect to misappropriation of a trade secret, a court may . . . award—

- (i) damages for actual loss caused by the misappropriation of the trade secret; and
- (ii) damages for any unjust enrichment caused by the misappropriation of the trade secret that is not addressed in computing damages for actual loss; or
- (iii) in lieu of damages measured by any other methods, the damages caused by the misappropriation measured by imposition of liability for a reasonable royalty for the misappropriator’s unauthorized disclosure or use of the trade secret.

18 U.S.C. § 1836(b)(3)(B). First, damages may be measured by the actual losses sustained by the plaintiff caused by the misappropriation. This type of damages was not sought in this case and is not at issue here. Second, damages may be measured by the defendant's **unjust enrichment** caused by the misappropriation, to the extent that such damages are not duplicative of any damages awarded for actual loss. This is measured by the profits the defendant obtained from using the trade secret." *Stanacard v. Rubarb LLC*, 2016 WL 6820741, at *1 (S.D.N.Y. Nov. 10, 2016). In short, this is a form of disgorgement. Third, regardless of whether the plaintiff has a contract right to such relief, a plaintiff may recover damages in the form of a **reasonable royalty** for misappropriation of a trade secret. In this case, Plaintiff sought damages for unjust enrichment and reasonable royalty. The Court will address these in reverse order.

In patent law, a reasonable royalty award attempts to measure a hypothetically agreed value of what the defendant wrongfully obtained from the plaintiff. A reasonable royalty may be calculated based on the supposed result of hypothetical negotiations between the plaintiff and defendant. *Versata Software, Inc. v. SAP Am., Inc.*, 717 F.3d 1255, 1267 (Fed. Cir. 2013). The hypothetical negotiation "attempts to ascertain the royalty upon which the parties would have agreed had they successfully negotiated an agreement just before infringement began." *Lucent Technologies, Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1324 (Fed. Cir. 2009). In *University Computing*, the Fifth Circuit imported these damage principles from patent law into trade secret reasonable royalty law and held that "the proper measure of damages in the case of a trade secret appropriation is to be determined by reference

to the analogous line of cases involving patent infringement.” *Univ. Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 535 (5th Cir. 1974).

Apportionment

Looking then to patent law, it is a long-standing requirement that patent owners “*must* in every case give evidence tending to separate *or apportion* the defendant’s profits and the patentee’s damages *between the patented feature and the unpatented features*, and such evidence must be reliable and tangible, and not conjectural or speculative.” *Garretson v. Clark*, 111 U.S. 120, 121 (1884) (emphasis added). Indeed, in patent cases in the 140 years since *Garretson*, the Federal Circuit has strictly mandated that a reasonable royalty award must apportion the value of the patented features from the unpatented features of the accused product.

For example, in *Finjan, Inc. v. Blue Coat Sys., Inc.*, the court vacated a \$24 million award of damages measured by reasonable royalty due to the failure to properly apportion damages evidence and explained that “[w]hen the accused technology does not make up the whole of the accused product, apportionment is required.” 879 F.3d 1299, 1302, 1309 (Fed. Cir. 2018). Likewise, in *Ericsson, Inc. v. D-Link Systems, Inc.*, the court vacated a \$10 million award of damages measured by reasonable royalty for infringement of a standard essential patent (“SEP”) and, citing *Garretson*, explained that “[a]s with all patents, the royalty rate for SEPs must be apportioned to the value of the patented invention.” 773 F.3d 1201, 1207, 1232, 1235 (Fed. Cir. 2014).⁹

⁹ See also *Cornell Univ. v. Hewlett-Packard Co.*, 609 F. Supp. 2d 279, 287–90 (N.D.N.Y. 2009) (granting JMOL against a \$184

While the Fifth Circuit does not appear to have encountered a case involving apportionment in trade secrets cases, other courts have grappled with how to apply this patent law requirement to trade secrets cases. Both KBR and Trinseo cite to case law supporting their position on the issue of whether apportionment is required on a per trade secret.¹⁰

On KBR's side, perhaps the most notable case is *O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, 399 F. Supp. 2d 1064 (N.D. Cal. 2005), *aff'd*, 221 F. App'x 996 (Fed. Cir. 2007). In *O2 Micro*, the plaintiff alleged misappropriation of eleven trade secrets and presented unjust enrichment evidence relating to all eleven in one lump sum (\$16 million). 399 F.Supp.2d at 1067. The jury found that only five of eleven trade secrets were misappropriated and that only one of those (the transformer information) resulted in the defendant being unjustly enriched.¹¹ *Id.* The court

million award of damages measured by reasonable royalty due to an expert's refusal to "heed [the] court's warning" about apportionment that the royalty must account for the fact that the patent at issue was part of a multi-component product).

¹⁰ When it comes to apportionment, there is an additional inherent difficulty in translating patent law to a trade secret trial, especially cases involving multiple alleged trade secrets. Setting aside a jury finding invalidating a patent, before trial in a patent case, the parties know which features of the accused product are patented and which are not (after all, there is a patent explicitly identifying its contours). By contrast, in cases involving multiple alleged trade secrets, it is not known until after the verdict which features of a product the jury finds to be trade-secreted and which it did not. Thus, in each trade secret case, the jury could return a mixed verdict on any number of the alleged trade secrets.

¹¹ The district court had warned the *O2* plaintiff of the dangers of bundling all of its alleged trade secrets damages together during the pretrial conference: "[I]t seems to me that if [the expert] is saying the damages are X dollars if they stole all our

found, and the Federal Circuit affirmed, that there was no reasonable basis for the jury to award \$12 million in unjust enrichment damages for misappropriation of *just* the transformer information, despite there being some evidence that, in comparison with the other alleged trade secrets, the transformer information was the “heart” of the technology and could be 75-90% percent of its importance. *Id.* at 1077. Rather, the court found that “jury’s award of unjust enrichment damages was based on speculation and guesswork, not on evidence” and granted the defendant judgment as a matter of law. *Id.*

Likewise, in *Texas Advanced Optoelectronic Solutions, Inc v. Renesas Elecs. Am., Inc*, a jury found the defendant liable for misappropriation of three trade secrets, but the Federal Circuit’s appellate panel vacated the grounds for liability on two of those three, leaving only one remaining. 895 F.3d 1304, 1311–15 (Fed. Cir. 2018). Turning to the damages award, the court concluded that, even though there was liability on one trade secret, the jury award could not stand

trade secrets, he can say that. But if the jury finds that he only stole 11 of them, then his testimony would be stricken and you would have no testimony because there’d be no basis upon which a jury could decide what the damages were from the theft of 11 secrets when they’ve heard testimony only about what the damages are from 12 secrets unless somehow he can say that no matter how many secrets are stolen, the same damages are accrued.” *Id.* The same is true here. Not only did the Court warn Trinseo of this danger at the informal charge conference (“if you don’t prevail on all ten trade secrets, you may lose the reasonable royalty verdict if you get one”) (Jan. 18 p.m. at 100:5-10), it gave a similar warning in its earlier *Daubert* order (if “there is no evidence that one of the alleged trade secrets was appropriated,” that “may undercut all of Pastore’s purported testimony”). (Doc. No. 224 at 9 n.4).

because it was based on evidence valuing all three trade secrets together. It reasoned:

[Plaintiff's] expert testified that the "trade secrets [were] the—the drivers of sales." But he did not explain which of the trade secrets contributed to what amount of profit to be disgorged; he assigned all profits to the misappropriation of all trade secrets. On this record, we have no basis to conclude that the remaining ground for liability—the photodiode structure trade secret—supports the entire award. This is one reason for vacating the award.

Id. at 1317. Thus, the court reasoned that the liability finding on one remaining trade secret cannot support a damages award based on multiple trade secrets, absent some evidence that certain trade secrets corresponded to certain profits (apportionment evidence) or evidence that the one trade secret supports the entire award (entire market value). In short, the all-or-nothing damages model failed when two out of three alleged trade secrets were ultimately found not to be trade secrets.

Similarly, a district court in the Eastern District of Michigan granted a defendant's motion for judgment as a matter of law, finding that the jury's damages award based on all-or-nothing evidence was not supported by sufficient evidence because the jury found liability on three of four alleged trade secrets.¹² *Versata Software, Inc. v Ford Motor Co.*, No. 15-11264, 2023 WL 3175427 (E.D. Mich. May 1, 2023). The

¹² This matter is currently on appeal before the Federal Circuit. *Versata Software, Inc. v. Ford Motor Company*, 24-1234. No opinion has been issued as of the date of this order.

Versata court noted that the plaintiff's expert provided a damages model for head-start damages that included all four trade secrets. He did not apportion the damages for each individual trade secret or "give the jury the tools to make those determinations." *Id.* at 16. The court reasoned: "Without this information, the jury had no way to reliably determine how long it would have taken Ford to develop the three (out of four) trade secrets that it found to have been misappropriated. Under these circumstances, any development-time figure used by the jury . . . would necessarily have been pure speculation. For that reason, the jury's award of trade secret damages lacks a sufficient evidentiary foundation and cannot stand." *Id.*

Thus, KBR has provided plentiful legal authority applying patent apportionment principles to trade secret cases and vacating jury verdicts when the all-or-nothing damages approach fails. *See also Mgmt. & Eng'g Techs. Int'l, Inc. v. Info Sys. Support, Inc.*, 490 F. App'x 30 (9th Cir. 2012) (vacating reasonable royalty award in trade secrets case when the expert "did not apportion value among the legally valid and the legally invalid alleged trade secrets" but rather based his hypothetically negotiated price based on what the defendant would have paid for *all* of the information alleged to be trade secrets.").

In response, Trinseo points to *Caudill Seed & Warehouse Co., Inc. v. Jarrow Formulas, Inc.*, 53 F.4th 368, 389 (6th Cir. 2022), seemingly to argue that apportionment per trade secret is not required if the trade secrets are used as part of a larger product, liability is found on fewer than all of the alleged trade secrets, and the jury awards less than the total amount requested. *See* (Doc. No. 409 at 5). In *Caudill*, the Sixth

Circuit affirmed a jury award for actual loss and unjust enrichment under the Kentucky Uniform Trade Secrets Act. 53 F.4th at 389. The plaintiff had alleged misappropriation of six trade secrets, though the jury found misappropriation for only Trade Secrets 1, 3, 4, and 5. The jury further found that plaintiff was only entitled to compensatory damages as to Trade Secret 1 and not the others. On appeal, the defendant challenged these damages, arguing that the plaintiff's expert "based his damage predictions on the jury finding [the defendant] liable on all six trade secrets," even though the plaintiff recovered damages only on Trade Secret 1. *Id.* at 386. The Sixth Circuit panel overruled this objection, in part because the jury awarded less than the plaintiff asked for (suggesting that it decreased the award based on its partial liability finding) and because the plaintiff's expert had testified that all of plaintiff's research and development expenses had gone into Trade Secret 1.

In reaching this decision, the *Caudill* court distinguished *O2 Micro*. It stated:

O2 is not as persuasive as Jarow thinks. The plaintiff's damages expert there took an all-or-nothing approach: his model turned on misappropriation of all the trade secrets without offering the jury a way to attribute value to each individual trade secret. But Caudill's expert gave the jury options. As explained above, although Caudill's expert's damages model assumed misappropriation of all six trade secrets, he testified that all of Caudill's research and development expenses went to broccoli seed research. That allowed the jury to calculate the value of Trade Secret 1 even while finding no misappropriation of

Trade Secrets 2 and 6. Jarrow has presented no evidence convincing us that Kentucky's Supreme Court would take a more narrow view of the evidence that can support a trade-secrets damages award, and so we will adhere to the broader view that a court may flexibly award trade-secrets damages. *See* Melvin F. Jager, 1 Trade Secrets Law § 7:20 (Oct. 2021); *Acuity Brands Lighting, Inc.*, 2015 WL 12976104, at *2 n.2. Jarrow also finds no refuge in Kentucky law . . .

Id. at 389.

The Court is not convinced that *Caudill* is necessarily in tension with the cases cited by KBR. The reasoning of *Caudill* did not contradict the reasoning of *O2 Micro*; rather, the court distinguished the cases on the different evidence presented by their damages experts, finding in *Caudill* there was evidence attributing value to Trade Secret 1. *See Versata*, 2023 WL 3175427 at *18 (“Given this context, the Court declines to read *Caudill* as generally disapproving of the reasoning from *O2 Micro*.”). Moreover, the Court is not convinced that *Caudill* is particularly persuasive here. *Caudill* did not deal with federal law and so did not discuss the patent law precedent requiring apportionment or the entire market value exception to that rule.¹³ In applying Kentucky law, the Sixth Circuit noted that there was “no evidence convincing us that Kentucky’s Supreme Court would take a more narrow view . . . and so we will adhere to the broader view.” When applying federal law, however, there is an

¹³ While the opinion did not mention the entire market value exception by name, it appears that the rationale mirrors that of the entire market value exception.

indication that the Federal Circuit, and by extension the Fifth Circuit, would take a more restrictive view—for example, it affirmed the *O2 Micro* decision and issued the *Texas Advanced Optoelectronics* opinion.

Therefore, upon examining the legal authority above, the Court agrees with KBR that apportionment is generally required in trade secrets cases involving multiple alleged trade secrets. Just as a patent owner is required to apportion the value of the patented feature from the unpatented feature, so must a trade secret plaintiff apportion the value of the trade-secreted features from the non-trade-secreted features. Given that it is often unknown which features are trade-secreted and which are not until *after* a jury verdict, a plaintiff must provide damage evidence on each trade secret (or else the plaintiff must suffer the consequences of its all-or-nothing approach). Specifically, the case law instructs that, to protect itself in the event that the jury finds liability on some, but not all, alleged trade secrets, a plaintiff¹⁴ must provide either (1) evidence that apportions value per trade secret, or (2) evidence that provides some methodology or guidance for how the jury may do so itself.¹⁵ Otherwise, the jury is left to play a guessing game, or perhaps to apply its own formula to devise a fraction of the total damage figure (for example, awarding 1/3 of the

¹⁴ For argument's sake, the apportionment rule would be satisfied if the defendant offered this evidence rather than the plaintiff (though the Court is not sure why a defendant would do so). All that matters is that the jury has enough apportionment evidence on which to rely.

¹⁵ The latter would be satisfied in situations involving the entire market value rule—that is, there would be evidence that the combined value of all alleged trade secrets is attributable to one or two key trade secrets.

damage figure after finding liability on only one out of three alleged trade secrets. Of course, doing so might be fine if there were testimony that each trade secret was equally valuable but would be unsupportable absent such evidence).

Having found that apportionment is generally required, the Court turns now to whether an exception to apportionment is applicable.

Entire Market Value Exception

There is a narrow exception to the general rule requiring apportionment called the “entire market value” exception. *LaserDynamics, Inc. v. Quanta Comput., Inc.*, 694 F.3d 51, 67 (Fed. Cir. 2012). This exception comes into play in circumstances where both the patented and unpatented components together are “analogous to components of a single assembly,” “parts of a complete machine,” or “constitute a functional unit.” *Tec Air, Inc. v. Denso Mfg Michigan Inc.*, 192 F.3d 1353, 1362 (Fed. Cir. 1999). In such cases, the patent owner can obtain damages on the entire product (unpatented components and patented components) only if the infringing product substantially derives economic value from the patented feature and the patented feature is the “basis for customer demand.” *Rite-Hite Corp. v. Kelley Co., Inc.*, 56 F.3d 1538, 1549 (Fed. Cir. 1995) (*en banc*). To invoke the rule, a plaintiff must show that “the patented feature drives the demand for an entire multi-component product.” *Mentor Graphics Corp. v. EVE-USA, Inc.*, 870 F.3d 1298, 1300 (Fed. Cir. 2017) (Stoll, J., concurring); *see also LaserDynamics*, 694 F.3d at 67–68 (“We reaffirm that in any case involving multi-component products, patentees may not calculate damages based on sales of the entire product, as opposed to the smallest salable patent-practicing unit, without showing that the

demand for the entire product is attributable to the patented feature.”). Importantly, the entire market value rule is *not* appropriate where the unpatented components “have essentially no functional relationship to the patented invention and . . . may have been sold with an infringing device only as a matter of convenience or business advantage.” *Rite-Hite Corp.*, 56 F.3d at 1550.

This premise—requiring that the patented feature drives consumer demand—is by far the most widely cited standard for invoking the entire market value rule. Nevertheless, patent law, as this Court has come to understand, cannot be so easily summarized. While the majority of cases involving the entire market value rule require evidence that the patented/trade-secreted feature drove consumer demand for the entire product, *Trinseo* cites to a less-cited line of cases that discusses an alternative (or perhaps additional) means of proving the exception. *See* (Doc. No. 409 at 8–9). This second line of cases seems to ask whether the licensee (here, *Trinseo*) can “normally anticipate” the sale of the unpatented components with the patented components. These cases look to how closely integrated the unpatented components and the patented components are.

The clearest example of this second line is found in *Kari Corp. v. Wilco Marsh Buggies & Draglines, Inc.*, 761 F.2d 649, 656 (Fed. Cir. 1985). In *Kari*, the Federal Circuit observed that “[t]he ultimate determining factor [for applying the entire market value rule] is whether the patentee or its licensee can normally anticipate the sale of the unpatented components with the patented components.” *Kari*, 761 F.2d at 656 (affirming an award of damages based on the entire product when the district court found “no evidence” that the unpatented features were used or could have

been used independently of the patented features) (emphasis added). The Federal Circuit later characterized the rule from *Kari* by stating that “the entire market rule is properly applied when the nonpatented devices cannot be sold without the patented feature.” *State Indus., Inc. v. Mor-Flo Indus., Inc.*, 883 F.2d 1573, 1580 (Fed. Cir. 1989). The United States Court of Federal Claims similarly remarked that under the “entire market value rule” it is the “financial and marketing dependence on the patented item under standard marketing procedures” which determines whether the non-patented features of a machine should be included in calculating compensation for infringement. *Leesona Corp. v. United States*, 599 F.2d 958, 974, 220 Ct.Cl. 234, 202 USPQ 424, 439 (1979).

Thus, citing these cases, Trinseo appears to believe that there exists an additional pathway to satisfy the entire market value rule—the first requiring that the patented feature drive consumer demand for the whole product, and the second requiring that unpatented components and the patented components be so financially and marketably dependent such that the licensee normally anticipates the sale of the unpatented and patented components together.¹⁶

The Court notes that while neither party expressly discusses the existence of these two different iterations of the entire market value rule (instead choosing to cite only to those cases that support their respective arguments), other district courts have

¹⁶ Some courts have referred to this articulation as the “single functioning unit test.” See *Cornell Rsch. Found., Inc. v. Hewlett-Packard Co.*, No. CIVA 501CV1974 NAM, 2007 WL 4349135 (N.D.N.Y. Jan. 31, 2007), *report and recommendation adopted sub nom. Cornell Univ. v. Hewlett-Packard Co.*, No. 01-CV-1974, 2007 WL 2791120 (N.D.N.Y. Sept. 24, 2007).

identified the two articulations. Most notably, one court in the Northern District of New York discussed at length these two somewhat parallel lines of cases and stated that “[a] review of the many Federal Circuit cases decided under the entire market value rubric discloses the emergence of two separate though inter-related iterations of the rule, one of which focuses upon the **relationship between the patented feature and the unpatented components** together with which it is sold, with the second concentrating on the importance of the patented feature in **creating customer demand** for the larger product.” *Cornell Rsch. Found., Inc. v. Hewlett-Packard Co.*, No. CIVA 501CV1974 NAM, 2007 WL 4349135 (N.D.N.Y., Jan. 31, 2007), *report and recommendation adopted sub nom. Cornell Univ. v. Hewlett-Packard Co.*, No. 01-CV-1974, 2007 WL 2791120 (N.D.N.Y. Sept. 24, 2007).

It is with this background that the Court must decide how to resolve this issue. In legal terms: Do these two lines of cases provide alternate ways to invoke the entire market value rule, or do they converge to create one rule? In practical terms: Can Trinseo avoid the fact that it (1) lacks apportionment evidence and (2) may lack consumer demand evidence by pointing to evidence that the PC package was designed to be marketed, licensed, and sold as one entire product? The Court finds that as a matter of law it cannot.

The Court cannot agree with Trinseo’s reading of the law for several reasons. As an initial matter, it is true that some district courts have suggested that satisfying *either* test will suffice, meaning that a plaintiff may invoke the entire market value rule by showing either consumer demand or normal anticipation/single functioning unit. *See Interactive Health LLC v. King*

Kong USA, Inc., No. CV 06-1902-VBF(PLAX), 2008 WL 11342980 at *2 (C.D. Cal. Dec. 1, 2008) (reasoning that “**another** formulation of the entire market value rule would also support its application here” after describing the consumer demand formulation but before describing the normally-anticipates formulation) (emphasis added); *see also Heidelberg Druckmaschinen Ag v. Hanischo Com. Prod, Inc.*, No. 87 CIV. 4522, 1995 WL 693170 at *2 (S.D.N.Y. Nov. 22, 1995) (“The entire market value rule permits recovery for the whole machine if the patent owner would normally expect that the patented and unpatented components would be sold together as one unit, **or** when the patented component is the basis for the demand of an apparatus containing several features” (cleaned up)).

Nevertheless, this Court concludes that the weight of legal authority requires that there must be sufficient evidence both that the patented/trade-secreted feature drives consumer demand *and* that the patented/unpatented features constitute a single functional unit. *See Cornell*, 2007 WL 4349135 at *63 (“[w]hether the single functioning unit and customer demand tests are regarded as two separate bases either of which could support application of the entire market value rule . . . or instead the two coalesce into a single analysis, **as the court believes better represents Federal Circuit authority . . .**” (emphasis added)).

In reaching this conclusion, the Court relies heavily on the Federal Circuit’s decision in *LaserDynamics, Inc. v. Quanta Comput., Inc.*, 694 F.3d 51. Not only was *LaserDynamics* decided more recently than the line of cases cited by Trinseo, but it also specifically rejected the kind of argument raised by Trinseo.

In *LaserDynamics*, the defendant filed a motion for new trial arguing that the plaintiff's expert's testimony should have been excluded because he improperly applied the entire market value rule by "using the revenues from sales of the entire laptop computers as the royalty base without having established that the patented feature [the optical disc drive, or "ODD"] drives the demand for the entire laptop computer." *Id.* at 63. The district court agreed and granted the new trial; the Federal Circuit affirmed. In doing so, the Federal Circuit firmly stated that the entire market value rule was a "narrow" exception to the apportionment requirement and "reaffirmed" that a patentee cannot calculate damages based on sales of the entire product "without showing that the demand for the entire product is attributable to the patented feature." *Id.* at 67–68. The circuit recognized that that LaserDynamics had employed the entire market value rule when it expressly calculated the royalty rate as a percentage of the "value of the laptop rather than a patent practicing ODD alone." *Id.* at 68. In that case, however, employing the entire market value rule was impermissible because there was no evidence showing that the patented ODD drove demand for the laptop computers. The court elaborated on the entire market value rule, stating:

It is not enough to merely show that the disc discrimination method is viewed as valuable, important, or even essential to the use of the laptop computer. Nor is it enough to show that a laptop computer without an ODD practicing the disc discrimination method would be commercially unviable. Were this sufficient, a plethora of features of a laptop computer could be deemed to drive demand for the

entire product. To name a few, a high resolution screen, responsive keyboard, fast wireless network receiver, and extended-life battery are all in a sense important or essential features to a laptop computer; take away one of these features and consumers are unlikely to select such a laptop computer in the marketplace. **But proof that consumers would not want a laptop computer without such features is not tantamount to proof that any one of those features alone drives the market for laptop computers.** Put another way, if given a choice between two otherwise equivalent laptop computers, only one of which practices optical disc discrimination, proof that consumers would choose the laptop computer having the disc discrimination functionality says nothing as to whether the presence of that functionality is what motivates consumers to buy a laptop computer in the first place. It is this latter and higher degree of proof that must exist to support an entire market value rule theory.

Id. Thus, even if a patented (or in this case, trade-secreted) feature is “valuable, important, or even essential,” to the entire product, a patentee still cannot recover on the full price of the product without more. It is similarly not enough to show that the entire product would be “commercially unviable” without the patented feature.

Finally, and perhaps most significantly, the Federal Circuit *rejected* LaserDynamics’ argument that *practical and economic necessity* required it to base its royalty figure on the entire product rather than the patented

feature. LaserDynamics had argued that neither party sold ODDs independent from laptop computers; therefore, the value of the laptop computers was the only true market value of anything that they sold. The difficulty in isolating the value of one component from the value of a multi-component product, though, is not enough to invoke the entire market value rule.¹⁷ Accordingly, the Circuit concluded by explicitly declining to “establish a necessity-based exception to the entire market value rule.” *Id.* at 69.

Going back to the arguments raised by Trinseo, the Court cannot agree that practical necessity, or the fact that it “normally anticipates” the sale of the entire product with its trade secrets, justifies applying the entire market value rule.¹⁸ The Court reads

¹⁷ “That is, **if difficulty in precisely identifying the value of the ODDs is what justifies using complete laptop computers as the royalty base**, when it comes time to then apportion a royalty rate that accounts for the ODD contribution only, the exceedingly difficult and error-prone task of discerning the ODD’s value relative to all other components in the laptop remains.” *Id.* at 69 (emphasis added).

¹⁸ It is worthwhile to examine Trinseo’s position on the entire market value rule in the broader context of the litigation. Trinseo did not request a jury instruction or question pertaining to any interpretation of the entire market value rule. In fact, it specifically argued *against* including KBR’s proposed instruction on the issue. At the January 22nd charge conference, KBR requested an instruction on the entire market value rule: “As the Court has recognized, Trinseo has taken an all-or-nothing approach to damages . . . this approach is controlled by the entire market value rule, which requires the jury to find that Trinseo’s alleged trade secrets are the sole driving factor for the customer’s demand . . .” (Jan. 22 p.m. at 126:11-19). Trinseo objected, arguing that patent jury instructions cannot be so easily thrown into a trade secret cases because “we don’t have an infringing product here. We don’t have the smallest salable unit or other patent law concepts . . . so it’s just – it’s trying to fit a square peg in a round

LaserDynamics as an attempt to prevent district courts from applying anything other than the somewhat rigid consumer-demand standard when invoking the entire market value rule. With this, the Court determines that the only way for Trinseo to keep the jury's \$50 million reasonable royalty award is if it presented evidence that any of the four trade secrets¹⁹ drove consumer demand for the entire PC package.

Evidence

Returning from its deep dive into the law, the Court must now consider the evidence. Trinseo alleged misappropriation of ten trade secrets relating to its polycarbonate technology: (1) Process control strategy and Concepts and Control Algorithms, (2) Raw Materials Specifications/Composition, (3) Phosgene Reactor Design and Associated Pressure Vessel Containment, (4) Continuous Plug Flow Oligomerization Reactor Inside Pressure Vessel Containment (with static mixer design), (5) Thermal Stabilizer Addition System, (6) Steam Devolatilization Process, (7) Polymer Solution Atomizer Nozzle, (8) "Snake" Design, (9)

role [sic]." (*Id.* at 127:7-20). Consequently, the Court did not include, and Trinseo did not request, an instruction on the entire market value based on either line of cases. Thus, it waived its application. Trinseo even fought to avoid mentioning the rule or its applicability throughout most of its post-verdict briefing. It was not until Trinseo's sur-reply to KBR's motion for new trial/remittitur that Trinseo mentioned the rule by name, and even then, Trinseo did not acknowledge the consumer-demand standard—the most widely accepted articulation of the rule used in the vast majority of cases.

¹⁹ (1) Process control strategy and Concepts and Control Algorithms, (3) Phosgene Reactor Design and Associated Pressure Vessel Containment, (4) Continuous Plug Flow Oligomerization Reactor Inside Pressure Vessel Containment (with static mixer design), and (6) Steam Devolatilization Process.

Polycarbonate Product Composition, Formulations or “Recipes,” (10) Negative and Positive Knowledge. The jury was given these ten items in a list and instructed to answer “yes” or “no” as to whether each of them constituted a trade secret. Of the ten claimed trade secrets, the jury found that only four were trade secrets—numbers (1), (3), (4), and (6). The jury then found that KBR and the Harper Defendants had misappropriated these four trade secrets.²⁰

While there was some evidence that a handful of the trade secrets were particularly valuable or desirable (the “value drivers,” “core,” or “heart” of Trinseo’s PC package), there was not sufficient or clear evidence any of the four found trade secrets were the drivers of consumer demand for the whole PC package. When Trinseo’s technical expert Jerry Duane was asked if any of the ten alleged trade secrets “form the heart or the core of the value of Dow or now Trinseo’s PC technology,” he did not provide *one* key trade secret. Rather, he provided five. He answered: “If you look at the process, you look at what’s there, you have the **oligomerization reactor**. You have the—with the containment system associated with it. You have the **entire devol process** and the elements of that. The specifics associated with the **steam atomization nozzle**. The **agglomerator**. And then in addition to that, you also have the **thermal stabilizer**.” (Jan. 10 a.m. at 38:3–15) (emphasis added). While he did list two items that were ultimately found to be trade secrets (the oligomerization reactor and the

²⁰ As against the Davis Defendants, Trinseo alleged misappropriation of only three claimed trade secrets—number (7) (9) and (10). Given that the jury did not find that these items were trade secrets, the jury did not find the Davis Defendants liable for any misappropriation.

devolatization system), he also listed three items that were not found to be trade secrets (the atomization nozzle, agglomerator,²¹ and the thermal stabilizer). Thus, Duane failed to provide evidence that any one (or combination) of the four found trade secrets drove consumer demand such that Trinseo is entitled to the value of the entire PC package. Rather, his testimony only demonstrates that Trinseo considered five of the ten trade secrets to be their most unique, valuable, or important.

In fact, later in his testimony, Duane added two additional items, the raw materials and product compositions, to the list. He testified that “[t]he only other thing that would be—you know, I’m thinking about, what are really kind of the **core** and the **heart** of the process, and those are the main ones. I mean there’s components that really enter into it, such as the **raw material, composition**, that type of thing, but those are the core ones.” (Jan. 10 a.m. at 38:24–39:13). The jury found that neither the raw materials nor product compositions were trade secrets.

Trinseo’s damages expert Pastore also stated “the oligomerization and agglomeration were the core and the key elements, especially the **snake**, the **nozzles**, and the **thermal stabilizer**.” (Jan. 17 p.m. at 134:3–8). Like Duane, Pastore considered the snake, nozzle, and thermal stabilizer to be important, “core,” trade secrets, and yet the jury did not find them to be. While the jury found that the oligomerization reactor was a trade secret, the jury found that the snake, nozzle, and thermal stabilizer were not.

²¹ The term “agglomerator” was sometimes used at trial to refer to the “snake” tube (alleged trade secret 8). (Trial Transcript 966:16-24).

Finally, Defendant Steve Harper also provided some testimony about the “heart” or the core” of the PC technology. Harper’s 2009 preliminary design package for nonparty Mustang stated that “[t]he **heart** of the technology is rooted in the steam: polymer mixer and polymer agglomeration unit.” *i.e.*, the atomizer nozzle and the snakes. (PX43 at 7). He went on to testify that he referred to these as the “heart” of the technology because they were “[t]he most important part. It was—the part that was different for Dow. It was the part that we put a lot of time and effort into.” (Jan. 11 p.m. at 73:14–23). Again, the jury did not find the nozzle or the snake to be trade secrets.

As shown above, there was inconsistent evidence at various points as to which, if any trade secret, was the “value driver,” “core,” or “heart” of the technology. There was evidence that five to seven of the ten alleged trade secrets were “value drivers” “core” or “heart” technology. The fact that the Steam Devolatilization System and Oligomerization Reactor were part of that discussion is not enough to invoke the entire market value rule. Furthermore, the terms thrown around during trial—“value driver,” “core,” and “heart”—are somewhat nebulous and have little legal significance. In other words, what little evidence that may exist does not comport with the standard for invoking the entire market value rule. That these features were viewed as important to Trinseo (or even important to consumers) is not enough. As was made clear in *LaserDynamics*, the entire market value rule can only be applied when there is evidence that the trade secret drove consumer demand for the end product.

Here, Trinseo has not pointed to any evidence that consumer demand for the PC package was driven by any of its four trade secrets. Trinseo did not offer any

consumer surveys, consumer testimony, or even expert testimony that one “secret” or a combination of “secrets” drove the entire market value of Trinseo’s PC technology. In fact, it was clear at trial that Trinseo had tried to sell a license for its technology for years but had not successfully sold a PC package since 2010. (Jan. 17 p.m. at 78:8-12); *see also* (Jan. 10 a.m. at 84:17-21) (Duane admitted “Styron/Trinseo never entered into an agreement to sell or license its polycarbonate technology to any other company anywhere in the world”). Given this fact, it is questionable whether Trinseo could, hypothetically, provide any evidence of what drove consumer demand when there were no consumers of its alleged product.²² Clearly, without any consumers, there was no evidence of consumer demand regardless of any so-called value drivers.

Lastly, the Court is unconvinced by Trinseo’s final attempt to salvage its reasonable royalty award by introducing the idea of “compilation” trade secrets. The Court does not find this concept can remedy the lack

²² The same result would occur even under Trinseo’s alternative pathway (single functioning unit) to the entire market value exception. The allegations in this case concern a plan for an entire PC manufacturing plant. The jury was never asked whether the plant design was a single functioning unit or whether any single alleged trade secret was included within a single functioning unit. Moreover, testimony revealed that, since obtaining Dow’s polycarbonate business and technology, Trinseo (or its predecessor Styron) had not built a PC plant, had not entered into a joint venture to build a PC plant, had not entered into any agreements to license its PC technology to another company to build a PC plant, and at the time of the trial, was not even attempting to market its PC technology. (Jan. 10 at 83:16–85:4). Therefore, there was no evidence for a finder of fact to conclude that Trinseo or its licensee “normally anticipates” the sale of trade secreted and nontrade-secreted components together when Trinseo had never sold or licensed the product.

of or inconsistent testimony regarding the five to seven “core” alleged trade secrets. In its briefing, Trinseo for the first time suggests that the Oligomerization Reactor and the Steam Devolatization Reaction are compilation trade secrets that encompass the other “value drivers” (the snake and nozzle). It maintains that these two trade secrets, particularly the Steam Devolatization Process, are compilation or catch-all trade secrets that satisfy the entire market value rule. Trinseo states that the obvious way to reconcile the jury’s affirmative answer to Trade Secret No. 6 (the entire Steam Devolatization Process) and its negative answers to Trade Secret Nos. 5, 7, and 8 (three individual components of that process) is to apply the Fifth Circuit’s express adoption of the *Restatement* regarding combination trade secrets.” (Doc. No. 326 at 12). Thus, Trinseo argues that, because the Steam Devolatization Process is a compilation trade secret that encompasses the other “value drivers,” the entire market value rule may properly be applied to the Steam Devolatization Process such that it may keep the \$50 million reasonable royalty award without apportionment.

Trinseo quotes Fifth Circuit precedent to argue that “[t]here is little doubt that a ‘compilation’ qualifies as a trade secret” and that a compilation can be a trade secret even if its individual parts are not. *DHI Grp., Inc. v. Kent*, No. 21-20274, 2022 WL 3755782 (5th Cir. Aug. 30, 2022). There is no dispute that under certain circumstances a compilation of non-trade-secreted information *may* be a trade secret. The question is whether here, the Court can *post hoc* find that the Steam Devolatization system and the Oligomerization reactor were compilation trade secrets that encompass the snake/nozzle such that the Court can apply the

(already narrowly applied) entire market value rule. For several reasons, it cannot.

For instance, Trinseo's reliance on *Bishop v. Miller* is misguided. Trinseo points to *Bishop v. Miller*, 412 S.W.3d 758 (Tex. App.—Houston [14th Dist.] 2013, no pet.) to support its contention that the jury's finding of a compilation trade secret can excuse a plaintiff's failure to apportion and nevertheless allow the plaintiff to recover on the entire product. In *Bishop*, the Fourteenth Court of Appeals sitting in Houston overruled the defendant's argument that the trade secret damages figure was unreliable because the jury answered "no" to whether several items listed were trade secrets and the plaintiff failed to provide separate values for each of the items that the jury answered "yes" to, instead providing only one value for misappropriation. *Id.* at 777–780. The *Bishop* court overruled the defendant's objections because the jury had found that the plaintiff owned a "compilation" trade secret in some or all of the items listed in the jury charge. The *Bishop* court's entire discussion on the issue is reproduced below.

[Defendant] begins by arguing that [Plaintiff's Finance Expert]'s damages calculations were unreliable because he failed to provide separate values for each of the items the jury found to be [Plaintiff]'s trade secrets and instead provided only one value for misappropriation. This argument, however, ignores the possibility that all of the discussed items were in fact part of [Plaintiff's] trade secret; the jury, after all, found [Plaintiff] owned a compilation trade secret comprised of some or all of the thirteen items listed in the jury charge. Moreover, [Plaintiff's Finance Expert]

appears to have reasonably concluded that within [Plaintiff]’s trade secrets there exists a “tipping point” of sorts without which mining in the Ten Mile Area was not economically feasible. **Under that analysis, it would be illogical to assign a value to each separate piece of the compilation. . . .** In other words, [Defendant’s] arguments do not account for the possibility that the value of [Plaintiff]’s plan may not fluctuate based on the number of individual items contained within the plan. If [Plaintiff]’s plan was the key that made potash mining in the Ten Mile Area economically feasible, as the jury may have reasonably determined, it would not necessarily matter that the plan had three components or thirteen. **The jury could have determined the plan had the same value regardless of how many component parts were involved or were trade secrets on their own.**

Bishop, 412 S.W.3d at 777–78 and n. 28 (emphasis added).

The Court recognizes that this language is helpful for *Trinseo* and the facts of this case appear analogous. The Court, however, sees several problems with applying *Bishop* here. First and foremost, it is a Texas case applying Texas law, not the federal law under which *Trinseo* sued. There is no mention of the entire market value rule exception or the general rule requiring apportionment. In fact, the *Bishop* court cites no legal authority in its reasoning. This alone is reason for this Court to question its value as precedent. Secondly, and just as importantly, there was also a key difference in how the jury in *Bishop* was

instructed. Like here, the *Bishop* plaintiff's trade secrets were part of an entirety (its mining plan). Question 20 of the jury instructions listed 13 individual items within that mining plan and asked the jury to answer yes or no to whether that item constituted a trade secret. Of those 13 items, the jury found that only three were trade secrets. Unlike this case, however, there was a 14th item that asked the jury whether the plaintiff owned a trade secret in "a compilation of any or all of the above items," and the jury answered "yes." Charge of the Court at 25–27, *Bishop v. Miller*, 412 S. W.3d 758 (Tex. App.—Houston [14th Dist.] 2013. no pet.) (No. 08-29234) 2011 WL 10973159. Thus, the jury explicitly found a compilation trade secret existed for plaintiff's mining plan made up of "any or all" of the individually alleged trade secrets contained therein. This finding of a compilation trade secret was the basis of the *Bishop* court's decision to allow the plaintiff to recover a damages amount haled on the entire plan.

Regardless of whether a compilation trade secret so undefined as to contain "any or all" of a list of items would comply with federal trade secret precedent, the jury here simply was not asked the question. Trinseo did not request this instruction. *See* (Doc. No. 228-4). No party did. The jury was asked ten questions as to whether Trinseo owned a trade secret in the alleged items: it was not asked an eleventh question of whether Trinseo owned a "compilation" trade secret comprising all ten of the above items. Therefore, even if the *Bishop* court's reasoning were applicable here, there is no equivalent jury finding of a catch-all combination trade secret that would allow recovery for damages based on the entire PC package.

Trinseo's attempt to shoehorn the sporadic and inconsistent evidence (unsupported by consumer demand or even sales) regarding the value drivers and core of the PC technology into a compilation trade secret is not enough to convince the Court to ignore the weight of precedent. The Court finds that the entire market value exception is not applicable, and even if it were applicable, was waived. There was no evidence for a jury to conclude that, without the nozzle and snakes, Trinseo's Oligomerization Reactor and Steam Devolatization System are the single-handed components of the entire PC technology package that drove consumer demand. Moreover, even if these two trade secrets were compilations of the other "value driver" trade secrets, there would still not be sufficient evidence to invoke the entire market value rule under *LaserDynamics*. It is not enough that the Steam Devolatization System and Oligomerization Reactor be "valuable, important, or even essential," to Trinseo's PC package, nor is it enough that the PC package be "commercially unviable" without them. There must be evidence that the Steam Devolatization System and Oligomerization Reactor trade secrets are the drivers of consumer demand for the entire PC package.²³

²³ The fact that Trinseo did not allege misappropriation of the Oligomerization Reactor and Steam Devolatization System—the two trade secrets it now claims are responsible for the entire market value of the PC package—against the Davis Defendants, and still sought damages against them, is also informative. Trinseo sought to recover hundreds of thousands of dollars from the Davis Defendants based on the alleged misappropriation of only three items, none of which were ultimately found to be trade secrets. It seems somewhat inconsistent to take a position at trial that on the one hand argues that these three (non)trade secrets provided value, and on the other hand to argue, now, that their value is of such minimal importance to the entire package that

Without the entire market value rule being available, Trinseo's failure to apportion, combined with the jury's failure to find liability on all ten alleged trade secrets is fatal.

As was the case in *LaserDynamics*, using a royalty rate based on the entire PC package would run counter to the policy underpinning the entire market value rule by overreaching and encompassing components not covered by the trade secrets. *See LaserDynamics*, 694 F.3d at 70 ("LaserDynamics' necessity argument also fails to address the fundamental concern of the entire market value rule, since permitting LaserDynamics to use a laptop computer royalty base does not ensure that the royalty rate applied thereto does not overreach and encompass components not covered by the patent.").

For these reasons, the Court finds that the jury's reasonable royalty award is unsupported by the law or the evidence. Given that it did not find liability on all alleged trade secrets, the jury had no evidentiary basis from which to allocate value per trade secret. Moreover, Trinseo's understanding of the entire market value rule appears to be legally incorrect. Nevertheless, even if correct, under either iteration of the rule the evidence does not support its application.

In sum, Trinseo failed to present evidence (1) that apportions value per trade secret or (2) that any of the four found trade secrets drove the entire consumer demand for its PC package, as would be required by law. That being the case, the Court hereby grants

Trinseo is excused from apportioning their value and may invoke the entire market value rule.

KBR's Motion for Judgment as a Matter of Law as to the reasonable royalty award. (Doc. No. 326).²⁴

iii. Objections to the Jury's Unjust Enrichment Award.

The next hurdle the Court must address is whether there is a good reason to distinguish between the reasonable royalty award and the unjust enrichment award, if both are based on evidence concerning the value of the entire PC package and neither is supported by specific apportionment evidence. After all, *O2 Micro* and *Texas Advanced Optoelectronics* both involved unjust enrichment awards and still their respective jury awards were vacated for failure to apportion.

The DTSA permits a court to award “damages for any unjust enrichment **caused by** the misappropriation of the trade secret that is not addressed in computing damages for actual loss.” 18 U.S.C. § 1836(b)(3)(B)(i)(II) (emphasis added). “Deciding what constitutes unjust enrichment is a fact-intensive endeavor.” *Syntel Sterling Best Shores Mauritius Ltd. v. The TriZetto Grp., Inc.*, 68 F.4th 792, 809 (2d Cir. 2024). “Because courts take a ‘flexible and imaginative approach to damages calculation in trade secret misappropriation cases,’ unjust enrichment can take several forms and cover a broad array of activity.” *Id.* (quoting *GlobeRanger Corp. v. Software AG U.S. of Am., Inc.*, 836 F.3d 477, 499 (5th Cir. 2016)). Perhaps most commonly, these damages include a “defendant’s

²⁴ KBR also argues that Trinseo’s expert Pastore did not follow the *University Computing* factors. The Court need not address this question given its finding on apportionment—it is undisputed that the reasonable royalty figures were based on the entire PC package rather than the individual trade secrets.

increased profits derived from its use of a misappropriated trade secret.” David S. Almeling *et al.*, *Disputed Issues in Awarding Unjust Enrichment Damages in Trade Secret Cases*, 19 Sedona Conf. J. 667, 687 (2018).

KBR argues that the Court should not distinguish between unjust enrichment and reasonable royalty awards when applying apportionment principles. *See, e.g. Motorola Sols., Inc. v. Hytera Commc’ns Corp. Ltd.*, 108 F.4th 458, 488-90 (7th Cir. 2024) (finding that the district court erred by failing to apportion DTSA unjust enrichment damages but that the error was harmless because the plaintiff was entitled to a greater recovery in lost profit damages). Trinseo, not surprisingly, maintains its position that apportionment is not required in either case. It does, however, appear to emphasize that unjust enrichment awards traditionally encompass a more flexible damages measure. Trinseo highlights some evidence that but for the misappropriation, KBR would not have been able to create its PC technology package. In doing so, Trinseo cites *University Computing*, which states:

Our review of the caselaw leads us to the conclusion that every case requires a flexible and imaginative approach to the problem of damages. We agree with the Court of Appeals for the Sixth Circuit that ‘each case is controlled by its own peculiar facts and circumstances,’ *Enterprise Manufacturing Co. v. Shakespeare Co.*, 141 F.2d 916, 920 (6th Cir. 1944), and accordingly we believe that the cases reveal that most courts adjust the measure of damages to accord with the commercial setting of the injury, the likely future consequences of the misappropriation, and the nature and extent of the use the

defendant put the trade secret to after misappropriation. Naturally in some cases the damages will be subject to exact measurement, either because the parties had previously agreed on a licensing price as in *Vitro Corp. v. Hall Chemical Co.*, supra, or because some industry standard provides a clear measure. Where the damages are uncertain, however, we do not feel that that uncertainty should preclude recovery; the plaintiff should be afforded every opportunity to prove damages once the misappropriation is shown.

504 F.2d at 538.

As noted in the reasonable royalty discussion, in this circumstance, patent law is perhaps an imperfect overlay. In the traditional patent case, it is relatively easy to isolate the patented features from the unpatented features. After all, the patented features are explicitly written in the patent. Here, however, it was not ten individual trade secrets that were misappropriated. Rather, it was virtually an entire PC manufacturing plant design, which was more or less one entire package consisting of many drawings, processes, and specifications. That being the case, to satisfy its burden of proof, Trinseo had to retroactively isolate and value the trade-secreted portions. Trinseo chose not to value the trade-secreted portions separately. While the Court is not privy to the reasons for this omission, it notes that there was some evidence introduced that, in the industry, the entire PC package, although made up of multiple components, was the product. In other words, PC packages are purchased or licensed in their entirety—there was no evidence that there ever was any *a la carte* sales of individual trade secrets within the package. Despite

the fact that it had never sold or licensed its PC package, there was testimony from Trinseo employees that confirmed that Trinseo would never have sold its PC package piecemeal.²⁵

Of note, especially with regard to the unjust enrichment claim, there was evidence that but-for the so-called “tech team” (Steve Harper’s consulting services group that, at least in part, was using Trinseo’s trade secrets), KBR could not have finished its PCMax package. There was testimony from a KBR employee that KBR was 90% done with its own PC package but could not solve the final 10% without using the tech team. *See* (PX220) (“We have 90% of the design necessary but the final 10% is very complicated and we will need them [the tech team].”); *see also* (PX304) (internal KBR emails stating that “our ability to rely on the [tech team]’s advice is absolutely critical to success”). Finally, KBR’s Steve Pringle admitted that “KBR was not able to come up with a marketable polycarbonate design on its own because KBR did not have the subject matter experts in polycarbonates.” (Jan. 22 a.m. at 3584:10-14).

Can the unique facts of this case—including all the evidence described above—overcome the general rule requiring apportionment? While the Court is sympathetic to the difficulty Trinseo faces given the facts of this case and given the absence of Fifth Circuit authority supporting its position, the Court must answer this question in the negative. As described in detail above, the law (both relating to patent and trade secret cases) requires either apportionment of damages

²⁵ There was also evidence that KBR did not sell its PC product in an *a la carte* fashion either—KBR licensed and sold an entire PC package.

per trade secret or proof that the entire market value exception applies. Otherwise, the jury award is speculative and unsupported. While it is a harsh consequence, the alternative—awarding damages based on an entire product that contains non-trade-secreted material—would go against the policies articulated by the Federal Circuit. This is in line with *O2* and *Texas Advanced Optoelectronics*, both of which were trade secret cases where the court vacated the unjust enrichment award due to failure to apportion. Finding that the jury’s unjust enrichment award is unsupported by proper evidence, the Court hereby grants KBR’s Motion for Judgment as a Matter of Law as to the jury’s unjust enrichment award. (Doc. No. 326).

The Court notes that there may be an open question of whether the Court should take the jury’s response in the unjust enrichment context as merely advisory. *See Comput. Servs. Corp. v. Tata Consultancy, Inc.*, 3:19-cv-000970-X (N.D. Tex. June 13, 2024) (taking jury’s unjust enrichment award as advisory in DTSA case). This Court reserved its right to do so.²⁶ The Court need not address this question because, were the Court to calculate its own unjust enrichment award, the Court’s calculation would face the same problem. There was no evidence to measure any kind of damages attributable just to the four misappropriated trade secrets. Any effort by the Court to come up with

²⁶ COURT: “Okay. Here’s -- I said -- I thought I said early on that I was treating the unjust enrichment damage question as an advisory, didn’t I?” TRINSEO: “I think you left it open, Your Honor.” COURT: “Oh, okay, well I am.” TRINSEO: “You would submit, but reserve your right --” COURT: “I am. I’m doing that. I’m submitting and I’m reserving my right.” (Jan. 22 p.m. at 122:12-21).

an individual value for the four trade secrets found by the jury would simply be an unsupported guess.

iv. Contingent Alternative Finding on Unjust Enrichment

The above ruling is premised on the notion that the patent law concept of apportionment applies to unjust enrichment awards in DTSA cases. By all indications, while seeming somewhat harsh, this is a correct interpretation of the law. If, however, the Fifth Circuit were to determine that the doctrine of apportionment taken from patent law (an area of law that does not typically award unjust enrichment damages) is not applicable to unjust enrichment awards in DTSA cases, the Court would find the jury's unjust enrichment award of \$21,206,132.00 is unsupported by evidence. It would grant KBR's request for remittitur and find Trinseo entitled to \$10.5 million in unjust enrichment damages from KBR.²⁷

This Court first notes that the liability evidence establishing Trinseo's right to unjust enrichment damages is substantial. Nevertheless, damages based upon an unjust enrichment claim must be *caused by* the misappropriation and must reflect the benefit conferred onto the defendant. In the trade secret context, the defendant's benefit often takes the form of (1) profits derived from the use of the trade secrets, or (2) the so-called "head start" that the defendant gained in terms of saving time and avoiding the research and

²⁷ To the extent that the jury's finding was merely advisory, the Court disregards that finding and finds Trinseo entitled to \$10.5 million in damages from KBR.

development costs that it would have incurred in developing the trade secrets itself.²⁸

When looking at profits-based unjust enrichment damages, the term “apportionment” can refer to at least three different axes. First, as described above, there is apportionment of damages *between* multiple trade secrets. That is, in a case involving multiple alleged trade secrets such that the jury could find liability on some but not all, there must be some evidence apportioning damages per trade secret. Having no such evidence, the Court held above that Trinseo is not entitled to any unjust enrichment award. Nevertheless, even if this per-trade secret apportionment rule is found not to apply to unjust enrichment damages, there are two other apportionment requirements that do. The second apportionment requirement is between any profits derived from trade secret misappropriation and any profits attributable to legitimate ventures (for example, engineering services). Third, and most generally, there is the requirement that net profits must be apportioned, or separated, from total revenue.

If the Fifth Circuit ultimately decides that the requirement of per-trade-secret apportionment does

²⁸ See, e.g. *Epic Sys. Corp. v. Tata Consultancy Servs. Ltd.*, 980 F.3d 1117, 1127 (7th Cir. 2020) (affirming a form of head-start unjust enrichment damages based on the “value [defendants] received by avoiding research and development costs they would have incurred without the stolen information” in trade secrets case). Trinseo did not seek head-start damages and explicitly waived this form of unjust enrichment at the pretrial conference. (Jan. 4 at 117:15-16) (“Plaintiffs don’t have a damage model for head start.”); (*Id.* at 121:10-12) (“he’s calculating this sort of head start damage that we’re not seeking, which is what was the time period where they got a head start.”).

not apply to an unjust enrichment claim, the Court would have to determine an unjust enrichment award that satisfies the second and third types of apportionment. Under that scenario, the Court hereby contingently finds Trinseo entitled to \$10.5 million in unjust enrichment based on the evidence presented at trial.

Trinseo's expert Pastore testified that to calculate unjust enrichment, he obtained income statements from KBR for the Cangzhou and Pingmei projects demonstrating the licensing profits, engineering profits, and training profits over a several-year period. (January 17 a.m. at 2500). For Cangzhou, he concluded that \$15,507,721 was the total profits figure KBR obtained from these three categories of activities. (Jan. 17 p.m. at 2562:15-18). He admitted that from this number, the next step would be "to exclude those labor expenses involved in the alleged misappropriation under the licensing category." (*Id.* at 2563:20-23). KBR had recorded that \$7,423,000 was the Cangzhou labor cost for its engineers and the Harper Tech Team. Pastore concluded that "misappropriated labor is not an allowable deduction. So you have to add it back to get the profits attributable to the alleges misappropriation for unjust enrichment." Thus, he added *back* the labor expenses that KBR had deducted. After adding back in the labor expenses, Pastore arrived at \$22,931,389 for Cangzhou. He applied the same methodology for Pingmei and arrived at \$21,993,426. In total, he concluded that there was \$44.9 million in damages attributable to Trinseo's unjust enrichment cause.

KBR's license fees to Cangzhou and Pingmei were \$12.2 and \$9.9 million, respectively. As explained above, Pastore included profits from these licensing

fees as well as several millions from KBR's engineering and design services to prepare a BEDP²⁹ package and related equipment. Pastore admitted that he did not deduct legitimate expenses, overhead, and engineering by KBR. *See* (Jan. 17 p.m. at 169:10-17); *see also* (*id.* at 169:18-21, 170:17-23, 171:3-15, 171:16-172:3). Instead, he assumed that all profits from both ventures were attributable to misappropriation of Trinseo trade secrets. Not only that, but he affirmatively added back in labor and expenses that he assumed were attributable to the misappropriation—so essentially, he calculated something closer to revenue figures rather than true profits.

The Court finds fault in both assumptions and therefore cannot find Pastore's conclusion to be reliable. At best, it is a guess, and not a very good one. There was evidence that KBR produced, engineered, and designed parts of its PCMax package without the use of Trinseo/Dow's PC package. For example, there was testimony that KBR expended ~130,000 hours in developing various aspects of its PCMax technology. There was no competent evidence that would allow the Court to conclude that (1) all of KBR's profits from the projects, including licensing, engineering, and training, were derived from Trinseo's claimed trade secrets (let alone the four that the jury found) or (2) that ~\$10 million in labor expenses from Cangzhou and Pingmei were so related to the misappropriation that they could be added back in to KBR's net profits. Thus, the Court finds that Pastore's figure ignores the second

²⁹ There was testimony at trial regarding the difference between a PDP (Process Design Package) and a BEDP (Basic Engineering Design Package). *See* (Jan 9. a.m. at 810: 9-17) (Jerry Duane testifying that the PDP is the "lead-in" to a BEDP: if the BEDP were a book, the PDP might be Chapter 1).

and third types of required apportionment, and thereby does not reflect net profits caused by misappropriation.

Normally, such a glaring omission might prove fatal, but the Court finds that the testimony of KBR's expert, David Leathers, filled in some of the gaps created by Pastore's assumptions such that a reliable measure of unjust enrichment damage may be reached. Leathers concluded that any profits caused by misappropriation would be reflected in the licensing fees. Thus, unlike Pastore, Leathers did not comingle the profits or revenues from KBR's engineering and training.³⁰ This was because there was testimony had KBR not licensed Cangzhou and Pingmei, these engineering and training personnel costs would have been allocated to another project.³¹ Looking only to the licensing, KBR sold its PCMax technology license to Cangzhou (\$12.2 million license fee) and Pingmei (\$9.9 million license fee). Leathers concluded that KBR's profits associated with these license fees would be \$10.5 million. (Jan. 23 p.m. at 80:15-20).³²

³⁰ "So, essentially, you can separate the profits that KBR's making off of engineering and training from that licensing fee. And so what you see below is, is myself separating that out and doing just the profits that are associated with the license fee." (Jan. 23 p.m. at 80:1-6).

³¹ Steve Pringle testified that KBR had a pool of engineers and had they not been tasked with working on PCMax, they would have been deployed elsewhere.

³² In his direct examination, Leathers then reduced this \$ 10.5 million profit figure to ~\$3 million, testifying that this was the true "benefit" to KBR. The Court finds this further reduction is conclusory and not clearly supported by any evidence. Thus, \$10.5 million is the amount it contingently awards based on the evidence.

Pastore acknowledged the difference between his and Leathers' calculation. He was asked on cross examination: "Setting aside apportionment for a minute, your disgorgement opinion differs from Mr. Leathers' opinion in at least two big ways. Number one, Mr. Leathers deducts costs for overhead and engineering, which you do not. And number two, you add back in costs that you say were somehow related to the misappropriation; correct?" "Correct." (Jan. 17 p.m. at 169:10–17).

Upon examining the evidence, the Court also finds that the jury's award of ~\$21 million is unsupported by the evidence. Instead, the Court finds that the evidence demonstrates that Trinseo is entitled to \$10.5 million from KBR in unjust enrichment damages. This number reflects the licensing profits that KBR enjoyed from selling its PCMax license to Cangzhou and Pingmei, and it is the maximum amount recoverable that the evidence supports. This number properly apportions profits from revenues, and properly apportions profits caused by trade secret misappropriation from those attributable to other legitimate endeavors. The Court concludes that, subject to its earlier ruling on apportionment between trade secrets, the evidence supports an unjust enrichment award of \$10.5 million.³³

³³ Of course, this analysis is not the Court's ultimate/final holding. It is only relevant in the event that the Fifth Circuit determines that apportionment by trade secret is not required to support an unjust enrichment award in DTSA cases involving multiple alleged trade secrets.

*b. Harper Defendants' Motion for FRCP 50(b)
Judgment as a Matter of Law and Motion for
FRCP 52(c) Judgment on Partial Findings.
(Doc. No. 333)*

Like KBR, the Harper Defendants filed a Motion for FRCP 50(b) Judgment as a Matter of Law and Motion for FRCP 52(c) Judgment on Partial Findings. (Doc. No. 333). The jury returned a verdict with unjust enrichment awards of \$2,930,817.00 against SHC and \$2,549,706.00 against PCS. The jury also found that Steve Harper was personally responsible for the acts of SHS and PCS. The Harper Defendants raise several arguments as to why the Court should grant their motion and vacate the jury's unjust enrichment award of \$2,930,817.00 against SHC and \$2,549,706.00 against PCS. These arguments include (1) that Trinseo failed to provide any evidence of net profits because it did not deduct legitimate expenses as required by *Liu v. Sec. & Exch. Comm'n*, 591 U.S. 71 (2020), (2) that Trinseo failed to provide evidence that would allow the jury to calculate or apportion damages attributable only to the four found trade secrets, and (3) that there was legally insufficient evidence to support the jury's finding that Steve Harper is personally responsible for the acts of SHC and PCS.

Without addressing the first and third objections listed above, the Court hereby grants the Harper Defendants' motion for judgment as a matter of law on the issue of apportionment. As with KBR, Trinseo alleged misappropriation of all ten trade secrets against the Harper Defendants; the jury found liability on four. Trinseo's all-or-nothing damages model failed to provide evidence that would allow a jury to apportion per trade secret or find that *all* of the Harper Defendants' unjust enrichment was attributable to

only the four trade secrets and no more. Thus, for the same reasons that the Court vacated the jury's damages against KBR, it must do the same for those against the Harper Defendants. Moreover, no other evidence fills in the gaps created by Trinseo's damages figure as to the Harper Defendants, so the Court cannot make a contingent alternative finding against the Harper Defendants.³⁴

*c. KBR's Motion for New Trial or Remittitur
(Doc. No. 350)*

KBR filed a Motion for New Trial or Remittitur in the alternative to its Motion for Judgment as a Matter of Law. Since the Court granted KBR's JMOL motion above, and motion for new trial was filed in the alternative, the Court hereby denies this motion as moot. (Doc. No. 350).

Again, however, if the patent law concept of apportionment per trade secret does not apply to unjust enrichment awards for DTSA cases, the Court partially grants KBR's motion for remittitur and finds Trinseo entitled to \$10.5 million in unjust enrichment damages.

³⁴ Pastore testified that he used *revenue* statements—not profit statements—to assess damages against the Harper Defendants. While Leathers filled in the evidentiary gaps as to KBR, he did not do the same for the Harper Defendants. There was no evidence by either side apportioning the Harper Defendants' profits from revenues or deducting expenses. This is one more reason why any unjust enrichment award would be guesswork.

d. Trinseo's Motion for Entry of Final Judgment (Doc. No. 328)

i. KBR

Trinseo asks the Court to enter final judgment against KBR for the full amount of the jury's reasonable royalty award—\$50 million—plus prejudgment interest. Though KBR objects to the reasonable royalty award for the reasons discussed above, the parties dedicated most of their briefing on the issue of prejudgment interest. Since the Court granted KBR's JMOL motion above, the Court need not address prejudgment interest. It hereby denies Trinseo's motion for entry of final judgment as to KBR. (Doc. No. 328). The Court will enter a separate order that Trinseo take nothing from KBR.

ii. Harper Defendants

Trinseo asks the Court to enter final judgment against the Harper personally for the full amount of the jury's unjust enrichment award of \$2,930,817.00 against SHC and \$2,549,706.00 against PCS without prejudgment interest. Since the Court granted the Harper Defendants' JMOL motion above, the Court hereby denies Trinseo's motion for entry of final judgment as to the Harper Defendants. (Doc. No. 328). The Court's separate judgment will indicate that Trinseo takes nothing from the Harper Defendants.

iii. Davis Defendants

Trinseo concedes that it should take nothing from the Davis Defendants in the final judgment. The Court's separate judgment will indicate that Trinseo takes nothing from the Davis Defendants.

e. Trinseo's Motion for Entry of Permanent Injunction (Doc. No. 330)

Trinseo asks this Court to enter a permanent injunction against *all* Defendants, which would require the destruction of all Trinseo Trade Secrets and prohibit the use of such trade secrets in the future. Trinseo further asks for the appointment of an independent monitor. The Defendants object, arguing that Trinseo is not entitled to a permanent injunction under Supreme Court precedent in *eBay*, and that even if it were, the proposed injunction is overly oppressive and broad. As an initial matter, the Court denies Trinseo's motion for permanent injunction as to the Davis Defendants. The jury found that the Davis Defendants had not misappropriated any Trinseo trade secrets. Without proving liability, Trinseo has not and cannot show that it is entitled to any relief against the Davis Defendants.

The DTSA expressly authorizes injunctive relief to "prevent any actual or threatened misappropriation" of trade secrets. 18 U.S.C. § 1836(b)(3)(A)(i). Injunctions are "common relief" in trade secret cases. *Lightning Box Games Pty. Ltd. v. Plaor, Inc.*, 2017 WL 7310782, at *9 (N.D. Cal. Dec. 29, 2017). The parties agree that Trinseo must "satisfy *eBay's* four-part balancing test to obtain a permanent injunction." (Doc. No. 357 at 2) (citing *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006)). Under that test, Trinseo must show: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *Id*

i. Irreparable Harm

The parties dispute whether Trinseo has shown it will be irreparably harmed absent a permanent injunction. According to Trinseo, there exists a presumption of irreparable harm in trade secret cases where the jury found liability. By contrast, Defendants argue that liability does not equate to irreparable harm; rather, *eBay* requires the plaintiff to make a specific showing of irreparable harm. Defendants contend that Trinseo cannot show irreparable harm given the fact that Trinseo exited the PC licensing business nearly ten years ago and that, after the trial, Trinseo announced that “Trinseo will no longer produce virgin PC and will obtain PC for its downstream businesses entirely via external purchases.” (Doc. No. 357, Exhibit 1).

In its 2006 decision in *eBay*, the Supreme Court held “[a]ccording to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief.” 547 U.S. at 391 (emphasis added). The Court vacated a permanent injunction awarded to a patent owner that succeeded on its claim for patent infringement even though the Patent Act (like DTSA) expressly authorizes injunctive relief. *See id.* at 394; *see also id.* at 392 n.2. Patent Act § 283 provides that courts “may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by a patent, on such terms as the court deems reasonable.” Similarly, the DTSA § 1836(b)(3)(A) provides that courts “may grant an injunction to prevent any actual or threatened misappropriation described in paragraph (1) on such terms as the court deems reasonable.” Thus, the Court cannot agree that the DTSA’s authorization of injunctive relief means

that Plaintiff has satisfied the irreparable harm requirement simply by proving liability.

Nevertheless, regardless of whether a presumption of irreparable harm exists, the Court finds that Trinseo has demonstrated that it will suffer harm by the continued use of its trade secrets. Though the damages have been vacated for legal reasons, there was certainly evidence that the trade secrets had value, even if Trinseo failed to pinpoint that value on a per-secret basis. While Trinseo may not license its PC technology anymore, it has demonstrated that the technology at issue still provides economic value to the company, whether it be for research and development, manufacturing, procurement, etc. *See* (Doc. No. 387 at 9–10).

ii. Other Remedies Are Inadequate

Trinseo has likewise shown that other remedies are inadequate to compensate it for future harm. Courts have long recognized that the “purpose of a permanent injunction is to protect trade secret owners from the ongoing damages caused by future use of trade secrets.” *Minnesota Mining & Mfg. Co. v. Pribyl*, 259 F.3d 587, 609 (7th Cir. 2001). As explained by Judge Mazzant in *ResMan, LLC v. Karya Prop. Mgmt., LLC*, 2021 WL 3423345 (E.D. Tex. Aug. 5, 2021), an injunction “does not go back in time and correct, or appropriately compensate for, the wrong. Rather, an injunction prevents harm from occurring in the future.” *Id.* at *4; *see also, e.g., PPG Indus. Inc v. Jiangsu Tie Mao Glass Co. Ltd.*, 47 F.4th 156,163–64 (3d Cir. 2022).

There was plenty of evidence at trial that KBR intended to continue licensing its PCMax technology. For example, KBR’s Francis Tsang testified that “KBR

expected it would sell potentially five licenses for five plants in ten years.” (Jan. 12 p.m. at 1962:1–4). It is clear that KBR’s technology includes some reliance on Trinseo’s intellectual property. Thus, Trinseo has proven that, in order to protect it from future harm, injunctive relief is required.

iii. Balance of Hardships and Public Interest

The third and fourth requirements of *eBay* are similarly met. As Trinseo described in its reply brief, “the hardship to Trinseo is precisely that discussed above: in the absence of an injunction, Trinseo is faced with the irreparable harm of threatened future misappropriation of its trade secrets for which there is no adequate remedy at law.” (Doc. No. 387 at 13). As for the hardship to KBR and Harper, Defendants primarily argue that Trinseo’s requested injunction “would cost KBR and Harper millions in compliance costs.” (Doc. No. 357 at 12). The injury that the Defendants might suffer if an injunction were imposed may be discounted by the fact that [KBR and Harper] brought that injury upon [themselves].” *NeighborFavor Inc. v. Hey Favor, Inc.*, 2023 WL 2550120, at *11 (W.D. Tex. Jan. 6, 2023) (internal quotation marks omitted). The jury found that KBR and the Harper Defendants had misappropriated four valuable Trinseo trade secrets under the DTSA. Any cost of complying with an injunction is outweighed by the policy concerns underlying the DTSA and the harm endured, and likely to be endured, by Trinseo. Moreover, the Court has not included the vast majority of the most costly compliance measures. To the extent either defendant finds that there are costs inherent in not using Trinseo’s trade secrets, those costs are the very expenses that the law expects those who misappropriate trade secret to absorb.

Finally, a permanent injunction against further misappropriation of trade secrets serves the public interest because “legal protections afforded to trade secrets protect legitimate competition, encourage investment in business and innovation, and ultimately protect jobs.” *CTCOA, LLC v. NSL Holdings, Inc.*, 2022 WL 19978294, at *2 (S.D. Tex. Sept. 30, 2022) (Hanen, J.). Therefore, the Court concludes that Trinseo, as a prevailing party in its DTSA case, has shown it is entitled to injunctive relief.

iv. Appropriate Breadth

Having found Trinseo entitled to a permanent injunction under *eBay*, the Court must determine the appropriate scope of the injunction. As a threshold matter, the Court does not find the appointment of an independent monitor necessary. The Court can enforce its own orders. The jury expressly found that the misappropriation was not willful or malicious and, with that finding, there is no reason to believe that KBR or Harper would willfully disregard this Court’s orders after four years of litigation without an independent monitor.

In paragraph 1.f of its proposed “Permanent Injunction,” Trinseo defines “**Trinseo Trade Secrets**” as “the four trade secrets found by the Jury in its January 26, 2024 verdict (Doc. No. 321) to be Trinseo’s trade secrets, including the Polycarbonate Plant Process Control Strategy and Control Algorithms, the Polycarbonate Plant Phosgene Reactor Design and associated Pressure Vessel Containment Scheme, the Polycarbonate Plant Continuous Plug Flow Oligomerization Reactor Design Inside Pressurized Vessel Containment (with static mixer design), and the Polycarbonate Plant Steam Devolatilization Process.” (Doc. No. 331-5 at 2).

The Court limits its injunction to these four Trinseo Trade Secrets given that Trinseo prevailed on the merits of these four trade secrets. The injunction is further restricted to any future use of these four trade secrets. The Court will enter a separate order of injunction in accordance with this ruling.

V. Conclusion

Upon considering the parties' respective post-trial motions and for the reasons above, the Court hereby AFFIRMS the jury's finding of liability as to KBR and the Harper Defendants, VACATES the jury's award of \$50,000,000.00 in reasonable royalty damages against KBR, VACATES the jury's award of \$21,206,132.00 in unjust enrichment damages against KBR,³⁵ and VACATES the jury's award of \$5,480,523.00 against the Harper Defendants. The Court will, by separate order, enter a take-nothing judgment as to KBR and the Harper Defendants. The Court, in accordance with the jury's verdict, also finds Trinseo takes nothing as to the Davis Defendants. The Court will enter a separate take-nothing Final Judgment and will issue a Permanent Injunction.

In sum, KBR's JMOL Motion (Doc. No. 326) is granted. The Harper Defendant's JMOL Motion (Doc. No. 333) is granted. KBR's Motion for New Trial or Remittitur (Doc. No. 350) is contingently granted in part and denied in part. Trinseo's Motion for Entry of Final Judgment (Doc. No. 328) is denied. Trinseo's

³⁵ Should the Fifth Circuit decide that apportionment on a per-trade secret basis is not required to support unjust enrichment damages in DTSA cases involving partial liability and multiple alleged trade secrets, the Court contingently finds Trinseo entitled to \$10.5 million in unjust enrichment damages against KBR.

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Motion for Permanent Injunction (Doc. No. 330) is granted. All other pending motions are hereby denied as moot.

SIGNED at this 11th day of September, 2024.

/s/ Andrew S. Hanen

Andrew S. Hanen

United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 4:20-CV-0478

TRINSEO, S.A.,

Plaintiff,

v.

STEPHEN HARPER, *et al.*,

Defendants.

AMENDED PERMANENT INJUNCTION

On the basis of the record and the jury's verdict, the Court finds that the conduct of Defendants Kellogg, Brown & Root, LLC ("KBR") and Stephen Harper, Steve Harper Consultants, Inc. and Polycarbonate Consulting Services, Inc. (collectively, the "Harper Defendants") conduct has caused, and will continue to cause, Trinseo Europe GmbH ("Trinseo") irreparable injury for which there is no adequate remedy at law and that a Permanent Injunction is necessary to address future harm to Trinseo.

Pursuant to the Court's inherent equitable powers, and the authority provided by the Defend Trade Secrets Act, 18 U.S.C. § 1836(b), the All Writs Act, 28 U.S.C. §1651, and Federal Rule of Civil Procedure 65, there being no further issues of fact for the Court to resolve, and upon balancing the hardships on the

parties and also taking into account the public interest, the Court ORDERS that the Enjoined Defendants are PERMANENTLY ENJOINED as set forth below.

1. Definitions. The following definitions apply for purposes of this Permanent Injunction:

- a. “Trinseo” means Trinseo Europe GmbH.
- b. “KBR” means Defendant Kellogg, Brown & Root, LLC.
- c. The “Harper Defendants” means Defendants Stephen Harper, Steve Harper Consultants, Inc. and Polycarbonate Consulting Services, Inc.
- d. “Enjoined Defendants” means KBR and the Harper Defendants and any of their principals, members, managers, shareholders, owners, officers, directors, agents, servants, and employees. This excludes William B. Davis and Polycarbonate Resins Consulting, LLC.
- e. The “Trinseo Trade Secrets” means the four trade secrets found by the Jury in its January 26, 2024 verdict, (Doc. No. 321), to be Trinseo’s trade secrets, including the Polycarbonate Plant Process Control Strategy and Control Algorithms, the Polycarbonate Plant Phosgene Reactor Design and associated Pressure Vessel Containment Scheme, the Polycarbonate Plant Continuous Plug Flow Oligomerization Reactor Design Inside Pressurized Vessel Containment (with static mixer design), and the Polycarbonate Plant Steam Devolatilization Process.
- f. The “Prohibited Information” means all documents, tangible items (including equipment, models, fixtures), or electronically stored information in the Enjoined Defendants’ possession, custody, or control that

describes, comprises, embodies, or is derived from the Trinseo Trade Secrets.

g. “Effective Date” means the date this Permanent Injunction is signed and entered or, if enforcement or implementation of this Permanent Injunction or any term or terms thereof is stayed by this Court, any Court of Appeals, or the United States Supreme Court, the date such stay is lifted.

2. Use of Trinseo Trade Secrets.

a. The Enjoined Defendants are enjoined in perpetuity from in any way acquiring, accessing, viewing, disclosing, transferring, disseminating, copying, storing, using, or exploiting the Prohibited Information without Trinseo’s express prior written consent and/or except as expressly provided herein to facilitate compliance with this Permanent Injunction. This includes the current and future use of the four Trinseo Trade Secrets in any PCMax package or any similar KBR/Harper polycarbonate plant design.

b. The Enjoined Defendants are also hereby ordered to delete and/or destroy all materials in their possession which encompass, replicate, are derived from, or describe any of the four Trinseo Trade Secrets as soon as reasonably feasible.

3. Information and Communication Requirements.

a. Within five business days of the Effective Date, the Enjoined Defendants shall designate one individual to serve as the point of contact for the Court or its designee. Each Enjoined Defendant shall authorize their designated individual to take all actions necessary to implement and comply with this Permanent

Injunction on behalf of the Enjoined Defendant for which the individual is designated.

b. Within thirty business days of the Effective Date, the Enjoined Defendants shall each provide to this Court a “Notice of Compliance” containing the steps that they have taken to ensure compliance with this Permanent Injunction, specifically Paragraphs 2(a) and 2(b).

c. The Enjoined Defendants may access and view Prohibited Information already in their possession, custody, or control solely to the extent necessary to comply with the requirements of this Permanent Injunction.

d. The Enjoined Defendants shall, no later than ten business days from the Effective Date, take commercially reasonable measures to convince any third parties to whom the Enjoined Defendants disclosed Prohibited Information to destroy any Prohibited Information that embodies the Trinseo Trade Secrets. Specifically, the Harper Defendants shall provide written notice to any consultant employed by the Harper Defendants, Mustang Engineering, Inc., Prime 3 Labs, LLC, Lucky Star, or Primestar Technologies (or any predecessor or successor entities of Mustang, Prime 3, Lucky Star, and Primestar) and Luxi Chemical Group Company. The Enjoined Defendants shall, no later than ten business days from transmission, serve upon Trinseo’s counsel a copy of each such notice.

4. Notice of Permanent Injunction.

a. Immediately upon the Effective Date, in addition to and notwithstanding the requirements of the notices described above in Paragraph 3(d), the Enjoined Defendants shall undertake commercially

reasonable steps to communicate the terms of this Permanent Injunction to their employees and agents, and to their vendors or licensees who are employed in the PC sector and with whom they are currently doing business, to ensure immediate compliance with this Permanent Injunction, including the destruction of the Prohibited Information in their possession and the communication of the terms of the Permanent Injunction to any third parties to whom the Trinseo Trade Secrets were or have been disclosed.

b. The Enjoined Defendants must fully comply with the notice requirements of Paragraphs 3(d) and 4(a) within thirty business days from the Effective Date, and the Enjoined Defendants shall inform the Court of their compliance with these sections in their Notice of Compliance. Specifically, the Enjoined Defendants (either individually or through an officer thereof) shall attest under penalty of perjury that each of the Enjoined Defendant has complied with these notice requirements. This Notice of Compliance shall be filed (with copies to counsel for Trinseo) no later than thirty business days from the Effective Date.

c. If the Notice of Compliance is not filed within thirty business days of the Effective Date, Trinseo may request an order from the Court to require any noncompliant Enjoined Defendant to show cause as to why they should not be held in contempt of this Permanent Injunction. The Enjoined Defendants shall bear all costs, fees, and expenses of such proceedings, including all costs, attorneys' and expert witness fees, and expenses that Trinseo may incur to seek or obtain such relief.

d. Each of the Enjoined Defendants shall provide such other notices or communications as the Court may deem necessary.

5. Monitoring and Certification.

a. On an annual basis for five years from the Effective Date, KBR shall undertake commercially reasonable efforts to prevent or uncover any potential violation of KBR's non-disclosure agreements with its licensees, suppliers, vendors, or contractors to whom KBR disclosed or provided access to documents or data that embodies, contains, comprises, or describes the Trinseo Trade Secrets. If KBR discerns any violations, KBR shall report to Trinseo any perceived violations no later than ten business days from the date KBR discerns any perceived violations. In addition, KBR shall (i) if necessary, join Trinseo as a party to any litigation/dispute resolution proceeding necessary to enforce compliance; or (b) assign Trinseo the right, but not necessarily the obligation, to enforce compliance with KBR's non-disclosure agreements. KBR shall bear all costs, fees, and expenses of such proceedings, including all costs, attorneys' and expert witness fees, and expenses that Trinseo may incur by virtue of such proceedings.

b. The Enjoined Defendants shall jointly and severally bear all costs, fees, and expenses of the Court or any vendor or agent the Court believes necessary to monitor the Enjoined Defendants' compliance with the provisions of this Permanent Injunction.

6. Violations and Non-Compliance.

a. If at any time the Court or any party discovers a violation of this Permanent Injunction any party may file with the Court a Notice of Non-Compliance specifying the violation.

b. If, after the expiration of ten business days, the noncompliant conduct has not been cured, Trinseo may request an order from the Court to require any

noncompliant Enjoined Defendant to show cause as to why they should not be held in contempt of this Permanent Injunction. The Enjoined Defendants shall bear all costs, fees, and expenses of such proceedings, including all costs, attorneys' and expert witness fees, and expenses that Trinseo may incur to seek or obtain such relief.

c. Any violation of, or non-compliance with, the terms of this Permanent Injunction may be redressed by one or more of the following: (i) contempt proceedings, which may result in fines against the Enjoined Defendants payable to Trinseo; (ii) extending the time applicable to the term(s) of the Permanent Injunction with which the Enjoined Defendants failed to comply; (iii) modifying the terms of this Permanent Injunction, including by imposing additional constraints, monitoring requirements, or certification requirements; or (iv) any other measure the Court deems just and proper.

7. The Enjoined Defendants shall take no action to circumvent the requirements of this Permanent Injunction.

VIOLATION OF THIS PERMANENT INJUNCTION SHALL CONSTITUTE CONTEMPT OF COURT, which will entitle Trinseo to seek, and the Court to grant, any and all appropriate relief. The Enjoined Defendants shall be liable for all expert witness and attorneys' fees, costs, and expenses incurred to enforce this Permanent Injunction, including all costs, attorneys' and expert witness fees, and expenses of Trinseo. All writs and processes for the enforcement of this Permanent Injunction may issue as necessary. The Court shall retain jurisdiction for enforcement of this Permanent Injunction.

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IT IS SO ORDERED.

SIGNED at this 13th day of November 2024.

/s/ Andrew S. Hanen

Andrew S. Hanen

United States District Judge

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Entered: Sept. 11, 2024]

CIVIL ACTION NO. 4:20-CV-0478

TRINSEO, S.A.,

Plaintiff,

v.

STEPHEN HARPER, *et al.*,

Defendants.

FINAL JUDGMENT

The Court's rulings on all post-verdict motions are set out in an accompanying Order. For the reasons set forth in the Court's Order, with the exception of the relief granted by this Court by the issuance of a Permanent Injunction, Trinseo Europe GmbH shall take nothing from any defendant, including Kellogg Brown & Root, LLC, Stephen Harper, Steve Harper Consulting, Inc., Polycarbonate Consulting Services, Inc., William Davis, and Polycarbonate Resins Consulting, LLC. Each party must bear their own fees and costs.

SIGNED at this 11th day of September, 2024.

/s/Andrew S. Hanen

Andrew S. Hanen

United States District Judge