IN THE

Court of Appeals of Virginia

RECORD NO. 1399-22-4

PEGASYSTEMS INC.,

Appellant,

v.

APPIAN CORPORATION,

Appellee.

OPENING BRIEF OF APPELLANT

Monica T. Monday
(VSB No. 33461)
Michael J. Finney
(VSB No. 78484)
GENTRY LOCKE
10 Franklin Road S.E.
Suite 900
Roanoke, VA 24011
T: (540) 983-9300
F: (540) 983-9400
Monday@gentrylocke.com
Finney@gentrylocke.com

E. Joshua Rosenkranz
(Pro Hac Vice)
Christopher J. Cariello
(Pro Hac Vice)
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com
ccariello@orrick.com

Eric A. Shumsky (Pro Hac Vice)
Jeremy Peterman (Pro Hac Vice)
James A. Flynn (Pro Hac Vice)
Jonas Wang (Pro Hac Vice)
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
eshumsky@orrick.com
jpeterman@orrick.com
jflynn@orrick.com
jonas.wang@orrick.com

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes, Regulations and Rules

Other Authorities

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS IN THE TRIAL COURT

The largest judgment in Virginia history is so riddled with legal error that it has all the structural integrity of a skyscraper of cards.

Appellant Pegasystems Inc. (Pega) pioneered business process management (BPM) software, developing a powerful platform that enables companies to create customizable apps that automate business operations. Appellee Appian Corporation entered the BPM market over 15 years later. It offered BPM-lite—a platform optimized for smaller-scale uses, not robust enough for the biggest projects of the biggest companies. Appian sued Pega in 2020 after learning that a consultant, who was never an Appian insider, gave Pega demonstrations of Appian's widely used platform. Finding that this consultant revealed Appian trade secrets, a jury awarded Appian $2 billion in unjust enrichment damages—one-third of Pega's entire revenue over an eight-year period and more than Appian's total revenue since it began public reporting in 2014. The judgment is incongruous—and legally flawed—in every way.

This is a trade-secret case with no secrets. Appian claims that the consultant taught Pega about certain capabilities of Appian's platform—specifically a few of the platform's limitations and how it performed a handful of functions. But the consultant had no inside information. He had never worked at Appian and had no special access. Every one of the thousands of users of Appian's platform had access to everything the consultant demonstrated, as did countless prospective customers. And Appian did not swear any of them to secrecy.

How could a jury have concluded that the information Pega learned was secret even though Appian shared it with thousands? Because the jury never learned that fact. Although Appian was required to prove that its purported secrets were not "generally known" and were "protected," Code § 59.1-336, the trial court excluded all evidence of widespread exposure and even instructed the jury that the number of people to whom Appian exposed its supposed secrets was "not relevant." R.42860.

This is also a software case without the software. Pega hotly disputed that it copied anything from Appian into its own BPM platform. The best way for Pega to prove that was to show the jury Pega's own BPM platform before and after the purported misappropriation. But the trial court excluded Pega's software from evidence.

This was an unjust enrichment case that relieved the plaintiff of any burden to prove the enrichment unjust. In an unprecedented instruction, the court instructed the jury that Appian could establish damages merely by noting the uncontested fact that Pega earned $6 billion in sales revenue. This instruction flouted the plain text of Virginia's trade-secret statute—which expressly requires the plaintiff to prove the amount of unjust enrichment caused by misappropriation—and defied all norms governing proof of damages.

Unconstrained by these basic legal guardrails, the jury was more susceptible to Appian's vitriol and innuendo. Appian exploited the opportunity by amping up the rhetoric before the jury, and doubtless will do the same here, casting Pega as a brazen thief engaged in a devious plot to get ahead in a market in which it had already been thriving. But breathless rhetoric is no substitute for satisfying foundational legal strictures. Sustaining this judgment will expose commonplace market research to trade-secret liability, and will turn every trade-secret case, however trivial, into a bet-the-company threat. This Court should order judgment for Pega or order a new trial.

ASSIGNMENTS OF ERROR

1. The trial court erred in denying Pega's motions to strike and set aside the verdict and ruling that Appian proved that each of its alleged trade secrets satisfied the definition of a trade secret under Code § 59.1-336 because Appian disclosed each alleged secret to others and did not take reasonable efforts to maintain the secrecy of its alleged trade secrets. R.11054, 11072-74, 18019-20, 18132-33, 38718-27, 38731-35, 42834.

2. The trial court erred in denying Pega's motion to strike and motion to set aside the verdict and ruling that Appian identified its alleged trade secrets with sufficient particularity. R.11054, 11074-76, 18020-21, 18132-33, 42641-58, 42677-93, 42710, 42713-14, 42834.

3. The trial court erred in excluding evidence of the number of people who accessed, had access to, or viewed demonstrations of Appian's alleged trade secrets and in granting Jury Instruction 13-1, which instructed the jury that the number of users of the Appian platform and Appian Forum licensees are not relevant to any issue in this case and should be disregarded. Add.34-35; R.27613, 30049-410, 33144-51, 33269-84, 38409-14, 38417, 40122-34, 40238-41, 40891-912, 41857-60, 42368-69, 42398, 42860.

4. The trial court erred in excluding from evidence Pega's software (DX 1575 and DX 1576) and related demonstratives and in ruling that Pega was not permitted to authenticate its software. R.37127-31, 37225-30, 37420-21, 39209-27, 39236-38.

5. The trial court erred in giving Jury Instruction 14 and shifting to Pega the burden of proving damages caused by misappropriation under Code § 59.1-338(A), and in denying its motions to strike and motion to set aside the verdict because the plain meaning of Code § 59.1-338(A), Virginia principles of common law, and Virginia precedent put the burden of proving causation and damages, including apportionment, on the plaintiff/complainant. R.9211, 9220-22, 10860, 10864-68, 10876-77, 11054, 11059-67, 15954, 18013-16, 18132-33, 38606-35, 38686-38710, 40064-67, 40107-92, 42715-30, 42736-37, 42746-64, 42834, 42860-61, 43430-66, 43484-94.

    a. The trial court erred in adopting one sentence of Comment f of the Restatement (Third) of Unfair Competition and in finding that that sentence and *Petters v. Williamson & Assocs., Inc.*, 210 P.3d 1048 (Wash. Ct. App. 2009), are a proper statement of Virginia law. R.11065-66, 18015-16, 18133, 38607, 38627-35, 38688-93, 38704-08, 42746-64, 43452-64, 43488-93.

b. The trial court erred in finding insignificant the difference between the damages provisions of the Uniform Trade Secrets Act and Code § 59.1-338(A) of the Virginia Uniform Trade Secrets Act. R.11061-62, 18013-14, 18133, 43452-60, 43489-92.

c. The trial court erred in refusing Pega's Instructions B, K, and L and Supplemental Instructions J-1, K-1, and L-1. R.9211, 9220-22, 10864-68, 11060, 18133, 40064-67, 40107-85.

6. Even if some burden-shifting is proper under Code § 59.1-338(A), the trial court erred in giving Jury Instruction 14, which fails to put any burden on Appian to link its damages amount to sales caused by the alleged misappropriation. R.10860, 10876-77, 11054, 11059, 11065-67, 15954, 18015-16, 18132-33, 40134-49, 40191-92, 42746-64, 43437-39, 42834, 42860-61, 43493.

a. The trial court erred in instructing the jury that Appian only has the burden of "proving Pega's sales" as opposed to proving Pega's sales caused by misappropriation. R.10876- 77, 11059, 11065-67, 18015-16, 18133, 40134-49, 40191-92, 42746-64, 43437-39, 43493.

b. The trial court erred in refusing Pega's alternative, proposed Instruction GG and additional alternatives proposed during the May 4, 2022 charge conference. R.10876-77, 11065-67, 18133, 40141-49.

7. The trial court erred in excluding evidence showing a significant percentage of Pega's sales or portions of sales were caused by products or factors other than any misappropriation and therefore were justly obtained; the trial court erroneously interpreted Interrogatory 18 and Pega's response to that interrogatory to bar this evidence, and erred in failing to permit the jury to evaluate the evidence and interrogatory response in resolving factual issues. R.26550-15, 37994-38000, 39040-67, 41180-213, 41926-27, 51869.

STATEMENT OF FACTS

The Pega Platform Is A Powerful Tool That Solves The Biggest Business Process Management Problems

Alan Trefler had a revolutionary vision in 1983: Software was automating all sorts of processes; why not develop software that would build other software? R.38866. Trefler scraped together "every penny" of his savings to launch Pega and realize that vision. R.38869. Today Pega employs over 6000 people and offers multiple products. R.34663-65, 39058-61.

The product at issue here is Pega's BPM platform. Businesses purchase the BPM platform to create programs or "apps" that automate processes, like opening a new customer account or fulfilling an order. R.38876. Pega's customers hire their own "developers" to use Pega's BPM platform to build apps. R.38973-74. The people who use the resulting apps are "end users," who may be a company's customers, its employees, or both. *Id*.

Pega designs its platform to solve "big," "complex," and "sophisticated" problems with many permutations for "very large … companies." R.38967-68, 39286-88. Pega thus puts a premium on "scalability"—the ability to quickly and reliably create, customize, and modify apps used by thousands of people. R.35369-71, 35892.

Two innovations make the Pega platform highly scalable. R.38978-79, 41068-74. The first is the "situational layer cake." R.38978-96. This patented approach divides the components of an app into modules that perform that same task in all apps. R.38989, 38994-96. Because apps are all built from the same components, a developer can change a common feature across many apps by editing a particular module once. R.38988-96. The other innovation is "Flex Scale deployment," which allows companies to put their "mission critical systems into Pega" without worrying about data loss or downtime. R.39000-03.

These two pillars have been "core aspects" of the Pega BPM platform since 2004. R.39250. Starting in 2010, before the events at issue here, Pega added mobile and social features in response to "major shifts" in the software industry. R.39260-65. The social features included a Facebook-like interface which allowed developers to communicate with each other by posting messages "in the context of a piece of work" and "comment on the post[s]" of others. R.39278-81. "Pega Mobile" optimized apps for mobile devices. R.39282-83, 39743-48.

In addition to the Pega BPM platform that developers use to create BPM apps, Pega sells other software products. Examples are customer relationship management software and real-time decisioning. R.37307-09, 39058-59. These additional products generate at least half of Pega's revenues. R.39058-61.

Appian Provides A BPM Solution Suited For Smaller Projects

Pega has numerous BPM competitors. R.35880. Appian is one, though it does not compete with Pega's other products. R.39058-59. Appian applies a fundamentally different BPM approach designed for a different customer base. Appian's former head of sales (who had previously worked at Pega) put it well: Appian and Pega are as different as a "car" is from a "helicopter." Add.212; R.40717-18. While Pega prioritizes scalability, Appian prioritizes speed and ease of app development. R. 31723-27, 36891-92, 39523, 39553.

Thus, large companies demanding scalability repeatedly chose Pega over Appian after "technical evaluation[s]" because Appian lacked Pega's capabilities. R.40697-98; *see* R.38430, 40704, 45216-18, 51292-98. For example, in 2014, Amazon dropped Appian in favor of Pega after six years of experience with Appian's BPM platform; by Appian's own account, that decision "had everything to do with scalability." Add.216; R.37956.

Pega Stays Informed About Its Competitors And Compares Its Product To The Competition

The trial below involved two claims—relating to two separate courses of conduct. R.12-19. The only claim relevant to this appeal is under the Virginia Uniform Trade Secrets Act (VUTSA). Accordingly, this section focuses on that claim, addressing at the end the other claim, under the Virginia Computer Crimes Act (VCCA), for completeness.

Like most companies in a competitive market, including Appian, Pega stays abreast of its competitors. R.35873-74. Appian maintains it would generally not license its platform directly to competitors. R.38155. But Appian helped competitors' research efforts by sharing and permitting others to share extensive information about its platform:

1. Appian gave public demonstrations of its product and posted videos on YouTube. R.35358, 35880-82, 39307-08, 39712-14, 41465-66.

2. Appian permitted its numerous sales partners—essentially resellers—to demonstrate *any* feature of its platform to *any* prospective customer. It also permitted those prospects to share whatever they learned, including pictures or videos, with anyone else. R.36598, 51086 § 2.2.1.

3. Pega's customers freely told Pega what they liked and disliked about their Appian experience. R.35445.

4. Industry analysts who were experts in the capabilities of all the BPM platforms published "detailed descriptions of the products." R.35882-83, 36814-18.

Beyond these exposures, Appian gave developers at other companies access to its platform and user manuals—called "documentation"—through an online portal called the Appian Forum. R.34049-51. Appian's customers also gave untold multitudes of their own developers access to Appian's platform. R.34319-20. Terms of use governed developers' use of the Appian Forum and the platform. As documented more fully below (at 24-25), those terms said nothing about the platform containing trade secrets, did not require developers to keep what they learned confidential, and did not even prohibit developers from demonstrating the platform to others. Add.645-47.

The trade-secret claims in this case arose from activities that Pega's then head of competitive intelligence, John Petronio, managed from 2012 to 2014. His goal was to take a fresh look at how Appian's BPM platform performed from the perspective of one of the thousands of developers outside Appian who used it to create apps. R.35618-21, 40891. Through a staffing agency, Petronio found a developer named Youyong Zou to demonstrate how he used Appian's platform. R.34522, 34691, 35618-21.

Zou was not an Appian employee and had no special access to Appian. He worked for Serco, a separate company that licensed Appian's platform. R.34031, 34483-84. Like thousands of developers at other companies, Zou had access to the Appian platform and user manuals. But Zou had no access to Appian's source code—the detailed instructions that enable a program to function and reveal how to replicate it. R.34498-99. Petronio asked Zou to demonstrate building apps with Appian's software. R.34067. Zou shared only the observable aspects of Appian's software and some documentation—things that every developer at any of Appian's many customers could see. R.34108-12, 34357-58, 35625-26. And he "[p]ressure-test[ed]" the platform's capabilities in ways that any customer was free to do. R.35849-50. At Petronio's urging, executives from sales and product management witnessed some demonstrations and there was evidence that Trefler may have attended one. R.35776, 39309. All told, Zou spent 200 hours consulting over two-and-a-half years and received $23,608. R.34472-73, 37670.

Zou's presentations confirmed that Appian struggled with scalability. Pega's head of sales concluded that Appian's "weaknesses are glaring and big." R.35778-80, 47286-88. Pega's product manager for social features was "not impressed … at all" with Appian's social features; she was only "impressed by their marketing" spin. R.43983; *see* R.39532-36. Pega also identified several weaknesses in Appian's mobile offering. R.44024, 45013-14. And Zou confirmed that Appian "excels in terms of ease of use." R.47184-86. After seeing how poorly Appian stacked up against Pega, Petronio confirmed, "we should never lose to Appian." R.35773-74.

Before Zou's presentations, Pega's marketing materials had already described numerous Appian weaknesses. R.51379-85. Pega periodically updated a few pages to reflect information Zou provided. R.34719.

Petronio relished the project. He joked that Zou was his "spy" and dubbed him "the other Matt," referring to Appian's CEO Matt Calkins. R.35663-64. He videotaped several Zou demonstrations and cobbled them into a training video, which he split and spliced to yield dozens of clips. R.35630-33, 36128-66. And he "beg[ged]" for more funds to extend his limited budget for work with Zou. R.35744-45.

Appian Hires Pega's Head Of Competitive Intelligence, Learns About Zou, And Sues Pega

In 2015, Pega fired Petronio for poor performance. R.35857, 41218. Appian hired him the next year, first as a consultant and then as its "[s]enior director of market intelligence and strategy." R.35857, 35870. That was par for the course. Appian aggressively recruits Pega employees to gather "inside knowledge" about Pega. R.49211. In 2020, Petronio told Appian about Zou. R.35857. Appian did not fire Petronio for what it now vilifies as "espionage." R.42906. It gave him a raise. R.35871. Then Appian sued Pega.

Appian based its VUTSA claim on Petronio's activities with Zou. Appian's theory was that its platform's capabilities and information in the documentation Zou shared with Pega were trade secrets. To establish a VUTSA claim, Appian needed to prove in relevant part that:

> (1) Appian possessed information that "[d]erives independent economic value … from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use"; and
>
> (2) Appian made "efforts that are reasonable under the circumstances to maintain … secrecy" of that information.

Code § 59.1-336.

Appian Fails To Specifically Identify Its Purported Trade Secrets

The alleged secrets related broadly to three categories of information: (1) weaknesses of Appian's platform; (2) Appian platform functions that Appian accused Pega of copying; and (3) portions of Appian's documentation. But beyond those broad categories, throughout discovery and trial, Appian did not specifically identify the purported secrets in the latter two categories. *See* R.1385-91, 42641-55.

Appian Weaknesses. Most of the purported secrets were Appian product deficiencies that Appian did not want potential customers to consider when making purchasing decisions. R.36633-34.[1] But upon purchasing the platform, every app developer at every customer could have readily observed each weakness. R.36450, 37478. Appian attributed $479 million in damages to these supposed secrets, positing that it was entitled to the proceeds of every sale Pega made in head-to-head competition against Appian from 2013 to 2021, R.37668-69, without regard to whether the customer knew about the weaknesses, learned about them from Pega, or considered them decisive.

---

[1] Appian's described the weaknesses as follows:

1. Concurrent Development and Locking of Process Model
2. Specific Reporting Tools and Chart Types Available
3. Web Services Returned Only the Process ID
4. Specifics on Unified Management Tools Available
5. Star Schema/Reporting on External Data
6. Configuration and Customization of Checkpointing
7. Topology Specifics, Including Information from Experimentation

R.11271 (closing demonstrative).

Purported Pega Improvements. Pega's BPM platform is packed with innumerable features. R.42625. Appian hired an expert to scour them to identify any functions or capabilities that looked similar to something Zou demonstrated. R.36859. He identified only five. He contended Pega copied those five functions to improve its platform. The alleged improvements are not foundational attributes like the patented layer cake or the flex scale development that most distinguish the Pega platform from much of the competition. Rather, they related to the following fairly common functions:

1. Smart services—which let a developer drag and drop into an app preconfigured functions, like sending an email. R.36906-07.
2. Custom data types—which allow a developer to group related pieces of data together. R.37448.
3. An edit button—which lets a developer toggle between the developer environment and a screen showing how an app will appear to the end user. R.36941.
4. Out-of-the-box mobile—which enables apps to run on a desktop or mobile device without additional configuration. R.36996-97.
5. Out-of-the box social—a user interface for end users that displays worklists and tasks in a social feed without additional configuration. R.36993-98.

Appian did not contend that the *idea* or *function* of any of those features was secret; some of them were ubiquitous in software products and Pega witnesses testified that Pega's platform had similar features before Pega encountered Zou.

Infra 17, 30-32. Rather, as described (at 29-32), as to each, Appian contended that Pega copied *something* from Appian's version—without ever specifying what.

Appian contended that it was entitled to $3 billion in unjust enrichment from these nondescript "secrets." R.8209, 37669-70. That sum was more than *double* the total *revenue* Appian had generated since 2014. R.38313. To calculate that figure, Appian's expert started with every sale Pega made of every Pega product in the eight years spanning 2013 to 2021—not just every sale of Pega's BPM platform. R.37728-29. He then subtracted limited costs, so-called "variable expenses," R.37729, but did not deduct many other costs, including marketing, administrative, and research expenses. R.37728-29. While the expert *called* this inflated result Pega's "profits," *id.*, Pega's audited financial statements for the relevant years reflect a cumulative *loss* of $45 million, R.42345, 47404.

Appian Documentation. The final category of purported secrets was documentation (i.e., the user manual) available on the Appian Forum. R.35362-63. Developers had accessed Appian documentation over 10,000 times before Zou. R.34518-21. And in 2017, Appian made most of its documentation public. R.35427. At trial, Appian introduced over 400 pages of documentation that Pega received from Zou, but never delineated which portions were trade secrets. R.34108-11, 37504, 43703-965, 44312-98.

Appian Seeks $1 Under The VCCA Premised On Different Activities Years Later

Appian also sought—and the jury eventually awarded—just $1 in nominal damages on Appian's VCCA claim. R.43010-11. Because Pega has opted not to challenge that nominal verdict, the underlying allegations are irrelevant to this appeal. But we summarize them briefly because Appian persistently accentuated them at trial to bolster its distinct trade-secret claim. *E.g.*, R.8042-48, 8089-98.

The VCCA claim targeted activities entirely distinct from Zou. To be clear, Appian never suggested these activities revealed any trade secrets. They revolve around free trials of the Appian platform that Appian distributed to many thousands of people, starting in 2017. R.36551-53, 37931-32, 40891-92. Although Appian considered Pega ineligible for free trials, a few Pega employees used non-Pega email addresses to sign up for them. R.43006-07. Appian also cast aspersions on Pega's CEO. He did not access any free trial, but Appian vilified him for using pseudonyms when he signed up for public webinars about Appian (often hosted by others) and marketing email lists. R.34637-63. Appian attributed no damages to this conduct. Hence the nominal award.

A Jury Finds Pega Liable For Trade Secret Misappropriation And Awards Appian Over $2 Billion In Damages

Turning back to the claim that *is* on appeal, Pega acknowledged at trial that Zou demonstrated Appian's platform and that Pega updated a few pages of marketing materials with additional information about the handful of Appian's weaknesses. R.34792. But Pega argued that none of this information qualified as trade secrets because of all the ways in which Appian exposed it without any nondisclosure obligation. Pega also denied copying anything from Appian. *Infra* 17.

Throughout trial, the court made numerous highly consequential rulings that hamstrung Pega's defense. Four are at issue here.

1. The court first deemed it wholly irrelevant that Appian permitted thousands of people to access the purported trade secrets and prohibited the jury from considering this fact. *See* R.40129, 40891-92, 42860; Add.34-35.

2. The court then prohibited Pega from demonstrating its software to the jury to disprove Appian's allegations of copying. Specifically, the court barred Pega from *showing* the jury how the accused features pre-dated Zou or were distinct. *See* R.39225. Appian exploited this ruling by telling the jury not to believe four Pega witnesses who denied copying because Pega offered no other corroboration. R.39084, 39326, 39911, 40372; Add.198, 207-08.

3. As to damages, the court relieved Appian of any burden to prove that its alleged trade secrets caused any of the Pega sales it characterized as unjust. The court instructed the jury that Appian could prove its damages by establishing nothing more than "Pegasystems' sales." R.42860. All Appian had to do was put before the jury an astronomical sum—that Pega's eight-year revenue exceeded

$6 billion. The burden then shifted to Pega to disprove that Appian was entitled to that revenue.

4. The court also excluded the evidence Pega needed to meet this improperly shifted burden. For example, Pega attempted to introduce evidence that half of its sales were for products other than its BPM platform. R.39058-59. But the court prohibited Pega from doing so based on an interrogatory response. R.39053-55.

Ultimately, the jury concluded that both Pega and Zou misappropriated Appian's purported trade secrets and awarded $2.037 billion in damages against Pega. That was 90,000 times what Pega paid Zou.

STANDARDS OF REVIEW

Assignments of error 1 and 2: This Court reviews the trial court's failure to set aside the verdict for insufficient evidence "to consider whether the evidence presented, taken in the light most favorable to the plaintiff, was sufficient to support the jury verdict.'" *Parson v. Miller*, 296 Va. 509, 524 (2018).

Errors 3, 5, and 6: This Court reviews the trial court's jury instructions de novo. *See Orthopedic & Sports Physical Therapy Assocs. v. Summit Grp. Props., LLC*, 283 Va. 777, 782 (2012).

Errors 3, 4, and 7: This Court reviews evidentiary rulings for abuse of discretion, which occurs when the trial court "incorrectly ascertains what the law requires." *Galloway v. Northampton Cnty.*, 299 Va. 558, 563 (2021).

For evidentiary or instructional errors, prejudice is "presumed" "unless it plainly appears that [the errors] *could not* have affected the result." *Clohessy v. Weiler*, 250 Va. 249, 254 (1995) (emphasis added).

ARGUMENT

I. The Verdict Must Be Reversed Because Appian Failed As A Matter Of Law To Prove Its Purported Secrets Were Trade Secrets.

The trial court erred in failing to enter judgment for Pega because Appian's trade-secret claim fails as a matter of law. R.43495. There are two independent failings: (A) Appian lost any trade-secret protection when it voluntarily exposed all its purported secrets; and (B) Appian did not identify a subset of purported secrets with the required specificity.

A. None of Appian's purported secrets were trade secrets as a matter of law because Appian exposed them without requiring confidentiality.

Not everything a business might wish to withhold from its competitors is a trade secret. Trade-secret law puts a business to a choice. If a company wants the benefits of trade-secret protection, it must keep its "secrets" secret. If instead, it elects to seek the benefits of publicizing information, it cannot wield trade-secret law against competitors who learn that information. *See* Restatement (First) of

Torts § 757 cmt. a.-b. Applied here: If Appian had crown jewels worth billions, trade-secret law put the onus on Appian to secure them in a proverbial vault.

To enforce this tradeoff, the law imposes two critical, and interlocking, requirements: (1) each trade secret must derive independent economic value from not being "generally known"; and (2) the plaintiff must make reasonable efforts to maintain the secrecy of each. Code § 59.1-336. These two elements combine into a rule that controls the outcome of this appeal: "If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information … his property right is extinguished." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984) (citing 1 R. Milgrim, Trade Secrets § 1.01[2] (1983)); *MicroStrategy Inc. v. Li*, 268 Va. 249, 262 (2004) (plaintiff fails to make reasonable efforts where it "disclos[es] the secret" to others without requiring "express or implied confidence"). While this inquiry is ordinarily a question of fact, courts routinely resolve it as a matter of law where the undisputed facts establish that the plaintiff did not satisfy this requirement. *MicroStrategy*, 268 Va. at 264-65; *Synopsys v. Risk Based Sec.*, No. 21-cv-252, 2022 WL 3005990, at *15-17 (E.D. Va. July 28, 2022) (granting summary judgment in VUTSA case).[2]

[2] *See, e.g.*, *Yellowfin Yachts, Inc. v. Barker Boatworks, LLC*, 898 F.3d 1279, 1300-01 (11th Cir. 2018) (summary judgment); *Warehouse Sols. v. Integrated Logistics*, 610 F. App'x 881, 885-86 (11th Cir. 2015) (summary judgment); *Turret Labs USA, Inc. v. CargoSprint, LLC*, No. 19-CV-6793, 2021 WL 535217, at *5

Here, the undisputed facts require judgment for Pega because Appian exposed its alleged secrets to two broad categories of people.

1. Appian delegated to independent resellers complete discretion to disclose its purported secrets without requiring confidentiality.

Appian enlisted numerous resellers—so many that it lost count. R.38286-87, 40891. They worked on commission to encourage maximum outreach to potential customers. R.38286-87. It is undisputed that Appian delegated complete discretion to these resellers to demonstrate any feature of its platform and display any documentation to prospective customers. R.38394 (Appian's trade secret expert Cole); R.40880 (Appian's corporate representative Ross). Appian put no feature, no weakness, and no page of documentation off limits. It gave resellers free rein to "decide[] what was reasonabl[e]" to disclose. R.38379. It actively encouraged resellers to "promote the benefits of the product." R.40938. Appian did not limit "the identity" or "the number of people who could be shown the documentation" or watch demonstrations. R. 38376, 38382-83, 38394.

(E.D.N.Y. Feb. 12, 2021), *aff'd*, 2022 WL 701161 (2d Cir. Mar. 9, 2022) (dismissal on pleadings); *SMH Enters., L.L.C. v. Krispy Krunchy Foods, L.L.C.*, No. CV 20-2970, 2021 WL 4460522, at *13 (E.D. La. Sept. 29, 2021) (summary judgment); *Structured Capital Sols. v. Commerzbank AG*, 177 F. Supp. 3d 816, 832 (S.D.N.Y. 2016) (summary judgment); *WeInfuse, LLC v. InfuseFlow, LLC*, No. 20-cv-1050, 2021 WL 1165132, at *4 (N.D. Tex. Mar. 26, 2021) (dismissal on pleadings); *see also* 1 Milgrim on Trade Secrets § 1.05 (2022).

Appian explicitly granted this limitless latitude in its agreements with its resellers. The agreements authorize resellers to "market, promote and demonstrate the Appian software"—defined to include Appian's "documentation"—"to prospective customers." R.51086 §§ 1.1, 2.2.1 (Business Partner Agreement); R.51262 §§ 1.1, 2.2.1 (Value Added Service Provider Agreement); R.49001-02 §§ 1.1, 2.2 (same). The agreements explicitly authorized "demonstrations" of any sort. *Id.*

Nothing in those agreements satisfied the condition required to preserve trade-secret protection after disclosure—a promise that the prospective customers keep anything they learned secret. R.51089 § 6; R.51265 § 6. On the contrary, potential customers were free to take and "share … screenshots or videos of [any] demo[nstration]" of any feature of interest. R.36598. So a prospective customer could say: "Show me Appian's smart services." Or "I'm interested in how custom data types work, send me the related documentation." In each instance, the prospect could receive a full demonstration of those features and all related documentation, no strings attached. The prospect was then free to go to Pega or any other competitor and say: "Here's a feature I like in the Appian platform, can your platform do that?"

Having delegated the power to share unconditionally any of the alleged secrets it now values at over $3 billion, Appian forfeited any trade-secret protection. *Synopsys*, 2022 WL 3005990, at *15-17; *Young Design v. Teletronics Int'l*, 2001 WL 35804500, at *7 (E.D. Va. July 31, 2001) (rejecting trade-secret claim); *supra* 20 & n.2.

This alone warrants judgment for Pega.

2. Appian shared its purported secrets with countless independent developers and end users without demanding that they keep them secret.

Judgment is required for the separate reason that Appian exposed its alleged secrets to thousands of independent app developers (and other platform users), again without imposing the required confidentiality obligation.

This is undisputed: Zou never worked for Appian and was no Appian insider; he had no more access than any developer who used the Appian platform to build apps; and each of those developers "would have been able to see [the alleged] trade secrets." R.37478; *see* R.36450, 36562, 36637-38. Appian exposed its purported secrets to many thousands of developers just like Zou. There were over 6000 people with access to the alleged trade secrets through the Appian Forum alone when Zou provided his demonstrations and Appian could not even estimate, let alone identify, the total number of people who obtained access by other means (although, as discussed below at 26-28, the court erroneously kept all that information from the jury). R.40891. Beyond that, any *end user* of an Appian app would see Appian's purportedly secret social view of work lists and tasks. R.35676.

Here, again, Appian did not require secrecy. *Supra* 20. In disclosing its social view to *end users*, Appian imposed on them no disclosure restrictions whatsoever. Same for *developers*, who could observe anything Zou observed. Appian pointed only to agreements that do not contain the required warnings or confidentiality obligations.

Terms of Use. The terms of use were the only agreement Appian imposed directly on developers. Appian's security expert Cole and its corporate representative Ross testified that Appian's "terms of use" somehow "protected" the information. R.36235-36, 38155. But they could not say the terms required confidentiality.

Appian's terms say nothing of trade secrets and impose no confidentiality requirements. Add.645-47. They are a bare-bones, two-page document with a short paragraph on "Use of Software." Add.646. This provision says only that the software itself is "the copyrighted work of Appian." *Id.* But *copyright* restrictions do not protect *confidentiality*—frontpage stories in the *Washington Post* are protected by copyright. Copyright does not "bar the licensee from describing the content of the material to others." 1 Milgrim on Trade Secrets § 1.05 (2022).

The same is true of the provision titled, "Use of Documents." It provides copyright-related restrictions prohibiting developers from copying or transmitting the documentation and it directs developers to *use* the material only for "personal, informational, and non-commercial purposes." Add.646. But again, this provision does not require developers to keep *confidential* any information contained in the documentation, which is what matters. *See Structured Capital*, 177 F. Supp. 3d at 832 (granting summary judgment where agreement did not actually place defendant "under an obligation to maintain [the] confidentiality" of alleged secrets). Indeed, Appian permitted bloggers with access to the Appian Forum to write publicly about its platform's strengths, weaknesses, and architecture. R.38425; *see* R. 35880-82, 36814-18, 42596-97.

The Serco agreements. At trial, Appian also pointed to a software-license agreement with Serco (Zou's employer) and another agreement between Serco and Zou. R.36235-37, 38167-75. Unlike the terms of use, those agreements contain *some* confidentiality provisions. But those provisions say nothing about *Appian's* alleged trade secrets being confidential.

The Serco-Appian agreement defines "Confidential information" circularly as Appian "drawings, data, specifications, technical information, and other information or materials … that reasonably should be considered … confidential." R.46685. Those terms do not put Appian's user interface or product capabilities in a vault of secrecy. *See Broker Genius, Inc. v. Zalta*, 280 F. Supp. 3d 495, 521 (S.D.N.Y. 2017) (requiring clarity to overcome "counterintuitive notion" that a product's observable features may be secret).

The Appian-Zou agreement is even further afield. It does not mention anything about *Appian*'s information; it obligates Zou to keep confidential only *Serco's* information and information related to its "customers (or their employees or family members)." R.43682-83.

B. Appian did not identify key trade secrets with the requisite particularity.

Six of the purported secrets—Appian's documentation and the five aspects Appian accused Pega of copying—fail as a matter of law for the independent reason that Appian did not "identify, with particularity, each trade secret it claims was misappropriated." *MicroStrategy, Inc. v. Bus. Objects, S.A.*, 331 F. Supp. 2d 396, 418 (E.D. Va. 2004). That constitutes a failure of proof as to these alleged secrets. *See Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655, 661 (4th Cir. 1993). A new trial is required for any others that remain viable after this appeal.

1. Appian was required to identify its asserted trade secrets with particularity.

Courts "uniformly" require trade-secret plaintiffs to identify their claimed secrets. *TLS Mgmt. & Mktg. Servs., LLC v. Rodríguez-Toledo*, 966 F.3d 46, 53 (1st Cir. 2020). Appian had to do so with sufficient particularity "to allow the finder of fact to distinguish that which is legitimately a trade secret from other information that is simply confidential but not a trade secret, or is publicly available information." *MicroStrategy*, 331 F. Supp. 2d at 418; *see Trandes*, 996 F.2d at 661.

This obligation is essential to fairly and accurately evaluate trade-secret claims because trade secrets are not defined by any public source (like a patent or a copyright) before the plaintiff sues. Only the plaintiff knows what it alleges is secret. Defendants simply cannot "prepare a rebuttal" without knowing the asserted secrets. *Inteliclear, LLC v. ETC Glob. Holdings, Inc.*, 978 F.3d 653, 658 (9th Cir. 2020); *see Givaudan Fragrances Corp. v. Krivda*, 639 F. App'x 840, 845 (3d Cir. 2016). And the jury needs to know the alleged secrets' precise contours to determine whether they were generally known and reasonably protected, as well as to assess their worth. *See Next Commc'ns, Inc. v. Viber Media, Inc.*, 758 F. App'x 46, 50 (2d Cir. 2018).

Plaintiffs routinely attempt to *avoid* defining trade secrets as a ploy to hobble the defense and move the jury with some gestalt narrative about misappropriation rather than assessing the merits of particular asserted secrets. *See* Charles Tait Graves & Brian D. Range, *Identification of Trade Secret Claims in Litigation: Solutions for a Ubiquitous Dispute*, 5 Nw. J. Tech. & Intell. Prop. 68, 75 (2006).

Courts prohibit that ploy with two legal requirements that Appian violated here. Requirement 1: It is not enough for the plaintiff to point to a haystack and declare that a needle of a secret is hiding in there somewhere. So when, as here, some alleged secrets are reflected in documents, the plaintiff cannot merely point to a stack of documents and "leave[] mysterious exactly which pieces of information are the trade secrets." *IDX Sys. Corp. v. Epic Sys. Corp.*, 285 F.3d 581, 584 (7th Cir. 2002). Requirement 2: When "a trade secrets claim involves a sophisticated and highly complex system," the plaintiff must identify the alleged secrets with precision because the "trier of fact will not have the requisite expertise to define what the plaintiff leaves abstract." *Olaplex, Inc. v. L'Oréal USA, Inc.*, 855 F. App'x 701, 712 (Fed. Cir. 2021) (quoting *Inteliclear*, 978 F.3d at 658). Complying with Requirement 2 can require specificity down to "precise numerical dimensions and tolerances." *Imax Corp. v. Cinema Techs., Inc.*, 152 F.3d 1161, 1167 (9th Cir. 1998).

2. Appian failed to adequately identify trade secrets in its documentation.

Appian's violation of Requirement 1 was flagrant. *IDX* held that alleging trade secrets somewhere within 43 pages of documentation was legally insufficient. 285 F.3d at 584. If the trade secrets in *IDX* were a needle in a haystack, the 400-plus pages of documentation that Appian dumped on the jury were a veritable *hayfield*. R.43697-702, 43703-965, 44312-398, 47016-33, 48804-

09, 48856-909. Appian conceded that not everything in those reams were trade secrets. R.37504. When Pega attempted to prove some subset was not secret, Appian would object with: "[W]e're not asserting that … *these particular documents* are our trade secrets." *Id.* (emphasis added). And specificity was particularly important here because some of the 400 pages had been accessed over 10,000 times by unknown individuals. R.34518-22.

But Appian never defined *what* details in its 400-page hayfield *were* trade secrets. *See, e.g.*, R.37034-36. Appian's closing described that category of trade secrets simply as "Confidential Documentation from Appian Forum." R.11271 (Appian Closing Slides). Appian accordingly failed to identify these trade secrets in a way that would permit the jury to distinguish "that which is legitimately a trade secret from other information." *MicroStrategy*, 331 F. Supp. 2d at 417-18. This failure of proof, alone, requires judgment for Pega as to Appian's documentation.

3. Appian failed to identify the alleged trade secrets Pega purportedly copied.

Appian also violated Requirement 2, that complex secrets require precise definition, for the five purported trade secrets it accused Pega of copying. R.37669-70, 37742. As discussed (at 14-15), these ostensible secrets related to aspects of five Appian functions.

Here is a direct quote from Appian identifying these supposed trade secrets:

How Appian Designed and Implemented:

- Smart Services,
- Custom Data Types,
- Ease of Editing Functionality,
- Out-of-the-Box Ability to Deploy Applications to Mobile Devices,
- Out-of-the-Box Integrated Social View of Worklists and Tasks.

R.11272 (Appian closing slides) at 17 (numbering removed); R.42945-46 (summation without further identification). Precise identification of these alleged secrets was essential because Appian conceded that there was nothing secret about either the existence of these capabilities or what they did: Appian's expert Marshall acknowledged that each function was widely known—sometimes ubiquitous. R.37557 ("The capabilities were publicly available …."). For each supposed secret, Marshall distinguished between what was known (which he called "the what") and Appian's peculiar way of achieving it ("the how"). Marshall contended the "how"—what he called the "architecture and design"—was not known. R.36890-91. So it was critical for Appian to precisely state what that purported "how" was. Yet Appian never did. Take them one by one.

Edit button. This allows a developer to toggle between testing an application and editing it. R.36938-41. This idea of a button to switch between views was known. R.37557. Marshall claimed that the "architecture behind th[e] button" was secret. R.36944. But the only thing "behind" a button on a computer screen is code, which Pega never had. R.35944, 37481.

Out-of-the-box mobile. This simply means that Appian could run apps on both desktop and mobile devices without specially configuring them. R.36993-97. Once again, Marshall conceded that this feature was known. R.37557, 42543. And Zou's demonstration showed Pega only that Appian had this capability, not how to achieve it. R.37069-70 (demonstration). Yet Marshall again testified in only general terms that Pega saw and copied something about the "architecture and design" of how Appian achieved this function. R.42542-43.

Out-of-the-box social. This function means that Appian's platform came pre-programmed with a user interface displaying work lists and tasks in a Facebook-like social feed. R.36993-98, 42531-32. Such social functions were ubiquitous in 2012, Marshall conceded. R.36992-95, 42532. And Pega already had a social feed. *Supra* at 7. But again, Marshall testified that some "architecture and design" was secret without identifying what that architecture and design was. *Id*.

Smart services. Smart services permit a developer to implement a function (such as sending an email when a customer orders a product) by dragging and dropping an icon embodying that function into an app. It is undisputed that this specific feature of Appian's software was publicly known. R.36909. Pega also had a drag-and-drop functionality for over 100 preconfigured functions before it talked to Zou. R. 36908, 39024-25, 39781-83. So it was essential for Appian to identify just what secret attribute(s) Pega allegedly copied. Yet Marshall offered only the unilluminating dodge that the alleged secret was "how [smart services] worked, how they were used." R.36909.

Custom data types. This is a standard computer science term describing how related data are grouped (e.g., address information). Marshall conceded that custom data types had been known since 1968. R.37447-49, 42584. And Petronio remarked contemporaneously to Zou that Pega already had this capability, which it called a "data class." R.37452. Again, Marshall did not specify what was secret and different. He offered only generalities—like Pega's capability was "fragmented" and "platform-focused rather than application focused"—that could not tell a lay jury what the secret was. R.42508-09.

4. A failure to identify any secret requires vacating the entire verdict.

Pega is entitled to judgment as a matter of law as to each purported secret Appian failed to identify adequately. *Trandes*, 996 F.2d at 661. If this Court eliminates any of these purported secrets, it must also grant a new liability trial as to all remaining "secrets." There is no way to know which purported secret(s) the jury found and how much it valued each. *See Exxon Mobil Corp. v. Minton*, 285 Va. 115, 133 (2013) (remanding for new trial; court could not "determine from the record" which of two theories the jury adopted); *see Va. Cedar Works v. Dalea,* 109 Va. 333, 335 (1909); *Crowell v. Duncan*, 145 Va. 489, 496-97 (1926).

II. A New Trial Is Necessary Because The Trial Court's Erroneous Jury Instructions And Evidentiary Rulings Blocked The Jury From Considering Crucial Information.

At a minimum, this Court should order a new trial because the trial court committed legal errors that blinded the jury to critical evidence necessary to evaluate both (A) whether Appian's alleged secrets were trade secrets; and (B) whether Pega misappropriated or benefited from them.

A. The court improperly excluded evidence that thousands of people had access to the purported trade secrets and instructed the jury that any such number is irrelevant.

Pega's defense at trial revolved around demonstrating that Appian's purported secrets were not trade secrets because they were "generally known" and not reasonably protected. Code § 59.1-336; *supra* 19. Yet, in a series of evidentiary rulings and a jury instruction, the trial court repeatedly and erroneously excluded one of the most important considerations for a jury hearing a trade-secrets case: The court ruled that the number of people with access to Appian's purported trade secrets was "not relevant at all." R.40129; *see* Add.34-35 (pretrial ruling). The court also instructed the jury that "[t]he number of users of the Appian Platform … are *not relevant* to any issue in this case." R.42860 (emphasis added). The court scrupulously enforced these rulings throughout trial, prohibiting Pega from introducing or soliciting evidence showing:

- over 6000 people had access to the Appian Forum where the purported trade secrets were located between 2012 and 2014, R.40891;
- the number of resellers Appian authorized to demonstrate its purported trade secrets to potential customers without imposing confidentiality restrictions, R.38417-18, 40891;
- the total number of people who could have seen Appian's purported secrets, R.38409-14;
- that over 44,000 people had access to the Forum between 2012 and 2021, R.40891-92; and
- that Appian exposed the purported secrets to 12,000 free-trial recipients between 2017 and 2021, R.40891-92.

That is reversible error. Far from being irrelevant, "who is given access," and in what numbers, are among the most important factors in assessing both whether the information was generally available and the reasonableness of efforts to maintain secrecy. *Turret Labs*, 2022 WL 701161, at *2; *see MicroStrategy*, 268 Va. at 264 (inquiries "require[] an ad hoc evaluation of *all* the surrounding circumstances" (quotation marks omitted)). Courts consistently hold that "the extent to which the information is known outside of [one's] business" is a "factor[] to be considered in determining whether given information is one's trade secret." *SI Handling Sys., Inc. v. Heisley*, 753 F.2d 1244, 1256 (3d Cir. 1985) (quoting Restatement (First) of Torts § 757, cmt. b (1939)). After all, "the chance of a leak increases as the number of people having access to information increases." *United Steelworkers of Am. v. Auchter*, 763 F.2d 728, 743 (3d Cir. 1985). Numerous courts have rejected trade-secret claims based on the "number of people who had access"—which confirms that these factors must at least be relevant to a jury. *Oberfoell v. Kyte*, No. A17-0575, 2018 WL 492629, at *3 (Minn. Ct. App. Jan. 22, 2018); *see SMH Enterprises*, 2021 WL 4460522, at *13.

We have found no case where any court has excluded such evidence. The two cases on which the trial court relied did not. Add.35-36. Both stated that "[d]istribution … to many users" does "not *necessarily* negate trade secrecy," as a matter of law, *if* the owners also took correspondingly reasonable measures to protect secrecy. *SyncSort v. Innovative Routines, Int'l*, No. 04-3623, 2011 WL 3651331, at *15 (D.N.J. Aug. 18, 2011) (emphasis added); *see Data General v. Digital Comput. Controls*, 297 A.2d 433, 436 (Del. Ch. 1971) (similar).

A new trial is warranted, whether on de novo review of the jury instruction or abuse of discretion review of the evidentiary rulings. *Supra* 18-19. The errors could have made all the difference to the jury. With this evidence, the jury could have concluded that Appian forfeited any trade-secret protection by widely sharing its purported secrets with thousands of people in 2012-14, without taking reasonable measures to protect its secrets, or that Appian later abandoned any secrets by sharing them with even more people—shortening the damages period. Accordingly, a new trial is required.

B. The court improperly prevented Pega from demonstrating Pega's software to the jury.

The court compounded its error with another extraordinary ruling: In a technical case where a $3 billion claim turned on whether and how Pega copied Appian functions, the court excluded Pega's software and any demonstrative images taken from it—depriving Pega of the best evidence to show the jury the functions pre-dated Zou or differed from Appian's. R.39225-27.

Before trial, Pega timely disclosed—twice—that it intended to introduce versions of its own software pre- and post-dating Zou on a "*Pega Laptop* Containing [the software]." R.8401 (exhibit list) (emphasis added); R.37128, 37219, 37227-28. Appian did not object either time. R.37226-28. But when Pega tried to introduce the software, Appian objected. It insisted that Pega had to use the same laptop on which it transmitted a copy of the software to Appian during discovery. R.37217-18, 37220-24, 39196. The court agreed. R.39225.

This was highly unfair. Appian could have objected when Pega listed the "Pega Laptop" on the exhibit list. Worse, earlier in the trial, Appian itself presented videos of its expert using Pega's BPM platform on *a different computer*. R.36911-12, 39212-14. Appian knew its objection would prevent Pega from countering those videos because the laptop that transported the software for discovery could not run the software. R.39195. Pega had used the laptop's hard drive simply as the medium for transferring its software to Appian, which Appian's expert then moved to a more powerful computer. R.39212-14.

The court's basis for excluding Pega's software was an unprecedented rule that software is inadmissible unless it resides on the very same physical hardware on which it was produced to the opposing party. R.39225. There is no such rule.

The court conflated evidence (the software) with the method by which the evidence is transmitted in discovery (whether via a disk, an external hard drive, or, here, a laptop's hard drive). If Pega were introducing a voluminous document into evidence, it would not be required to use Appian's copy. The rule is no different for software. As this Court has held, "electronic documents or records that are merely stored in a computer raise no computer-specific authentication issues." *Midkiff v. Commonwealth*, 54 Va. App. 323, 337 (2009) (quotation marks omitted), *aff'd*, 280 Va. 216 (2010). That is consistent with the "legal consensus" that "traditional evidentiary rules [apply] to electronic" evidence. *United States v. Browne*, 834 F.3d 403, 412 (3d Cir. 2016) (collecting authorities). Pega was entitled to introduce a copy of software as long as it was relevant, Rule 2:401, and authenticated, Rule 2:901. *See* Rule 2:402.

The trial court suggested that using a different computer might raise doubts about the software's authenticity, calling for "a trial within a trial to authenticate." R.39225. That was doubly erroneous. To start, the way to address authenticity concerns was to require Pega to authenticate the software. Rule 2:901. The court recognized "[t]he fact that this upcoming witness may be able to authenticate what's on there." R.39225. Yet it prohibited Pega from doing so. *Id.* ("we're not doing that").

Nor would authentication have required "a trial within a trial." R.36966. Under the "very modest," "non-demanding standard," 1 The Law of Evidence in Virginia § 16-1 (2022), the only question was whether Pega had evidence "*sufficient for the trier of fact*" to conclude Pega's software was in fact Pega's software, *Walters v. Littleton*, 223 Va. 446, 451 (1982) (emphasis added). Pega did. Pega was prepared to authenticate the software through the person who led development of the software Pega sought to introduce (Stephen Bixby) and who would have testified that it was "the exact same thing" Pega produced to Appian during discovery. R.39212-14. That was more than enough to satisfy the lenient standard.

Prejudice is "'presumed,'" *Clohessy*, 250 Va. at 254, and it certainly was present here. With the software, Pega could have "*shown* the jury how the features in question in this case … either existed in Version 6.3, which predated Mr. Zou, or were developed entirely independently within Pega without any input from Appian." R.39237-38 (emphasis added). A demonstration was also the best counter to Marshall's vague mantra that Pega copied from Appian not the function itself (the "what") but only its "architecture and design" (the "how"). *Supra* 30. The best way to disprove that was by showing the jury how each function either predated Zou or worked differently from Appian's, or both. For example, Pega could have demonstrated that its edit button actually performed a different function from Appian's, and that the other alleged improvements were independent of Zou. R.39029, 39237-38. At a minimum, the demonstration would also have shown the jury that any alleged benefit could not justify $2 billion in damages.

Appian exploited the gap by urging the jury in closing to discount Pega's testimony denying that it copied, because Pega asked the jury to "take [its] word for it," with no corroborating evidence. R.42901; *see* R.39084.

III. The Trial Court's Erroneous Causation And Damages Rulings Require A New Trial.

The trial court inflicted a similar one-two punch on Pega with respect to causation and damages. First, ignoring clear statutory text, the court relieved Appian of the burden that applies to every plaintiff: to prove that the defendant's wrongdoing proximately caused the claimed damages. Instead, the court issued jury instructions requiring that Appian prove only Pega's *total revenues from all products*—and forcing Pega to prove which revenues were *not* caused by the alleged misappropriation. § III.A. Then, having incorrectly shifted the burden to Pega, the trial court blocked Pega from satisfying it by excluding compelling evidence disproving the causal link between Appian's claimed trade secrets and Pega's sales. § III.B. These errors independently require a new trial on all issues.

A. The trial court erroneously relieved Appian of its burden to prove the amount of unjust enrichment caused by misappropriation.

VUTSA requires the "complainant" to "prove" that any "unjust enrichment" damages were "caused by misappropriation." Code § 59.1-338(A). Yet, the court relieved Appian of its burden to prove that the alleged misappropriation caused Pega to win any sale, much less every sale. And it rejected Pega's requests for instructions requiring Appian to prove that "Pega's wrongful conduct was the proximate cause of Appian's damages." R.9221.

Instead, the court instructed the jury to apply an unprecedented burden-shifting approach: Upon proving that Pega misappropriated even just one purported trade secret, Appian's only further burden was to "establish[] by … greater weight of the evidence Pegasystems' *sales*"—period. R.15954, 42860 (emphasis added). The result was a presumption not just that the misappropriation benefited Pega *but also* that the purported trade secrets were the but-for cause of every penny Pega earned on every product, including from product lines that could not use, and are not alleged to have used, Appian's claimed trade secrets at all. Once Appian proved that Pega's *total 2013-2021 revenue* was $6 billion, R.37669, the instruction shifted the burden to Pega to prove what "portion of the sales [was] *not* attributable to the trade secrets." R.15954, 42861 (emphasis added).

On de novo review, the trial court's instruction is reversible error. Consistent with Virginia common law, VUTSA's plain language requires the plaintiff to prove damages caused by misappropriation. It thereby forecloses a burden-shifting approach that relieves plaintiffs of such a burden. § III.A.1. Even if some form of burden-shifting were permissible under VUTSA, the court erred in crafting the unprecedented instruction applied here. § III.A.2. The erroneous instruction was highly prejudicial, and it drove the verdict sky-high. § III.A.3.

1. VUTSA requires plaintiffs to prove the damages caused by misappropriation—foreclosing burden-shifting.

a. Statutory construction "begin[s] with the language of the statute." *Appalachian Power Co. v. State Corp. Comm'n*, 284 Va. 695, 705 (2012). When a statute "is plain and unambiguous, [courts] are bound by th[at] plain meaning." *Jones v. Commonwealth*, 296 Va. 412, 415 (2018) (quotation marks omitted). A court "must presume that the General Assembly chose, with care, the words that appear in a statute, and must apply the statute in a manner faithful to that choice." *Id.*

VUTSA's text places the burden—to prove unjust-enrichment damages caused by misappropriation—squarely on the complainant (plaintiff):

> Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. *If a complainant is unable to prove a greater amount of damages by other methods of measurement*, the damages caused by misappropriation can be measured exclusively by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

Code § 59.1-338(A) (emphasis added).

The first sentence authorizes damages in the form of actual loss and/or unjust enrichment caused by misappropriation. The second sentence prescribes when a plaintiff may pursue a reasonable royalty. In doing so, the second sentence refers to "other methods of measurement"—those other methods being actual loss and unjust enrichment, mentioned in the first sentence. *Id.* Thus, a reasonable royalty is available only "[i]f a complainant is unable to prove a greater amount of [actual loss and/or unjust enrichment damages caused by misappropriation]."

Because a royalty hinges on the *complainant's* inability to *prove* higher unjust-enrichment damages, it must be the *complainant* who has the burden to prove unjust enrichment caused by misappropriation in the first place. Otherwise, that key phrase ("complainant is unable to prove") is superfluous. *See Wintergreen Homestead, LLC v. Pennington*, 76 Va. App. 69, 76 (2022) (courts must give "every word … of the statute, if possible, its due effect and meaning"). Thus, the statute's plain meaning allocates the burden of proving unjust enrichment and, in doing so, forecloses burden-shifting.

This statutory burden is deliberate: When it drafted this provision, the General Assembly deviated from the pre-existing model Uniform Trade Secrets Act to add the critical language ("complainant is unable to prove"). The Uniform Act lacks that language and does not explicitly allocate the burden of proof. Instead, the corresponding sentence allows royalties "[i]n lieu of damages measured by any other methods." Uniform Trade Secrets Act § 3(a), *reproduced at* R.11229-30. When the General Assembly changed this to "[i]f a complainant is unable to prove a greater amount of damages," it codified language unique to Virginia among state statutes. Courts must effectuate this "deliberate and intentional" choice. *Commonwealth v. Champion Int'l Corp.*, 220 Va. 981, 992 (1980).

In short, the statute here is "clear on its face," and the court therefore need "look no further." *Virginia Dep't of Tax'n v. R.J. Reynolds Tobacco Co.*, 300 Va. 446, 455 (2022) (quotation marks omitted).

But even if VUTSA were silent as to allocating the burden of proof—Appian would *still* bear the burden. VUTSA *is* silent as to the burden of proving the misappropriation element of a trade-secret claim. Despite that silence, the Supreme Court, in *MicroStrategy*, held that "[t]he plain language of [VUTSA] does not provide any burden-shifting requirement" for the misappropriation element, and courts may not import one. 268 Va. at 265. That reflects the broader principle that when "the General Assembly did not expressly include [burden-shifting] in the statute," a court may not "add[] [the] requirement." *David v. David*, 287 Va. 231, 240 (2014).

It is no surprise, then, that the Supreme Court has held that trade-secrets plaintiffs have "the burden of proving with reasonable certainty the amount of damages and the cause from which they resulted." *Banks v. Mario Indus. of Va., Inc.*, 274 Va. 438, 455 (2007) (quoting *Saks Fifth Ave., Inc. v. James, Ltd.*, 272 Va. 177, 188 (2006)).

b. The statute's plain meaning is also reinforced by common-law principles, which apply "unless it clearly appears from express language or by necessary implication that the purpose of the statute was to change the common law." *Wicks v. City of Charlottesville*, 215 Va. 274, 276 (1974); *accord* Code § 1-200. VUTSA has no such express language or necessary implication.

Virginia law places the burden on plaintiffs "in any case" to "prove with reasonable certainty the amount of [their] damages and the cause from which they resulted." *Hale v. Fawcett*, 214 Va. 583, 585-86 (1974); *accord Banks*, 274 Va. at 455. Plaintiffs must "show the necessary factor of proximate causation." *Saks,* 272 Va. at 190. Proximate cause requires plaintiffs to prove that defendants' unlawful conduct "produce[d]" the damages in a "natural and continuous sequence" and that it was a but-for cause "without which that event" (here, a Pega sale) "would not have occurred." *Ford Motor Co. v. Boomer*, 285 Va. 141, 150 (2013) (quoting *Wells v. Whitaker*, 207 Va. 616, 622 (1966)).

Per the leading treatise on Virginia remedies, this requirement squarely applies to trade-secrets claims—including unjust enrichment damages. 1 Sinclair on Virginia Remedies § 29-3[A] (2022), *reproduced at* R.11236-39.

Under these principles, it was not enough for Appian to prove only misappropriation plus Pega's total sales. Appian also had the burden to prove, at a minimum, that one caused the other—i.e., to show what share of Pega's sales were caused by the alleged misappropriation, and were therefore *unjust*. If Pega would have made a sale anyway, then the sale yielded no unjust enrichment. *See Saks*, 272 Va. at 188-91. As the Seventh Circuit explained, "[i]f General Motors were to steal your copyright and put it in a sales brochure, you could not just put a copy of General Motors' corporate income tax return in the record and rest your case for an award of infringer's profits." *Taylor v. Meirick*, 712 F.2d 1112, 1122 (7th Cir. 1983). Under VUTSA and long-standing causation and damages principles, Appian had to prove its damages *and their cause* with reasonable certainty.

The court was not free to adopt what it thought to be the "better view" based on policy rationales that "the defendant is the wrongful actor" and "has the best access to the information." R.38706-07. If either were enough, the Supreme Court would not have rejected burden-shifting in *Microstrategy*.

2. The trial court misapplied the Restatement's burden-shifting approach, which requires plaintiffs to prove sales causation.

a. The trial court brushed aside VUTSA's unique and clear text, the common law, and Virginia caselaw in favor of what it thought was the approach under the Restatement (Third) of Unfair Competition. But even if that were permissible, the court was still wrong because it misread the Restatement. By way of context, the Restatement reflects that *some* states condone *some* burden-shifting. *See ADA Motors, Inc. v. Butler*, 432 P.3d 445, 449-51 (Wash. 2018). Notably, those states lack Virginia's unique statutory language expressly allocating the burden. And not a single state has adopted the extreme burden-shifting the trial court invented here.

Even the states that allow burden-shifting require plaintiffs to prove more than misappropriation plus total sales. They require plaintiffs to prove "whether or not the sales are attributable to the trade secret[s]"—what might be called sales causation. *Id.* at 451. They shift the burden to defendants only for two subsequent steps: (1) deducting expenses from revenue to yield profits; and (2) what is often called "apportionment." *Id.* at 450-51. Apportionment is the exercise, common throughout intellectual-property law, of segregating the portion of revenue from *any particular sale* that is attributable to the misappropriated information from the portion that is "not attributable to the trade secret[s]." *Id.* In other words, apportionment segregates the value of the copied feature from the value attributable to the defendants' own contributions. *Id.*; *accord* William Kerr & Richard Troxel, *Calculating Intellectual Property Damages* §§ 7:2, 7:4 (2022).

All these steps—sales causation, apportionment, and profit calculation—are necessary to segregate the defendant's unjust gains from its just gains. *Id.* § 7:4 *Collelo v. Geographic Servs., Inc.*, 283 Va. 56, 84 (2012) (McClanahan, J., concurring and dissenting in part) (explaining that plaintiffs must "provid[e] a factual basis upon which a jury could discern between [defendants'] just and unjust enrichment"). Pega proposed an alternative instruction reflecting this regime. R.10876.

Even if the Restatement could supersede VUTSA's language, it would shift (at most) the last two steps: profits and apportionment. The Restatement still requires plaintiffs to prove the first step—the share of sales that were caused by the misappropriation. That is consistent with the uniform practice of the states that have adopted the Restatement.

The Restatement certainly does not excuse plaintiffs from proving that misappropriation caused even a single additional sale. The black-letter text of Restatement § 45 contemplates "a comparative appraisal of all the factors of the case" for determining whether plaintiffs have shown that "monetary relief is appropriate" *at all*. One of the "primary factors" is "the degree of certainty with which *the plaintiff has established* the fact and extent of … pecuniary gain *resulting from the appropriation*." § 45(2)(a) (emphases added). In other words, § 45 expressly references the plaintiff's burden: to demonstrate sales causation.

The trial court erroneously overrode that principle by misreading a comment—comment *f*. But comment *f* confirms that plaintiffs bear the burden to show sales causation. It begins by defining the outer limits of recoverable unjust-enrichment damages: Plaintiffs can recover, at most, a defendant's "profits on *sales attributable to the use of the trade secret*." § 45, cmt. *f* (emphasis added). It then defines a plaintiff's burden as "establishing the defendant's sales." *Id.* But recall the limit imposed by that first sentence: Plaintiffs must show that a defendant's sales are within the recoverable universe—i.e., that they are attributable to use of the trade secrets. Comment *f* shifts to defendants only the subsequent steps, including apportionment, i.e., the "*portion*" of each sale that is "not attributable to the trade secret," which covers, for example, backing out the value of features that the defendant contributed. The defendant's burden—dealing with portions of sales—makes sense only if the plaintiff has already shown that the alleged trade secrets proximately caused each of those sales. The trial court erred in taking one sentence in one comment out of its context and turning it into a stand-alone damages instruction that contravenes controlling statutory language, caselaw, and the Restatement itself.

b. Multiple courts have read comment *f* as shifting only apportionment and profits, explaining that "[n]othing in the Restatement's framework relieved [the plaintiff] from its obligation to prove causation in the first instance." *Alifax Holding Spa v. Alcor Sci. Inc.*, 404 F. Supp. 3d 552, 574 (D.R.I. 2019), *appealed on other grounds*, No. 22-1723 (Fed. Cir.); *see Inteum Co. v. Nat'l Univ. of Sing.*, 371 F. Supp. 3d 864, 884-85 (W.D. Wash. 2019); *Lockheed Martin Corp. v. L-3 Commc'ns Integrated Sys., L.P.*, No. 05-cv-902, 2009 WL 8435667, at *3 (N.D. Ga. Apr. 9, 2009).

To support its contrary reading of comment *f*, the trial court adopted a selective reading of the law of one state. It invoked an intermediate appellate decision in Washington, *Petters v. Williamson & Assocs., Inc.*, 210 P.3d 1048, 1054 (Wash. Ct. App. 2009). R.42762-64. That was wrong twice over. To start, *Petters* did not absolve plaintiffs of the initial burden of proving sales causation; it addressed only the apportionment burden, "the burden of demonstrating which *portion* … was not, in fact, attributable to the transfer." 210 P.3d at 1054 (emphasis added).

Moreover, in *ADA Motors*, that very same Washington court later emphasized a plaintiff's initial sale causation burden, when it flatly rejected an instruction nearly identical to the one issued here. *See* 432 P.3d at 450-51. The instruction was: "Plaintiff has the initial burden of proving defendants' sales." *Id.*

at 451 (emphasis omitted). The appellate court held the instruction improper—even under *Petters*—because it could "be read to allow the plaintiff to satisfy its burden with gross sales data, *whether or not the sales are attributable to the trade secret*," *id.* (emphasis added)—precisely the trial court's error here. The Washington court explained that a proper instruction must impose on plaintiffs the burden of proving not just any sales, but sales "attributable to the trade secret," *id.*—precisely what Pega urged here.

Here, the trial court acknowledged that its instruction was inconsistent with Washington law: "I see that and I disagree with [*ADA Motors*'s] conclusion…. I think this is the wrong standard" under Virginia law. R.42763-64. It gave no explanation for selectively adopting one Washington decision while rejecting a subsequent—and controlling—holding of the same court. Thus, the court departed from the very authorities it invoked—the Restatement and Washington law.

c. A final reason to enforce the requirement that Appian prove causation before any burden can shift is that this interpretation of VUTSA would avoid a constitutional issue. The trial court's instruction amounted to a presumption that every time Pega made a sale, misappropriation caused that sale. The Fourteenth Amendment, however, forbids such presumptions where there is not at least "a rational connection between what is proved and what is to be inferred"—especially where a plaintiff is relieved of the burden to show causation. *W. & Atl. R.R. v.*

Henderson, 279 U.S. 639, 642 (1929) (unconstitutional presumption of negligence and causation based on mere showing of accident and injury); *see Hensler v. City of Davenport*, 790 N.W.2d 569, 586-89 (Iowa 2010). Here, Appian was not required to and did not prove any facts from which a rational inference of causation could be drawn. As the U.S. Supreme Court explained, "[r]easoning does not lead from the occurrence" (i.e., a Pega sale) "back to its cause" (i.e., alleged misappropriation). *Henderson*, 279 U.S. at 643. Whether because the trial court's instruction incorrectly stated Virginia law, or because it is constitutionally defective, the verdict must be set aside.

3. The erroneous jury instruction was prejudicial.

The instructional error requires a new trial. Prejudice is presumed because Jury Instruction 14 misstated the parties' burdens on the fundamental elements of causation and damages. The harmless-error doctrine "is never applied … when it appears that the jury has been misinstructed and, had it been properly instructed, that it might have returned a different verdict." *Rhoades v. Painter*, 234 Va. 20, 24 (1987). Not only "might" a proper instruction have yielded a different verdict; it almost certainly would have. The instruction assigned Appian the lightest possible burden: to prove one revenue number that was itself undisputed and, indeed, established by Pega's own audited financial statements. It required no showing of causation at all.

Even the trial court "agree[d]" that if the instruction was erroneous, it "did cause significant prejudice." R.43493-94. Appian too confirmed just how consequential that ruling was, by telling the jury that "[t]he burdens of proof … are critical" and repeatedly emphasizing the erroneous instruction: "We just got to show all the money that flowed in, the 6 billion plus from their customers, right? That's what we have to show." R.43206-07; *see* R.11291, 42996-3008, 43211-14; *Keesee v. Donigan*, 259 Va. 157, 162 (2000) (identifying prejudice from "emphasi[s] … in [a] closing argument").

The instruction was especially prejudicial because Appian's had little to no evidence to support such a massive verdict—as to sales causation or apportionment. On sales causation, Appian's damages expert conceded he was "not talking about what would have happened but for use of the trade secrets." R.37746. He further conceded that Pega's sales were "made for a lot of reasons[:] price, sales relationships, and the like." R.37743. And he failed to exclude sales of Pega products other than the BPM platform.

On apportionment, Appian's experts did not even try. Appian's technical expert conceded that Pega's BPM platform had "numerous capabilities" which "ha[ve] nothing to do with the case" and were "continuously … being added" from "within the Pega canon." R.42624-25. His own analysis identified roughly 50 such improvements to Pega's BPM platform—improvements he conceded "had value." R.42627. Yet Appian's theory attributed every cent of Pega's revenue to misappropriation and nothing to these other "valu[able]" features. In support, the expert offered only a conclusory opinion that Appian's alleged trade secrets were important in the BPM marketplace and to Pega's survival as a company. R.42975, 43209. Beyond that, Appian pointed to little more than internal documents in which Pega employees suggested that Zou-obtained intelligence would confer an advantage in the subset of sales in which Appian competed against Pega (i.e., the $479 million). *E.g.*, R.42926.

Because a jury could easily have concluded this was not enough to justify a $2 billion verdict, a new trial is required. *Cain v. Lee*, 290 Va. 129, 136 (2015).

B. The trial court erroneously excluded evidence that other causes drove Pega's sales.

Having erroneously saddled Pega with the burden on causation and damages, the trial court then prevented Pega from meeting that burden. It precluded Pega from presenting testimony or documents, or conducting cross-examination, to demonstrate that much of Pega's revenue was attributable to products with which Appian did not compete and functions that—as Appian's expert conceded—had "nothing to do with the case." R.42625. Specifically, the trial court made the following rulings:

1. It prohibited Pega CEO Trefler from testifying (or demonstrating through supporting documents, including Appian's own evidence) that

Pega sold products that did not compete with Appian's and offered features unrelated to Appian's purported trade secrets. R.39058-59. He would have established that "more than 50 percent of Pega's revenue is derived from customers for these other products." R.39061; *accord* R.39047.

2. The court blocked Pega's CTO Schuerman from testifying that Pega had many customers who "bought things that Appian didn't sell," R.41194, and that Pega sales were "driven by motivations that had nothing to do with" Appian's purported trade secrets, R.41194.

3. The court also barred Schuerman's exhibit cataloguing 25 products unique to Pega—and distinct from the BPM platform—that caused its sales. R. 41209-10, 51869.

4. Pega's expert Platt would have testified that Appian's claimed damages should be reduced to account for sales driven by Pega's unique products. Add.669-670. The products Platt considered "were not available from Appian" and "were important," such that the associated revenue was attributable to Pega's own innovation rather than Appian's purported trade secrets. Add.669; *see* R.41926-27.

5. The court precluded Pega from exposing a gaping hole in the testimony of Appian's expert Malackowski: that his "damage calculation"

> "include[d] sales made by Pega when it was not selling BPM products." R.37994. As Pega explained to the court, Malackowski incorrectly assumed that all of Pega's revenue derived from the sale of products that incorporated the purported trade secrets, and he "ha[d] not done anything" to factor in other products as causes of Pega's sales. R.37996-97.

Every bit of this evidence related to sales causation, apportionment, or both. But the court excluded it all, declaring that Pega had "essentially given up" any such "defense" in a single pretrial interrogatory response. R.41210. Here is the interrogatory and Pega's response:

> Interrogatory No. 18: Identify all *revenues* received by Pegasystems for each fiscal year from 2012 through 2021 relating to *Pega 6.3, Pega 7.0* and any subsequent *version* broken out by year and version of the software; and identify the costs and expenses Pegasystems incurred in order to realize those revenues.
>
> Answer: Pegasystems does *not record* or report *revenue*, or any associated costs and expenses incurred by Pegasystems, *based on the 'version' of the product sold (e.g., Pega 6.3, Pega 7.0)*. There is no mechanism or process by which Pegasystems is able to determine these revenue, cost and expense amounts. As a result, Pegasystems' financial results (including total revenue and all associated costs and expenses) for each applicable fiscal year as reported to the SEC in Pegasystems' annual Form 10-K filings and quarterly Form 10-Q filings are attached as Schedule 3.

R.47525-26 (objections omitted; emphases added).

This answer was responsive to the question asked, but the court read it to disclaim *all* methods for allocating Pega revenues. The court categorically declared that any argument about causation and apportionment "is a defense that you've essentially given up by answering an interrogatory that you can't breakdown the damages, you can't breakdown your revenue based on lines of business." R.41210.

That ruling was wrong. As an initial matter, even if the court's reading of the response were plausible, the court had no authority to exclude evidence on that basis. *See Belew v. Commonwealth*, 284 Va. 173, 177 (2012) (de novo review of trial-court authority). Interrogatory responses "generally are not conclusively binding upon a party." *Gentry v. Toyota Motor Corp.*, 252 Va. 30, 34 n.2 (1996). As Pega argued, if Appian saw an inconsistency between Pega's positions during discovery and at trial, its recourse was to introduce the response as evidence and let Pega "try to persuade the jury" to accept its trial position. R.41208. "Resolution of any inconsistencies and discrepancies is peculiarly within the province of the jury." *TransiLift Equip., Ltd. v. Cunningham*, 234 Va. 84, 93 (1987). On this basis alone, the Court should vacate and remand for a new trial. *Brown v. Black*, 260 Va. 305, 311-12 (2000).

In any event, the trial court misinterpreted Pega's response as a declaration that Pega "can't breakdown [its] revenue based on lines of business." R.41210. It held that one can "assume from [the interrogatory response] that means that all the revenue came from those [BPM] platforms," R.39050; *accord* R.39053. The court enforced this ruling strictly, even though it later clarified its view that this is what "[t]his answer strongly suggests, not absolutely says." R.39055.

These rulings missed a fundamental distinction between different *products* and different "*versions*" of the same product. The interrogatory asked about "*versions*" of a specific product: the BPM platform. R.47525. Because Pega does not track revenue by version, it had no version-by-version data to provide in its interrogatory response. Its answer merely (and clearly) communicated this fact to Appian.

But the evidence the court excluded had nothing to do with versions. Trefler's, Schuerman's, and Platt's testimony, and their supporting documents, were all about different *products*—products that perform entirely different functions. Pega's evidence establishing that more than half of its revenue comes from a range of other *products* was not about different *versions* of the BPM platform. Similarly, the planned cross of Appian's expert was about his failure to consider unaffected "products," R.37994—not about different versions of the Pega BPM platform.

Saying that Pega does not track revenue by version is not an admission that Pega sells no other products or that Pega does not track revenue by product or by lines of business. It is not even close to a statement that "all revenue came from" the BPM platform that could have been affected by the purported trade secrets.

And it certainly provides no logical basis to bar evidence showing that revenue from distinct products should be excluded from the damages calculation. What the court did was like awarding a plaintiff all of Microsoft's profits based on an allegation that PowerPoint misappropriates a few trade secrets, while prohibiting Microsoft from demonstrating that most of its revenues are attributable to other products—such as Word, Outlook, and Teams—bearing no relation to the trade secrets.

If Appian regretted asking a question about "version[s]," it was free to propound a different interrogatory—asking about "products" or "lines of business." Either way, Appian knew long before trial that Pega broke down its revenue based on products, not versions. Pega's damages expert, Platt, submitted a report that did that, opining that the unique nature of several of these products foreclosed any suggestion that Appian's claimed trade secrets caused those revenues. Add.669-670.

The excluded evidence could easily have changed the jury's causation determination and damages award. The exclusion was especially problematic in light of the trial court's burden-shifting instruction. There was no better way to satisfy the (misplaced) burden of disproving sales causation than to demonstrate that Pega sold unique products and that those products—not the BPM products—caused significant parts of its sales revenue. There was no better way to sustain the (misplaced) apportionment burden than by demonstrating that the purported trade secrets were not relevant to, much less decisive for, customers—and that many other Pega-derived features drove customer demand. Barring Pega from proving any of these points—on the erroneous ground that Pega had given up any such defense—left the jury with the crucial misimpression that Pega had no defense to Appian's claim that it was entitled to the benefit of every Pega sale—and every dollar of supposed profit from every sale (putting aside that Pega's audited financial statements showed it had no profit over the relevant period at all, *supra* at 15).

***

The trial court turned VUTSA and Virginia precedent upside-down by requiring Pega *to disprove* billions in alleged damages, and then blocked Pega from doing so. That is how you get the largest verdict in Virginia history.

If this Court vacates the verdict for either error related to causation and damages—the erroneous instruction or the ruling on the interrogatory—it should order a new trial as to all issues (including liability). A trial limited to damages is untenable because this Court cannot say with confidence which purported trade secrets the jury found. At Appian's insistence, the jury returned a general verdict, R.10934-36, 40223-35, 42765-802; Add.7-9, so there is no way to know which of Appian's 13 purported secrets the jury found to be both secret and misappropriated, and which the jury thought caused any damages. Without knowing that, there is no way for a new jury to allocate damages specific to those purported trade secrets. *See McGinn v. Merrill Lynch*, 736 F.2d 1254, 1259 (8th Cir. 1984) (requiring a new trial on liability and damages, "the first jury having concluded that some, but not all, of the trades were churned, and there being no way to communicate to the second jury which trades were included in this finding"); R.37921-23 (Appian's damages expert conceding that his analysis did not consider scenarios where fewer than all asserted trade secrets were misappropriated). This is especially problematic because one possible explanation for the jury's decision to cut Appian's $3 billion demand to $2 billion was that the jury rejected liability based on some unknown subset of the asserted trade secrets. Therefore, a new trial is required as to both liability and damages.

CONCLUSION

The Court should vacate the VUTSA judgment and dependent attorneys' fee and interest award, R.18129-31, and enter judgment in Pega's favor or, in the alternative, remand for a new trial.

Respectfully submitted,

<u>/s/ Monica T. Monday</u>
Monica T. Monday
(VSB No. 33461)
Michael J. Finney
(VSB No. 78484)
GENTRY LOCKE

10 Franklin Road S.E.
Suite 900
Roanoke, VA 24011
T: (540) 983-9300
F: (540) 983-9400
Monday@gentrylocke.com
Finney@gentrylocke.com

E. Joshua Rosenkranz
(Pro Hac Vice)
Christopher J. Cariello
(Pro Hac Vice)
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
T: (212) 506-5000
F: (212) 506-5151
jrosenkranz@orrick.com
ccariello@orrick.com

Eric A. Shumsky (Pro Hac Vice)
Jeremy Peterman (Pro Hac Vice)
James A. Flynn (Pro Hac Vice)
Jonas Wang (Pro Hac Vice)
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
T: (202) 339-8400
F: (202) 339-8500
eshumsky@orrick.com
jpeterman@orrick.com
jflynn@orrick.com
jonas.wang@orrick.com

Counsel for Appellant

February 6, 2023

CERTIFICATE OF COMPLIANCE

I hereby certify compliance with Rule 5A:20(h) on this 6th day of February, 2023. Electronic copies of the Opening Brief of Appellant have been filed with the Clerk of the Court of Appeals of Virginia, via VACES and served via email upon counsel for Appian Corporation:

Ellen D. Marcus
Sheila M. Costin
HOLMES COSTIN & MARCUS PLLC
301 N. Fairfax Street, Suite 202
Alexandria VA 22314
T: (703) 260-6401
F: (703) 439-1873
emarcus@hcmlawva.com
scostin@hcmlawva.com

John M. McNichols
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
T: (202) 434-5000
F: (202) 434-5029
jmcnichols@wc.com

Adeel A. Mangi
Jeffrey S. Ginsberg
Muhammad U. Faridi
Abhishek Bapna
Matthew B. Weiss
Margaret O'Neil
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the America
New York, NY 10036
T: (212) 336-2000
F: (212) 336-2222
aamangi@pbwt.com

mfarisi@pbwt.com
abapna@ pbwt.com
mweiss@ pbwt.com
moneil@ pbwt.com

Robert W. Loftin (VSB No. 68377)
MCGUIREWOODS LLP
Gateway Plaza
800 East Canal Street
Richmond, VA 23219
T: (804) 775-4715
F: (804) 775-1061
rloftin@mcguirewoods.com

Jonathan Y. Ellis (*pro hac vice*)
MCGUIREWOODS LLP
501 Fayetteville Street, Suite 500
Raleigh, NC 27601
T: (919) 755-6688
F: (919) 755-6699
jellis@mcguirewoods.com

Counsel for Plaintiff-Appellee Appian Corporation

Counsel does not waive oral argument.

This brief contains 13,492 words, excluding those portions that by rule do not count toward the word limit.

/s/ Monica T. Monday