No. 25-1373

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In 2019, petitioner Trinseo Europe GmbH ("Trinseo") sued respondent Kellogg Brown & Root, LLC ("KBR") for allegedly misappropriating ten purported trade secrets related to its polycarbonate technology. Despite explicit warnings from the district court, Trinseo pursued damages on an "all-or-nothing" basis; it provided the jury with a lump-sum damages calculation for all ten alleged trade secrets, without any reference to the value of any subset of the purported secrets. That strategy did not pay off. The jury rejected Trinseo's claims with respect to the majority of the ten purported trade secrets. While the jury awarded millions of dollars in damages for the four trade secrets it found, the district court set aside the award as mere guesswork without evidentiary basis due to Trinseo's all-or-nothing approach to damages. The court thus awarded only injunctive relief. The Fifth Circuit affirmed, holding that the jury had no reasonable basis to award damages with respect to the four allegedly misappropriated trade secrets because Trinseo provided the jury with no evidence or methodology to valuate damages for them.

The question presented is:

Whether a trade-secrets plaintiff should be excused from the consequences of pursuing an all-or-nothing damages theory when the jury rejects the majority of the purported trade secrets.

PARTIES TO THE PROCEEDING

Petitioner Trinseo Europe GmbH was the plaintiff in the U.S. District Court for the Southern District of Texas and the appellant/cross-appellee in the U.S. Court of Appeals for the Fifth Circuit.

Respondents Kellogg Brown & Root, LLC, Stephen Harper, Steve Harper Consulting, Inc., and Polycarbonate Consulting Services, Inc. were defendants in the U.S. District Court for the Southern District of Texas and appellees/cross-appellants in the U.S. Court of Appeals for the Fifth Circuit.

CORPORATE DISCLOSURE STATEMENT

Kellogg Brown & Root LLC is a direct wholly owned subsidiary of KBR Holdings, LLC. KBR Holdings, LLC is a direct wholly owned subsidiary of KBR, Inc. KBR Inc. is a publicly held company whose shares are traded on the New York Stock Exchange (NYSE: KBR) and has no parent corporation. KBR, Inc. is a publicly held corporation that indirectly owns 10% or more of Kellogg Brown & Root LLC's stock.

Steve Harper Consulting, Inc. and Polycarbonate Consulting Services, Inc. are closely held companies wholly owned by Stephen Harper. Neither corporation is a publicly held company.

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INTRODUCTION

This case concerns petitioner's effort to escape the consequences of its strategic decision to swing for the fences at trial by seeking a lump sum of damages for misappropriation of ten alleged trade secrets. When the jury ruled against petitioner on six of the ten purported trade secrets, petitioner's "all-or-nothing" approach appropriately resulted in an award of zero damages and the entry of injunctive relief. The Fifth Circuit's unanimous decision affirming that judgment does not implicate any circuit split, and petitioner's criticisms of the Fifth Circuit's decision are both meritless and not remotely worthy of this Court's attention.

In 2019, petitioner Trinseo sued respondent KBR under the Defend Trade Secrets Act ("DTSA"), claiming that KBR had misappropriated ten purported trade secrets related to Trinseo's polycarbonate manufacturing process—used to produce items such as eyeglass lenses, lighting fixtures, medical devices, and bulletproof glass. In the trial court, Trinseo chose not to supply the jury with a damages theory for any individual trade secret or any subset of the alleged secrets. Instead, Trinseo rolled the dice on an all-or-nothing damages model that relied on the assumption that KBR had misappropriated all ten of the alleged trade secrets. Pet.App.51a. "[T]he 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 Trinseo's evidence on damages would be "'totally undermined' if Trinseo failed to obtain a verdict on all ten of its alleged trade secrets." Pet.App.33a. Despite these warnings, Trinseo forged ahead with its gamble.

Trinseo's all-or-nothing strategy backfired when the jury rejected "all" and instead found in Trinseo's favor on only four of the ten alleged trade secrets. Although the jury went on to award substantial damages, the district court recognized—in line with its pre-trial warnings—that those damages reflected unsubstantiated guesswork, as Trinseo had not presented the jury with a legally sufficient evidentiary basis to award damages for only those four secrets. The district court accordingly concluded that the damages award was "unsupported by the law or the evidence," Pet.App.83a, and issued only injunctive relief tailored to those four secrets. It also denied Trinseo's motion for a new trial on damages.

The Fifth Circuit unanimously affirmed. Consistent with longstanding precedent, the Fifth Circuit held that "trade secret misappropriation damages must reflect the value attributable to the information or technology that is misappropriated by the defendant." Pet.App.18a; *see* Pet.App.33a. Because "Trinseo failed to present evidence that would allow the jury to" reasonably "award damages attributable only to" the four trade secrets it found misappropriated, the Fifth Circuit affirmed the district court's judgment. Pet.App.18a. That fact-bound decision plainly does not warrant this Court's review.

Apparently recognizing as much, Trinseo seeks review of a question that the case does not actually present. Trinseo's petition is premised on the notion that the Fifth Circuit adopted "a strict-apportionment approach to trade secret damages." Pet.22 (capitalization altered); *see, e.g.*, Pet.3-5, 24-28. But the decision below explicitly disavows any strict-apportionment requirement. Pet.App.18a. The Fifth Circuit instead applied the well-established principle that plaintiffs must present evidence of damages traceable to defendants' alleged misconduct.

Much like Trinseo's framing of the question presented, the purported "circuit split" that Trinseo invokes is divorced from reality. The Fifth Circuit went out of its way to reconcile its approach with the out-of-circuit cases Trinseo invokes, no court has recognized a circuit split, and the cases express no disagreement with one another on the relevant legal inquiry. Instead, they reach different results on a fact-bound question based on different facts and different damages theories. Here, the Fifth Circuit correctly affirmed the district court's judgment because Trinseo opted for an all-or-nothing strategy—i.e., it "failed to present evidence" that would allow the jury to calculate damages for the misappropriation of just four trade secrets. Pet.App.18a.

Moreover, this case is a poor vehicle to address questions regarding apportionment of damages under the DTSA. Trinseo could have presented the jury with the tools to apportion liability to particular purported trade secrets, but opted for an all-or-nothing approach. This Court does not grant plenary review to rescue parties from such tactical judgments, particularly when (as here) there are multiple alternative grounds for affirmance. The decision below granted Trinseo prospective injunctive relief, so any claims of unremedied trade secrets violations are misguided. The decision is also the first precedential opinion from any circuit court to address apportionment under the DTSA, so even if it were not correct, further percolation would be required before this Court's review.

At bottom, Trinseo's petition is just a fact-bound effort to avoid the consequences of an all-or-nothing damages strategy gone bad. That request is not remotely certworthy, and there was no error in any event. The Court should deny the petition.

STATEMENT OF THE CASE

A. Legal Background

It is a foundational principle of remedies that a factfinder may not award damages based "on speculation or guesswork." *See Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 124 (1969). It is equally clear that a jury's damages award must reflect only those damages causally traceable to the defendant's wrongdoing. *See* 18 U.S.C. § 1836(b)(3)(B)(i)(II), (ii) (trade-secret plaintiff may recover damages "caused by the misappropriation").

In the context of intellectual property, these fundamental principles are reflected in the "apportionment" doctrine. Pet.App.12a-13a. Apportionment isolates the value of the misappropriated intellectual property—i.e., the patented or trade-secret information—from the value of non-proprietary information. It therefore ensures that the factfinder has a non-speculative basis to determine which damages are causally connected to a defendant's unlawful misappropriation (and therefore compensable), as opposed to a defendant's lawful activities. Pet.App.18a. The proper application of apportionment principles simply "reflect[s] the commonsense notion that trade secret damages must be tied to the defendant's wrongful conduct—i.e., the misappropriation." Pet.App.15a-16a.

This Court first recognized apportionment in the patent context more than 140 years ago. In *Garretson v. Clark*, the Court held that the patent owner "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 . . . ." 111 U.S. 120, 121 (1884). The Court affirmed a decree that the plaintiff presented no proof of damages where the plaintiff "produced no evidence to apportion the profits or damages between the improvement constituting the patented feature and the other features of the [device]." *Id.*

Patent damages principles have long guided trade-secret damages. For many decades, it has been "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 (5th Cir. 1974) (citation omitted). Thus, the proper measure of damages in both patent and trade-secret cases requires that damages be apportioned in a way that corresponds to the portion of the product that was misappropriated. *See id.* at 535-39. In the trade-secret context, apportionment principles apply to both reasonable royalty and restitutionary (or unjust enrichment) measures of damages. Reasonable-royalty damages award "an apportionment of profits based on an approximation of the actual value of the infringed device to the defendant." *Id.* at 537. And unjust-enrichment damages award a plaintiff "the full total of 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.

Courts have applied these apportionment principles to vacate trade-secret damages awards where a plaintiff fails to introduce evidence that would allow the factfinder to award damages corresponding to the compensable misappropriation. *See O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, 399 F. Supp. 2d 1064, 1076-77 (N.D. Cal. 2005) (vacating damages award where plaintiff presented damages evidence that assumed misappropriation of twelve alleged trade secrets, but plaintiff introduced no apportionment evidence that allowed the jury to calculate damages limited to the one trade secret that resulted in unjust enrichment), *aff'd*, 221 F. App'x 996 (Fed. Cir. 2007); *Tex. Advanced Optoelectronic Sols., Inc. v. Renesas Elecs. Am., Inc.*, 895 F.3d 1304, 1317 (Fed. Cir. 2018) (vacating damages award where plaintiff presented unapportioned damages evidence allegedly resulting from the misappropriation of three trade secrets, but defendant was liable as to only one trade secret). Many other courts have applied apportionment principles to trade-secret cases in other procedural postures. *See* Pet.App.15a n.8 (collecting cases applying apportionment principles in trade-secret cases to motions for summary judgment and motions to exclude experts).

B. Factual Background

1. Beginning in the 1960s, The Dow Chemical Company began developing a process to manufacture polycarbonate. Pet.App.2a. In 1985, Dow began commercially producing polycarbonate. Pet.App.3a. At its peak, Dow operated and participated in polycarbonate facilities worldwide. Pet.App.3a.

By 2010, polycarbonate had become a commodity product, and Dow exited the business because it was no longer strategic. ROA.11598-601, 11605-09, 44509-10. Dow sold its polycarbonate interests to a private equity company, and the polycarbonate business was operated under the name Styron and later Trinseo. Pet.App.3a.

From 2011 to 2014, Trinseo repeatedly tried and failed to license its polycarbonate technology in several countries. ROA.10125, 12113-17. By 2014, Trinseo internally acknowledged that it "has had no success up to this point in its licensing efforts." ROA.51969. As a result, Trinseo gave up and began exiting the polycarbonate business. ROA.10125-27, 12136-39.

Between 2014 and 2016, Trinseo shut down or exited all but one of its polycarbonate facilities and agreements. Pet.App.6a n.3. In 2019, Trinseo developed a project team to consider selling or shutting down its final remaining polycarbonate facility. ROA.12167-70, 48297-308, 53452. Trinseo's internal documents valued the polycarbonate technology—including the right to license future plants—at just $10 million. ROA.11690-94, 48300. Trinseo ultimately "deci[ded] to exit virgin polycarbonate production" and sold the manufacturing equipment from its last polycarbonate facility. ROA.8437.

2. Steve Harper is a former Dow employee who worked in Dow's polycarbonate business in the 1980s and began polycarbonate consulting in 2007. Pet.App.3a. In his polycarbonate consulting, Harper employed a group of ex-Dow employees, which became known as the "Tech Team," to assist him. Pet.App.3a.

Between 2007 and 2017, Harper engaged in polycarbonate consulting with numerous companies and widely shared information about Dow's (later

Trinseo's) polycarbonate process—the same information Trinseo would later claim comprised its trade secrets. In 2007, Harper created a design package for a Dow-type polycarbonate plant for a Chinese client. Pet.App.3a. In 2009, Harper provided an American engineering firm with a process design package for another Chinese client. Pet.App.3a-4a. Between 2013 and 2016, Harper and the Tech Team prepared a design package for yet another Chinese client, and the Tech Team collaborated with multiple other companies in the process. Pet.App.4a-5a.

3. During that time, Trinseo was well aware that its claimed trade-secret information was circulating in the polycarbonate industry. In 2011, Trinseo first learned that an industry publication received its "highly confidential, proprietary, and non-public, trade secret information" from "various consultants," but Trinseo never attempted to identify those consultants or otherwise investigate how the publication obtained the information. Pet.App.4a; ROA.10167-71, 10175-80, 10226-28, 12098-113, 12937-42, 51549-50.

As of 2014, Trinseo believed that ex-Dow employees were violating their confidentiality obligations and performing polycarbonate consulting in China, but again did nothing to investigate. Pet.App.5a; ROA.10240-41, 10244, 10246-54, 12134-35, 52011, 52029. Harper also disclosed to Trinseo's lead polycarbonate engineer that Harper was consulting alongside other ex-Dow polycarbonate employees. ROA.10094-96, 10272-77, 10917-19. And in 2018, a Tech Team member disclosed to the same Trinseo engineer that Harper and the Tech Team members had been working on polycarbonate projects in China for years and were currently working for KBR. Pet.App.7a. Harper also had lunch with this Trinseo engineer to discuss Harper's consulting work using Dow's polycarbonate process. ROA.10292-96, 47844-45. At no point did the Trinseo engineer express any concern, nor did Trinseo take any action in response. ROA.10277-79, 10285-96, 10919.

4. KBR provides engineering and manufacturing consulting services across a number of technologies. In 2012, KBR became interested in finding polycarbonate technology to market alongside KBR's other technology and services. ROA.11055-56, 11063-66, 46457. KBR learned that Harper and the Tech Team had been involved in numerous polycarbonate projects in China, and so KBR sought out the Tech Team's services. Pet.App.6a; ROA.11293-98. In November 2017, Harper's consulting company entered into an agreement with KBR. Harper represented he (1) owned all the IP rights in the process design package being provided, (2) had not received any notice of infringement allegations, (3) was not aware of any conditions that would prevent KBR from licensing the IP rights, (4) had performed due diligence to determine he was entitled to disclose the information, and (5) the process design package had previously been disclosed to multiple other companies. ROA.52667.

KBR dedicated significant resources and over 120,000 work hours to develop its own polycarbonate licensing package named "PCMax." ROA.13052-53. KBR purchased a technology package for a 65 KTA (kilotons per annum) plant from another company, but KBR sought to build the world's first 100 KTA polycarbonate facility and had to substantially rework the existing design. ROA.10298-300, 11203, 11393-403, 13064-65.

KBR secured its first licensee for PCMax with the Chinese chemical company Cangzhou in October 2017. Pet.App.7a. KBR later signed agreements to license its PCMax package to another Chinese client, Pingmei. Pet.App.7a.

5. From 2011 to 2018, Trinseo had been told and believed that multiple companies received its alleged trade secrets long before KBR, but Trinseo did not sue any of them and did not anticipate bringing any litigation against KBR. ROA.12182-86, 12189-90, 12209-10. Things changed in 2019, however, when Trinseo received a cold-call email introduction to a lawyer who wanted to pitch a trade-secret lawsuit. ROA.12187-97, 39667. Trinseo hired that lawyer, and this lawsuit followed.

C. Procedural History

1. Trinseo sued KBR, Harper, Tech Team member Bill Davis, and Harper's and Davis's consulting companies under the DTSA for misappropriating its polycarbonate technology, asserting eleven (later reduced to ten) purported trade secrets. Pet.App.7a-8a. Throughout the litigation, Trinseo took an all-or-nothing approach to calculating damages under both reasonable royalty and unjust enrichment theories, and its expert Thomas Pastore provided only lump-sum damages amounts allegedly resulting from the misappropriation of *all ten* alleged trade secrets. Almost a year before trial, KBR moved to exclude Pastore's opinions because, among other flaws, he failed to apportion damages associated with each trade secret or with any subset of them. Pet.App.8a; ROA.16734-39. The court granted KBR's motion in part, but it declined to exclude Pastore's opinions in their entirety

because it concluded that Pastore's all-or-nothing approach was not per se inadmissible. ROA.6132-42.

Despite admitting the testimony, the district court warned Trinseo that its all-or-nothing approach could come back to bite it. The court warned Trinseo that if it failed to prove that any one of its alleged trade secrets was misappropriated, this "may undercut all of Pastore's purported testimony." ROA.6140 & n.2. But "Trinseo appear[ed] willing to gamble that it c[ould] convince the jury that the allegedly misappropriated trade secrets provided all of the value of KBR's end usage/product." ROA.6140.

At the jury charge conference, the court again warned Trinseo about "bank[ing] on an all or nothing approach" to damages and noted that "the plaintiffs chose to go down this route . . . [b]ut they're taking a chance." ROA.12424-26. The court cautioned that if the jury answered "no" to the existence of any one secret, Trinseo would "lose the whole reasonable royalty argument." ROA.12423, 12426.

2. At trial, the jury rejected Trinseo's claims as to a majority (six of ten) of the alleged trade secrets, including most of the alleged secrets that Trinseo's witnesses testified were the "heart, core, and value driver" of its technology. ROA.7546, 10079-80. On the other four secrets, the jury found that KBR's and Harper's misappropriation was not willful and malicious. ROA.7549-52, 7561. The jury nonetheless awarded $50 million against KBR for reasonable-royalty damages and, alternatively, found KBR was unjustly enriched by $21.2 million. ROA.7557-58. The jury found that Harper's two companies were unjustly enriched by $2.9 million and $2.5 million. ROA.7558.

The district court subsequently granted judgment as a matter of law on damages for KBR and Harper because Trinseo did not present any damages evidence specific to the four trade secrets the jury found to have been misappropriated. Pet.App.51a-89a, 95a-96a, 103a. Because the jury did not find in Trinseo's favor on all the alleged trade secrets, Trinseo's all-or-nothing damages evidence on all ten alleged secrets could not support the jury's award as to the four trade secrets it found. Pet.App.51a-89a. Accordingly, the district court entered judgment that Trinseo take nothing on damages, although it did enter a permanent injunction for Trinseo against KBR and Harper tailored to the four trade secrets the jury found. Pet.App.105a-112a, 113a.

3. Both sides appealed, and the Fifth Circuit unanimously affirmed. On damages, KBR raised multiple grounds for affirmance of the district court's take-nothing judgment. C.A.Dkt.134 at 39-75. The Fifth Circuit addressed only one of them, affirming the district court's conclusion that Trinseo's damages evidence for all ten claimed trade secrets (collectively) could not support the jury's award of damages for only four of the alleged trade secrets. Pet.App.11a-23a.

As relevant here, the Fifth Circuit observed that "Trinseo had 'bundl[ed] all of its alleged trade secrets damages together,'" such that "the jury did not have a reasonable basis to award damages based on the misappropriation of only four trade secrets." Pet.App.16a. The court recognized that its caselaw takes a "flexible approach to trade secret damages," but reasoned that this flexibility "does not disturb the settled principle that '[e]stimation of damages . . . should not be based on sheer speculation.'" Pet.App.17a. To that end, the Fifth Circuit held that "trade secret misappropriation damages must reflect the value attributable to the information or technology that is misappropriated by the defendant" and 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." Pet.App.18a.

The Fifth Circuit also expressly rejected a "strict apportionment" requirement for trade-secret damages. Pet.App.18a. Its decision was instead premised on the undisputed fact that "Trinseo only presented damage estimates that assumed misappropriation of ten alleged trade secrets," which meant "the jury had no basis for awarding damages based on the misappropriation of only the four trade secrets it found." Pet.App.23a. To further rebuff the notion that it had adopted a "strict apportionment" requirement for trade secret damages, the court also identified some of the "many ways" in which a plaintiff may carry its evidentiary burden in this context. Pet.App.18a n.10.

In light of Trinseo's failure to heed the "commonsense notion that trade secret damages must be tied to the defendant's wrongful conduct—i.e., the misappropriation," the Fifth Circuit held that the district court had properly vacated the jury's damages awards. Pet.App.13a-16a, 22a-23a. It thus affirmed the take-nothing judgment. Trinseo unsuccessfully sought panel rehearing and rehearing en banc. No judge on the Fifth Circuit requested a poll, nor did any judge dissent from the denial of rehearing. Pet.App.42a.

REASONS FOR DENYING THE PETITION

Trinseo's petition misstates the Fifth Circuit's decision below, conjures a non-existent split, and otherwise demands error correction where there is no error to correct. Trinseo repeatedly asserts that the Fifth Circuit imposed a "strict apportionment" requirement—i.e., a requirement that a DTSA plaintiff must always divide its damages on a "per trade secret" basis. But the Fifth Circuit explicitly rejected any such requirement (and rejected Trinseo's effort to attribute that approach to the district court), reaffirming that it follows a "flexible" approach that simply requires plaintiffs to provide evidence to enable a jury to trace any requested damages to a defendant's wrongdoing. The decision below did nothing more than apply this commonsense principle to the facts of this case: Trinseo failed to present the necessary evidence to support damages for a subset of the purported trade secrets, so the jury's damages award could not stand.

The Fifth Circuit's decision is well supported by the record below. Trinseo chose to allege misappropriation of ten trade secrets and to present damages evidence that assumed misappropriation of all ten secrets. But, as Trinseo's own expert admitted, Trinseo presented no evidence that would allow the jury to award damages on less than all ten secrets. Thus, the jury was presented with no evidence or methodology that would have allowed it to apportion damages to the four trade secrets it ultimately found misappropriated. Because the jury had no basis to determine damages limited to the scope of liability it found—i.e., the misappropriation of four trade secrets—the courts below correctly held that the jury had no evidence to award damages.

None of that conflicts with any decision from any other court of appeals. Trinseo claims that the Fifth Circuit's opinion deepens a circuit split on apportionment. But the handful of supposedly contrary decisions Trinseo cites from the Third, Sixth, and Ninth Circuits all reflect the Fifth Circuit's legally correct, commonsense understanding that apportionment evidence is needed to support an award in certain cases. The cases simply reach different results on different facts based on different damages theories. Tellingly, the opinions Trinseo cites do not express any disagreement with each other on the relevant legal standard—let alone recognize a circuit split. Moreover, two of the three cases Trinseo cites were decided under state law—not the DTSA—and only one is precedential in its own circuit.

While all of that is reason enough to deny certiorari, this case is also a poor vehicle for addressing any issues regarding apportionment of trade-secret damages. For one thing, there are multiple alternative grounds for affirmance of the district court's take-nothing damages judgment, so this Court's intervention would be highly unlikely to alter the ultimate outcome of the case. For another, even assuming that there was tension between different circuits' approach to apportionment under the DTSA, substantially more percolation in the courts of appeals would be warranted. Finally, as indicated by Trinseo's failure to raise the issue at any point in the proceedings below, this case plainly does not implicate any Seventh Amendment concerns. Consistent with the Seventh Amendment, the Fifth Circuit merely required Trinseo to support its claims with legally sufficient, non-speculative evidence. And while Trinseo tells a tale of unremedied trade secrets violations, it obtained injunctive relief tailored to the four trade secrets on which it prevailed. The fact that it did not obtain a windfall based on unsubstantiated guesswork as well is no cause for concern, let alone a cause for this Court's intervention.

I. There Is No Circuit Split On Apportionment Of DTSA Trade-Secret Damages.

Trinseo contends that the Fifth Circuit's decision warrants this Court's review because it "sharpens a circuit split over the apportionment of damages in cases involving multiple trade secrets." Pet.14-22. That is incorrect.

No court of appeals has expressed disagreement with the Fifth Circuit's commonsense view that "trade secret misappropriation damages must reflect the value attributable to the information or technology that is misappropriated by the defendant." Pet.App.18a. Trinseo's suggestion that the decision below creates a split between the Fifth Circuit and the Third, Sixth, and Ninth Circuits—supposedly because the latter three courts "have adopted a more flexible, deferential approach to damages awards" in cases "involving multiple trade secrets," Pet.18—is wrong several times over.

In the Third Circuit, Trinseo identifies just one unpublished case that purportedly conflicts with the decision below. *See* Pet.20 (citing *Sabre GLBL, Inc v. Shan*, 779 F. App'x 843 (3d Cir. 2019)). There is plainly no conflict. In *Sabre*, the plaintiff—like Trinseo here—presented damages evidence "in the aggregate." 779 F. App'x at 852. But, unlike Trinseo, the plaintiff prevailed on every one of its trade-secret claims. *Id.* at 848, 852-53. The Third Circuit's conclusion that "apportionment of damages is [not] required in all cases involving trade secrets," *id.* at 852—and was not required in that distinct factual context—is perfectly consistent with the Fifth Circuit's decision that some type of apportionment was required here. There is no problem with an all-or-nothing trial strategy when the jury finds "all"—i.e., all the trade secrets valid and infringed. Regardless, *Sabre* is a non-precedential opinion that involved Texas law concerning the breach of a fiduciary duty, rather than the DTSA. *Id.* at 848, 852. *Sabre* is wholly inapposite, soup to nuts.

Trinseo's invocation of *Caudill Seed & Warehouse Company v. Jarrow Formulas, Inc.*, 53 F.4th 368 (6th Cir. 2022), is similarly unavailing. As both the district court and the Fifth Circuit explained, *Caudill* is "not . . . in tension" with and does "not contradict the reasoning of" cases (like the decision below) requiring apportionment of damages where there are multiple alleged trade secrets. Pet.App.63a; *see* Pet.App.16a-17a. Indeed, *Caudill* itself indicates as much: the Sixth Circuit acknowledged several such cases and expressly "*distinguished*" them on the ground that the expert in *Caudill*—unlike Trinseo's expert here—"did not take an 'all-or-nothing approach' and [instead] '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." Pet.App.16a-17a (quoting *Caudill*, 53 F.4th at 389). Regardless, *Caudill* cannot create a DTSA circuit split because—like *Sabre*—it was decided under state law rather than the DTSA. *See* 53 F.4th at 389-90.

The third and final case in Trinseo's purported circuit split is the Ninth Circuit's unpublished decision in *EchoSpan, Inc. v. Medallia, Inc.*, 2025 WL 3046753 (9th Cir. Oct. 31, 2025). That decision also accords with the Fifth Circuit's decision below, as it recognizes that "apportionment testimony may be essential to provide a reasonable basis for a jury to value a defendant's gain" in complex trade-secrets cases. *Id.* at *2. What is more, the Fifth Circuit expressly considered *EchoSpan* and explained that it came out differently because of its "markedly different" facts: there, the jury *did* hear evidence from which it could reasonably estimate the damages stemming from the one jury-found secret, which was the "'core' tool that 'enable[d] everything.'" Pet.App.21a-22a (quoting *EchoSpan*, 2025 WL 3046753 at *2). Far from expressing disagreement with the Ninth Circuit's approach, the Fifth Circuit explained that Trinseo's testimony on damages "contrast[ed] with the testimony in *EchoSpan*," leading to a different outcome. Pet.App.22a. Simply put, even leaving aside the fact that *EchoSpan* is unpublished and therefore non-precedential, the decision below neither "split" with *EchoSpan* on the legal issue of apportionment nor suggested any disagreement with its application of that principle to a particular set of facts.

In short, Trinseo identifies nothing remotely approaching a circuit split on when a plaintiff needs to apportion damages in complex cases under the DTSA. For that reason alone, this Court's intervention is unwarranted.

II. The Decision Below Correctly Affirmed That Trinseo Failed To Present Adequate Evidence To Support The Jury's Damages Award.

With no circuit split that might warrant this Court's intervention, Trinseo's petition amounts to a fact-bound request for error correction that does not satisfy this Court's standards for certiorari. Regardless, there is no error to correct. Trinseo spends much of its petition asserting that the decision below erroneously applied a "strict apportionment" requirement that categorically obligates every plaintiff to introduce damages on a per-trade-secret basis. Not so. In reality, the Fifth Circuit explicitly disavowed a "strict apportionment" requirement; it merely held that Trinseo needed to (but failed to) provide the jury with some reasonable basis for apportioning damages to the four trade secrets it found were misappropriated. That straightforward conclusion is clearly correct.

1. Trinseo's merits argument attacks a straw man. The petition repeatedly accuses the Fifth Circuit of broadly demanding "strict apportionment" of damages on a per-trade-secret basis. *E.g.*, Pet.i, 3-5, 13, 22-28. The Fifth Circuit did no such thing. In fact, when Trinseo tried to attribute that label to the district court's analysis, the Fifth Circuit stated that "the district court did not create a novel 'strict apportionment' theory. Nor do we." Pet.App.18a. The Fifth Circuit instead held that "trade secret misappropriation damages must reflect the value attributable to the information or technology that is misappropriated by the defendant." Pet.App.18a. Accordingly, "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." Pet.App.18a.

Further evidencing the Fifth Circuit's *rejection* of a strict-apportionment requirement, the court emphasized the "many ways" that plaintiffs alleging misappropriation of trade secrets may satisfy the more flexible approach it reaffirmed. Pet.App.18a n.10. As an alternative to "individually valuat[ing] each alleged trade secret," a plaintiff could "valuate a *group* of trade secrets." Pet.App.18a n.10. Or "a plaintiff could *provide a methodology* for the jury to calculate the value of a particular trade secret or group of trade secrets." Pet.App.18a n.10 (emphasis added). What is more, the court emphasized that this is *not* "an exhaustive list of ways" a plaintiff could carry its evidentiary burden because "every case requires a flexible and imaginative approach to the problem of damages." Pet.App.18a n.10 (quoting *Univ. Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 538 (5th Cir. 1974)).

That understanding of the law makes perfect sense. Indeed, the court's expectation that a plaintiff present *some* apportionment evidence is firmly rooted in the text of the DTSA, which requires a causal connection between the defendant's misappropriation and the plaintiff's damages. *See* 18 U.S.C. § 1836(b)(3)(B)(i)(II), (ii). It is also supported by this Court's longstanding application of common-law apportionment principles and the universally applicable requirement that a plaintiff provide non-speculative evidence to support an award of damages. *See, e.g.*, *Garretson*, 111 U.S. at 121. It is thus no surprise that Trinseo has *admitted*, on multiple occasions, that apportionment may properly be required in DTSA cases.

C.A.Dkt.115 at 24-26; Pet.App.13a n.7; *see also* Pet.13 ("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.").

Trinseo's problem here was not that it failed to strictly apportion its damages. The problem was that Trinseo did not offer *any* evidence or methodology to give the jury a reasonable basis to award damages attributable only to the four trade secrets it found misappropriated. Instead, Trinseo presented the jury with lump-sum damages tied to the purported misappropriation of all ten claimed trade secrets without any way to determine the damages attributable to less than all ten. *See infra* pp. 22-25. The Fifth Circuit correctly concluded that, having rejected the majority of the purported trade secrets, the jury was left to speculate about how to award damages for the misappropriation of the four trade secrets. Pet.App.18a. That is, and has always been, unacceptable under this Court's precedents. *See, e.g.*, *Zenith Radio*, 395 U.S. at 124; *Garretson*, 111 U.S. at 121. There is, accordingly, no reason to question the Fifth Circuit's holding below—and certainly not pursuant to Trinseo's "question presented," Pet.i, which badly mischaracterizes the Fifth Circuit's analysis.[1]

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[1] Lacking any credible argument against the Fifth Circuit's actual reasoning, Trinseo turns its ire to the district court. *See* Pet.i, 3, 12, 15-16, 30. But the district court's order is not a candidate for certiorari, and, in all events, the Fifth Circuit correctly clarified that "the district court did not create a novel 'strict apportionment' theory." Pet.App.18a. Indeed, the district court mentioned "strict apportionment" only to describe *Trinseo's* arguments, Pet.App.52a-53a ("Trinseo argues that strict apportionment is not generally required . . . ."), and it certainly did not

2. To the extent Trinseo engages with what the Fifth Circuit actually held, it merely disagrees with the Fifth Circuit's application of well-established legal principles to the facts of this case. But this Court is not in the business of reviewing that kind of dispute. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"); S. Shapiro, K. Geller, T. Bishop, E. Hartnett & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3), p. 352 (10th ed. 2013) ("[E]rror correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari.").

In all events, the Fifth Circuit correctly applied the law to the facts of this case. "Trinseo took an all-or-nothing approach to its damages models; it provided one lump sum for damages related to its entire [polycarbonate] technology package that included all ten alleged trade secrets." Pet.App.51a. Trinseo thus presented the jury with no evidence, guidance, or methodology to allow the jury to take that lump sum and award an apportioned amount of damages limited to the four trade secrets the jury found were misappropriated. That was a strategic decision on Trinseo's part, and this Court should reject Trinseo's efforts to shift the blame.

Start with Trinseo's reasonable-royalty damages. To support those damages, Trinseo's damages expert Thomas Pastore offered testimony about an unapportioned "reasonable royalty" for KBR to license Trinseo's entire polycarbonate package. ROA.11824-

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require the "near-mathematical levels of exactitude" that Trinseo claims it did, Pet.16, 30; Pet.App.54a & n.8.

27. He offered no testimony valuing the four trade secrets found by the jury, no testimony regarding the individual value of any trade secret, and no methodology to calculate damages on less than all ten alleged trade secrets. That is not hyperbole. Pastore himself admitted he offered *no opinion* that would allow the jury to calculate a reasonable royalty for less than all the trade secrets. ROA.11924 ("I don't have that opinion at this time."). Trinseo's own expert thus conceded that the jury had no evidence to determine the amount of a reasonable royalty limited to the four trade secrets the jury found.

Instead, Pastore based his reasonable-royalty testimony on his valuation of a license to Trinseo's *entire* polycarbonate manufacturing technology. ROA.11842-61, 11899-902. Far from conducting any kind of apportionment, Pastore admitted he "d[id] not" even "differentiate" between value attributable to Trinseo's alleged secrets and value attributable to public, non-trade-secret information. ROA.11926; *see also* ROA.11399-402, 11925-26, 13061-66, 13648-49, 13664-67. So, while the jury was instructed to calculate a reasonable royalty reflecting "the value attributable to" just the four trade secrets it found "and no more," ROA.7556, the gaps in Trinseo's evidentiary showing left the jury to speculate on any royalty for the four trade secrets it found were misappropriated. The Fifth Circuit thus correctly rejected the award that resulted from that speculation.

The same problems plagued the jury's unjust-enrichment award. Again, Trinseo's damages expert Pastore testified only to lump-sum damages claimed for the misappropriation of all ten of Trinseo's alleged trade secrets. ROA.11828-32, 11836. Pastore offered no testimony about the amount of unjust enrichment resulting solely from the four jury-found trade secrets. Pastore failed even to apportion his calculation of KBR's supposed unjust enrichment between profits attributable to KBR's alleged use of the ten claimed secrets and profits attributable to non-secret information (such as KBR's own work on PCMax). *See, e.g.*, ROA.11393-403, 11829-32, 11930, 11936, 13053. And, again, Pastore admitted he did not perform any apportionment analysis in his disgorgement calculation. ROA.11936.

As with Trinseo's reasonable-royalty theory, there was a disconnect between the evidence and the jury's task in determining unjust-enrichment damages. The jury was charged with determining "[t]he amount of Defendant's unjust enrichment that is a result of its misappropriation of the polycarbonate trade secrets." ROA.7555, 7557; *see also* 18 U.S.C. § 1836(b)(3)(B)(i)(II) (trade-secret plaintiff may recover damages "caused by the misappropriation"). Thus, the jury had to calculate an amount of unjust enrichment that resulted from the misappropriation it found by KBR—i.e., the misappropriation of only four secrets. Yet again, the jury heard only evidence of an amount that KBR was purportedly unjustly enriched by using all ten of Trinseo's alleged secrets and that was improperly inflated by profits resulting from KBR's own work, not any alleged misappropriation. As the Fifth Circuit rightly determined, that evidence provided no basis for the jury to calculate damages as to only four trade secrets.[2] *See* Pet.App.16a, 18a, 23a.

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[2] As the Fifth Circuit recognized, Trinseo followed the same all-or-nothing approach to its damages with respect to its claims against Harper and his companies—Trinseo introduced damages estimations that assumed misappropriation of all ten alleged

To be sure, Trinseo argued below, as here, that a subset of the ten alleged trade secrets were the "heart, core, and value driver" of Trinseo's technology. *See, e.g.*, Pet.30. But the jury rejected most of those purported "core" trade secrets, and Trinseo provided the jury with no evidence or methodology to value the secrets that remained. Pet.App.21a-22a. Despite Trinseo's best efforts to manufacture a problem in this case, the jury's damages awards simply had no reasonable, non-speculative support in the record and so the Fifth Circuit properly affirmed the vacatur of those awards.

3. Trinseo repeatedly suggests that its undeniable failure to offer any apportionment evidence should be excused because its alleged trade secrets "relate to a single, integrated system whose value *cannot* be apportioned per trade secret." Pet.14; *see* Pet.i, 3, 24-25. This argument ignores the record. Trinseo presented no evidence that apportionment of its damages among its alleged trade secrets would have been impossible. To the contrary, Trinseo's damages expert admitted that he *could have* come up with an apportionment of damages for a subset of Trinseo's alleged trade secrets, but he simply did not do so. ROA.11924 ("I could do that work, if I was ordered to do it."). Rather than showing that apportionment was impossible, Trinseo intentionally chose not to apportion its damages and insisted that it was "not required to" apportion. ROA.12425. Thus, Trinseo's failure to apportion did not result from the impossibility of doing so—it resulted from Trinseo's strategic decision to offer

trade secrets. Pet.App.16a, 22a-23a. Thus, the same reasoning required the vacatur of the jury's unjust-enrichment awards against Harper's companies.

lump-sum damages for all its alleged trade secrets in an effort to maximize its damages.

And even assuming it would have been impossible to apportion Trinseo's damages to correspond to a subset of Trinseo's ten alleged trade secrets, there was a simple solution. Trinseo could have submitted its polycarbonate technology to the jury as a single compilation trade secret. It declined to do so. Pet.App.17a. Instead, Trinseo deliberately *chose* to divide its supposedly "integrated system" into ten alleged trade secrets and submit them separately to the jury. Whatever problems of proof resulted from that choice were problems of Trinseo's own making.

There were also at least two other methods under which Trinseo could have proven its damages. In the Fifth Circuit, Trinseo argued that, even if apportionment applies here, it could recover damages under the "built-in apportionment" theory or "entire market value" exception. Pet.App.18a-19a. Trinseo, however, forfeited or waived those arguments below and has not attempted to revive them before this Court.

In some cases, under the "built in apportionment" doctrine, it can be assumed that the values presented to the jury already reflect an apportioned amount attributable to the trade secrets. "Built-in apportionment" applies "when a sufficiently comparable license is used as the basis for determining the appropriate royalty" such that it can be assumed the negotiators of the comparable license settled on a royalty amount for the value of the trade secrets. *See Omega Patents, LLC v. CalAmp Corp.,* 13 F.4th 1361, 1376-77 (Fed. Cir. 2021) (citation omitted). But Trinseo conceded it failed to raise "built-in apportionment" in the district court. Pet.App.19a. The Fifth Circuit held Trinseo therefore forfeited this argument. Pet.App.19a.

In the Fifth Circuit, Trinseo also attempted to invoke the "entire-market-value" exception to apportionment. Under this exception, plaintiffs need not satisfy the apportionment requirement where they show "the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature." *Garretson*, 111 U.S. at 121. Trinseo argued against including the entire-market-value exception in the jury charge, but attempted to raise it post-verdict. Pet.App.72a n.18. The district court found Trinseo had waived the entire-market-value exception, and Trinseo did not challenge that waiver finding on appeal. Pet.App.20a.

Trinseo's failure to preserve the built-in-apportionment and entire-market-value theories underscores that Trinseo's problems in this case resulted from Trinseo's own litigation choices, not from any impossibility of satisfying the legal rule that the Fifth Circuit correctly applied here.

4. The consequences of Trinseo's all-or-nothing approach were also no surprise to Trinseo. As the Fifth Circuit emphasized in affirming the denial of Trinseo's motion for a new trial on damages, the district court warned Trinseo before trial that its all-or-nothing approach was a gamble that required Trinseo to prevail on all its alleged trade secrets. Pet.App.33a; ROA.6140. Trinseo deliberately chose to gamble anyway. In these circumstances, Trinseo's request for a new trial was meritless when made and remains meritless now. Pet.34; Pet.App.33a.

In sum, Trinseo made a conscious choice to ignore the district court's warnings about its evidentiary presentation, hoping that its gamble would result in a windfall. When Trinseo's gamble failed, the district court correctly rendered judgment that Trinseo take no damages and obtain only injunctive relief. There is no basis for this Court to revisit that entirely correct conclusion.

III. This Case Is A Poor Vehicle To Address Trinseo's Misplaced Concerns.

There is no reason for this Court to grant Trinseo's petition, and countless reasons to deny it. First, this case is not a proper vehicle to address Trinseo's concerns about a "strict," per-trade-secret "apportionment" requirement because, as explained, the Fifth Circuit explicitly rejected any such requirement and there is no circuit split on that issue. *See supra* pp. 16-21.

Second, KBR presented multiple independent grounds for affirmance that the Fifth Circuit did not reach. Those grounds included, for example, Trinseo's failure to offer legally sufficient evidence of the requisite hypothetical negotiations, net profits, and causation. *See* C.A.Dkt.134 at 59-63, 71-75. Moreover, as to the award for unjust enrichment, "the district court made a 'contingent alternative finding' that, in the event" the Fifth Circuit "found apportionment was not required, the jury's award was otherwise unsupported by the evidence." Pet.App.10a n.5. Thus, even if this Court granted certiorari on the apportionment issue and reversed, it would (at most) result in a remand that would consume judicial and party resources without affecting the final disposition of the case.

Third, it would be wholly premature for this Court to weigh in on the application of apportionment principles to trade secrets at this juncture. Not only is there very little circuit-level authority addressing the application of apportionment principles to trade-secret cases in general, but the Fifth Circuit's decision below is the *only* precedential opinion from any federal court of appeals addressing apportionment under the DTSA. *See* Pet.14-20. This dearth of circuit-level authority not only demonstrates that there is no circuit split, but also undermines Trinseo's purported concerns about ensuring uniformity in the circuits where most trade-secret litigation takes place. Pet.4, 21-22. It also demonstrates the absence of any recurring and important legal dispute about the application of the apportionment doctrine to DTSA cases. Far more percolation would be required in the lower courts before this Court might consider getting involved.

In a last-ditch effort to manufacture a certworthy issue, Trinseo claims that this case raises constitutional concerns under the Seventh Amendment. Pet.5, 13-14, 22, 28. But Trinseo never even mentioned such concerns before the Fifth Circuit, so Trinseo cannot introduce them for the first time in this Court. In any event, the decision below simply required Trinseo to support its claims with legally sufficient, non-speculative evidence—a baseline requirement that this Court has long held raises no Seventh Amendment concerns. *See Galloway v. United States*, 319 U.S. 372, 388-96 (1943).

Finally, Trinseo bemoans the possibility that proven trade-secrets violations could go unremedied. The short answer is that injunctive relief remains available and was awarded in this case. That relief, unlike Trinseo's damages evidence, is tailored to the trade secrets actually found by the jury. The absence of a damages remedy on top of that injunctive relief is entirely a product of a case-specific failure of proof. At bottom, Trinseo made a knowing gamble in its trial strategy and is now disappointed with the result. That is not a basis for this Court's intervention. The case does not implicate any circuit split; the Fifth Circuit's analysis was sound; and, in all events, the narrow question of when a plaintiff must provide evidence on apportionment of damages in complex trade-secrets litigation is hardly the type of important, frequently recurring issue that might warrant this Court's attention.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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