No. 13-

IN THE

Supreme Court of the United States

ACCENTURE, L.L.P.,

Petitioner,

v.

WELLOGIX, INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

MARIA WYCKOFF BOYCE
MACEY REASONER STOKES
CRISTINA ESPINOSA RODRIGUEZ
AARON M. STREETT
BAKER BOTTS L.L.P.
910 Louisiana
Houston, TX 77002
(713) 229-1234

CARTER G. PHILLIPS*
JONATHAN F. COHN
ERIC D. MCARTHUR
JOSHUA J. FOUGERE
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Petitioner Accenture LLP

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* Counsel of Record

QUESTION PRESENTED

Federal Rule of Evidence 702 provides that a witness "who is qualified as an expert" may testify only if "the testimony is based on sufficient facts or data" and "the expert has reliably applied the principles and methods to the facts of the case."

The question presented is whether Rule 702 requires a court, and not the jury, to decide whether expert testimony is "based on sufficient facts or data" and "reliably applie[s] . . . principles and methods to the facts of the case," and to set aside a jury verdict that rests on expert testimony that fails to meet these fundamental requirements.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding are Accenture LLP and Wellogix, Inc.

RULE 29.6 STATEMENT

Accenture LLP is a wholly owned subsidiary of Accenture plc. Accenture plc is a publicly traded company on the New York Stock Exchange.

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PETITION FOR A WRIT OF CERTIORARI

Accenture LLP respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 716 F.3d 867 and is reproduced at Pet. App. 1a–30a (as revised) and Pet. App. 31a–60a (as originally issued). The Fifth Circuit's unpublished order denying rehearing is reproduced at Pet. App. 159a–160a. The decisions of the district court are reported at 823 F. Supp. 2d 555 and 788 F. Supp. 2d 523, and are reproduced at Pet. App. 65a–101a and 110a–158a. The final judgment of the district court is reproduced at Pet. App. 61a–64a.

JURISDICTION

The court of appeals filed its initial decision on May 15, 2013, modified it on January 15, 2014, and denied the petition for rehearing on January 16, 2014. This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT RULE

Federal Rule of Evidence 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

INTRODUCTION

"'Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.'" *Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993). Indeed, it is "widely acknowledged" that expert testimony may "impres[s] lay jurors[, who] tend to assume it is more accurate and objective than lay testimony." *Barefoot* v. *Estelle*, 463 U.S. 880, 926–27 & n.8 (1983) (Blackmun, J., dissenting). Case outcomes can and often do turn on expert evidence. *E.g.*, Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L. Rev. 40, 50–52 (1901); *Gen. Elec. Co.* v. *Joiner*, 522 U.S. 136, 143 (1997). For this reason, the Federal Rules of Evidence and this Court's cases demand that expert testimony be carefully scrutinized by the court before it reaches the jury. Fed. R. Evid. 702; *Daubert*, 509 U.S. at 592–97.

Too frequently, however, courts are abdicating this essential "gatekeeping" duty by passing questions that the court must resolve at the admissibility stage over to the jury to weigh as a part of the merits determination. This case is a paradigmatic example. Plaintiff Wellogix's suit for misappropriation of trade secrets hinged entirely on a software expert, Kendyl Roman, whose testimony was as inadmissible as it was decisive. Straying far beyond an analysis of software, and making critical "misstatements" along the way, Roman was allowed to testify on virtually every issue in the case, including which information was a trade secret and whether Accenture had misappropriated those trade secrets. Even more significantly, Roman, a computer scientist, was allowed to offer evidence—indeed, the *only* evidence—of the post-tort value of Wellogix's business and whether the alleged misappropriation caused Wellogix's entire economic loss. Roman had no firsthand knowledge of the underlying facts, no expertise in the industry (oil and gas), no background in appraising businesses or assessing damages, and no factual basis for his opinion. Nonetheless, he testified.

Wellogix's $50 million case depended on this flawed testimony, but the district court and court of appeals punted to the jury. According to them, notwithstanding Rule 702, cross-examination is the proper check on wayward experts, and any defects in an expert's runaway testimony can be worked out by the jury. Remarkably, the Fifth Circuit even deemed Roman's purported business valuation admissible on the ground that Roman was an expert on software and Wellogix's business value was "related to" its software. In the court's view, the jury could assess the merits of the expert opinion and render a verdict necessarily based on it.

This case requires this Court's immediate review. The Fifth Circuit's decision deepens a troubling and acknowledged split within the lower courts as to judges' role in assessing the factual basis for expert testimony. In conflict with Rule 702 and this Court's precedents, the decision below is part of a growing trend in which many courts are turning a blind eye to Rule 702's requirements, and faulty expert testimony is reaching jurors under the rationale that its deficiencies go to the weight of the testimony, not its admissibility. Misuse of that familiar refrain is turning Rule 702 upside down: it is precisely because experts can have an outsized influence on jurors that the Rule demands rigorous scrutiny by the courts. Discord among the lower courts on this important issue urgently needs this Court's correction and guidance.

STATEMENT OF THE CASE

A. Factual Background.

This case arises from the failure of a small, speculative start-up company called Wellogix. Beginning in 2000, Wellogix developed and later patented a suite of software designed to automate the process by which oil-and-gas companies procure the goods and services they use to drill oil wells (referred to in the industry as "complex services"). Pet. App. 2a–3a. Oil-and-gas companies historically have procured these services by meeting face-to-face with their suppliers "'over coffee and doughnuts'" and using paper-based methods or basic electronic tools like email, spreadsheets, and standard accounting software. *Id.* at 2a. Wellogix aimed to revolutionize this process with software that allowed companies to plan, purchase, and account for complex services online. *Id.* at 2a–3a.

From the start, however, Wellogix had great difficulty selling its software. Companies resisted changing the way they had traditionally done business, Tr. 587–88, and suppliers balked at the extra work Wellogix's software pushed onto them, *id.* at 2035–36. As Wellogix's own CEO testified, the company was "ahead of its time." *Id.* at 588. In its entire history, Wellogix had only three paying customers, none of which used Wellogix's software beyond the pilot stage. *Id.* at 615. Still today, no company uses Wellogix's software or anything like it. *Id.* at 1336, 1565, 1802–03, 2035.

Because Wellogix's software was not a stand-alone solution but relied on other companies' software to work, Wellogix pursued partnerships with companies like SAP, a German software company whose procurement software is used by many oil-and-gas companies. Pet. App. 3a. In addition, Wellogix joined with consultants like Accenture, which helped Wellogix market its software and assisted with implementation of the software during one of Wellogix's pilot projects. *Id.*

Despite this assistance, Wellogix was consistently unprofitable. As its CEO, Ike Epley, testified, the company had run out of money by the first half of 2005. Tr. 610–15. In August 2005, Epley convinced a group of investors that, notwithstanding the company's financial straits and lack of clients, Wellogix was a "rocket ship" ready to launch. *Id.* at 407, 614. The investors provided Wellogix with $7.4 million, and Wellogix undertook a software upgrade in an effort to make its product more competitive. *Id.* at 593–96, 614. But the company quickly returned to unprofitability and burned through the additional capital before the end of the year, causing the venture-capital firm that provided the final infusion to write off the entirety of its investment. *Id.* at 615.

B. Proceedings Below.

1. Having failed in business, Wellogix turned to the courts. On one front, Wellogix has actively pursued patent litigation, asserting claims under a series of patents that cover its "entire suite" of software. Tr. 644. Wellogix has demanded substantial damages from Accenture and other companies for alleged infringement of those purportedly valuable patents. See, *e.g.*, Defs. Wellogix, Inc. and Wellogix Tech. Licensing LLC's Am. Answer and First Am. Countercls.

at 12–41, *SAP Am., Inc. v. Wellogix, Inc.*, No. 4:10-cv-01224 (S.D. Tex. Nov. 10, 2011) (Dkt. 70).

Other suits, like this one, have asserted trade secrets pertaining to the same technology publicly claimed in the patents. In 2008, Wellogix sued a number of companies for misappropriation and theft of alleged secrets. Pet. App. 4a. One company prevailed in an arbitration against Wellogix, but the claims against Accenture proceeded to trial, riding on Wellogix's software expert, Roman. *Id.* at 4a–5a.

Before trial, Accenture moved to exclude Roman's testimony because (among other reasons) his opinions were unreliable and factually unsupported. The district court denied the motion, however, stating that Accenture could raise its objections on cross-examination. Pet. App. 131a–133a. In the court's view, the challenges to the factual basis for Roman's testimony were ultimately for the jury to decide.

At trial, Roman's testimony was the beginning, middle, and end of Wellogix's case. Most importantly, Roman testified about causation and damages. To support its claim for lost business value, Wellogix was required to prove "'the market value of the business immediately before and immediately after'" the alleged tort. Pet. App. 18a; *Sawyer* v. *Fitts*, 630 S.W.2d 872, 875 (Tex. App. 1982). Wellogix called a damages expert, who claimed that in 2005, *before* Wellogix burned through the additional capital, the company was worth approximately $27.8 million. Pet. App. 16a–17a; Tr. 614–15, 1090, 1098–1100. That expert, however, well aware of Wellogix's cash burn, expressly disclaimed any opinion on the cause of the company's decline or its post-tort value. Tr. 1092, 1101, 1118; see also *id.* at 1125–28 (conceding that the projection on which he based his valuation "wasn't even close to what happened" and was "way off" of Wellogix's actual financial results).

To plug this hole, Wellogix turned to Roman, its software expert. Although he was not disclosed as a damages expert, had no expertise in business valuation or the oil-and-gas industry, and did not even purport to have performed a forensic review of Wellogix's immediate post-tort condition, Roman testified that Wellogix's value after the alleged tort "'went to zero'" as a result of the alleged theft. Pet. App. 17a–18a; Tr. 925–26. Roman never considered whether the company had already lost value for business reasons (indeed, Wellogix had already run out of cash), or whether Wellogix retained residual value on account of its patents or otherwise (Wellogix contends its patents are worth millions). Tr. 925–26. Nonetheless, he provided the *only* evidence as to whether the alleged theft destroyed Wellogix's business, which was the jury's ultimate finding.

Roman's testimony was no better supported in other respects. He testified, for example, that an "XML schema"[1] was an "'incredibly valuable trade secret'" that "'would not be known publicly'" even though it was posted *publicly* on Wellogix's website. Pet. App. 21a; Tr. 804–05, 1026–37. And he claimed to have discovered "forensic evidence" that Accenture had stolen Wellogix's trade secrets based on a purported "matc[h]" he found between Wellogix's source code and certain SAP source code. Pet. App. 20a–21a; Tr. 805, 907–13, 1141–42. But he conducted his comparative analysis against *the wrong (and irrelevant) software*. Undisputed record evidence showed that the

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[1] An "XML schema" merely defines a particular way to organize information produced by a computer program so that another program can interpret that information. Tr. 1793–94.

software in which he discovered the supposed "match" was a budgeting tool for local German governments and had nothing to do with procurement of complex services in the North American oil-and-gas industry. Pet. App. 21a; Tr. 1799–1802.

The district court on occasion expressed concerns about this testimony. At one point, for example, the court asked how Roman could be "that much off the point" and make "such a rudimentary mistake." Tr. 1827. The judge also lamented that, despite having "already been through an arbitration on" the same subject, he found Roman's testimony "very hard . . . to follow." *Id.* The judge "just hope[d] the jury [wa]s up to it, [he] really d[id]." *Id.* Despite such misgivings, however, Roman testified to the jury on all fronts.

2. Swayed by Roman, the jury returned a verdict awarding Wellogix $26.2 million in compensatory damages and $68.2 in punitive damages—$50 million more than Wellogix had requested. Pet. App. 102a–109a. Accenture filed post-trial motions, and the court remitted the award to the $48.9 million (including interest) Wellogix sought. *Id.* at 5a, 63a, 94a.

In all other respects, however, the court denied Accenture's motions and upheld the verdict. The court recognized that Roman's testimony provided the only evidence about Wellogix's post-tort value, but concluded that the "[t]here was sufficient evidence in the record, through Roman's testimony, that Wellogix lost all of its value as a software company once its trade secrets were misappropriated," and that "[t]he jury was entitled to accept Roman's testimony and reject Accenture's evidence that Wellogix might still have some value based upon its patents." Pet. App. 83a–84a. As for the other issues, the court again held that "[t]he various challenges that Accenture raises to Roman's expert testimony were issues appropriately presented to the jury, and were relevant to the weight assigned to Roman's testimony, not to its admissibility." *Id.* at 100a.

3. The Fifth Circuit affirmed. Pet. App. 31a–60a. In its view, because Roman was a software expert, he could testify on any subject "related to Wellogix's software," including causation and Wellogix's post-tort value. *Id.* at 52a (citing Fed. R. Evid. 702). The nonexistent factual support for his testimony was no obstacle. The court even acknowledged that Roman "twice misstated facts in his testimony" and made "'a rudimentary mistake'" by examining the wrong software. *Id.* at 51a. But the court held that these "misstatements" were admissible because "Accenture had the chance to highlight and dispute these errors through 'vigorous cross-examination' and the 'presentation of contrary evidence.'" *Id.* (alteration omitted).

4. Accenture petitioned for rehearing and rehearing en banc. After eight months, the court denied both petitions, but the panel simultaneously issued a revised opinion with one significant substantive change. Pet. App. 1a–30a; 159a–160a. The original opinion had stated that the company's post-tort value was supported by testimony from Roman *and* Epley, Wellogix's CEO. *Id.* at 48a. But Accenture's rehearing petition pointed out that Epley's testimony actually undermined the jury's verdict, because Epley said the company had run out of money *in 2005*, long before the alleged theft, which the jury found occurred in August 2006. Pet. For Rehearing En Banc 14 n.3; see Pet. App. 48a, 105a. Instead of grappling with this contradiction, the revised opinion simply deleted the references to Epley's testimony. Compare Pet. App. 18a, with *id.* at 48a. As a result, like the district court, the Fifth Circuit ultimately rested its ruling

about Wellogix's post-tort value entirely on Roman's unsupported testimony. *Id.* at 18a.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari and reverse the Fifth Circuit's erroneous decision for three reasons.

First, there is an entrenched and recognized conflict in the lower courts over what questions a court must resolve in deciding the admissibility of expert evidence under Federal Rule of Evidence 702 and what questions the court may delegate to the jury. Cases oscillate between strict adherence to the Rule and utter abdication of it, sometimes relying, like the Fifth Circuit below, on stale case law that predates the current version of Rule 702 and *Daubert*. Such dissonance merits this Court's review.

Second, the decision below is contrary to Rule 702 and this Court's precedents. Those authorities make clear that expert testimony must, among other things, be "based on sufficient facts or data" and be reliably tied to the facts of the case. Thus, whether Roman was "qualified as an expert" to testify about software does not obviate the need to apply the rest of Rule 702 to his testimony, including his testimony on causation and damages. And the fact that Roman was subject to cross-examination does not eliminate the need to exclude portions of his testimony that plainly fall short of what Rule 702 requires. Without that inadmissible testimony, there is nothing left to sustain the jury's verdict.

Third, the lower courts' obligation to scrupulously enforce Rule 702 is critically important. Expert testimony impacts much of the litigation in this country, and it often decides cases—as it unquestionably did here. The pattern of lower courts disregarding Rule

702 and casually dismissing fundamental problems with expert testimony as issues for the jury warrants this Court's attention. This Court has not weighed in since Rule 702 was amended in 2000, and cases like this one make clear its guidance is sorely needed.

I. THE LOWER COURTS ARE DIVIDED OVER WHAT THE COURT MUST DECIDE WHEN DETERMINING WHETHER TO ADMIT EXPERT EVIDENCE UNDER RULE 702.

The Fifth Circuit's decision in this case deepens a growing rift among the lower courts about what questions a court must resolve at the admissibility stage—*before* expert evidence is sent to the jury. Rule 702 requires not only that an expert be qualified, but that an expert's opinion be, among other things, "based on sufficient facts or data" and the product of reliable principles and methods that have been "reliably applied . . . to the facts of the case." Fed. R. Evid. 702. But how—or even whether—those requirements are enforced has irreconcilably split the lower courts.

1. On one side are cases that continue to enforce vigorously the strictures of Rule 702, insisting that expert testimony be based on sufficient facts and be reliably connected to the case at hand. These cases hold that when an expert opinion markedly diverges from the actual facts of the case or is otherwise unreliable, it is unacceptable to admit the testimony and simply inform the jury about the disparities. *Estate of Barabin* v. *AstenJohnson, Inc.*, 740 F.3d 457, 463–64 (9th Cir. 2014) (en banc). Instead, the district court must ensure that, "[j]ust as [it] cannot abdicate its role as gatekeeper, . . . it avoid[s] delegating that role to the jury." *Id.* at 464.

Accordingly, in these cases, the courts of appeals have reversed or vacated the admission of expert evidence that lacked a "'sufficient factual foundation'" in the record, or that "appears unreliable on its face" due to the disconnect with the facts of the case. *Elcock* v. *Kmart Corp.*, 233 F.3d 734, 749, 754–56 & n.13 (3d Cir. 2000). Such criticism is often levied against unsupported damages testimony. The Tenth Circuit, for example, held that a company's CEO could not testify to a damages model because he was not a damages expert and because his model did not conform to the underlying facts. *LifeWise Master Funding* v. *Telebank*, 374 F.3d 917, 926–30 (10th Cir. 2004). Similarly, the Ninth Circuit rejected the admission of evidence from an "expert accountant" who was nevertheless "not an expert in the valuation of a business" and whose calculations were based on unfounded and speculative assumptions. *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 85–88 (9th Cir. 1969). These decisions correctly recognize that it is error to admit an "economic damages model [that] relie[s] on several empirical assumptions that [a]re not supported by the record." *Elcock*, 233 F.3d at 756.

By the same token, courts in this group have had no trouble reversing district court decisions to admit expert testimony that "did not incorporate all aspects of the economic reality of the [relevant] market," *Concord Boat Corp.* v. *Brunswick Corp.*, 207 F.3d 1039, 1055–57 (8th Cir. 2000) (requiring a "thorough analysis" of the expert opinion, including "'fit'" to factual reality), or that did "not reflect the realities of the . . . industry" at issue, *Mike's Train House, Inc.* v. *Lionel, L.L.C.*, 472 F.3d 398, 408 (6th Cir. 2006); see also, *e.g.*, *Tamraz* v. *Lincoln Elec. Co.*, 620 F.3d 665, 667–77 (6th Cir. 2010) (expert testimony is inadmissible if it is not "'based upon sufficient facts or data' or the 'product of reliable principles and methods . . . applied . . . reliably to the facts of the case'") (omissions in original). And they have scrutinized every step in an expert's analysis to make sure that district courts "undertake a rigorous examination of the facts on which the expert relies, the method by which the expert draws an opinion from those facts, and how the expert applies the facts and methods to the case at hand." *Amorgianos* v. *Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002).

2. At the other end of the spectrum, however, decisions like the one below abandon the courts' responsibility to curb expert testimony at the gate and to enforce *all* of Rule 702's requirements. Disregarding Rule 702(b)'s requirement that expert opinions be "based on sufficient facts or data," numerous cases hold that questions about an opinion's factual underpinnings are reserved for the jury as matters affecting the weight of the testimony. See, *e.g.*, *Stollings* v. *Ryobi Techs., Inc.*, 725 F.3d 753, 765–68 (7th Cir. 2013); *Milward* v. *Acuity Specialty Prods. Grp., Inc.*, 639 F.3d 11, 22 (1st Cir. 2011). For these courts, the jury should be able to decide whether there is "*insufficient* support for an expert's conclusion," *Milward*, 639 F.3d at 22, even though Rule 702's demand for "sufficient" factual support should by definition exclude support that is "insufficient."

Cases on this side of the split are equally dismissive of the reliability requirement in Rule 702(d). According to them, identifying "flaws in [the application of] generally reliable scientific evidence is precisely the role of cross-examination." *Quiet Tech. DC-8, Inc.* v. *Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1345 (11th Cir. 2003); see also, *e.g.*, *Liquid Dynamics Corp.* v. *Vaughan Co.*, 449 F.3d 1209, 1221 (Fed. Cir. 2006) (challenge based on admitted errors in applying methodology to facts of the case went to weight not admissibility, especially when "this fact was fully discussed on cross examination"); *Rosenfeld* v. *Oceania Cruises, Inc.*, 654 F.3d 1190, 1193–94 (11th Cir. 2011). What is more, they openly take the position that challenges to the application of a methodology (the province of subsection (d)) get less scrutiny than challenges to the methodology itself (the focus of subsection (c)). See, *e.g.*, *Quiet Tech.*, 326 F.3d at 1343–46; *United States* v. *Shea*, 211 F.3d 658, 667–68 (1st Cir. 2000).

3. Such disparate results reflect deep-seated differences that cannot be written off as a product of the case-by-case nature of evidentiary determinations. Quite the opposite: the incongruent views about Rule 702 are well documented. A manual for federal judges, for example, recognizes this very split. Margaret A. Berger, *The Admissibility of Expert Testimony*, *in* Fed. Judicial Ctr., *Reference Manual on Scientific Evidence* 11, 22 & n.57 (3d ed. 2011) (citing cases going both ways on whether a court must exclude expert evidence "if it finds that the expert's model did not incorporate the appropriate data that fits the facts of the case, or [whether] this is an issue for the jury"); see also, *e.g.*, David E. Bernstein, *The Misbegotten Judicial Resistance to the* Daubert *Revolution*, 89 Notre Dame L. Rev. 27, 50–52 & nn.138–142, 55, 59 n.188 (2013); Victor E. Schwartz & Cary Silverman, *The Draining of* Daubert *and the Recidivism of Junk Science in Federal and State Courts*, 35 Hofstra L. Rev. 217, 237–40 (2006). As a result, litigants cannot predict how a court will apply Rule 702, leaving case outcomes subject to a "roulette wheel randomness." Schwartz & Silverman, *supra*, at 218. This Court's

review is needed to bring the lower courts into accord with Rule 702 and with one another.

II. THE DECISION BELOW CONFLICTS WITH RULE 702 AND THIS COURT'S PRECEDENTS.

1. The Fifth Circuit's decision also contravenes Rule 702 and this Court's precedents. Rule 702 establishes what a court must decide before admitting expert testimony: (1) the expert must be "qualified"; (2) the "specialized knowledge" must "help the trier of fact to understand the evidence or to determine a fact in issue"; the testimony must be (3) "based on sufficient facts or data" and (4) "the product of reliable principles and methods"; and (5) the expert must "reliably appl[y] the principles and methods to the facts of the case." Fed. R. Evid. 702. The Rule does not designate any of these requirements as optional, or suggest that some count more than others.

This Court's precedents highlight the same rigorous admissibility requirements. The Court has explained that Rule 702 imposes an "obligation" on district courts to "ensure that any and all [expert] testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589. Likewise, the Court has made clear that questions about the "factual basis, data, principles, [and] methods" of expert testimony, or "their application," require a determination that the testimony is reliable before it is sent to the jury, *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 149 (1999), and that expert testimony should be excluded when "there is simply too great an analytical gap between the data and the opinion proffered," *Joiner*, 552 U.S. at 146. To be admissible, expert evidence must meet, and lower courts must apply, "exacting standards." *Weisgram* v. *Marley Co.*, 528 U.S. 440, 455 (2000).

When expert testimony falls short of these standards, either because it is "not supported by sufficient facts to validate it in the eyes of the law, or . . . indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict." *Brooke Grp. Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993). "Inadmissible evidence contributes nothing to a 'legally sufficient evidentiary basis,'" *Weisgram*, 528 U.S. at 454, and thus a jury verdict that rests solely on the unsupported *ipse dixit* of an expert must fall along with the inadmissible expert testimony.

2. The decision below cannot be squared with this authority. "Conjectures that are probably wrong" have no place in front of a jury, *Daubert*, 509 U.S. at 597, but that is just what Roman offered up. No "sufficient facts" or "reliable" analysis supported conclusory testimony from a *software* expert with no experience in business valuation or the oil-and-gas industry that the value of Wellogix's business abruptly plummeted to "zero" as a result of the alleged tort—indeed, Roman provided no analysis at all. Nor could he have, as his conclusion cannot be reconciled with the fact that Wellogix held patents—which cover the same technology as its purported trade secrets, and which it is still actively litigating—or with the CEO's testimony that Wellogix had already run out of cash months earlier, well before the alleged theft occurred. See *supra*, at 6–7. Plainly this was not the "same level of intellectual rigor" that an actual expert in the field of business valuation would apply to the task. *Kumho Tire*, 526 U.S. at 152.

The Fifth Circuit's justification for upholding the admission of this testimony, and the $50 million judgment that rested on it, flouts Rule 702. According to the Fifth Circuit, "Wellogix's post-tort value related to Wellogix's software, and therefore was within Roman's expertise." Pet. App. 22a. But that flimsy reasoning is doubly wrong. For starters, an expert's qualifications are just the first requirement under Rule 702; there are four more subsections that follow, each with its own separate constraints. Whether or not a particular subject is within an expert's expertise, his testimony is not admissible unless it is "based on sufficient facts or data" and "reliably applie[s] the principles and methods to the facts of the case." Fed. R. Evid. 702. Indeed, the opinion's reliability is inexorably tied up with its factual basis, such that "an analysis of the sufficiency of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion." Fed. R. Evid. 702 advisory committee's notes. Roman's armchair valuation of Wellogix's business did not come close to meeting these requirements.

Moreover, the idea that business valuation was within Roman's expertise as a computer scientist is simply untenable. Valuing a business is a complicated endeavor requiring economic and financial training and experience. It is not something that can be discerned by examining source code. The Fifth Circuit's contrary conclusion, under which an expert may provide case-dispositive testimony on any subject that is loosely "related to" his area of expertise, eviscerates Rule 702. It takes little imagination to appreciate the Pandora's box that would open if a technical expert—be it a software specialist, a mechanical engineer, or a medical researcher—could value a business with multiple assets in any of those fields, and then also determine the cause of the company's loss in value. Rule 702 cannot tolerate being stretched that far, and $50 million verdicts cannot be upheld by such testimony.

The Fifth Circuit's answer to Accenture's showing that Roman "did not investigate the facts underlying" his other opinions was no better. Pet. App. 21a. There was no sufficient factual basis for Roman's testimony that *public* information was a trade secret (because that is impossible) or for his conclusion that Accenture stole a trade secret (because he compared the code in the wrong software). See *supra*, at 7–8. The Fifth Circuit recognized these errors, but brushed them off because "Accenture had the chance to highlight and dispute [them] through 'vigorous cross-examination' and the 'presentation of contrary evidence.'" Pet. App. 21a (alteration omitted).

This curt reasoning again fails to give due regard to Rule 702 and the courts' gatekeeping responsibilities. The Rule demands that courts assess and resolve whether an opinion has a sufficient factual basis and is connected to the facts of the case; it does not permit courts simply to hand challenges on those grounds over to the jury. Fed. R. Evid. 702. Although "[v]igorous cross-examination" is a "means of attacking shaky but *admissible* evidence," *Daubert*, 509 U.S. at 596 (emphasis added), it cannot substitute for the admissibility determination itself. That is "hornbook law." *Barefoot*, 463 U.S. at 930 (Blackmun, J., dissenting); cf. also 29 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6262, at 187 (1997) ("Cross-examination is ineffective to reveal reliability problems when, because of the complexity of the subject, that examination goes over the heads of the jurors."). Here, the district court recognized this exact problem and simply ignored the plight the jury faced.

Worse still, the Fifth Circuit's logic flips Rule 702 on its head: it is precisely because of the significant risk that juries assign outsized weight to expert testimony that it must be carefully scrutinized *before* the jury sees it. *E.g.*, *Daubert*, 509 U.S. at 595. Shirking the gatekeeping requirements of Rule 702 on the assumption that the jury will detect and properly discount the flaws in an expert opinion is thus dangerously backwards. The Rule requires careful scrutiny at the admissibility stage, and the Court need look no further than this case to see why.

When a district court confesses that expert testimony with "rudimentary mistake[s]" is "very hard . . . to follow," that should signal a need for more scrutiny, not less. Tr. 1827 (instead "just hop[ing] the jury is up to it"). Likewise, when an expert's key opinions lack any factual support whatsoever or are based on "misstatements" of the facts, the correct response is exclusion, not cross-examination. Certiorari should be granted to correct the Fifth Circuit's erroneous application of Rule 702 and this Court's precedents.

Indeed, the error below is sufficiently egregious that this Court may wish to consider summary reversal. It is simply intolerable for a $50 million judgment to rest on the unsupported "*ipse dixit* of [an] expert." *Joiner*, 522 U.S. at 146.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

It is difficult to overstate the importance of expert testimony and the courts' duty to regulate it. Experts are everywhere: they "participate in the great majority of civil trials," as well as criminal ones. David H. Kaye et al., *The New Wigmore: Expert Evidence* § 1.1, at 2 (2d ed. 2010). And, as in this case, their testimony routinely is outcome determinative. See, *e.g.*, *Joiner*, 522 U.S. at 142–43; *Rider* v. *Sandoz Pharms. Corp.*, 295 F.3d 1194, 1197 (11th Cir. 2002); Hand, *supra*, at 50–52; Kenneth R. Foster & Peter W. Huber, *Judging Science: Scientific Knowledge and the Federal Courts* 1 (1997) ("In the courtroom, the outcomes of criminal, paternity, first amendment, and civil liability cases (among others) often turn on scientific evidence . . . ."); James A. Gardner, *Agency Problems in the Law of Attorney-Client Privilege: The Expert Witness*, 42 U. Det. L.J. 473, 475 (1965) ("[E]xpert testimony frequently constitutes the most important item of proof or the decisive element upon which the case actually turns.").

This potentially "'powerful'" testimony brings with it well-known hazards. *Daubert*, 509 U.S. at 595. "Expert witnesses can have an extremely prejudicial impact on the jury, in part because of the way in which the jury perceives a witness labeled as an expert." *E.I. du Pont de Nemours & Co.* v. *Robinson*, 923 S.W.2d 549, 553 (Tex. 1995). There is a "substantial danger of undue prejudice or of confusing the issues or of misleading the jury" because of the "aura of special reliability and trustworthiness" that surrounds expert testimony. *United States* v. *Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973); see also *Allison* v. *McGhan Med. Corp.*, 184 F.3d 1300, 1310 (11th Cir. 1999) (jury is "more likely than the judge to be awestruck by the expert's mystique"). In considering the post-*Daubert* amendment to Rule 702, the advisory committee itself noted the "legitimate concern that the jury, unschooled in the ways of experts, will if unregulated give undue weight to expert testimony that is in fact unreliable." See Daniel J. Capra, Advisory Committee on Evidence Rules, Minutes of the Meeting of April 12-13, 1999, at 3, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/499minEV.pdf.

No doubt this is why Rule 702 demands that expert evidence be well founded and relevant if it is to be submitted to a lay jury. Before jurors look to an expert for help in how to value a business, there has to be substantial assurance that the help being offered is trustworthy. Accuracy in expert testimony—especially technical or scientific testimony—is critical. See, *e.g.*, Stephen Breyer, *Introduction*, *in* Fed. Judicial Ctr., *supra*, at 1, 4 (noting the "importance of scientific accuracy in the decision of . . . cases"). And the courts' admissibility determinations are supposed to play an essential role in ensuring that accuracy prevails, screening out the junk and preventing the jury from relying on expert-generated mirages.

With the stakes so high, this Court's intervention is needed to ensure that decisions like the Fifth Circuit's do not continue. Indeed, it is particularly troubling that "the most common judicial response to attacks on the reliability of expert testimony is that such matters go to weight, not admissibility." 29 Wright & Gold, *supra*, § 6262, at 185–86. That refrain is being trotted out too often, in a manner that is inconsistent with Rule 702, and $50 million judgments are being sustained based solely on inadmissible evidence. The Court should step in and restore Rule 702 to its proper place.

Over a decade has passed since Rule 702 was amended in 2000, and yet "some judges seem not to realize [it]." Bernstein, *supra*, at 67. "The Court should intervene, not just because lower courts are defying Rule 702, but because Rule 702 is substantively correct." *Id.* at 69.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MARIA WYCKOFF BOYCE
MACEY REASONER STOKES
CRISTINA ESPINOSA
RODRIGUEZ
AARON M. STREETT
BAKER BOTTS L.L.P.
910 Louisiana
Houston, TX 77002
(713) 229-1234

CARTER G. PHILLIPS*
JONATHAN F. COHN
ERIC D. MCARTHUR
JOSHUA J. FOUGERE
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Accenture LLP

February 28, 2014

* Counsel of Record

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

No. 11-20816

WELLOGIX, INC.,
Plaintiff-Appellee,
v.

ACCENTURE, L.L.P.,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

Filed May 15, 2013
REVISED January 15, 2014

Before DeMOSS, SOUTHWICK, and HIGGINSON, Circuit Judges.

Opinion

HIGGINSON, Circuit Judge:

Plaintiff-Appellee Wellogix, Inc. alleged that Defendant-Appellant Accenture, L.L.P., misappropriated its trade secrets. After a nine-day trial, a jury returned a unanimous verdict against Accenture, awarding Wellogix compensatory and punitive damages. After a careful review of the record, we find that there was sufficient evidence to support the jury's verdict, and the resulting damages awards.

See Lavender v. Kurn, 327 U.S. 645, 653, 66 S.Ct. 740, 90 L.Ed. 916 (1946) ("Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear."). Had we sat in the jury box, we may have decided otherwise. "But juries are not bound by what seems inescapable logic to judges." *Morissette v. United States*, 342 U.S. 246, 276, 72 S.Ct. 240, 96 L.Ed. 288 (1952). Guided by this deference, we AFFIRM.

I. Facts and Proceedings

The oil and gas industry spends "billions of dollars" each year to construct oil wells. Yet, traditionally, oil companies planned such projects over "coffee and doughnuts," using paper records to track and pay costs. And, to the extent that they employed computer software, they relied on "basic tools" such as Excel. Due, in part, to this "paper process," oil companies struggled to estimate certain well construction costs—known as "complex services." Even modest improvements in how companies estimated such costs could save "[h]undreds of millions of dollars."

Wellogix, Inc.—motto: "[m]aking the complex simple"—sought to modernize this process. Wellogix developed software that allowed oil companies to "plan, procure, and pay for complex services"—all online. The software featured: "dynamic templates" that adjusted cost and supply estimates based on "intelligence built into" the underlying source code;[1] a "workflow navigator" that provided a framework for planning and procuring services; and "electronic field

[1] Source code is the set of instructions that computer programmers write in specialized computer language to cause a software program to function.

tickets" that allowed suppliers to record information about orders.

Wellogix was, according to its CEO, the only company offering complex services software from 2000 to 2005. However, Wellogix's software was not a standalone solution. Wellogix instead relied on other companies' software to perform core accounting functions.

To fill this technology gap, Wellogix entered into an agreement in 2005 with the software company SAP. The agreement allowed Wellogix to integrate its complex services software with SAP's accounting software. As part of the agreement, Wellogix provided its source code to SAP.

To promote its software, Wellogix entered into six marketing agreements with the consulting firm Accenture, L.L.P. Wellogix also participated in pilot projects with oil companies. Wellogix shared source code and access to its technology with both Accenture and the oil companies, subject to confidentiality agreements.

Some of the pilot projects involved Accenture. For example, Wellogix and Accenture worked together in 2000 on an "eServices" pilot that provided BP America, Inc. ("BP") with access to the "dynamic template" and "workflow navigator" features. Others did not. For example, Wellogix worked with a different consultant on a 2004 "eTrans" pilot for BP.

As part of "eTrans," BP implemented Wellogix software at two well sites. BP also hosted a confidential online portal that allowed Wellogix to share files and information with BP employees. Although a BP manager considered the pilot a success, BP discontinued the project in 2005 "due to cost and internal integration issues."

After "eTrans," BP sought to implement global software that "was not just for complex services, but was for [its] entire . . . system." To that end, BP sponsored a new pilot, known as "Purchase-to-Pay," or "P2P." BP instructed Accenture to select a software provider.

SAP and Wellogix pitched their integrated software to Accenture in May 2005. As part of the pitch, Wellogix described the software's dynamic templates.

Without notifying Wellogix, Accenture and SAP began developing the complex services component of the global software for BP.[2] As they developed the component, Accenture and SAP apparently accessed Wellogix technology—including flow diagrams, design specifications, and source code critical to Wellogix's software—that had been uploaded to the confidential eTrans portal.

Wellogix sued BP, Accenture and SAP in district court in 2008, alleging that they had stolen and misappropriated Wellogix trade secrets. District Judge Keith Ellison dismissed SAP from the lawsuit for lack of venue.

Wellogix and BP agreed to arbitrate. Judge Ellison, acting as the arbitrator, found that Wellogix's source code was a trade secret, but that BP did not use the code. However, Judge Ellison found that BP breached its confidentiality agreement with Wellogix by making Wellogix's confidential information accessible to Accenture and SAP.

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[2] Accenture and SAP worked together in 2004 to develop an application with a complex services component, known as "xIEP." Accenture and SAP intended to integrate Wellogix's software into xIEP, but ended the project before developing the complex services feature.

Wellogix's suit against Accenture proceeded to trial. The jury returned a verdict for Wellogix, awarding \$26.2 million in compensatory damages and \$68.2 million in punitive damages. Accenture renewed its motion for judgment as a matter of law, and also filed a motion for a new trial. Judge Ellison denied both motions except to suggest a remittitur of the punitive damages award to \$18.2 million—the amount Wellogix sought at trial. Wellogix accepted the remittitur, and the district court entered final judgment. Accenture appeals.

II. Accenture's Motion for Judgment as a Matter of Law

"Although we review denial of a motion for judgment as a matter of law *de novo* . . . 'our standard of review with respect to a jury verdict is especially deferential.'" *SMI Owen Steel Co. v. Marsh USA, Inc.*, 520 F.3d 432, 437 (5th Cir.2008) (quoting *Flowers v. S. Reg'l Physician Servs., Inc.*, 247 F.3d 229, 235 (5th Cir.2001)). In reviewing the record, "we draw all reasonable inferences in favor of the nonmoving party, and . . . may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); *see Brown v. Bryan Cnty*., 219 F.3d 450, 456 (5th Cir.2000). This is because "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id*. (quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). Accordingly, we do not find that the district court erred unless "the evidence at trial points so strongly and overwhelmingly in the movant's favor that reasonable jurors could not reach a contrary conclusion." *Omnitech Int'l, Inc. v. Clorox Co.*, 11 F.3d 1316, 1323 (5th Cir.1994).

1. Misappropriation

"Trade secret misappropriation under Texas law is established by showing: (a) a trade secret existed; (b) the trade secret was acquired through a breach of a confidential relationship or discovered by improper means; and (c) use of the trade secret without authorization from the plaintiff."[3] *Phillips v. Frey*, 20 F.3d 623, 627 (5th Cir.1994); *see also Taco Cabana Int'l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1123 (5th Cir.1991), *aff'd sub nom. Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 112 S.Ct. 2753, 120 L.Ed.2d 615 (1992).

a) Existence of Trade Secret

"'The existence of a trade secret is properly considered a question of fact to be decided by the judge or jury as fact-finder.'" *Gen. Universal Sys., Inc. v. Lee*, 379 F.3d 131, 150 (5th Cir.2004) (quoting RESTATEMENT (THIRD) UNFAIR COMPETITION § 39 cmt. (1995)). A trade secret "is any formula, pattern, device, or compilation of information used in one's business, and which gives an opportunity to obtain an advantage over competitors who do not know or use it." *Taco Cabana*, 932 F.2d at 1123; *see Hyde Corp. v. Huffines*, 158 Tex. 566, 314 S.W.2d 763, 776 (1958). To determine whether a trade secret exists, we consider six factors, weighed "in the context of the surrounding circumstances":

> (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his

[3] The parties do not dispute that Texas law applies.

> business; (3) the extent of the measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others

In re Bass, 113 S.W.3d 735, 739-40 (Tex.2003) (quoting RESTATEMENT OF TORTS § 757 cmt. B. (1939)); *see Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 267 (5th Cir.2007).

Here, Wellogix presented sufficient evidence and testimony to support the jury's finding that Wellogix's technology contained trade secrets. Wellogix showed that, because it was the only company offering complex services software from 2000 to 2005, its software—and, in particular, the underlying proprietary source code—gave it "an opportunity to obtain an advantage over competitors." *Taco Cabana*, 932 F.2d at 1123. Wellogix also showed that the six *Bass* factors weigh in its favor. For example, Wellogix introduced evidence that it "guard[ed] the secrecy of" its technology, *see Bass*, 113 S.W.3d at 739, by placing its software behind a firewall, and sharing it subject to confidentiality agreements. Wellogix also introduced evidence that its technology had "value," *see Bass*, 113 S.W.3d at 739, because other companies partnered with Wellogix, and, as discussed below, third-party investors valued Wellogix at more than $27 million.

Accenture argues that Wellogix's technology was not "secret" because Wellogix disclosed it to the public in patents and patent applications. However, as the district court instructed the jury, a patent destroys the secrecy necessary to maintain a trade secret only when the patent and the trade secret "both cover the same subject matter." *Luccous v. J.C. Kinley Co*., 376 S.W.2d 336, 340 (Tex.1964*); see Carbo Ceramics, Inc. v. Keefe*, 166 Fed. Appx. 714, 719-20 (5th Cir.2006) (upholding the jury's verdict on the basis that the jury "could have concluded—and apparently did conclude—that the [plaintiff's] patents did not reveal [its] trade secrets"). Neither party in this case introduced Wellogix's patents into evidence. In fact, Wellogix argued against introducing patent-related documents, fearing prejudice. Although Accenture maintains that it was Wellogix's burden to show that the patents did not cover the same subject matter, Accenture does not cite, nor we could we find, case law imposing such a burden. Further, another circuit, in an unpublished opinion, held that it is for the defendant, once a plaintiff makes a *prima facie* case for the existence of a trade secret, to show that disclosure destroys the secret. *See Injection Research Specialists, Inc. v. Polaris, L.P.*, Nos. 97-1516, 97-1545 & 97-1557, 1998 WL 536585, at *8-9 (Fed.Cir. Aug. 13, 1998).

Accenture argues that, even if Wellogix's patents did not disclose the trade secrets, there was insufficient evidence that Wellogix even possessed such secrets. Accenture contends, for example, that technical information related to the eTrans pilot was not a trade secret because Wellogix published a document containing the information on its public website. Accenture adds that, without entering into confidentiality agreements, Wellogix provided other companies with documents containing "process flow" maps of the eTrans project. However, Wellogix software expert Kendyl Roman testified that, while some trade secrets appeared on Wellogix's website, others did not. In addition, the district court instructed that the jury could not find that there was a trade secret on the basis of the "process flow" maps. "A jury is presumed to follow its instructions[,]" *Weeks v. Angelone*, 528 U.S. 225, 234, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000), and Accenture has not overcome this presumption.

b) Acquisition of Trade Secret

"One is liable for disclosure of trade secrets if (a) he discovers the secret by improper means, or (b) his disclosure or use constitutes a breach of confidence reposed in one who is in a confidential relationship with another who discloses protected information to him." *Phillips v. Frey*, 20 F.3d 623, 630 (5th Cir.1994); *see Huffines*, 314 S.W.2d at 769. "Improper means of acquiring another's trade secrets include theft, fraud, unauthorized interception of communications, inducement of or knowing participation in a breach of confidence, and other means either wrongful in themselves or wrongful under the circumstances of the case." *Astoria Indus. of Iowa, Inc. v. SNF, Inc.*, 223 S.W.3d 616, 636 (Tex.App.2007) (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 43 (1995)).

Here, Wellogix presented sufficient evidence and testimony to support the jury's finding that Accenture improperly acquired Wellogix's trade secrets. Wellogix showed: that it entered into six confidential agreements with Accenture; that, through the marketing agreements, Accenture had access to Wellogix trade secrets; that Accenture also had access to Wellogix trade secrets uploaded to the confidential eTrans portal; and that an Accenture email referenced "harvesting IP" from Wellogix. Together, this evidence and testimony supports the "legitimate inference[,]" *Reeves*, 530 U.S. at 150, 120 S.Ct. 2097, that Accenture acquired Wellogix's trade secrets.

Accenture argues that there was no evidence, other than expert Roman's testimony, that Wellogix's trade secrets were on the eTrans portal. Accenture maintains that Roman's testimony was not probative because Roman did not have personal knowledge that certain trade secrets were on the portal. However, as an expert, Roman did not need "firsthand knowledge or observation." *Daubert v. Merrell Dow Pharms., Inc*., 509 U.S. 579, 592, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Indeed, Roman conceded that he lacked such knowledge. Instead, Roman testified that, in his experience in the software industry, he believed it likely that companies working together on a pilot project would share documents containing trade secrets on an online portal. He added that he based this belief, in part, on a BP contractor's deposition testimony that information resembling Wellogix's trade secrets was on the eTrans portal. Given that "an expert is permitted wide latitude to offer opinions," *Daubert*, 509 U.S. at 592, 113 S.Ct. 2786, and that, as discussed below, Roman's testimony was sufficiently "reliable" and "relevant," the jury was reasonable in crediting his testimony.

Accenture also argues that Wellogix CEO Ike Epley's "vague and unsupported" testimony does not show that Accenture acquired Wellogix's trade secrets. Accenture maintains that Epley's testimony that one of Wellogix's pilot partners, Trade Ranger, "had access" to Wellogix source code does not "support the inferential leap" that Accenture had such access. Accenture adds that it could not access Wellogix's source code because, as CEO Epley testified, the code was behind a firewall. However, Accenture's involvement in the Trade Ranger pilot—Accenture "was the consultant and the implementer [of software] for Trade Ranger"—supports the inference that

Accenture could have accessed Wellogix source code through the pilot. Further, Epley's testimony that Wellogix kept its source code behind a firewall for the eTrans project does not preclude a jury from finding that Accenture otherwise had access to the code. For example, a jury could have inferred that Accenture gained such access by entering into six confidentiality agreements with Wellogix. Although Accenture notes that Wellogix corporate representative John Chisholm testified that Wellogix never gave Accenture access to its source code, we decline to assume "jury functions" by weighing Chisholm's credibility against Epley's. *See Reeves*, 530 U.S. at 150, 120 S.Ct. 2097.

c) Use of Trade Secret

> As a general matter, any exploitation of the trade secret that is likely to result in injury to the trade secret owner or enrichment to the defendant is a "use[.]" . . . Thus, marketing goods that embody the trade secret, employing the trade secret in manufacturing or production, relying on the trade secret to assist or accelerate research or development, or soliciting customers through the use of information that is a trade secret . . . all constitute "use."

General Universal Systems Inc. v. HAL Inc., 500 F.3d 444, 451 (5th Cir.2007) (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40 (1995)). "Use" can include "activities other than the actual selling of the product." *Dresser-Rand Co. v. Virtual Automation, Inc.*, 361 F.3d 831, 840 (5th Cir.2004); *see ForScan Corp. v. Dresser Indus., Inc.*, 789 S.W.2d 389, 395 (Tex.App.1990) (finding that attempts to market a product constituted "use"). Indeed, an act that "lower[s] the market value" of a trade secret by "making it less likely that [the plaintiff] would sell his invention to [the defendant's] competitors" could amount to "use." *Bohnsack v. Varco, L.P.*, 668 F.3d 262, 280 (5th Cir.2012).

Here, Wellogix presented sufficient evidence and testimony to support the jury's finding that Accenture used its trade secrets. Wellogix showed: that Accenture joined with SAP to develop a complex services component for BP's P2P pilot; that, around the time that Accenture and SAP partnered, they were able to access Wellogix's dynamic templates source code that had been uploaded to the confidential eTrans portal; that an Accenture document referenced the "creation of . . . complex service templates," and then "right below" stated: "Use Wellogix content"; that the same document provided that the templates "better deliver similar or better functionality than Wellogix or we may have a problem"; that other Accenture documents referenced Wellogix's templates, and that, as the pilot progressed, a BP employee told Wellogix that the company should: "sue Accenture . . . [b]ecause Accenture was utilizing [Wellogix's] confidential information and building out [its] functionality." Together, this evidence and testimony supports the "legitimate inference[,]" *Reeves*, 530 U.S. at 150, 120 S.Ct. 2097, that Accenture used Wellogix's trade secrets.

Accenture acknowledges that it developed complex services templates for the P2P pilot, but argues that its templates lacked "dynamic" features, and therefore were "nothing like Wellogix's." Accenture notes that Wellogix CEO Epley recognized that "Wellogix doesn't own the concept of templates." However, the standard for finding "use" is not whether Accenture's templates contained Wellogix trade secrets, but whether Accenture "rel[ied] on the trade secret[s] to assist or accelerate research or development" of its templates.

HAL, 500 F.3d at 451 (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40). A jury could "legitimate[ly] infer[,]" *Reeves*, 530 U.S. at 150, 120 S.Ct. 2097, on the basis of, for example, the Accenture email suggesting that the company should "[u]se Wellogix for content," that Accenture "rel[ied]" on Wellogix's templates to develop its own. *See HAL*, 500 F.3d at 451.

Accenture argues that Roman's testimony about the meaning of certain terms in Accenture documents, such as "development," was "pure conjecture, which cannot sustain the judgment." However, as an expert with experience in the software industry, Roman had the requisite "experience, training, or education" to testify as to the software industry's understanding of such terms. *Wilson v. Woods*, 163 F.3d 935, 937 (5th Cir.1999) (quoting FED.R.EVID. 702); *see United States v. Tucker*, 345 F.3d 320, 327-28 (5th Cir.2003) (finding that the district court's exclusion of an expert's proposed testimony on the technical meaning of the term "invest" was "improper" because the testimony was "relevant to the issue of the definition of 'invest'"). Further, even without Roman's testimony, a jury could "legitimate[ly] infer[,]" *Reeves*, 530 U.S. at 150, 120 S.Ct. 2097, based on the plain language of the documents—for example, Accenture's reference to "us[ing] Wellogix for content"—that Accenture used Wellogix's trade secrets.

Relying on *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60, 78-79, 27 S.Ct. 412, 51 L.Ed. 708 (1907), and *Rutherford v. Harris Cnty*., 197 F.3d 173, 185 (5th Cir.1999), Accenture argues for the first time on appeal that, "because the evidence supporting [Wellogix's xIEP] theory was insufficient, and because it is impossible to know whether the jury improperly relied on it in finding misappropriation, Accenture is at least entitled to a new trial." Accenture does not direct us to any request to the district court for a special verdict, FED.R.CIV.P. 49(a), nor to a request for answers to questions, FED.R.CIV.P. 49(b), nor to any pertinent objection to the jury submission and charge, FED.R.CIV.P. 51, nor, later, to any request for verdict clarification, nor, finally, to any such contention of inherent ambiguity in the general verdict in their new trial motion. In such circumstances, with no objection made as to form or substance, we have explained that a request for retrial has not been preserved. *See Pan E. Exploration Co. v. Hufo Oils*, 855 F.2d 1106, 1123-25 (5th Cir.1988) (forfeiture from arguing only that none of the possible theories of recovery were supported by the evidence, not that the cause should be reversed and remanded if any one of the theories was invalid); *In re A.V.*, 113 S.W.3d 355, 363 (Tex.2003); *McCord v. Maguire*, 873 F.2d 1271, 1274 (9th Cir.1989).[4]

[4] Even if preserved, this argument applies to cases "[w]hen a district court submits two or more alternative grounds for recovery to the jury on a single interrogatory," *Reeves v. AcroMed Corp.*, 44 F.3d 300, 302 (5th Cir.1995), yet one theory proves to be erroneous, whereas, in this case, the evidence showing that Accenture used Wellogix trade secrets for the P2P pilot, xIEP application, and SAP's core accounting software supported a single, valid legal theory: that Accenture entered into a confidential relationship with Wellogix, and then breached that confidence by using the trade secrets for Accenture's benefit. *See Walther v. Lone Star Gas Co.*, 952 F.2d 119, 126 (5th Cir.1992) ("[W]e will not reverse a verdict simply because the jury might have decided on a ground that was supported by insufficient evidence. Instead we must assume that the jury considered all of the evidence in reaching its decision."), *opinion on reh'g*, 977 F.2d 161, 162 (5th Cir.1992) ("Jurors are well equipped to analyze the

Because Wellogix showed that Accenture used its trade secrets for the P2P pilot, we decline to address whether Wellogix showed that Accenture also used Wellogix's trade secrets for the xIEP application or SAP's core accounting software.

2. Compensatory Damages

"If the use of trade secrets results in economic injury to the employer, an award of actual damages is . . . a proper remedy." *Zoecon Indus. v. Am. Stockman Tag Co.*, 713 F.2d 1174, 1180 (5th Cir.1983) (citing *K & G Oil Tool & Serv. Co. v. G & G Fishing Tool Serv.*, 158 Tex. 594, 314 S.W.2d 782, 792 (1958)). "Damages in misappropriation cases can take several forms: the value of plaintiff's lost profits; the defendant's actual profits from the use of the secret, the value that a reasonably prudent investor would have paid for the trade secret; the development costs the defendant avoided incurring through misappropriation; and a 'reasonable royalty.'" *Bohnsack*, 668 F.3d at 280 (internal citations omitted). "This variety of approaches demonstrates the 'flexible' approach used to calculate

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evidence and reach a decision despite the availability of a factually unsupported theory in the jury instructions."); *Prestenbach v. Rains*, 4 F.3d 358, 361 n. 2 (5th Cir.1993) ("[A] jury verdict may be sustained even though not all the theories on which it was submitted had sufficient evidentiary support."); *Rodriguez v. Riddell Sports, Inc.*, 242 F.3d 567, 577 n. 8 (5th Cir.2001); *E. Trading Co. v. Refco, Inc.*, 229 F.3d 617, 621-22 (7th Cir.2000). As closing arguments demonstrate, Wellogix's case rested overwhelmingly on misappropriation arising from the P2P project. *See Muth v. Ford Motor Co.*, 461 F.3d 557, 564-65 (5th Cir.2006) (distinguishing *Wilmington Star* by observing that "this Court, as well as many others, have engrafted a sort-of harmless error gloss onto the basic principle" that "if both theories are put to the jury, a new trial is generally necessary when the evidence is insufficient on one").

damages for claims of misappropriation of trade secrets." *Id.*; *see Univ. Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 535 (5th Cir.1974) ("The case law is thus plentiful, but the standard for measuring damages which emerges is very flexible."). Under this "flexible approach," even "[w]here the damages are uncertain . . . we do not we do not feel that uncertainty should preclude recovery; the plaintiff should be afforded every opportunity to prove damages once the misappropriation is shown." *Univ. Computing*, 504 F.2d at 539; *see Carbo*, 166 Fed.Appx. at 724 (finding that "plaintiffs are entitled to adapt their damages theory to fit within the particular facts of the case"). "'[I]t will be enough if the evidence show[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.'" *DSC Commc'ns Corp. v. Next Level Communications*, 107 F.3d 322, 330 (5th Cir.1997) (quoting *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 24 (5th Cir.1974)); *see Downtown Realty, Inc. v. 509 Tremont Bldg., Inc.*, 748 S.W.2d 309, 313 (Tex.App.1988).

Here, Wellogix presented sufficient evidence and testimony to support the jury's $26.2 million compensatory damages award to Wellogix. Wellogix introduced testimony by damages expert Michael Wagner that the company was worth $27.8 million in 2005—the amount, apparently after deducting for licensing fees, that the jury awarded Wellogix. Wellogix showed that Wagner based his valuation, in part, on the decision by venture capital groups to invest $8.5 million in Wellogix in exchange for a 31% percent equity stake. Wellogix also showed: that an Accenture employee believed that "BP work alone could generate annual fees . . . in excess of $20 million if Accenture controlled Wellogix"; that other companies viewed

Wellogix's technology as valuable; that this value derived from Wellogix's complex services technology; that no other company had such technology from 2000 to 2005; that, as discussed above, Accenture misappropriated Wellogix's trade secrets to develop complex services technology; that this misappropriation created a competitive dis-advantage; that this disadvantage caused Wellogix's value to drop to "zero"; and that this disadvantage also caused Wellogix to lose out on potential deals with other oil and gas companies.

Accenture argues that Wagner's $27.8 million valuation was too speculative.[5] Accenture notes that Wagner based his valuation on a decision by venture capital groups to invest in Wellogix and that, in turn, the groups based their decision to invest on speculative projections that Wellogix "would suddenly begin reaping huge profits." Accenture adds that the projections relied on information supplied by Wellogix, and not objective data, such as customer contracts. However, Wagner testified that, before projecting Wellogix's value, the venture capital groups audited Wellogix's "financials"; made phone calls "to partners and customers"; "asked knowledgeable people . . . what they thought of the software"; and "tried to find out i[f]

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[5] Wellogix argues that Accenture waived its challenge to the compensatory damages award. However, in an oral motion, Accenture said: "[F]or the same reason, Your Honor, that we moved for judgment as a matter of law at the conclusion of Plaintiff's case, we so move at the conclusion of all the evidence. . . . We do not believe that there is any legally sufficient evidentiary basis for a reasonable jury to find . . . damages." The district court denied the motion, but noted: "That's all preserved." Wellogix said that it had "[n]o objection to that." Accordingly, Accenture did not waive its challenge. *See Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 288 (5th Cir.2007).

there [was] any competition." Wagner also testified that "it would be very unusual" if Wellogix did not supply information to the groups because "[t]hat is the source of most of your information when you[ ] come in and [are] asked to value a company." Given the "'flexible' approach used to calculate damages," *Bohnsack*, 668 F.3d at 280, reasonable jurors could find that the $8.5 million investment for a 31% stake, and the underlying projections, supported a $27.8 million valuation. *See Reeves*, 530 U.S. at 150, 120 S.Ct. 2097.

Accenture argues that, notwithstanding Wagner's valuation, Wellogix did not show that the alleged misappropriation "totally or almost totally destroyed" Wellogix's value. Accenture maintains that Wellogix did not establish "the market value of the business immediately before and immediately after" the alleged misappropriation. However, Wagner testified that the investment and projections were made "right about the time that the theft occurred." Roman testified that, based on his knowledge of the software industry, "the total value of Wellogix went to zero" after the alleged misappropriation.[6] Reasonable jurors could find that this testimony established the "market value of the business immediately before and after" the alleged misappropriation. *Sawyer v. Fitts*, 630 S.W.2d 872, 875 (Tex.App.1982); *see C.A. May Marine Supply Co.*

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[6] For the reasons, discussed below, that Roman's general background in computer sciences qualified him to testify about Wellogix's software, Roman's software expertise allowed him to offer his opinion as to the general effect Accenture's misappropriation of Wellogix's technology would have on Wellogix's value—particularly given that, as discussed above, Wellogix's value derived from this technology. *See Huss v. Gayden*, 571 F.3d 442, 452 (5th Cir.2009).

v. Brunswick Corp., 649 F.2d 1049, 1053 (5th Cir. July 1981).

In sum, given the conflicting evidence and testimony, and resolving every inference in Wellogix's favor, *see* 530 U.S. at 150, 120 S.Ct. 2097, reasonable jurors could find that Accenture misappropriated Wellogix's trade secrets. Reasonable jurors also could find, under the "'flexible' approach used to calculate damages," *Bohnsack*, 668 F.3d at 280, that there was sufficient evidence to support a $26.2 million compensatory damages award. As a result, the district court did not abuse its discretion by denying Accenture's motion for a judgment as a matter of law.

III. Accenture's Motion for a New Trial

"This Court can overturn a decision denying a motion for a new trial only if it finds that the district court abused its discretion." *Seidman v. Am. Airlines, Inc*., 923 F.2d 1134, 1140 (5th Cir.1991). "The district court abuses its discretion by denying a new trial only when there is an 'absolute absence of evidence to support the jury's verdict.'" *Id*. (quoting *Cobb v. Rowan Companies, Inc.*, 919 F.2d 1089, 1090 (5th Cir.1991)); *see Smith v. Transworld Drilling Co*., 773 F.2d 610, 613 (5th Cir.1985) (finding an abuse of discretion only if "the verdict is against the weight of the evidence, the damages awarded are excessive, the trial was unfair, or prejudicial error was committed in its course."). "In reviewing the district court's actions, the evidence is viewed in the light most favorable to the jury verdict." *Seidman*, 923 F.2d at 1140; *see Dotson v. Clark Equip. Co*., 805 F.2d 1225, 1227 (5th Cir.1986) ("A trial court should not grant a new trial on evidentiary grounds unless the verdict is against the great weight of the evidence.").

1. Roman's Testimony

"In rulings on the admissibility of expert opinion evidence the trial court has broad discretion and its rulings must be sustained unless manifestly erroneous." *Viterbo v. Dow Chem. Co*., 826 F.2d 420, 422 (5th Cir.1987); *see Watkins v. Telsmith, Inc*., 121 F.3d 984, 988 (5th Cir.1997). In making such rulings, district courts "function as gatekeepers and permit only reliable and relevant expert testimony to be presented to the jury." *Wilson*, 163 F.3d at 937 (citing *Daubert*, 509 U.S. at 590-93, 113 S.Ct. 2786). "District courts must be assured that the proffered witness is qualified to testify by virtue of his 'knowledge, skill, experience, training, or education.'" *Wilson*, 163 F.3d at 937 (quoting FED.R.EVID. 702). "A district court should refuse to allow an expert witness to testify if it finds that the witness is not qualified to testify in a particular field or on a given subject." *Wilson*, 163 F.3d at 937; *see United States v. Cooks*, 589 F.3d 173, 179 (5th Cir.2009). "'Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'" *Pipitone v. Biomatrix, Inc*., 288 F.3d 239, 250 (5th Cir.2002) (quoting *Daubert*, 509 U.S. at 596, 113 S.Ct. 2786).

Here, the district court did not abuse its discretion by allowing Wellogix software expert Roman to testify. Roman's experience as a software developer and forensic analyst, and his fluency in different programming codes, qualified him as an expert on the subject of his testimony: software programming and source codes. *See Wilson*, 163 F.3d at 937. Further, by limiting his testimony to whether Wellogix's source code was a trade secret, and whether Wellogix's code matched SAP's, Roman did not stray from this subject matter. *See id*.

Accenture argues that Roman's general computer sciences background did not qualify him to testify about "the oil-and-gas industry, complex-services procurement, or SAP software." However, Roman did not need particular expertise in the oil-and-gas industry, or complex services procurement, to help the jury understand software concepts and terms. *See* FED.R.EVID. 702(a). Further, Roman had "specialized knowledge" about SAP's software because he "testified that he had been able to teach himself [SAP's programming language] language and implement the SAP software." *See id.* Given that "Rule 702 does not mandate that an expert be *highly* qualified in order to testify about a given issue," *Huss*, 571 F.3d at 452 (emphasis added), Roman's back-ground in computer science, and knowledge about SAP's software, sufficed.

Accenture argues that, even if Roman was qualified, his testimony was unreliable because he did not investigate the facts underlying his opinions. Accenture notes that Roman twice misstated facts in his testimony. First, Roman said that a Wellogix design specification was "an incredibly valuable trade secret" and "would not be known publicly" even though it was available on Wellogix's public website. Second, Roman compared Wellogix's source code to the wrong software, causing the district court to wonder how "[h]ow . . . somebody as experienced as Mr. Roman [could] be . . . that much off the point" and make "such a rudimentary mistake." However, Accenture had the chance to highlight and dispute these errors through "[v]igorous cross-examination" and the "presentation of contrary evidence." *Pipitone*, 288 F.3d at 250. In the context of Roman's broader testimony, two misstatements do not constitute "manifest[ ] erro[r]." *Viterbo*, 826 F.2d at 422.

Accenture renews its argument, discussed above, that Roman testified about matters outside his personal knowledge. However, as we noted above, Roman's testimony about the meaning of certain terms, and the availability of Wellogix's source code, was within his "experience, training, or education." *See Wilson*, 163 F.3d at 937. Likewise, Roman's testimony about Accenture's access to Wellogix's trade secrets, Accenture's breach of a confidentiality agreement with Wellogix, and Wellogix's post-tort value related to Wellogix's software, and therefore was within Roman's expertise. *See id.*; FED.R.EVID. 702.

2. Patent-Related Documents

Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence." FED.R.EVID. 401(a). A district court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury." FED.R.EVID. 403; *see Old Chief v. United States*, 519 U.S. 172, 180, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997). "A trial court's ruling on admissibility under Rule 403's balancing test will not be overturned on appeal absent a clear abuse of discretion." *Ballou v. Henri Studios, Inc.*, 656 F.2d 1147, 1153 (5th Cir.1981); *see Old Chief*, 519 U.S. at 180, 117 S.Ct. 644. "We will not reverse a district court's evidentiary rulings unless they are erroneous and substantial prejudice results. The burden of proving substantial prejudice lies with the party asserting error." *F.D.I.C. v. Mijalis*, 15 F.3d 1314, 1318-19 (5th Cir.1994); *see*

Smith v. Wal-Mart Stores (No. 471), 891 F.2d 1177, 1180 (5th Cir.1990).

Here, the district court did not abuse its discretion by allowing Wellogix to introduce into evidence documents—including emails and a patent demand letter—in which Accenture appears to acknowledge, among other things, that its infringement of Wellogix patents created "some potential for litigation." The district court, as requested by Accenture, instructed that "[t]he existence of a patent does not mean that a trade secret exists." As discussed above, "[a] jury is presumed to follow its instructions," *Weeks*, 528 U.S. at 234, 120 S.Ct. 727, and Accenture has not overcome this presumption in this instance. Also, noted earlier, without the documents, Wellogix presented sufficient evidence and testimony to support Wellogix's misappropriation claim. In addition, as discussed below, the documents are relevant to support other propositions, such as Accenture's malice to Wellogix. Although the district court observed in its order denying the motion for a new trial that, "from these emails, the jury was entitled to draw the inference that Accenture and BP had engaged in misappropriation of trade secrets," the record evidence does not support that the district court allowed the patent-related documents into evidence for this purpose.

Accenture argues that "the verdict itself shows the jury improperly relied on the" documents because the jury found that, by May 15, 2006—the date of the demand letter—Wellogix should have discovered Accenture's misappropriation. However, as the district court concluded, the jury's finding was proper because Wellogix framed the demand letter as "an indicator of the date by which Wellogix was aware of Accenture's wrongful conduct with respect to Wellogix's intellectual property." For example, in its closing statement, Wellogix noted that the date of discovery was "a tough one," and that the demand letter suggested "the date of reasonable diligence when we discovered misappropriation." Given that Wellogix did not represent that the documents showed that Accenture misappropriated Wellogix trade secrets, the jury's use of the May 15, 2006 date, without more, does not overcome the presumption that the jury followed its instructions. *See Weeks*, 528 U.S. at 234, 120 S.Ct. 727.

In sum, the district court did not abuse its discretion by allowing Roman to testify about software because Roman's computer sciences background qualified him as an expert on software, and because he limited his testimony to that subject matter. The district court also did not abuse its discretion by allowing Wellogix to introduce into evidence patent-related documents because, among other things, the district court cautioned the jury that "[t]he existence of a patent does not mean that a trade secret exists." As a result, the district court did not abuse its discretion by denying Accenture's motion for a new trial.

IV. The Punitive Damages Award

1. Malice

"When reviewing a district court's refusal to set aside an award of punitive damages, we will reverse only upon determining that 'no legally sufficient evidentiary basis' exists for making such an award, the same standard applied by the district court in the first instance." *Watson v. Johnson Mobile Homes*, 284 F.3d 568, 571 (5th Cir.2002) (quoting FED.R.CIV.P. 50(a)(1)). A legally sufficient evidentiary basis exists if "the plaintiff proves by clear and convincing evidence that harm resulted from 'malice.'" *Bennett v. Reynolds*, 315 S.W.3d 867, 871 (Tex.2010); *see* TEX. CIV. PRAC. & REM.CODE ANN. § 41.003(a)(2). "Malice" exists if there is "'a specific intent by the defendant to cause substantial injury [or harm] to the claimant.'" *Bennett*, 315 S.W.3d at 872 (quoting TEX. CIV. PRAC. & REM.CODE ANN. § 41.001(7)). "[S]pecific intent," in turn, exists if "the actor desires to cause the consequences of his act, or he believes the con-sequences are substantially certain to result from it." *Marrs & Smith P'ship v. D.K. Boyd Oil & Gas Co*., 223 S.W.3d 1, 22 (Tex.App.2005) (citing *Reed Tool Co. v. Copelin*, 689 S.W.2d 404, 406 (Tex.1985)). "Malice may be proven by direct or circumstantial evidence." *Marrs & Smith*, 223 S.W.3d at 22 (citing *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex.1998)).

Here, Wellogix introduced sufficient evidence and testimony to support the jury's finding that Accenture acted with malice. Wellogix showed: that Accenture stated that it could "easily replicate[ ]" and "[l]ift" Wellogix technology; that Accenture "harvest[ed]" Wellogix technology while engaged in confidential partnerships with Wellogix; that Accenture CEO Peggy Kostial wrote in a May 2006 email that "[o]ne can only hope" that SAP would no long "sponsor" Wellogix; that Accenture, in an apparent attempt to interfere with Wellogix's business relationship with SAP, warned Wellogix of SAP's "bleed the knowledge tactics"; that Accenture "acknowledge[d] its responsebility for patent infringement caused by products created by Accenture during those previous phases of the [P2P] project"; and that Accenture recognized that "[w]e may be at risk if Wellogix claims that we used knowledge of their product through involvement with eTrans to design and develop a solution for BP." Against the backdrop discussed above—Accenture's decision to develop the P2P pilot without Wellogix, and then apparently to "[u]se Wellogix content" for the "creation of . . . complex services" templates for the pilot—this evidence and testimony was sufficient to support the jury's malice finding. *See Marrs & Smith*, 223 S.W.3d at 22-23 (finding that the defendant's attempts to interfere with the plaintiff's business relationships supported the jury's malice finding); *Nova Consulting Grp., Inc. v. Eng'g Consulting Servs., Ltd.*, 290 Fed.Appx. 727, 741 (5th Cir.2008) (finding that "vulgarity about [the plaintiff] in [the defendant's] email . . . was evidence a reasonable jury could consider regarding malice").

Accenture argues that Wellogix did not show malice because Wellogix did not introduce clear and convincing evidence that Accenture intended to cause substantial injury to Wellogix. Accenture notes that Wellogix CEO Epley testified that he had "many positive relationships with Accenture personnel," that "Accenture was helpful" to Wellogix, that Accenture tried to warn Wellogix to protect its intellectual property from SAP, and that Accenture CEO Kostial was a "good friend." Accenture adds that Kostial wrote that she was "supportive" of Wellogix in a January 2006 email. However, Accenture does not cite, nor could we find, case law to support the proposition that a defendant's supportive comments about a plaintiff, or, conversely, a plaintiff's supportive comments about a defendant, preclude a jury's finding of malice. Rather, the jury was able to weigh Epley's comments, and Kostial's "support[ ]," against the evidence, discussed above, that Accenture "harvested" Wellogix technology. *See Reeves*, 530 U.S. at 150, 120 S.Ct. 2097. "As an appellate court reviewing a cold record long after the jury has evaluated the evidence," *Richardson v. State*, 879 S.W.2d 874, 879 (Tex.

Crim.App.1993) (en banc), we decline to "reweigh th[is] evidence." *Carey v. Apfel*, 230 F.3d 131, 135 (5th Cir.2000) (internal quotation marks omitted).

2. Due Process

"[W]e review [a] constitutional challenge to the size of the punitive damages award de novo." *Lincoln v. Case*, 340 F.3d 283, 290 (5th Cir.2003) (citing *Cooper Indus., Inc. v. Leatherman Tool Grp*., Inc., 532 U.S. 424, 436, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001)). "The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm*, 538 U.S. at 416, 123 S.Ct. 1513; *see TXO Prod. Corp. v. Alliance Res. Corp*., 509 U.S. 443, 446, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993). The Supreme Court has established "three guideposts courts should consider in determining whether a punitive damages award is unconstitutionally excessive: the degree of the defendant's reprehensibility or culpability; the disparity between the harm or potential harm suffered by the victim and the punitive damages award; and the sanctions authorized or imposed in other cases for comparable misconduct." *Lincoln v. Case*, 340 F.3d 283, 292 (5th Cir.2003) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-75, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996)).

"[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419, 123 S.Ct. 1513 (quoting *Gore*, 517 U.S. at 575, 116 S.Ct. 1589). "Reprehensibility" factors include whether

> the harm caused was physical as opposed to economic; the tortious conduct evinced an

> indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident

State Farm, 538 U.S. at 419, 123 S.Ct. 1513 (citing *Gore*, 517 U.S. at 576-77, 116 S.Ct. 1589). "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *State Farm*, 538 U.S. at 419, 123 S.Ct. 1513.

"[T]he potential relevance of the ratio between compensatory and punitive damages is indisputable, being a central feature in our due process analysis." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 507, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008); *see Gore*, 517 U.S. at 580-82, 116 S.Ct. 1589 ("The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree."). Although "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, we have determined that few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Baker*, 554 U.S. at 501, 128 S.Ct. 2605 (internal citations and quotation marks omitted); *see State Farm*, 538 U.S. at 425, 123 S.Ct. 1513 ("Single-digit multipliers are more likely to comport with due process[.]"); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) (upholding as constitutional a punitive damages award "more than 4 times the amount of compensatory damages").

Here, the *Gore* guideposts at issue in this case—reprehensibility and the ratio between punitive and compensatory damages—do not require us to find that the punitive damages award was grossly excessive.

The "reprehensibility" guidepost is neutral. Some factors favor Accenture. For example, Wellogix does not dispute that "the harm caused was . . . economic," and that Accenture's conduct did not "evince[ ] an indifference to or a reckless disregard of the health or safety of others." *State Farm*, 538 U.S. at 419, 123 S.Ct. 1513. Other factors favors Wellogix. For example, the jury's "malice" finding, discussed above, supports that "the harm was the result of intentional malice." *State Farm*, 538 U.S. at 419, 123 S.Ct. 1513. Other factors are ambiguous. For example, the evidence that Wellogix's value derived from its complex services technology, and that this value plummeted when Accenture misappropriated the technology, suggests that Wellogix was "financial[ly] vulnerab[le]." *State Farm*, 538 U.S. at 419, 123 S.Ct. 1513. However, the Supreme Court neither has defined "financial vulnerability," nor has addressed whether a corporation can be financially vulnerable in this context. *Cf. State Farm*, 538 U.S. at 433-34, 123 S.Ct. 1513 (finding that an elderly couple was "economically vulnerable"). As a result, we cannot say that the "financial vulnerability" factor favors either party.

The "ratio" guidepost strongly favors Wellogix. The ratio of punitive to compensatory damages in this case is $18.2 million to $26.2 million, or about 0.7:1. Although we decline to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable." *Gore*, 517 U.S. at 583, 116 S.Ct. 1589 (quoting *TXO*, 509 U.S. at 458, 113

S.Ct. 2711), this 0.7:1 ratio is within the "[s]ingle-digit [ratio] likely to comport with the due process." *State Farm*, 538 U.S. at 425, 123 S.Ct. 1513; *see Haslip*, 499 U.S. at 23-24, 111 S.Ct. 1032.

Accenture argues that "[o]ther courts have reduced punitive damages awards to far less than 1:1 ratios because the awards were not necessary to punish or deter." However, the cases Accenture cites—*Chi. Title Ins. Corp. v. Magnuson*, 487 F.3d 985, 990, 998-1001 (6th Cir.2007); *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 463-70 (3d Cir.1999)—are distinguishable. The punitive damages award in Magnuson was three times the amount of the compensatory damages award, *see* 487 F.3d at 990; the punitive damages award in *EBI* was $2 million more than the compensatory damages award, *see* 181 F.3d at 450. By contrast, the punitive award in this case is $8 million *less* than the compensatory award. Accenture does not identify, nor could we find, a case in which an appellate court vacated or reduced a punitive award that was less than the compensatory award. Given that the reprehensibility guidepost was neutral, we decline to do so in this case.

In sum, there was sufficient evidence and testimony to support the jury's "malice" finding. In addition, the amount of the punitive damages award was not grossly excessive. As a result, the district court did not err by refusing to set aside the punitive award.

V. Conclusion

Accordingly, we AFFIRM the district court's judgment.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed May 15, 2013]

No. 11-20816

WELLOGIX, INC.,
Plaintiff-Appellee,

v.

ACCENTURE, L.L.P.,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

Before DeMOSS, SOUTHWICK, and HIGGINSON, *Circuit Judges.*

HIGGINSON, *Circuit Judge*:

Plaintiff-Appellee Wellogix, Inc. alleged that Defendant-Appellant Accenture, L.L.P, misappropriated its trade secrets. After a nine-day trial, a jury returned a unanimous verdict against Accenture, awarding Wellogix compensatory and punitive damages. After a careful review of the record, we find that there was sufficient evidence to support the jury's verdict, and the resulting damages awards. *See Lavender v. Kurn*, 327 U.S. 645, 653 (1946) ("Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear."). Had we sat in the jury box, we may have decided otherwise. "But juries are not bound by what seems inescapable logic to judges." *Morissette v. United States*, 342 U.S. 246, 276 (1952). Guided by this deference, we AFFIRM.

I. Facts and Proceedings

The oil and gas industry spends "billions of dollars" each year to construct oil wells. Yet, traditionally, oil companies planned such projects over "coffee and doughnuts," using paper records to track and pay costs. And, to the extent that they employed computer software, they relied on "basic tools" such as Excel. Due, in part, to this "paper process," oil companies struggled to estimate certain well construction costs—known as "complex services." Even modest improvements in how companies estimated such costs could save "[h]undreds of millions of dollars."

Wellogix, Inc.—motto: "[m]aking the complex simple"—sought to modernize this process. Wellogix developed software that allowed oil companies to "plan, procure, and pay for complex services"—all online. The software featured: "dynamic templates" that adjusted cost and supply estimates based on "intelligence built into" the underlying source code;[1] a "workflow navigator" that provided a framework for planning and procuring services; and "electronic field tickets" that allowed suppliers to record information about orders.

Wellogix was, according to its CEO, the only company offering complex services software from 2000 to 2005. However, Wellogix's software was not a stand-alone solution. Wellogix instead relied on other

[1] Source code is the set of instructions that computer programmers write in specialized computer language to cause a software program to function.

companies' software to perform core accounting functions.

To fill this technology gap, Wellogix entered into an agreement in 2005 with the software company SAP. The agreement allowed Wellogix to integrate its complex services software with SAP's accounting software. As part of the agreement, Wellogix provided its source code to SAP.

To promote its software, Wellogix entered into six marketing agreements with the consulting firm Accenture, L.L.P. Wellogix also participated in pilot projects with oil companies. Wellogix shared source code and access to its technology with both Accenture and the oil companies, subject to confidentiality agreements.

Some of the pilot projects involved Accenture. For example, Wellogix and Accenture worked together in 2000 on an "eServices" pilot that provided BP America, Inc. ("BP") with access to the "dynamic template" and "workflow navigator" features. Others did not. For example, Wellogix worked with a different consultant on a 2004 "eTrans" pilot for BP.

As part of "eTrans," BP implemented Wellogix software at two well sites. BP also hosted a confidential online portal that allowed Wellogix to share files and information with BP employees. Although a BP manager considered the pilot a success, BP discontinued the project in 2005 "due to cost and internal integration issues."

After "eTrans," BP sought to implement global software that "was not just for complex services, but was for [its] entire . . . system." To that end, BP sponsored a new pilot, known as "Purchase-to-Pay," or

"P2P." BP instructed Accenture to select a software provider.

SAP and Wellogix pitched their integrated software to Accenture in May 2005. As part of the pitch, Wellogix described the software's dynamic templates.

Without notifying Wellogix, Accenture and SAP began developing the complex services component of the global software for BP.[2] As they developed the component, Accenture and SAP apparently accessed Wellogix technology—including flow diagrams, design specifications, and source code critical to Wellogix's software—that had been uploaded to the confidential eTrans portal.

Wellogix sued BP, Accenture and SAP in district court in 2008, alleging that they had stolen and misappropriated Wellogix trade secrets. District Judge Keith Ellison dismissed SAP from the lawsuit for lack of venue.

Wellogix and BP agreed to arbitrate. Judge Ellison, acting as the arbitrator, found that Wellogix's source code was a trade secret, but that BP did not use the code. However, Judge Ellison found that BP breached its confidentiality agreement with Wellogix by making Wellogix's confidential information accessible to Accenture and SAP.

Wellogix's suit against Accenture proceeded to trial. The jury returned a verdict for Wellogix, awarding $26.2 million in compensatory damages and $68.2

[2] Accenture and SAP worked together in 2004 to develop an application with a complex services component, known as "xIEP." Accenture and SAP intended to integrate Wellogix's software into xIEP, but ended the project before developing the complex services feature.

million in punitive damages. Accenture renewed its motion for judgment as a matter of law, and also filed a motion for a new trial. Judge Ellison denied both motions except to suggest a remittitur of the punitive damages award to $18.2 million—the amount Wellogix sought at trial. Wellogix accepted the remittitur, and the district court entered final judgment. Accenture appeals.

II. Accenture's Motion for Judgment as a Matter of Law

"Although we review denial of a motion for judgment as a matter of law *de novo* . . . 'our standard of review with respect to a jury verdict is especially deferential.'" *SMI Owen Steel Co. v. Marsh USA, Inc*, 520 F.3d 432, 437 (5th Cir. 2008) (quoting *Flowers v. S. Reg'l Physician Servs., Inc.*, 247 F.3d 229, 235 (5th Cir. 2001)). In reviewing the record, "we draw all reasonable inferences in favor of the nonmoving party, and . . . may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *see Brown v. Bryan Cnty.*, 219 F.3d 450, 456 (5th Cir. 2000). This is because "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id*. (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Accordingly, we do not find that the district court erred unless "the evidence at trial points so strongly and overwhelmingly in the movant's favor that reasonable jurors could not reach a contrary conclusion." *Omnitech Int'l, Inc. v. Clorox Co.*, 11 F.3d 1316, 1323 (5th Cir. 1994).

1. Misappropriation

"Trade secret misappropriation under Texas law is established by showing: (a) a trade secret existed; (b) the trade secret was acquired through a breach of a confidential relationship or discovered by improper means; and (c) use of the trade secret without authorization from the plaintiff."[3] *Phillips v. Frey*, 20 F.3d 623, 627 (5th Cir. 1994); *see also Taco Cabana Int'l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1123 (5th Cir. 1991), *aff'd sub nom. Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992).

a) Existence of Trade Secret

"'The existence of a trade secret is properly considered a question of fact to be decided by the judge or jury as fact-finder.'" *Gen. Universal Sys., Inc. v. Lee*, 379 F.3d 131, 150 (5th Cir. 2004) (quoting RESTATEMENT (THIRD) UNFAIR COMPETITION § 39 cmt. (1995)). A trade secret "is any formula, pattern, device, or compilation of information used in one's business, and which gives an opportunity to obtain an advantage over competitors who do not know or use it." *Taco Cabana*, 932 F.2d at 1123; *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). To determine whether a trade secret exists, we consider six factors, weighed "in the context of the surrounding circumstances":

> (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of the measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information;

[3] The parties do not dispute that Texas law applies.

> (6) the ease or difficulty with which the information could be properly acquired or duplicated by others

In re Bass, 113 S.W.3d 735, 739-40 (Tex. 2003) (quoting RESTATEMENT OF TORTS § 757 cmt. B. (1939)); *see Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 267 (5th Cir. 2007).

Here, Wellogix presented sufficient evidence and testimony to support the jury's finding that Wellogix's technology contained trade secrets. Wellogix showed that, because it was the only company offering complex services software from 2000 to 2005, its software—and, in particular, the underlying proprietary source code—gave it "an opportunity to obtain an advantage over competitors." *Taco Cabana*, 932 F.2d at 1123. Wellogix also showed that the six *Bass* factors weigh in its favor. For example, Wellogix introduced evidence that it "guard[ed] the secrecy of" its technology, *see Bass*, 113 S.W.3d at 739, by placing its software behind a firewall, and sharing it subject to confidentiality agreements. Wellogix also introduced evidence that its technology had "value," *see Bass*, 113 S.W.3d, because other companies partnered with Wellogix, and, as discussed below, third-party investors valued Wellogix at more than $27 million.

Accenture argues that Wellogix's technology was not "secret" because Wellogix disclosed it to the public in patents and patent applications. However, as the district court instructed the jury, a patent destroys the secrecy necessary to maintain a trade secret only when the patent and the trade secret "both cover the same subject matter." *Luccous v. J. C. Kinley Co.*, 376 S.W.2d 336, 340 (Tex. 1964); *see Carbo Ceramics, Inc. v. Keefe*, 166 F. App'x. 714, 719-20 (5th Cir. 2006) (upholding the jury's verdict on the basis that the jury "could have concluded-and apparently did conclude-that the [plaintiff's] patents did not reveal [its] trade secrets"). Neither party in this case introduced Wellogix's patents into evidence. In fact, Wellogix argued against introducing patent-related documents, fearing prejudice. Although Accenture maintains that it was Wellogix's burden to show that the patents did not cover the same subject matter, Accenture does not cite, nor we could we find, case law imposing such a burden. Further, another circuit, in an unpublished opinion, held that it is for the defendant, once a plaintiff makes a *prima facie* case for the existence of a trade secret, to show that disclosure destroys the secret. *See Injection Research Specialists, Inc. v. Polaris, L.P.*, Nos. 97-1516, 97-1545 & 97-1557, 1998 WL 536585, at *8-9 (Fed. Cir. Aug. 13, 1998).

Accenture argues that, even if Wellogix's patents did not disclose the trade secrets, there was insufficient evidence that Wellogix even possessed such secrets. Accenture contends, for example, that technical information related to the eTrans pilot was not a trade secret because Wellogix published a document containing the information on its public website. Accenture adds that, without entering into confidentiality agreements, Wellogix provided other companies with documents containing "process flow" maps of the eTrans project. However, Wellogix software expert Kendyl Roman testified that, while some trade secrets appeared on Wellogix's website, others did not. In addition, the district court instructed that the jury could not find that there was a trade secret on the basis of the "process flow" maps. "A jury is presumed to follow its instructions[,]" *Weeks v. Angelone*, 528 U.S. 225, 234 (2000), and Accenture has not overcome this presumption.

b) Acquisition of Trade Secret

"One is liable for disclosure of trade secrets if (a) he discovers the secret by improper means, or (b) his disclosure or use constitutes a breach of confidence reposed in one who is in a confidential relationship with another who discloses protected information to him." *Phillips v. Frey*, 20 F.3d 623, 630 (5th Cir. 1994); *see Huffines*, 314 S.W.2d at 769. "Improper means of acquiring another's trade secrets include theft, fraud, unauthorized interception of communications, inducement of or knowing participation in a breach of confidence, and other means either wrongful in themselves or wrongful under the circumstances of the case." *Astoria Indus. of Iowa, Inc. v. SNF, Inc.*, 223 S.W. 3d 616, 636 (Tex. App. 2007) (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 43 (1995)).

Here, Wellogix presented sufficient evidence and testimony to support the jury's finding that Accenture improperly acquired Wellogix's trade secrets. Wellogix showed: that it entered into six confidential agreements with Accenture; that, through the marketing agreements, Accenture had access to Wellogix trade secrets; that Accenture also had access to Wellogix trade secrets uploaded to the confidential eTrans portal; and that an Accenture email referenced "harvesting IP" from Wellogix. Together, this evidence and testimony supports the "legitimate inference[,]" *Reeves*, 530 U.S. at 150, that Accenture acquired Wellogix's trade secrets.

Accenture argues that there was no evidence, other than expert Roman's testimony, that Wellogix's trade secrets were on the eTrans portal. Accenture maintains that Roman's testimony was not probative because Roman did not have personal knowledge that certain trade secrets were on the portal. However, as an expert, Roman did not need "firsthand knowledge or observation." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993). Indeed, Roman conceded that he lacked such knowledge. Instead, Roman testified that, in his experience in the software industry, he believed it likely that companies working together on a pilot project would share documents containing trade secrets on an online portal. He added that he based this belief, in part, on a BP contractor's deposition testimony that information resembling Wellogix's trade secrets was on the eTrans portal. Given that "an expert is permitted wide latitude to offer opinions," *Daubert*, 509 U.S. at 592, and that, as discussed below, Roman's testimony was sufficiently "reliable" and "relevant," the jury was reasonable in crediting his testimony.

Accenture also argues that Wellogix CEO Ike Epley's "vague and unsupported" testimony does not show that Accenture acquired Wellogix's trade secrets. Accenture maintains that Epley's testimony that one of Wellogix's pilot partners, Trade Ranger, "had access" to Wellogix source code does not "support the inferential leap" that Accenture had such access. Accenture adds that it could not access Wellogix's source code because, as CEO Epley testified, the code was behind a firewall. However, Accenture's involvement in the Trade Ranger pilot—Accenture "was the consultant and the implementer [of software] for Trade Ranger"—supports the inference that Accenture could have accessed Wellogix source code through the pilot. Further, Epley's testimony that Wellogix kept its source code behind a firewall for the eTrans project does not preclude a jury from finding that Accenture otherwise had access to the code. For example, a jury could have inferred that Accenture gained such access by entering into six confidentiality agreements with Wellogix. Although Accenture notes that Wellogix corporate representative John Chisholm testified that Wellogix never gave Accenture access to its source code, we decline to assume "jury functions" by weighing Chisholm's credibility against Epley's. *See Reeves*, 530 U.S. at 150.

c) Use of Trade Secret

> As a general matter, any exploitation of the trade secret that is likely to result in injury to the trade secret owner or enrichment to the defendant is a "use[.]" . . . Thus, marketing goods that embody the trade secret, employing the trade secret in manufacturing or production, relying on the trade secret to assist or accelerate research or development, or soliciting customers through the use of information that is a trade secret . . . all constitute "use."

HAL, 500 F.3d at 451 (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40 (1995)). "Use" can include "activities other than the actual selling of the product." *Dresser-Rand Co. v. Virtual Automatic, Inc.*, 361 F.3d 831, 840 (5th Cir. 2004); *see ForScan Corp. v. Dresser Indus., Inc.*, 789 S.W.2d 389, 395 (Tex. App. 1990) (finding that attempts to market a product constituted "use"). Indeed, an act that "lower[s] the market value" of a trade secret by "making it less likely that [the plaintiff] would sell his invention to [the defendant's] competitors" could amount to "use." *Bohnsack v. Varco, L.P.*, 668 F.3d 262, 280 (5th Cir. 2010).

Here, Wellogix presented sufficient evidence and testimony to support the jury's finding that Accenture used its trade secrets. Wellogix showed: that

Accenture joined with SAP to develop a complex services component for BP's P2P pilot; that, around the time that Accenture and SAP partnered, they were able to access Wellogix's dynamic templates source code that had been uploaded to the confidential eTrans portal; that an Accenture document referenced the "creation of . . . complex service templates," and then "right below" stated: "Use Wellogix content"; that the same document provided that the templates "better deliver similar or better functionality than Wellogix or we may have a problem"; that other Accenture documents referenced Wellogix's templates, and that, as the pilot progressed, a BP employee told Wellogix that the company should: "sue Accenture . . . [b]ecause Accenture was utilizing [Wellogix's] confidential information and building out [its] functionality." Together, this evidence and testimony supports the "legitimate inference[,]" *Reeves*, 530 U.S. at 150, that Accenture used Wellogix's trade secrets.

Accenture acknowledges that it developed complex services templates for the P2P pilot, but argues that its templates lacked "dynamic" features, and therefore were "nothing like Wellogix's." Accenture notes that Wellogix CEO Epley recognized that "Wellogix doesn't own the concept of templates." However, the standard for finding "use" is not whether Accenture's templates contained Wellogix trade secrets, but whether Accenture "rel[ied] on the trade secret[s] to assist or accelerate research or development" of its templates. *HAL*, 500 F.3d at 451 (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40). A jury could "legitimate[ly] infer[,]" *Reeves*, 530 U.S. at 150, on the basis of, for example, the Accenture email suggesting that the company should "[u]se Wellogix for content," that Accenture "rel[ied]" on Wellogix's templates to develop its own. *See HAL*, 500 F.3d at 451.

Accenture argues that Roman's testimony about the meaning of certain terms in Accenture documents, such as "development," was "pure conjecture, which cannot sustain the judgment." However, as an expert with experience in the software industry, Roman had the requisite "experience, training, or education" to testify as to the software industry's understanding of such terms. *Wilson v. Woods*, 163 F.3d 935, 937 (5th Cir. 1999) (quoting FED. R. EVID. 702); *see United States v. Tucker*, 345 F.3d 320, 327-28 (5th Cir. 2003) (finding that the district court's exclusion of an expert's proposed testimony on the technical meaning of the term "invest" was "improper" because the testimony was "relevant to the issue of the definition of 'invest'"). Further, even without Roman's testimony, a jury could "legitimate[ly] infer[,]" *Reeves*, 530 U.S. at 150, based on the plain language of the documents—for example, Accenture's reference to "us[ing] Wellogix for content"—that Accenture used Wellogix's trade secrets.

Relying on *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60, 78-79 (1907), and *Rutherford v. Harris Cnty.*, 197 F.3d 173, 185 (5th Cir. 1999), Accenture argues for the first time on appeal that, "because the evidence supporting [Wellogix's xIEP] theory was insufficient, and because it is impossible to know whether the jury improperly relied on it in finding misappropriation, Accenture is at least entitled to a new trial." Accenture does not direct us to any request to the district court for a special verdict, FED. R. CIV. P. 49(a), nor to a request for answers to questions, FED. R. CIV. P. 49(b), nor to any pertinent objection to the jury submission and charge, FED. R. CIV. P. 51, nor, later, to any request for verdict clarification, nor, finally, to any such contention of inherent ambiguity in the general verdict in their new trial motion. In such circumstances, with no objection made as to form or substance, we have explained that a request for retrial has not been preserved. *See Pan E. Exploration Co. v. Hufo Oils*, 855 F.2d 1106, 1123-25 (5th Cir. 1988) (forfeiture from arguing only that none of the possible theories of recovery were supported by the evidence, not that the cause should be reversed and remanded if any one of the theories was invalid); *In re A.V.*, 113 S.W.3d 355, 363 (Tex. 2003); *McCord v. Maguire*, 873 F.2d 1271, 1274 (9th Cir. 1989).[4]

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[4] Even if preserved, this argument applies to cases "[w]hen a district court submits two or more alternative grounds for recovery to the jury on a single interrogatory," *Reeves v. AcroMed Corp.*, 44 F.3d 300, 302 (5th Cir. 1995), yet one theory proves to be erroneous, whereas, in this case, the evidence showing that Accenture used Wellogix trade secrets for the P2P pilot, xIEP application, and SAP's core accounting software supported a single, valid legal theory: that Accenture entered into a confidential relationship with Wellogix, and then breached that confidence by using the trade secrets for Accenture's benefit. *See Walther v. Lone Star Gas Co.*, 952 F.2d 119, 126 (5th Cir. 1992) ("[W]e will not reverse a verdict simply because the jury might have decided on a ground that was supported by insufficient evidence. Instead we must assume that the jury considered all of the evidence in reaching its decision."), *opinion on reh'g*, 977 F.2d 161, 162 (5th Cir. 1992) ("Jurors are well equipped to analyze the evidence and reach a decision despite the availability of a factually unsupported theory in the jury instructions."); *Prestenbach v. Rains*, 4 F.3d 358, 361 n.2 (5th Cir. 1993) ("[A] jury verdict may be sustained even though not all the theories on which it was submitted had sufficient evidentiary support."); *Rodriguez v. Riddell Sports, Inc.*, 242 F.3d 567, 577 n.8 (5th Cir. 2001); *E. Trading Co. v. Refco, Inc.*, 229 F.3d 617, 621-22 (7th Cir. 2000). As closing arguments demonstrate, Wellogix's case rested overwhelmingly on misappropriation arising from the P2P project. *See Muth v. Ford Motor Co.,* 461 F.3d 557, 564-65 (5th Cir. 2006) (distinguishing *Wilmington Star* by observing that "this Court, as well as many others, have engrafted a sort-of harmless error gloss onto the basic principle" that "if both

Because Wellogix showed that Accenture used its trade secrets for the P2P pilot, we decline to address whether Wellogix showed that Accenture also used Wellogix's trade secrets for the xIEP application or SAP's core accounting software.

2. Compensatory Damages

"If the use of trade secrets results in economic injury to the employer, an award of actual damages is . . . a proper remedy." *Zoecon Indus. v. Am. Stockman Tag Co.*, 713 F.2d 1174, 1180 (5th Cir. 1983) (citing *K & G Oil Tool & Serv. Co. v. G & G Fishing Tool Serv.*, 314 S.W.2d 782, 792 (Tex. 1958)). "Damages in misappropriation cases can take several forms: the value of plaintiff's lost profits; the defendant's actual profits from the use of the secret, the value that a reasonably prudent investor would have paid for the trade secret; the development costs the defendant avoided incurring through misappropriation; and a 'reasonable royalty.'" *Bohnsack*, 668 F.3d at 280 (internal citations omitted). "This variety of approaches demonstrates the 'flexible' approach used to calculate damages for claims of misappropriation of trade secrets." *Id.*; *see Univ. Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 535 (5th Cir. 1974) ("The case law is thus plentiful, but the standard for measuring damages which emerges is very flexible."). Under this "flexible approach," even "[w]here the damages are uncertain . . . we do not we do not feel that uncertainty should preclude recovery; the plaintiff should be afforded every opportunity to prove damages once the misappropriation is shown." *Univ. Computing*, 504 F.2d at 539; *see Carbo*, 166 F. App'x at 724 (finding

theories are put to the jury, a new trial is generally necessary when the evidence is insufficient on one").

that "plaintiffs are entitled to adapt their damages theory to fit within the particular facts of the case"). "'[I]t will be enough if the evidence show[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.'" *DSC Commc'ns Corp. v. Next Level Communications*, 107 F.3d 322, 330 (5th Cir. 1997) (quoting *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 24 (5th Cir. 1974)); *see Downtown Realty, Inc. v. 509 Tremont Bldg., Inc.*, 748 S.W.2d 309, 313 (Tex. App. 1988).

Here, Wellogix presented sufficient evidence and testimony to support the jury's $26.2 million compensatory damages award to Wellogix. Wellogix introduced testimony by damages expert Michael Wagner that the company was worth $27.8 million in 2005—the amount, apparently after deducting for licensing fees, that the jury awarded Wellogix. Wellogix showed that Wagner based his valuation, in part, on the decision by venture capital groups to invest $8.5 million in Wellogix in exchange for a 31% percent equity stake. Wellogix also showed: that an Accenture employee believed that "BP work alone could generate annual fees . . . in excess of $20 million if Accenture controlled Wellogix"; that other companies viewed Wellogix's technology as valuable; that this value derived from Wellogix's complex services technology; that no other company had such technology from 2000 to 2005; that, as discussed above, Accenture misappropriated Wellogix's trade secrets to develop complex services technology; that this misappropriation created a competitive disadvantage; that this disadvantage caused Wellogix's value to drop to "zero"; that this disadvantage also caused Wellogix to lose out on potential deals with other oil and gas companies; and that, as a result, Wellogix's "money was all gone" by 2005.

Accenture argues that Wagner's $27.8 million valuation was too speculative.[5] Accenture notes that Wagner based his valuation on a decision by venture capital groups to invest in Wellogix and that, in turn, the groups based their decision to invest on speculative projections that Wellogix "would suddenly begin reaping huge profits." Accenture adds that the projections relied on information supplied by Wellogix, and not objective data, such as customer contracts. However, Wagner testified that, before projecting Wellogix's value, the venture capital groups audited Wellogix's "financials"; made phone calls "to partners and customers"; "asked knowledgeable people . . . what they thought of the software"; and "tried to find out i[f] there [was] any competition." Wagner also testified that "it would be very unusual" if Wellogix did not supply information to the groups because "[t]hat is the source of most of your information when you[ ] come in and [are] asked to value a company." Given the "'flexible' approach used to calculate damages," *Bohnsack*, 668 F.3d at 280, reasonable jurors could find that the $8.5 million investment for a 31% stake,

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[5] Wellogix argues that Accenture waived its challenge to the compensatory damages award. However, in an oral motion, Accenture said: "[F]or the same reason, Your Honor, that we moved for judgment as a matter of law at the conclusion of Plaintiff's case, we so move at the conclusion of all the evidence. . . . We do not believe that there is any legally sufficient evidentiary basis for a reasonable jury to find . . . damages." The district court denied the motion, but noted: "That's all preserved." Wellogix said that it had "[n]o objection to that." Accordingly, Accenture did not waive its challenge. *See Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 288 (5th Cir. 2007).

and the underlying projections, supported a $27.8 million valuation. *See Reeves*, 530 U.S. at 150.

Accenture argues that, notwithstanding Wagner's valuation, Wellogix did not show that the alleged misappropriation "totally or almost totally destroyed" Wellogix's value. Accenture maintains that Wellogix did not establish "the market value of the business immediately before and immediately after" the alleged misappropriation. However, Wagner testified that the investment and projections were made "right about the time that the theft occurred." Roman testified that, based on his knowledge of the software industry, "the total value of Wellogix went to zero" after the alleged misappropriation. [6] Independently, Epley testified that, by 2005, the "money was all gone" and Wellogix was "nearly broke." Reasonable jurors could find that this testimony established the "market value of the business immediately before and after" the alleged misappropriation. *Sawyer v. Fitts*, 630 S.W.2d 872, 875 (Tex. App. 1982); *see C. A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1053 (5th Cir. July 1981).

In sum, given the conflicting evidence and testimony, and resolving every inference in Wellogix's favor, *see* 530 U.S. at 150, reasonable jurors could find that Accenture misappropriated Wellogix's trade secrets. Reasonable jurors also could find, under the

[6] For the reasons, discussed below, that Roman's general background in computer sciences qualified him to testify about Wellogix's software, Roman's software expertise allowed him to offer his opinion as to the general effect Accenture's misappropriation of Wellogix's technology would have on Wellogix's value—particularly given that, as discussed above, Wellogix's value derived from this technology. *See Huss v. Gayden*, 571 F.3d 442, 452 (5th Cir. 2009).

"'flexible' approach used to calculate damages," *Bohnsack*, 668 F.3d at 280, that there was sufficient evidence to support a $26.2 million compensatory damages award. As a result, the district court did not abuse its discretion by denying Accenture's motion for a judgment as a matter of law.

III. Accenture's Motion for a New Trial

"This Court can overturn a decision denying a motion for a new trial only if it finds that the district court abused its discretion." *Seidman v. Am. Airlines, Inc.*, 923 F.2d 1134, 1140 (5th Cir. 1991). "The district court abuses its discretion by denying a new trial only when there is an 'absolute absence of evidence to support the jury's verdict.'" *Id.* (quoting *Cobb v. Rowan Companies, Inc.*, 919 F.2d 1089, 1090 (5th Cir. 1991)); *see Smith v. Transworld Drilling Co.*, 773 F.2d 610, 613 (5th Cir. 1985) (finding an abuse of discretion only if "the verdict is against the weight of the evidence, the damages awarded are excessive, the trial was unfair, or prejudicial error was committed in its course."). "In reviewing the district court's actions, the evidence is viewed in the light most favorable to the jury verdict." *Seidman*, 923 F.2d at 1140; *see Dotson v. Clark Equip. Co.*, 805 F.2d 1225, 1227 (5th Cir. 1986) ("A trial court should not grant a new trial on evidentiary grounds unless the verdict is against the great weight of the evidence.").

1. Roman's Testimony

"In rulings on the admissibility of expert opinion evidence the trial court has broad discretion and its rulings must be sustained unless manifestly erroneous." *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987); *see Watkins v. Telsmith, Inc.*, 121 F.3d 984, 988 (5th Cir. 1997). In making such rulings, district courts "function as gatekeepers and permit only reliable and relevant expert testimony to be presented to the jury." *Wilson*, 163 F.3d at 937 (citing *Daubert*, 509 U.S. at 590-93). "District courts must be assured that the proffered witness is qualified to testify by virtue of his 'knowledge, skill, experience, training, or education.'" *Wilson*, 163 F.3d at 937 (quoting FED. R. EVID. 702). "A district court should refuse to allow an expert witness to testify if it finds that the witness is not qualified to testify in a particular field or on a given subject." *Wilson*, 163 F.3d at 937; *see United States v. Cooks*, 589 F.3d 173, 179 (5th Cir. 2009). "'Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'" *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 250 (5th Cir. 2002) (quoting *Daubert*, 509 U.S. at 596).

Here, the district court did not abuse its discretion by allowing Wellogix software expert Roman to testify. Roman's experience as a software developer and forensic analyst, and his fluency in different programming codes, qualified him as an expert on the subject of his testimony: software programming and source codes. *See Wilson*, 163 F.3d at 937. Further, by limiting his testimony to whether Wellogix's source code was a trade secret, and whether Wellogix's code matched SAP's, Roman did not stray from this subject matter. *See id*.

Accenture argues that Roman's general computer sciences background did not qualify him to testify about "the oil-and-gas industry, complex-services procurement, or SAP software." However, Roman did not need particular expertise in the oil-and-gas industry, or complex services procurement, to help the jury understand software concepts and terms. *See* FED. R. EVID. 702(a). Further, Roman had "specialized knowledge" about SAP's software because he "testified that he had been able to teach himself [SAP's programming language] language and implement the SAP software." *See id*. Given that "Rule 702 does not mandate that an expert be *highly* qualified in order to testify about a given issue," *Huss*, 571 F.3d at 452 (emphasis added), Roman's background in computer science, and knowledge about SAP's software, sufficed.

Accenture argues that, even if Roman was qualified, his testimony was unreliable because he did not investigate the facts underlying his opinions. Accenture notes that Roman twice misstated facts in his testimony. First, Roman said that a Wellogix design specification was "an incredibly valuable trade secret" and "would not be known publicly" even though it was available on Wellogix's public website. Second, Roman compared Wellogix's source code to the wrong software, causing the district court to wonder how "[h]ow . . . somebody as experienced as Mr. Roman [could] be . . . that much off the point" and make "such a rudimentary mistake." However, Accenture had the chance to highlight and dispute these errors through "[v]igorous cross-examination" and the "presentation of contrary evidence." *Pipitone*, 288 F.3d at 250. In the context of Roman's broader testimony, two misstatements do not constitute "manifest[ ] erro[r]." *Viterbo*, 826 F.2d at 422.

Accenture renews its argument, discussed above, that Roman testified about matters outside his personal knowledge. However, as we noted above, Roman's testimony about the meaning of certain terms, and the availability of Wellogix's source code, was within his "experience, training, or education."

See Wilson, 163 F.3d at 937. Likewise, Roman's testimony about Accenture's access to Wellogix's trade secrets, Accenture's breach of a confidentiality agreement with Wellogix, and Wellogix's post-tort value related to Wellogix's software, and therefore was within Roman's expertise. *See id.*; FED. R. EVID. 702.

2. Patent-Related Documents

Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence." FED. R. EVID. 401(a). A district court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury." FED. R. EVID. 403; *see Old Chief v. United States*, 519 U.S. 172, 180 (1997). "A trial court's ruling on admissibility under Rule 403's balancing test will not be overturned on appeal absent a clear abuse of discretion." *Ballou v. Henri Studios, Inc.*, 656 F.2d 1147, 1153 (5th Cir. Sept. 1981); *see Old Chief*, 519 U.S. at 180. "We will not reverse a district court's evidentiary rulings unless they are erroneous and substantial prejudice results. The burden of proving substantial prejudice lies with the party asserting error." *F.D.I.C. v. Mijalis*, 15 F.3d 1314, 1318-19 (5th Cir. 1994); *see Smith v. Wal-Mart Stores (No. 471)*, 891 F.2d 1177, 1180 (5th Cir.1990).

Here, the district court did not abuse its discretion by allowing Wellogix to introduce into evidence documents—including emails and a patent demand letter—in which Accenture appears to acknowledge, among other things, that its infringement of Wellogix patents created "some potential for litigation." The district court, as requested by Accenture, instructed that "[t]he existence of a patent does not mean that a trade secret exists." As discussed above, "[a] jury is presumed to follow its instructions," *Weeks,* 528 U.S. at 234, and Accenture has not overcome this presumption in this instance. Also, noted earlier, without the documents, Wellogix presented sufficient evidence and testimony to support Wellogix's misappropriation claim. In addition, as discussed below, the documents are relevant to support other propositions, such as Accenture's malice to Wellogix. Although the district court observed in its order denying the motion for a new trial that, "from these emails, the jury was entitled to draw the inference that Accenture and BP had engaged in misappropriation of trade secrets," the record evidence does not support that the district court allowed the patent-related documents into evidence for this purpose.

Accenture argues that "the verdict itself shows the jury improperly relied on the" documents because the jury found that, by May 15, 2006—the date of the demand letter—Wellogix should have discovered Accenture's misappropriation. However, as the district court concluded, the jury's finding was proper because Wellogix framed the demand letter as "an indicator of the date by which Wellogix was aware of Accenture's wrongful conduct with respect to Wellogix's intellectual property." For example, in its closing statement, Wellogix noted that the date of discovery was "a tough one," and that the demand letter suggested "the date of reasonable diligence when we discovered misappropriation." Given that Wellogix did not represent that the documents showed that Accenture misappropriated Wellogix trade secrets, the jury's use of the May 15, 2006 date, without more, does not overcome the presumption that the jury followed its instructions. *See Weeks*, 528 U.S. at 234.

In sum, the district court did not abuse its discretion by allowing Roman to testify about software because Roman's computer sciences background qualified him as an expert on software, and because he limited his testimony to that subject matter. The district court also did not abuse its discretion by allowing Wellogix to introduce into evidence patent-related documents because, among other things, the district court cautioned the jury that "[t]he existence of a patent does not mean that a trade secret exists." As a result, the district court did not abuse its discretion by denying Accenture's motion for a new trial.

IV. The Punitive Damages Award

1. Malice

"When reviewing a district court's refusal to set aside an award of punitive damages, we will reverse only upon determining that 'no legally sufficient evidentiary basis' exists for making such an award, the same standard applied by the district court in the first instance." *Watson v. Johnson Mobile Homes*, 284 F.3d 568, 571 (5th Cir. 2002) (quoting FED. R. CIV. P. 50(a)(1)). A legally sufficient evidentiary basis exists if "the plaintiff proves by clear and convincing evidence that harm resulted from 'malice.'" *Bennett v. Reynolds*, 315 S.W.3d 867, 871 (Tex. 2010); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a)(2). "Malice" exists if there is "'a specific intent by the defendant to cause substantial injury [or harm] to the claimant.'" *Bennett*, 315 S.W.3d at 872 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(7)). "[S]pecific intent," in turn, exists if "the actor desires to cause the consequences of his act, or he believes the consequences are substantially certain to result from it." *Marrs & Smith P'ship v. D.K. Boyd Oil & Gas Co.*, 223 S.W.3d 1, 22 (Tex. App. 2005) (citing *Reed Tool Co. v. Copelin*, 689 S.W.2d 404, 406

(Tex. 1985)). "Malice may be proven by direct or circumstantial evidence." *Marrs & Smith*, 223 S.W.3d at 22 (citing *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex.1998)).

Here, Wellogix introduced sufficient evidence and testimony to support the jury's finding that Accenture acted with malice. Wellogix showed: that Accenture stated that it could "easily replicate[ ]" and "[l]ift" Wellogix technology; that Accenture "harvest[ed]" Wellogix technology while engaged in confidential partnerships with Wellogix; that Accenture CEO Peggy Kostial wrote in a May 2006 email that "[o]ne can only hope" that SAP would no long "sponsor" Wellogix; that Accenture, in an apparent attempt to interfere with Wellogix's business relationship with SAP, warned Wellogix of SAP's "bleed the knowledge tactics"; that Accenture "acknowledge[d] its responsibility for patent infringement caused by products created by Accenture during those previous phases of the [P2P] project"; and that Accenture recognized that "[w]e may be at risk if Wellogix claims that we used knowledge of their product through involvement with eTrans to design and develop a solution for BP." Against the backdrop discussed above—Accenture's decision to develop the P2P pilot without Wellogix, and then apparently to "[u]se Wellogix content" for the "creation of . . . complex services" templates for the pilot—this evidence and testimony was sufficient to support the jury's malice finding. *See Marrs & Smith*, 223 S.W. 3d at 22-23 (finding that the defendant's attempts to interfere with the plaintiff's business relationships supported the jury's malice finding); *Nova Consulting Grp., Inc. v. Eng'g Consulting Servs., Ltd.*, 290 F. App'x 727, 741 (5th Cir. 2008) (finding that "vulgarity about [the plaintiff] in [the defendant's] email . . . was evidence a reasonable jury could consider regarding malice").

Accenture argues that Wellogix did not show malice because Wellogix did not introduce clear and convincing evidence that Accenture intended to cause substantial injury to Wellogix. Accenture notes that Wellogix CEO Epley testified that he had "many positive relationships with Accenture personnel," that "Accenture was helpful" to Wellogix, that Accenture tried to warn Wellogix to protect its intellectual property from SAP, and that Accenture CEO Kostial was a "good friend." Accenture adds that Kostial wrote that she was "supportive" of Wellogix in a January 2006 email. However, Accenture does not cite, nor could we find, case law to support the proposition that a defendant's supportive comments about a plaintiff, or, conversely, a plaintiff's supportive comments about a defendant, preclude a jury's finding of malice. Rather, the jury was able to weigh Epley's comments, and Kostial's "support[ ]," against the evidence, discussed above, that Accenture "harvested" Wellogix technology. *See Reeves*, 530 U.S. at 150. "As an appellate court reviewing a cold record long after the jury has evaluated the evidence," *Richardson v. State*, 879 S.W.2d 874, 879 (Tex. Crim. App. 1993) (en banc), we decline to "reweigh th[is] evidence." *Carey v. Apfel*, 230 F.3d 131, 135 (5th Cir. 2000) (internal quotation marks omitted).

2. Due Process

"[W]e review [a] constitutional challenge to the size of the punitive damages award de novo." *Lincoln v. Case*, 340 F.3d 283, 290 (5th Cir. 2003) (citing *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 436 (2001)). "The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm*, 538 U.S. at 416; *see TXO Prod. Corp. v. Alliance Res. Corp*., 509 U.S. 443, 446 (1993). The Supreme Court has established "three guideposts courts should consider in determining whether a punitive damages award is unconstitutionally excessive: the degree of the defendant's reprehensibility or culpability; the disparity between the harm or potential harm suffered by the victim and the punitive damages award; and the sanctions authorized or imposed in other cases for comparable misconduct." *Lincoln v. Case*, 340 F.3d 283, 292 (5th Cir. 2003) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-75 (1996)).

"[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419 (quoting *Gore*, 517 U.S. at 575). "Reprehensibility" factors include whether

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident

State Farm, 538 U.S. at 419 (citing *Gore*, 517 U.S. at 576-77). "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *State Farm*, 538 U.S. at 419.

"[T]he potential relevance of the ratio between compensatory and punitive damages is indisputable, being a central feature in our due process analysis." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 507 (2008); *see Gore*, 517 U.S. at 580-82 ("The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree."). Although "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, we have determined that few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Baker*, 554 U.S. at 501 (internal citations and quotation marks omitted); *see State Farm*, 538 U.S. at 425 ("Single-digit multipliers are more likely to comport with due process[.]"); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991) (upholding as constitutional a punitive damages award "more than 4 times the amount of compensatory damages").

Here, the *Gore* guideposts at issue in this case—reprehensibility and the ratio between punitive and compensatory damages—do not require us to find that the punitive damages award was grossly excessive.

The "reprehensibility" guidepost is neutral. Some factors favor Accenture. For example, Wellogix does not dispute that "the harm caused was . . . economic," and that Accenture's conduct did not "evince[ ] an indifference to or a reckless disregard of the health or safety of others." *State Farm*, 538 U.S. at 419. Other factors favors Wellogix. For example, the jury's "malice" finding, discussed above, supports that "the harm was the result of intentional malice." *State Farm*, 538 U.S. at 419. Other factors are ambiguous. For example, the evidence that Wellogix's value derived from its complex services technology, and that this value plummeted when Accenture misappropriated the technology, suggests that Wellogix was "financial[ly] vulnerab[le]." *State Farm*, 538 U.S. at 419. However, the Supreme Court neither has defined "financial vulnerability," nor has addressed whether a corporation can be financially vulnerable in this context. *Cf. State Farm*, 528 U.S. at 433-34 (finding that an elderly couple was "economically vulnerable"). As a result, we cannot say that the "financial vulnerability" factor favors either party.

The "ratio" guidepost strongly favors Wellogix. The ratio of punitive to compensatory damages in this case is $18.2 million to $26.2 million, or about 0.7:1. Although we decline to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable." *Gore*, 582, 517 U.S. at 583 (quoting *TXO*, 509 U.S. at 458), this 0.7:1 ratio is within the "[s]ingle-digit [ratio] likely to comport with the due process." *State Farm*, 538 U.S. at 425; see *Haslip*, 499 U.S. at 23-24.

Accenture argues that "[o]ther courts have reduced punitive damages awards to far less than 1:1 ratios because the awards were not necessary to punish or deter." However, the cases Accenture cites—*Chi. Title Ins. Corp. v. Magnuson*, 487 F.3d 985, 990, 998-1001 (6th Cir. 2007); *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 463-70 (3d Cir. 1990)—are distinguishable. The punitive damages award in *Magnuson* was three times the amount of the compensatory damages award, *see* 487 F.3d at 990; the punitive damages award in *EBI* was $2 million more than the compensatory damages award, *see* 181 F.3d at 450. By contrast, the punitive award in this case is $8 million *less* than the compensatory award.

Accenture does not identify, nor could we find, a case in which an appellate court vacated or reduced a punitive award that was less than the compensatory award. Given that the reprehensibility guidepost was neutral, we decline to do so in this case.

In sum, there was sufficient evidence and testimony to support the jury's "malice" finding. In addition, the amount of the punitive damages award was not grossly excessive. As a result, the district court did not err by refusing to set aside the punitive award.

V. Conclusion

Accordingly, we AFFIRM the district court's judgment.

APPENDIX C

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

Civil Action No. 3:08-CV-119

WELLOGIX, INC.
Plaintiff,

v.

ACCENTURE, LLP
Defendant.

FINAL JUDGMENT

This action came on for trial before this Court on May 9, 2011. Plaintiff Wellogix, Inc. ("Wellogix") appeared in person and through its attorneys and announced ready for trial. Defendant Accenture LLP ("Accenture") appeared in person and through its attorneys and announced ready for trial. The Court determined that it had jurisdiction over the subject matter and the parties in this case. The Court then impaneled and swore in the jury, which heard evidence and arguments of counsel. At the conclusion of the evidence, the Court submitted questions, definitions and instructions to the jury. After deliberation, the jury returned and announced its verdict in open court, which verdict was unanimous and was duly received and filed by the Court. As part of its verdict, the jury found that:

(1) Wellogix possesses trade secrets.

(2) Accenture misappropriated Wellogix's trade secrets and this misappropriation caused Wellogix to suffer damages.

(3) Accenture committed theft of Wellogix's trade secrets by knowingly copying, or knowingly communicating or transmitting Wellogix's trade secrets without Wellogix's effective consent.

(4) Wellogix sustained actual damages of $26,179,725.00 as a result of Accenture's misappropriation and theft of trade secrets.

(5) Accenture acted with specific intent to cause substantial injury or harm to Wellogix.

(6) Accenture should be assessed $68,200,000.00 in exemplary damages.

At the direction of the Court, Accenture filed its Rule 50(b) Renewed Motion for Judgment As a Matter of Law and a Motion for New Trial or Remittitur (collectively "post-judgment motions") prior to the entry of judgment. Wellogix filed timely responses to Accenture's post-judgment motions and the Court heard argument from counsel on August 12, 2011.

On October 14, 2011 the Court denied Accenture's Rule 50(b) Renewed Motion for Judgment as a Matter of Law and granted in part and denied in part Accenture's Motion for New Trial or Remittitur, ordering Wellogix to elect between consenting to a remittitur of exemplary damages in the amount of $50 million or holding a new trial. On October 21, 2011, in accordance with the Court's order, Wellogix elected to accept the suggested remittitur of $50 million of the jury's award of exemplary damages.

The Court finds that prejudgment interest has accrued on Wellogix's claim for actual damages, which is based on Texas law. Accordingly, prejudgment interest on these damages will be calculated as simple interest at the rate of five percent (5%) per year. *See* TEX. FIN. CODE § 304.104. Prejudgment interest, as allowable by law, began on May 16, 2008 (the day Wellogix's suit was filed), and ends on the day before the final judgment is signed.

Wellogix moved for entry of judgment on the verdict. The Court considered the motion and hereby renders judgment for Wellogix and against Accenture.

IT IS THEREFORE ORDERED by the Court that Wellogix shall recover from Accenture as follows:

(1) Wellogix shall recover from Accenture actual damages in the sum of $26,179,725.00, plus prejudgment interest in the amount of $4,540,209.84, accrued and calculated as simple interest at a rate of five percent (5%) per year beginning on May 16, 2008 (the day suit was filed), and ending on the day before the final judgment is signed (November 3, 2011) for a total award of actual damages and prejudgment interest in the sum of $30,719,934.84; and

(2) Wellogix shall recover from Accenture exemplary damages in the sum of $18,200,000.00; and

(3) The total award of actual damages, prejudgment interest, and exemplary damages ($48,919,934.84) shall bear interest at the rate of 0.12% interest per year, compounded annually, from the day the judgment is signed (November 4, 2011) until the day the judgment is satisfied.

IT IS FURTHER ORDERED that all costs of court are taxed in favor of Wellogix and against Accenture. Attorneys' fees and related non-taxable expenses will be addressed in a separate motion and order, pursuant to Federal Rules of Civil Procedure 54 and 58(c).

With the exception of Wellogix's request for attorneys' fees and related non-taxable expenses, the Court denies all relief not expressly granted in this judgment.

This is a FINAL JUDGMENT.

SIGNED this 2nd day of November, 2011 at Houston, Texas.

/s/ Keith P. Ellison
THE HONORABLE KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT,
S.D. TEXAS,
HOUSTON DIVISION

Case No. 3:08-cv-119

WELLOGIX, INC.,
Plaintiff,
v.
ACCENTURE, LLP,
Defendant.

Oct. 14, 2011

MEMORANDUM AND ORDER

KEITH P. ELLISON, District Judge.

Pending before the Court is Accenture's Rule 50(b) Renewed Motion for Judgment as a Matter of Law (Doc. No. 311) and Accenture's Motion for New Trial or Remittitur (Doc. No. 312). Upon considering the motions, all responses thereto, and the applicable law, the Court finds that the Rule 50(b) Renewed Motion for Judgment as a Matter of Law must be denied, and the Motion for New Trial or Remittitur must be granted in part and denied in part.

I. BACKGROUND

Plaintiff Wellogix, Inc. ("Plaintiff" or "Wellogix") filed suit against Defendant Accenture, LLP ("Defendant" or "Accenture") for several claims related to Accenture's wrongful conduct vis-à-vis Wellogix's intellectual property.[1] On April 22, 2011, 788 F.Supp.2d 523 (S.D.Tex.2011), the Court granted in part and denied in part Accenture's motion for summary judgment (the "April 22, 2011 Order"). (Doc. No. 237.) The parties proceeded to trial on May 9, 2011 on Wellogix's claims for misappropriation of trade secrets under Texas common law and theft of trade secrets under the Texas Theft Liability Act ("TTLA"). Accenture moved for judgment as a matter of law under Rule 50(a) at the close of Wellogix's case-in-chief and reurged its motion at the close of all evidence. (5/17/11 Tr. 1522-33; 5/18/11 Tr. 2097.) On May 20, 2011, the jury returned a verdict in favor of Wellogix on both counts and awarded compensatory damages of $26,179,725 and exemplary damages of $68,200,000. (Doc. No. 298.) On June 15, 2011, the Court ordered Accenture to file its Rule 50(b) and 59 motions prior to the entry of judgment. (Doc. No. 306.) Accenture has filed its Rule 50(b) renewed motion for judgment as a matter of law and Rule 59 motion for a new trial. The motions, having been briefed and orally argued, are ripe for disposition.

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[1] Wellogix originally filed suit against BP America, Inc. ("BP"), Accenture, and SAP America, Inc. ("SAP"). SAP was dismissed from the case due to improper venue. (Doc. No. 54.) Pursuant to a stipulation by the parties, Wellogix's action against BP was severed from the case against Accenture. (Doc. Nos. 106, 107.) Wellogix and BP agreed to arbitrate the claims between them, with Judge Keith P. Ellison acting as sole arbitrator. (Doc. No. 109.) The private arbitration between Wellogix and BP was held from June 22, 2010 through July 2, 2010. The arbitrator's findings of fact and conclusions of law were issued in August 2010 (the "Arbitration Order").

II. RULE 50(b) RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

A. Legal Standard

Under Federal Rule of Civil Procedure 50, a motion for judgment as a matter of law may be granted if a trial court finds that a "reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed.R.Civ.P. 50(a). "The decision to grant a directed verdict . . . is not a matter of discretion, but a conclusion of law based upon a finding that there is insufficient evidence to create a fact question for the jury." *Omnitech Int'l v. Clorox Co.*, 11 F.3d 1316, 1323 (5th Cir.1994) (omitting internal citations and quotation). There is no legally sufficient evidentiary basis when "'the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict.'" *Rubinstein v. Adm'rs of the Tulane Educ. Fund*, 218 F.3d 392, 401 (5th Cir.2000) (quoting *Boeing Co. v. Shipman,* 411 F.2d 365, 374 (5th Cir.1969) (en banc), *overruled on other grounds by Gautreaux v. Scurlock Marine, Inc.,* 107 F.3d 331 (5th Cir.1997) (en banc)).

In evaluating such a motion, the court is to view the entire trial record in the light most favorable to the non-movant and draw all inferences in its favor, without making credibility determinations or weighing the evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); *Becker v. PaineWebber, Inc.,* 962 F.2d 524, 526 (5th Cir.1992). The court must "give credence to . . . that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'" *Wallace v. Methodist Hospital Sys.*, 271

F.3d 212, 219 (5th Cir.2001) (quoting *Reeves,* 530 U.S. at 151, 120 S.Ct. 2097). Finally, "there must be more than a mere scintilla of evidence in the record to render the grant of JMOL inappropriate." *Wallace,* 271 F.3d at 219.

B. Misappropriation of Trade Secrets

Under Texas law, a claim of trade secret misappropriation requires a plaintiff to show (a) that a trade secret existed; (b) that the trade secret was acquired through a breach of a confidential relationship or discovered by improper means; and (c) use of the trade secret without authorization from the plaintiff. *See Phillips v. Frey*, 20 F.3d 623, 627 (5th Cir.1994) (citing cases); *Avera v. Clark Moulding*, 791 S.W.2d 144, 145 (Tex.App.-Dallas 1990, no writ.). To establish a theft of trade secrets claim under the TTLA, a plaintiff must establish that, without its consent, the defendant knowingly stole its trade secret, made a copy of its trade secret, or communicated or transmitted its trade secret. Tex. Civ. Prac. & Rem.Code §§ 134.002(2), 134.003, 134.005(a); Tex. Penal Code § 31.05. A claim based on theft of trade secrets rests on the same evidence as a trade secret misappropriation claim. *See SP Midtown, Ltd. v. Urban Storage, L.P.*, 2008 WL 1991747, *7 n. 8, 2008 Tex.App. LEXIS 3364, *21 n. 8 (Tex.App.-Houston May 8, 2008, pet. denied) (though "the elements of a statutory claim and a common law claim of misappropriation are not exactly the same, we conclude the same evidence supports both causes of action.")

Accenture contends that it is entitled to judgment as a matter of law because Wellogix did not present legally sufficient evidence to meet its burden of proof with respect to any element of its trade secret misappropriation and theft of trade secrets claims.

1. Existence of Trade Secret

A trade secret is any formula, pattern, device or compilation of information used in one's business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use it. *See Hyde Corp. v. Huffines*, 158 Tex. 566, 314 S.W.2d 763, 776 (1958) (adopting Restatement of Torts § 757 (1939)), *cert. denied*, 358 U.S. 898, 79 S.Ct. 223, 3 L.Ed.2d 148. To determine whether a trade secret exists, a court weighs six fact-intensive factors: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of the measures taken to guard the secrecy of the information; (4) the value of the information to the business and to its competitors; (5) the amount of effort or money expended in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *See In re Bass,* 113 S.W.3d 735, 739 (Tex.2003) (citing Restatement of Torts § 757 cmt. b. (1939); Restatement (Third) of Unfair Competition § 39 reporter's note cmt. d. (1995)).

We find that Wellogix presented sufficient evidence to allow a jury to conclude that trade secrets existed. First, Wellogix presented evidence that the source code for its software was a trade secret and was maintained behind a firewall to ensure its secrecy. (5/10/11 Tr. 285; 5/11/11 Tr. 513-14; 5/12/11 Tr. 802.) Second, Wellogix presented evidence that the logic behind its software, including the steps required for the software to work, the software architecture, product maps and designs, and workflows, were all trade secrets. (5/10/11 Tr. 285; 5/12/11 Tr. 801-02.) Accenture's expert Deon Smith ("Smith") confirmed that Wellogix's software performed certain functions that could not be performed by SAP's software. (5/18/11 Tr. 1932.) The jury was also presented with documentary evidence indicating that, though the functions of Wellogix's software were known to the industry, other software companies did not have identical functions in their software. (PX 496; PX 894.)[2] This evidence, which the jury assessed using the *Bass* factors outlined in the jury instructions, provides a legally sufficient basis for the jury's conclusion that trade secrets existed.

Accenture raises several arguments as to why the evidence presented could not support the jury's finding of trade secret existence. First, Accenture contends that, at the time of the alleged misappropriation and theft, all of Wellogix's technology was covered by patents or patent applications, thereby destroying the secrecy necessary for trade secret status under Texas law. Texas law recognizes that information published in a patent application becomes public and loses trade secret status. *See Tewari De-Ox Sys. v. Mountain States/Rosen, L.L.C.,* 637 F.3d 604, 612 (5th Cir.2011); *Frey,* 20 F.3d at 629; *Luccous v. J.C. Kinley Co.*, 376 S.W.2d 336, 340 (Tex.1964). However, Texas law also recognizes that trade secret status may be maintained along with patent protection in situations where the patent does not disclose the exact information or details that a plaintiff contends are trade secrets. *See Frey,* 20 F.3d at 629 (manufacturing process protected by trade secret status where patent merely described the product, and failed to disclose information about the manufacturing process or

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[2] For the purposes of this Memorandum and Order, the Court adopts the abbreviations used by the parties in this case. "PX" refers to Plaintiff's exhibits; "DX" refers to Defendant's exhibits.

specifications); *Carbo Ceramics, Inc. v. Keefe*, 166 Fed.Appx. 714, 719 (5th Cir.2006) (jury was able to conclude, based on conflicting testimony, that patents did not disclose plaintiff's trade secrets); *cf. On-Line Techs., Inc. v. Bodenseewerk Perkin-Elmer GmbH*, 386 F.3d 1133, 1141 (Fed.Cir.2004) ("After a patent has issued, *the information contained within it* is ordinarily regarded as public and not subject to protection as a trade secret.") (emphasis added). Like the jury in *Carbo*, the jury here was not unreasonable in examining the evidence presented regarding Wellogix's technology and its patents and concluding that Wellogix's technology retained trade secret status.

Second, Accenture argues that PX 714, the interface design specification for a Maximoto-Wellogix interface in the BP eTrans pilot, could not be a trade secret because it was published on Wellogix's publicly-available website. (5/13/2011 Tr. 1031-1037, 1161; DX 136.) "It is self-evident that the subject matter of a trade secret must be secret." *Luccous v. J.C. Kinley Co.*, 376 S.W.2d 336, 338 (Tex.1964). Wellogix presented testimony from its expert Kendyl Roman ("Roman") that PX 714 contained several pages of information that were trade secrets, including "Detailed Data Transformation Rules," an XML schema, "Intermediate Table Layout," and "Processing Requirements." (5/13/11 Tr. 1159-62; PX 714.) Accenture presented evidence that the XML schema contained in PX 714 was published on Wellogix's publicly available website. (*Id.* 1161; DX 136.) Accenture did not present evidence that information in PX 714 other than the XML schema was available on Wellogix's website. The jury was entitled to credit Roman's testimony that the information in PX 714 that was not available on Wellogix's website included trade secrets and was kept secret by Wellogix.

Third, Accenture argues that certain documents, such as PX 918 and PX 478/DX 98, were provided to Wellogix's customers without the protection of a confidentiality agreement, thereby losing any secrecy. (5/11/11 Tr. at 508-511; DX 120). Texas law instructs that the trade secret owner "will lose his secret by its disclosure unless it is done in some manner by which he creates a duty and places it on the other party not to further disclose or use it in violation of that duty." *Taco Cabana Int'l v. Two Pesos, Inc.*, 932 F.2d 1113, 1123-24 (5th Cir.1991) (citing *Furr's, Inc. v. United Specialty Advertising Co.,* 385 S.W.2d 456, 459 (Tex.Civ.App.-El Paso 1964, writ ref'd n.r.e.), *cert. denied* 382 U.S. 824, 86 S.Ct. 59, 15 L.Ed.2d 71 (1965)); *see also Carson Products Co. v. Califano*, 594 F.2d 453, 461 (5th Cir.1979) (however strong other indicia of trade secret status may be, subject matter must be secret, such that acquiring information would be difficult except by improper means). Yet, "[s]ecrecy is a relative term. The information may be known to several persons and yet still be secret if third parties would be willing to pay for a breach of trust in order to ascertain it." *Taco Cabana Int'l,* 932 F.2d at 1125 (quoting *A.H. Emery Co. v. Marcan Products Corp.*, 268 F.Supp. 289, 299 (S.D.N.Y.1967)). Courts have held that, even where a plaintiff voluntarily discloses the trade secret without the benefit of a confidentiality agreement, the requisite secrecy is retained if the "disclosure occurs in a context that would not ordinarily occasion public exposure, and in a manner that does not carelessly exceed the imperatives of a beneficial transaction." *Taco Cabana Int'l*, 932 F.2d at 1124; *see also Phillips*, 20 F.3d at 631-32 (holding that disclosure of trade secret without protection of express confidentiality agreement was not fatal to trade secret protection where disclosure occurred during sale negotiation); *Metallurgical Industries Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1200 (5th Cir.1986) (finding no surrender of secrecy where disclosures were not public announcements and secrets divulged only to businesses with whom plaintiff dealt with expectation of profit). Here, Wellogix presented evidence that its voluntary disclosures of PX 918 and PX 478/DX 98 were made to customers or potential customers in hopes of obtaining business. Such disclosures were made to further economic transactions and would not, by themselves, expose any substantive information contained in the disclosed material to the public. Further, Epley testified that email communications transmitting trade secrets to customers and potential customers contained confidentiality notices requiring the recipient to maintain the confidentiality of the information transmitted. (5/10/11 Tr. 288; 5/11/11 Tr. 510:24-25.) The jury was not unreasonable in weighing this evidence and concluding that Wellogix's trade secrets had not lost their secrecy through disclosure.

Fourth, Accenture argues that PX 478 and DX 98, which are substantively identical process workflows for the Maximo-to-Wellogix interface, cannot be trade secrets because the workflows were jointly created by Wellogix, SAIC, and IBM. (5/13/11 Tr. 1039; DX 120.) The Arbitration Order found that such jointly-created workflows were not trade secrets. Our April 22, 2011 Order held that this finding was entitled to preclusive effect against Wellogix, which was reiterated in the jury instruction that "[t]he architectural and process flow maps of the eTrans project that other companies took part in developing are not Wellogix trade secrets." (Doc. No. 298 at 7.) Roman, Wellogix's expert, acknowledged as much when he testified, "I wouldn't say the entire document is a trade secret based on what I now know" about "contributors from SAIC or from IBM." (5/13/11 Tr. 1039:18, 1040:4-5.) While the jury could not rely on PX 478 ad DX 98 as trade secrets in themselves, it was entitled to credit Roman's testimony that PX 478 demonstrated that Wellogix's software contained functions that were not already contained in existing software products. (5/13/11 Tr. 1039:23-1040:8.)

Fifth, Accenture argues that PX 918, which contains a "simply generic process workflow" for integration of Wellogix's Workflow Navigator and e-Field Ticket software with SAP's software, cannot be a trade secret because Epley conceded that this exhibit does not contain any trade secrets. (5/11/11 Tr. 508-510). As this testimony was uncontradicted, we must accept that the jury was not entitled to rely upon PX 918 as evidence of a trade secret.

In sum, we find that sufficient evidence underlay the jury's conclusion that trade secrets existed, even if PX 478, DX 98, and PX 918 are excluded as a proper basis for the jury's finding of trade secrets.

2. Acquisition of Trade Secret

At trial, Wellogix presented sufficient evidence that Accenture had acquired Wellogix's trade secrets through a breach of a confidential relationship or discovered the trade secrets through improper means. "Improper means of acquiring another's trade secrets include theft, fraud, unauthorized interception of communications, inducement of or knowing participation in a breach of confidence, and other means either wrongful in themselves or wrongful under the circumstances of the case." *Astoria Indus. of Iowa, Inc. v. SNF, Inc.*, 223 S.W.3d 616, 636 (Tex.App.-Fort Worth 2007, pet. denied). The existence of a confidentiality agreement between two parties can establish that a confidential relationship existed between those parties. *See IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 199 (Tex.App.-Forth Worth 2005, no pet.).

Wellogix presented evidence through the testimony of Epley and Roman that it had provided its trade secrets, including source code, to Accenture over the course of several years. The evidence indicated that the trade secrets had been provided in connection with several project (including Trade Ranger, a Marathon project, and a Grand Basin project), as well as when Accenture conducted due diligence in consideration of a potential acquisition of Wellogix. (5/11/11 Tr. 476-78; 5/12/11 Tr. 921; 5/13/11 Tr. 1018; PX 473.) Wellogix also presented evidence that it had entered into six confidentiality agreements with Accenture over several years, including a teaming agreement and an agreement regarding the Marathon project. (5/10/11 Tr. 289, 297, 299; PX 890.) Epley testified that Wellogix had provided Accenture its trade secrets pursuant to a teaming agreement and the Marathon agreement, including its source code pursuant to a confidentiality agreement. (5/11/11 Tr. 477:8-14, 478:19-23.) Wellogix also presented evidence that Accenture had access to its trade secrets, including a document like PX 714, via the eTrans SharePoint site. (5/12/11 Tr. 805, 873-77; 5/13/11 Tr. 1022-27; PX 433; PX 494; PX 904; PX 1002.) This evidence provided a basis for the jury to infer that Accenture obtained Wellogix's trade secrets pursuant to a confidential relationship between the two companies and, by later using the trade secrets for unauthorized purposes, breached that confidential relationship.

Accenture argues that the evidence showed that Wellogix never provided its source code to Accenture and always maintained it behind a firewall. However, Epley's testimony on this point referenced the provision of source code during the eTrans project; Epley and Roman also testified that the source code had been provided directly to Accenture during other projects, such as the Trade Ranger and Marathon projects. (5/11/11 Tr. 513-14; 5/13/11 Tr. 1018-19.)

Accenture also attacks the jury's reliance on testimony by Epley and Roman that contradicts the testimony of Wellogix's corporate representative, Chisholm, that Wellogix never provided its source code to Accenture. (5/17/11 Tr. 1805.) Finally, Accenture points to its own fact witness testimony that Accenture employees never saw Wellogix's source code. Despite the testimony favoring Accenture's claims that it never had access to Wellogix's trade secrets, including its source code, the jury was entitled to weigh the credibility of the witnesses and draw the reasonable inference from the testimonial and documentary evidence that Accenture, in fact, did have access to Wellogix's source code. *See Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 222 (5th Cir.2000) (jury's function is to weigh conflicting evidence and inferences and determine credibility, while court "must disregard all evidence favorable to the moving party that the jury is not required to believe") (quoting *Reeves,* 530 U.S. at 151, 120 S.Ct. 2097). Thus, while Accenture presented evidence from interested witnesses that the jury could have believed, the jury was not unreasonable in crediting the testimony of Epley and Roman and accepting documentary evidence showing Accenture's access to the eTrans SharePoint site. We find that there was sufficient evidence to support the jury's finding of improper acquisition of Wellogix's trade secrets.

3. Use of Trade Secret

Accenture argues that the jury did not have a legally sufficient evidentiary basis to conclude that Accenture had used Wellogix's trade secrets. "Use" of a trade secret means commercial use, by which a person seeks to profit from the use of the secret. *Atlantic Richfield Co. v. Misty Prods., Inc.*, 820 S.W.2d 414, 421 (Tex.App.-Houston [14th Dist.] 1991, writ denied). This definition of "use" was provided in the jury's instructions. (Doc. No. 298 at 8.) Accenture contends that the evidence presented at trial did not support Wellogix's contention that Accenture had used Wellogix's trade secrets in one or more of the following projects: BP's P2P Project, xIEP, and/or enhancement of SAP's SRM software.

First, with respect to BP's P2P Project, Wellogix presented evidence that Accenture was retained to assist BP with implementation of SAP's software platform in the P2P Project. Accenture played the role of a consultant, engaged in software implementation, while BP acted as the client. (5/12/11 Tr. 703; 5/16/11 Tr. 1369.) The distinct roles played by Accenture and BP during the P2P Project are crucial. Although the Arbitration Order found that BP had not used Wellogix's trade secrets in the P2P Project, this finding does not preclude Wellogix's allegations that *Accenture*, which carried out a different set of activities than BP in relation to the P2P Project, used Wellogix's trade secrets while working on the P2P Project.[3] (5/17/11 Tr. 1581-82.) Indeed, Wellogix

[3] For example, although the testimony of Michelle Monteau, a BP employee, is relevant to whether BP misappropriated Wellogix's trade secrets, and could shed light on Accenture's role on the P2P Project, it cannot directly answer the question of what work Accenture performed on the P2P Project. (5/13/11 Tr. 1209.)

presented evidence that Accenture had developed complex services templates for the P2P Project through the efforts of Accenture employees working apart from BP employees. (PX 894; PX 898; PX 923.) Although Accenture presented controverting evidence that its employees had not accessed Wellogix's intellectual property and had simply used standard SRM features to create shopping cart-type templates, the jury was entitled to weigh the evidence presented and find against Accenture on this element of trade secret misappropriation.[4] (5/16/11 Tr. 1262, 1340-42, 1351-53; 5/17/11 Tr. 1792, 1809.) Even though the P2P Project remained in its pilot phases, Accenture clearly sought to profit by using Wellogix's trade secrets to keep BP content with the P2P Project and retain its lucrative consulting work with BP. (PX 923 at ACN00002805.)

Second, with respect to the xIEP project, Wellogix presented evidence that Accenture and SAP were developing an application called xIEP for use by oil and gas companies. (5/11/11 Tr. 563-64.) Of the three scenarios included in xIEP, Wellogix was intended to be the developer for Scenario 3, which related to complex services. (*Id.* at 564.) In addition, Wellogix presented documentary evidence that Accenture

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[4] Accenture's citation to *Plains Cotton Coop. Ass'n of Lubbock, Tex. v. Goodpasture Computer Serv., Inc.*, 807 F.2d 1256 (5th Cir.1987), is inapposite. In *Plains Cotton,* the Fifth Circuit affirmed the district court's denial of a preliminary injunction for alleged trade secret misappropriation because the trade secret misappropriation was "nothing more than a restaging of the copyright battle," and the plaintiff had failed to show copying on any level of the computer software, including direct copying of source code. Here, Wellogix submitted evidence that Accenture copied not only the content of its complex service templates, but also the specific design and function of Wellogix's software.

intended to lift Wellogix's intellectual property from the Marathon project to SAP's development center in Walldorf, Germany for use in the xIEP project. (PX 473.) However, as both Roman and Smith testified, Scenario 3 was never developed, and xIEP did not contain any source code or confidential information from Wellogix. (5/13/11 Tr. 1053; 5/17/11 Tr. 1809.) Therefore, the "use" element of trade secret misappropriation cannot be shown through Accenture's development work on the xIEP project.[5]

Finally, with respect to enhancement of SAP's SRM software, Wellogix presented evidence that SAP's SRM software worked together with SAP's ECC software, which was confirmed by Accenture's expert. (5/12/11 Tr. 933-34; 5/13/11 Tr. 1141-42; 5/18/11 Tr. 1932:15-18.) Wellogix presented evidence that SAP's ECC software contained certain matches to Wellogix's software in terms of functional identity. (5/12/11 Tr. 907-12, 1144; PX 831-36-1.) Contrary to Accenture's characterization, Roman did not testify only that the function copied from Wellogix's software was the use of red lights and green lights. (5/13/11 Tr. 1146.) Rather, Roman also testified that the function being copied from Wellogix's software was the manner in which the software could reconcile the line item detail of the purchase order or contract with the eField Ticket and invoice. (5/13/11 Tr. 1146:22-1147:3.) To controvert Wellogix's claims, Accenture presented evidence that it never modified the source code for SAP's software. (5/17/11 Tr. 1558.) Accenture also presented expert testimony, through Smith, that none of SAP's software, including SRM 4.0, SRM 5.0, SRM

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[5] However, other elements of trade secret misappropriation and issues submitted to the jury, including malice, can be shown through Accenture's work on the xIEP project.

7.0 ECC, or R/3, contained Wellogix's source code. (5/17/11 Tr. 1787-88, 1800, 1809.) The jury, presented with Wellogix's evidence and Accenture's controverting evidence, had a legally sufficient basis to conclude that Accenture used Wellogix's trade secrets in order to enhance SAP's software. Therefore, we must deny Accenture's motion for judgment as a matter of law on the element of "use" in Wellogix's trade secret misappropriation claim.[6]

C. Harm to Wellogix

In order to succeed on a claim of trade secret misappropriation, Wellogix was required to show that it was damaged as a result of Accenture's use of its trade secrets. *See Taco Cabana Int'l*, 932 F.2d at 1123. During trial, Wellogix introduced evidence of its value at the time of the misappropriation in late 2005, and that it had been eyed by companies such as SAP for acquisition or investment. (5/13/11 Tr. 1077; 5/10/11 Tr. 401-02; PX 878.) Wellogix also introduced testimony that the value of its company rested on its trade secrets. (5/12/11 Tr. 925-27.) Finally, Wellogix introduced evidence that, after Accenture's use of its trade secrets, the value of its intellectual property was severely diminished because companies no longer needed to go through Wellogix to obtain the functions that Wellogix's software provided. (5/12/11 Tr. 926-27.)

Accenture contends that it presented evidence of several other factors that contributed to Wellogix's failure as a start-up company. These included the

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[6] For the same reasons, we find that the jury had a legally sufficient evidentiary basis to find that Accenture had committed a theft of Wellogix's trade secrets by knowingly copying, communicating or transmitting Wellogix's trade secrets without Wellogix's effective consent. (Doc. 298 at 10.)

preference of customers and oilfield service vendors to use existing methods of ordering complex services, the decision by Wellogix's customers to stop using Wellogix technology due to problems with the technology itself, problems with product development, competitor technology, and a general economic downturn. Accenture also points to Wellogix's purported inability to present evidence that it lost prospective clients due to Accenture's actions. Finally, Accenture argues that Wellogix failed to rule out the possibility that its loss in value was due to SAP's access and potential misappropriation rather than Accenture's actions.

Under Texas law, "[t]he components of proximate cause are cause in fact and foreseeability. The test for cause in fact, or 'but for causation,' is whether the act or omission was a substantial factor in causing the injury 'without which the harm would not have occurred.' A finding of cause in fact may be based on either direct or circumstantial evidence, but cannot be supported by mere conjecture, guess, or speculation." *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727 (Tex.2003) (internal citations omitted). Here, the jury was entitled to rely on Wellogix's expert and fact witness testimony, the valuation done in 2005, and the chronology of events to conclude that Accenture's actions, rather than SAP's actions, were a substantial factor in Wellogix's loss of value. Although the Court may not have reached the same conclusion regarding proximate causation as the jury did, under the deferential standard applicable to the jury's findings and our obligation to draw all reasonable inferences in favor of Wellogix, we must conclude that the jury's finding was supported by legally sufficient evidence.

D. Proof of Wellogix's Compensatory Damages

At trial, Wellogix submitted evidence of its lost business value through the testimony of its experts Michael Wagner ("Wagner") and Kendyl Roman. Wagner testified that Wellogix's value just prior to the alleged misappropriation by Accenture in late 2005 was $27,779,725. Wagner testified that his opinion regarding Wellogix's value in late 2005 was based primarily upon the transaction between First Capital investors and Wellogix in which First Capital, after conducting due diligence, decided to invest approximately $8.5 million in exchange for 31% of Wellogix's shares. (5/13/11 Tr. 1090:1-4, 1102:13-18, 1135; PX 1013.) Wagner testified that this type of transaction, performed close in time to the alleged misappropriation and based on independent review of Wellogix's financial performance and projections, was a good basis for a calculation of Wellogix's value in late 2005. (5/13/11 Tr. 1078-79, 1090.) Wagner also testified about his review of a valuation of the company performed by Innovation Advisors in May 2005 that placed the value of Wellogix's equity at $17.2 to $17.9 million. (5/13/11 Tr. 1079-81; PX 878.) In addition to Wagner's testimony, Wellogix presented Roman, who testified that the value of Wellogix dropped to zero after the misappropriation. (5/12/11 Tr. 926.)

Under Texas law, "the proper measure of damages for destruction of a business is measured by the difference between the value of the business before and after the injury or destruction." *Sawyer v. Fitts*, 630 S.W.2d 872, 874-75 (Tex.App.-Fort Worth 1982, no writ). Lost business value is an appropriate measure of damages when business value is completely or almost completely destroyed. *C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1053 (5th Cir.1981).

If future profits are included within the calculation of lost business value, it is impermissible to obtain damages awards for both lost business value and lost future profits. *Id.*

Accenture argues that Wagner's testimony was insufficient to support a theory of compensatory damages based on lost profits.[7] The crux of Accenture's challenge to Wellogix's compensatory damages award is misplaced. Wellogix did not seek lost profits as its measure of damages, but rather sought lost business value. There was sufficient evidence in the record, through Roman's testimony, that Wellogix lost all of its value as a software company once its trade secrets were misappropriated. The jury was entitled to accept Roman's testimony and reject Accenture's evidence that Wellogix might still have some value based upon

[7] Wellogix challenges the propriety of Accenture's inclusion of this argument in its renewed motion for judgment as a matter of law. Wellogix contends that Accenture never mentioned the alleged insufficiency of evidence supporting compensatory damages during either of the prior times it moved for judgment as a matter of law. Although a party who fails to present a Rule 50(a) motion on an issue at the close of evidence waives both its right to present a Rule 50(b) motion after judgment and its right to challenge the sufficiency of the evidence on appeal, "Rule 50(b) is construed liberally, and we may excuse 'technical noncompliance' when the purposes of the rule are satisfied." *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 288 (5th Cir.2007). Here, Accenture moved for judgment as a matter of law at the close of all the evidence and clearly stated that it did not believe that there was a legally sufficient evidentiary basis for Wellogix's "damages, or, as you just heard, with respect to exemplary damages." (5/18/11 Tr. 2097.) Wellogix did not object to the Court's preserving of all of Accenture's arguments for the motion. (*Id.*) Therefore, we find that Accenture sufficiently preserved its right to make a Rule 50(b) motion on the issue of compensatory damages.

its patents. Once Wellogix provided sufficient evidence that it had lost all or almost all of its value, it was entitled to a damages award based upon lost business value.

The cases cited by Accenture address damages awards that are based exclusively on future lost profits and do not encompass lost business value as a measure of damages. *See, e.g., Small Bus. Assistance Corp. v. Clear Channel Broad., Inc.*, 210 F.3d 278, 281 (5th Cir.2000); *Information Commc'n Corp. v. Unisys Corp.,* 181 F.3d 629, 633 (5th Cir.1999); *Texas Instruments v. Teletron Energy Mgmt.*, 877 S.W.2d 276, 278-79 (Tex.1994). Here, future profits were part of the valuations performed by First Capital and Innovation Advisors, which, in turn, served as part of the basis for Wagner's expert opinion on Wellogix's value in late 2005.[8] However, Wagner testified that the best and primary evidence supporting his opinion was First Capital's $8.5 million investment in Wellogix in exchange for 31% of the company. This investment, and Wagner's reliance upon it, is neither speculative nor uncertain. *See Fluorine on Call Ltd. v. Fluorogas Ltd.*, 380 F.3d 849, 860 (5th Cir.2004) (lost value measure of damages is based upon market value of asset prior to wrongful conduct, which, in turn, "is determined by considering what a hypothetical buyer would pay for the chance to earn future profits. And the best evidence of this value is an actual sale of the asset."). Thus, we conclude that sufficient concrete evidence supported the jury's award of compensatory damages based on lost business value.

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[8] Wagner, however, testified that he did not use the same calculations as Innovation Advisors or the valuations of First Capital. (5/13/11 Tr. 1081:11-16.)

E. Proof of Accenture's Malice

In order to support an award of exemplary damages, Wellogix was required to prove, by clear and convincing evidence, that Accenture acted with malice when it misappropriated Wellogix's trade secrets. *See* Tex. Civ. Prac. & Rem.Code § 41.003(a)(2) (2011). "Malice" is defined as "a specific intent by the defendant to cause substantial injury or harm to the claimant." *Id.* § 41.001(7).

At trial, Wellogix presented evidence that supported the jury's finding that Accenture not only intended to misappropriate Wellogix's trade secrets, but also intended to cause Wellogix substantial harm. With respect to misappropriation, the jury heard testimony and saw documentary evidence showing that Accenture had access to and used Wellogix's trade secrets on the eTrans SharePoint site. (5/12/11 Tr. 873, 879-85; PX 433; PX 469; PX 494, PX 902; PX 904; PX 923.)

In addition to the evidence regarding Accenture's intent to misappropriate Wellogix's trade secrets, the jury heard evidence indicating that Accenture intended to cause substantial injury to Wellogix's business. The jury saw emails in which Accenture employees, when faced with the alternatives of developing SAP SRM's complex services functionality with Wellogix or without Wellogix, expressed a "preference" for helping SAP build this functionality without Wellogix. (PX 496; PX 473.) The jury also heard testimony regarding Accenture's fear that, if SAP bought Wellogix and integrated Wellogix's functionality directly into its software, Accenture would be at risk of losing lucrative consulting assignments at oil and gas companies where it served as an implementer of Wellogix's software. (5/18/11 Tr. 2086-87; PX 972; *see also* 5/11/11 Tr. 574.) Accenture did present controverting evidence indicating that it did not develop software itself and looked for ways to partner with Wellogix. (5/16/11 Tr. 1485; 5/11/11 Tr. 574-75.) However, the jury was entitled to weigh the evidence, determine the credibility of the various witnesses, and decide that Accenture, in fact, not only intended to steal Wellogix's trade secrets, but also intended to cut Wellogix out of the business deals with BP and SAP in order to preserve the need of oil and gas companies for Accenture's consulting services. The jury was also entitled to conclude that Accenture's cautions to Wellogix about SAP's "bleed the knowledge" tactics were a way for Accenture to prevent Wellogix from working "around" Accenture and to prevent SAP from acquiring control over Wellogix's functionality and eliminating the need for Accenture's implementation services. (5/10/11 Tr. 390-91; 5/11/11 Tr. 580-82; PX 985.)

In sum, the evidence was sufficient to demonstrate that Accenture acted with malice.

F. Exemplary Damages

Based on our finding regarding the sufficiency of evidence regarding Accenture's malice, we find that there was sufficient evidence to support the jury's award of exemplary damages. Accenture's Motion for Judgment as a Matter of law also incorporates its argument, urged in its Motion for New Trial or Remittitur, that the amount of exemplary damages awarded in this case is unconstitutionally excessive. The Court considers that argument in its discussion of Accenture's Motion for New Trial or Remittitur, below.

In sum, we find that, based on the standard requiring us to provide generous deference to jury findings, the jury verdict was based on legally sufficient evidence. Considering the evidence, "in the light and with all reasonable inferences most favorable" to Wellogix, we must conclude that the "facts and inferences" do not "point so strongly and overwhelmingly in favor of" Accenture that reasonable persons could not have arrived at a verdict in favor of Wellogix. *See Taco Cabana Int'l, Inc*., 932 F.2d at 1124 (citing *Boeing Co. v. Shipman,* 411 F.2d 365, 374 (5th Cir.1969) (en banc)). As such, Accenture's Rule 50(b) renewed motion for judgment as a matter of law is denied.

III. MOTION FOR NEW TRIAL OR REMITTUR

Also pursuant to Rule 50(b), Accenture moves for a new trial or, in the alternative, a remittitur of the exemplary damages awarded by the jury. Accenture makes the following arguments: (1) the Due Process Clause requires the elimination or substantial reduction of the exemplary damages award; (2) the Court should also, or alternatively, exercise its discretion to suggest a substantial remittitur of the exemplary damages award; (3) the jury's findings are against the great weight of the evidence; (4) the admission of Wellogix's patent evidence requires a new trial; and (5) the admission of Roman's testimony warrants a new trial.

A. Legal Standard

Federal Rule of Civil Procedure 59 states that a court may, on motion, grant a new trial after a jury trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed.R.Civ.P. 59(a). A court therefore may grant a new trial if it finds that the verdict is against the weight of the evidence, the damages awarded are excessive, the trial was unfair, or prejudicial error was committed in its course. *Smith v. Transworld Drilling Co.*, 773 F.2d 610, 613 (5th Cir.1985).

Courts are to decide whether to grant a new trial based on their assessment of the fairness of the trial and the reliability of the jury's verdict. *Seidman v. Am. Airlines, Inc.*, 923 F.2d 1134, 1140 (5th Cir.1991). This decision lies within the discretion of the court. *Shows v. Jamison Bedding, Inc.*, 671 F.2d 927, 930 (5th Cir.1982). In determining whether to grant a motion for new trial, the court must view the evidence in the light most favorable to the jury's verdict, and the verdict must be affirmed unless the evidence points so strongly and overwhelmingly in favor of the other party that the Court believes that reasonable persons could not arrive at a contrary conclusion. *Dawson v. Wal-Mart Stores, Inc.*, 978 F.2d 205, 208 (5th Cir.1992). When a party moves for a new trial on evidentiary grounds, a new trial should not be granted unless "the verdict is against the great weight of the evidence." *Pryor v. Trane Co.,* 138 F.3d 1024, 1026 (5th Cir.1998). A decision on remittitur, like a determination on whether to grant a new trial, is within the sound discretion of the trial court. *See Thompson v. Connick,* 553 F.3d 836, 865 (5th Cir.2008).

B. Constitutionality of Exemplary Damages

Accenture moves for a new trial or, in the alternative, a remittitur, on the basis that the damage award in this case violates the Due Process Clause. Ultimately, "[o]nly when an award can fairly be categorized as 'grossly excessive' does it enter the zone of arbitrariness that violates the Due Process Clause." *BMW of N. Am. v. Gore*, 517 U.S. 559, 568, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). In *Gore,* the Supreme Court provides three factors that courts are to consider when determining the constitutionality of a punitive damages award. They are "the defendant's reprehensibility or culpability; the relationship between the penalty and the harm to the victim caused by the defendant's actions; and the sanctions imposed in other cases for comparable misconduct." *Id.* (citing *Cooper Indust., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001)). Of these three factors, the "most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (quoting *Gore*, 517 U.S. at 575, 116 S.Ct. 1589).

1. Reprehensibility or Culpability

The Supreme Court has provided five factors for courts to consider in analyzing a defendant's reprehensibility, but notes that "[t]he existence of any one of these factors . . . may not be sufficient to sustain a punitive damages award[,] and the absence of all of them renders any award suspect." *Id.* These factors are: (1) whether the harm caused was physical or economic; (2) whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) the financial vulnerability of the target of the conduct; (4) whether the conduct involved repeated actions or was an isolated incident; and (5) whether the harm was the result of intentional malice, trickery, or deceit as opposed to mere accident. *Id.* While the first two factors weigh against Wellogix—the harm was not physical nor was health or safety an issue in this case[9]—the third and fifth factors weigh in

[9] As clarified by the Supreme Court, the absence of a physical injury itself does not render an award of exemplary damages unconstitutional. In *Gore,* the Supreme Court held that "infliction of economic injury, especially when done intentionally through

Wellogix's favor. The fourth factor does not clearly favor either party.

As to financial vulnerability, Accenture argues that Wellogix was a "sophisticated software company" sharing few similarities with the financially vulnerable plaintiffs in *State Farm* (an elderly couple whose insurer refused to settle within policy limits). 538 U.S. at 413, 123 S.Ct. 1513. However, the Supreme Court's "financial vulnerability" prong is not limited to individual, highly sympathetic plaintiffs like those in *State Farm*; rather, the financial vulnerability of a plaintiff may be looked at in context. *See, e.g., Saunders v. Branch Banking and Trust Co. of Virginia*, 526 F.3d 142, 153 (4th Cir.2008) (considering the fact that the plaintiff had limited resources as compared to the defendant, and that the defendant's conduct rendered the plaintiff more financially vulnerable). Wellogix was a start-up at the time of the Accenture's conduct; it was a relatively young company with an uncertain financial future. Wellogix's complete loss in value demonstrates just how vulnerable it was. Especially when considered in comparison to Accenture, we conclude that Wellogix was a financially vulnerable target.

As to whether the conduct involved repeated actions or was an isolated incident, Wellogix presented evidence that Accenture's ongoing efforts to steal its trade secrets caused the company's ultimate collapse. However, Accenture points out that "repeated conduct," as it is meant by the Supreme Court in *Gore,* refers to "recidivism." 517 U.S. at 577, 116 S.Ct. 1589; *see also Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299,

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affirmative acts of misconduct . . . can warrant a substantial penalty." 517 U.S. at 576, 116 S.Ct. 1589.

309 n. 48 (Tex.2006). While Wellogix has not presented an argument that the conduct in this case was recidivist, it was clearly not an "individual instance of malfeasance," *Gore*, 517 U.S. at 577, 116 S.Ct. 1589, as it involved ongoing conduct by Accenture, rather than one isolated act. We therefore conclude that, while this factor does not weigh in Wellogix's favor, it does not weigh in favor of finding the punitive damages award unconstitutional.

Finally, as to whether the harm was a result of intentional malice, trickery, or deceit, the Court determines, as discussed above, that Wellogix presented sufficient evidence to support such a conclusion. Wellogix presented evidence that Accenture not only intended to misappropriate Wellogix's trade secrets, but that it also intended to cause Wellogix substantial harm. Further, there was evidence that Accenture intended to steal Wellogix's trade secrets and to cut Wellogix out of the business deals with BP and SAP. Ultimately, the Court finds that there is sufficient evidence that Accenture engaged in reprehensible conduct.

2. Relationship Between Penalty and Harm to the Victim

With respect to the second factor, the Supreme Court has "rejected the notion that the constitutional line is marked by a simple mathematical formula." *Gore,* 517 U.S. at 582, 116 S.Ct. 1589. (citation omitted). While "exemplary damages must bear a reasonable relationship to compensatory damages," *id.* at 580, 116 S.Ct. 1589 (internal quotation marks and citation omitted), "[t]here is no particular disparity between punitive and actual damages that will automatically result in [the court's] declaring a punitive damages award unconstitutional," *Watson v. Johnson Mobile*

Homes, 284 F.3d 568, 573 (5th Cir.2002). Higher ratios of punitive to compensatory damages may "be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *Gore,* 517 U.S. at 582, 116 S.Ct. 1589. There exists no "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable." *Id.* at 583, 116 S.Ct. 1589 (citations and internal quotations omitted).

The ratio of exemplary damages to compensatory damages in this case is approximately 2.6:1. Though the Supreme Court has not articulated a bright line ratio which exemplary damages awards cannot exceed, it has held that "single-digit multipliers are more likely to comport with due process." *State Farm*, 538 U.S. at 425, 123 S.Ct. 1513. The Supreme Court also held that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425, 123 S.Ct. 1513. While the Court agrees with Accenture that the compensatory damages in this case are substantial, it does not find that the relationship between exemplary damages and compensatory damages exceeds constitutional bounds.

3. Sanctions Imposed in Other Cases

Neither party asks the Court to consider sanctions imposed in other cases, and the Court finds that the facts of this case—Accenture's conduct, the nature of the relationship between Wellogix and Accenture, and the extent of the harm to Wellogix—render the case unique and minimize the relevance of sanctions imposed in other cases.

Ultimately, the Court concludes that the exemplary damages in this case are not *grossly excessive*, and are therefore not unconstitutional.

C. Discretionary Reduction of Exemplary Damages

Beyond the reasons which Accenture argues justify a constitutional reduction of exemplary damages in this case, Accenture also asks the Court to reduce the exemplary damages because of the extent to which exemplary damages exceed the amount requested by Wellogix's own counsel. In Texas, the standard of review for an excessive damages complaint is the factual sufficiency of the evidence. *Forte v. Wal-Mart Stores, Inc.*, 2011 WL 1740182, at *3 (S.D.Tex. May 4, 2011). The standard is highly deferential, and damages are set aside "only upon a clear showing of excessiveness." *Duff v. Werner Enters., Inc.,* 489 F.3d 727, 730 (5th Cir.2007). An excessive award exceeds the "maximum amount calculable from the evidence." *Carlton v. H.C. Price Co.,* 640 F.2d 573, 579 (5th Cir.1981) (citation omitted). After reviewing all of the evidence, courts are permitted to vacate or remit a damage award if it appears to be "so factually against the great weight and preponderance of the evidence as to be manifestly unjust." *Forte,* 2011 WL 1740182, at *3 (citation and quotation omitted).

Wellogix requested $18.2 million in exemplary damages in this case; the jury ultimately awarded $68.2 million—$50 million more than Wellogix requested. The Court therefore agrees with Accenture that the punitive damages award in this case is factually against the great weight of the evidence; the amount so exceeds what was requested by Wellogix's counsel that it appears contrary to right reason. *See Brunnemann v. Terra Int'l, Inc.*, 975 F.2d 175, 178 (5th Cir.1992) ("Damage awards which are merely excessive or so large as to appear contrary to right reason . . . are subject to remittitur.") (citing *Wells v. Dallas Indep. Sch. Dist.*, 793 F.2d 679, 683-84 (5th Cir.1986)). The Court concludes that the maximum amount of punitive damages supported by the evidence in this case is $18.2 million dollars. We therefore grant Accenture's Motion for New Trial or Remittitur, and order Wellogix to choose whether to accept a $50 million remittitur or hold a new trial.

D. Jury's Findings Against the Great Weight of the Evidence

Accenture moves for a new trial based on its argument that the jury's findings are against the great weight of the evidence. As discussed in Part II, above, Wellogix presented sufficient evidence to support the jury's findings and avoid judgment as a matter of law. Even in the context of a motion for a new trial, where we do not weigh the evidence in the light most favorable to Wellogix, we still find that Wellogix presented sufficient evidence of all of its claims to sustain the jury's verdict. At trial, both Wellogix and Accenture presented numerous documents and testimony to substantiate their account of the business relationship between Wellogix, Accenture, BP, and SAP, and Accenture's misappropriation of Wellogix's trade secrets. In addition, Wellogix and Accenture both presented varying accounts of Accenture's malice towards Wellogix and evidence to support their respective position. Viewing the evidence presented during trial, we cannot reach the conclusion that the jury's verdict was against the great weight of the evidence. As such, we deny the motion for a new trial on this ground.

E. Admission of Patent Evidence

Accenture contends that admission of evidence regarding Wellogix's patents was prejudicial error that entitles Accenture to a new trial. According to Accenture, Wellogix used evidence that it had patented its software to confuse the jury into believing that it possessed trade secrets. Accenture argues that the jury confusion caused by admission of the patent evidence prejudiced Accenture.

We begin from the undisputed fact that the jury was given a legally correct instruction, "The existence of a patent does not mean that a trade secret exists" (Doc. No. 198 at 6), and from the legal presumption that a jury follows its instructions.[10] *See Weeks v. Angelone,* 528 U.S. 225, 234, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000). This jury instruction was reinforced by the Court's own statements to the jury that a patent and a trade secret cannot coexist because a patent is a public statement, while a trade secret remains secret. (5/10/11 Tr. 214-15.) In light of the Court's statements to the jury, we cannot accept Accenture's contention that the jury disregarded the jury instructions and instead somehow believed that Wellogix's patents meant that a trade secret existed.

The jury's reliance on Wellogix's May 16, 2006 demand letter regarding potential patent infringement was not inappropriate and does not necessarily indicate that the jury erroneously understood Wellogix's patents to confer trade secret status. Rather, Wellogix's counsel argued to the jury that the May 16, 2006 letter should be interpreted as an indicator of the date by which Wellogix was aware of Accenture's

[10] For the reasons explained in Part II, above, Wellogix's gloss on the jury instruction, "it says, the existence of a patent does not mean that a trade secret exists. It certainly doesn't mean it doesn't either," was not an incorrect statement of the law. (5/19/11 Tr. 2139.)

wrongful conduct with respect to Wellogix's intellectual property. (5/19/11 Tr. 2142-43; 5/11/11 Tr. 470; PX 847.) Similarly, Wellogix's references to its patents and patent applications were framed by Wellogix's counsel not as a sign that Wellogix had trade secrets, but rather as an indicator that Wellogix possessed valuable intellectual property. (5/10/11 Tr. 238; 5/11/11 Tr. 475-76.) Finally, Wellogix's use of emails exchanged between Accenture and BP employees regarding Wellogix's claims of patent infringement could be interpreted by the jury as a recognition and acknowledgment by the employees of the wrongful nature of the conduct vis-à-vis Wellogix's intellectual property. (PX 501; PX 502; PX 818; PX 1005.) Accenture attempted to rebut this reading of the emails by suggesting that the discussion among Accenture and BP employees was an entirely appropriate reaction to threatened litigation, rather than acknowledgement of guilty conduct. (5/11/11 Tr. 484-87.) From these emails, the jury was entitled to draw the inference that Accenture and BP had engaged in misappropriation of trade secrets. The jury was not entitled to draw the conclusion that Wellogix's patents indicated that it possessed trade secrets, and there is no suggestion that they did so.

Ultimately, the instructions provided to the jury were substantively correct and we are not convinced that Wellogix's presentation of evidence that referenced its patents had the effect of convincing the jury otherwise. Therefore, we deny Accenture's motion for a new trial on this ground.

F. Admission of Roman's Testimony

Accenture also moves for a new trial based on the admission of Roman's testimony, which, according to Accenture, constituted prejudicial error. Specifically, Accenture contends that Roman's testimony should have been excluded because he was unqualified to testify, his testimony was unreliable and likely confused the jury, and he presented fact witness testimony despite his lack of personal knowledge.

Regarding Roman's qualifications, the Court previously addressed and rejected a motion to exclude Roman's expert opinions on this basis. (Doc. No. 237.) At trial, Roman did not exceed the bounds of his area of expertise, which included computer software programming, software design and implementation, testing, and source code comparison and analysis. (5/12/11 Tr. 784-92, 904-06.) Although the software at issue in this case was implemented within the oil and gas industry, Roman did not need to possess oil and gas industry-specific knowledge in order to provide testimony that assisted the jury in understanding the complex, software-related terminology and determining many elements of Wellogix's trade secret misappropriation claim. *See* Fed.R.Evid. 702. For example, Roman reviewed an Accenture document that assessed various software vendors' capabilities, and he described how Wellogix's solution was identified in the Accenture document as a unique solution. (5/12/11 Tr. 797-98; 5/13/11 Tr. 1000-03.) As for Roman's lack of prior experience implementing SAP software and working with SAP's programming language, ABAP, Roman testified that he had been able to teach himself the language and implement the SAP software within his own company. (5/13/11 Tr. 994, 1138-40.) For the purpose of his expert opinion, which was to compare Wellogix's source code with SAP's source code, we believe that this experience, combined with Roman's extensive experience with many types of programming languages, software implementation, and code comparison analysis, was sufficient to qualify him to render the opinion.

Regarding Roman's alleged fact testimony given without personal knowledge, the Court finds that Roman's testimony stayed on the right side of the line between expert and fact witness testimony. For example, when testifying about Plaintiff's exhibit 894, Roman identified the contributors to the document based on his review of hundreds of documents and many depositions, described how to read the spreadsheet in an intelligible manner, and provided the jury with his understanding, gathered from his industry expertise, of the term "functionality." (5/12/11 Tr. 810-16.) Roman did not testify as to what the contributors to the document meant when they used the word "functionality," but rather how the term is generally used in the industry. Similarly, Roman testified as to the manner in which certain documents were stored and sent among key personnel—information that he obtained from the documents themselves and relevant deposition testimony. (5/13/11 Tr. 874-77.) Finally, Roman testified regarding the relationships among the key players in the case, including Accenture and SAP, based on his general knowledge of how consultant and software companies work together. (5/12/11 Tr. 913-15.) This testimony provided helpful context for the jury to understand the various relationships among the key entities in the case.

The most serious challenge to Roman's testimony is his comparison of Wellogix's source code to SAP's source code in its SRM and ECC software programs. It is clear that Roman compared Wellogix's source code to both SRM and ECC. (5/13/11 Tr. 903.) Testimony from both Roman and Accenture's expert, Smith, demonstrated that SRM and ECC, although they are separate software products, work together as part of SAP's overall business suite software package. (5/13/11 Tr. 1141-42; 5/18/11 Tr. 1932:15-18.) Smith confirmed that ECC was used by the oil and gas industry in addition to German municipal governments and other organizations. (5/18/11 Tr. 1930.) Roman identified code in ECC that was functionally similar to Wellogix's source code, but did not identify any code in SRM that was similar to Wellogix's source code. (5/13/11 Tr. 912.) However, Roman's identification of functionally similar code in ECC, rather than in SRM, does not render his methods in conducting source code comparison and analysis unreliable.[11] Smith's controverting testimony that Roman's matches were not actually matches and that the matches came from source code only used by German municipal governments was appropriately considered by the jury in terms of the weight to assign to each expert's testimony. (5/17/11 Tr. 1800-01.) Further, given both experts' testimony regarding the interaction between ECC and SRM, Roman's conclusion that SAP had incorporated Wellogix's source code into its key components is not unreliable.

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[11] Accenture cites to certain testimony by Roman to emphasize the point that Roman's analysis does not show any misappropriation of Wellogix's source code in the SRM source code. (5/13/11 Tr. 1152:7-14.) However, the question posed to Roman was among a series of questions intended to highlight Accenture's argument that Accenture itself could have had nothing to do with alleged misappropriation, since Wellogix had shared its intellectual property with SAP directly. (5/13/11 Tr. 1152-53.) Thus, the testimony cited by Accenture does not demonstrate that Roman agreed with the proposition that his analysis of ECC source code is irrelevant to the SRM source code.

Overall, both Wellogix and Accenture had an opportunity to present testimony from experts whose qualifications and methodology met the standards required by the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The various challenges that Accenture raises to Roman's expert testimony were issues appropriately presented to the jury, and were relevant to the weight assigned to Roman's testimony, not to its admissibility. We do not find the admission of Roman's testimony to be prejudicial error and deny Accenture's motion for a new trial on this ground.

G. Other Evidentiary Issues

Accenture also raises two additional issues that it contends merit a new trial. First, Accenture argues that the Court erroneously admitted evidence related to Accenture's work for BP, when it should have given preclusive effect to the arbitral finding that no trade secrets were used in BP's P2P project. Our discussion in Part II, above, outlines why admission of Accenture's role in BP P2P's project was appropriate and not precluded by the arbitral findings. Therefore, this ground does not suffice as a basis for a new trial.

Second, Accenture contends that the Court admitted several BP documents over Accenture's objection that they contained inadmissible hearsay. First, it appears that Wellogix withdrew several of the BP emails, while others were referenced only for a limited purpose that did not involve the truth of the matter asserted within the document. (5/10/11 Tr. 201-08.) Second, with respect to other BP documents, the documents were not offered for the truth of the matter asserted but rather reflected the oil and gas industry's general perception of Wellogix's software offerings. (5/10/11 Tr. 374-75;

5/19/11 Tr. 2130-31.) The Court does not find the admission of these documents to be a sufficient basis to order a new trial.

IV. CONCLUSION

Accenture's Rule 50(b) Renewed Motion for Judgment as a Matter of Law (Doc. 311) is DENIED. Accenture's Motion for New Trial or Remittitur (Doc. No. 312) is GRANTED IN PART AND DENIED IN PART. Wellogix is ordered to elect between consenting to remittitur and holding a new trial.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Case No. 3:08-cv-119

WELLOGIX, INC.,
Plaintiff,
v.
ACCENTURE, LLP,
Defendant.

VERDICT

QUESTION 1

Does Wellogix possess any trade secrets?

A "trade secret" means the whole or any part of any scientific or technical information, design, process, procedure, formula or improvement that has value and that the owner has taken measures to prevent from becoming available to persons other than those selected by the owner to have access for limited purposes. A trade secret must give the owner an opportunity to obtain an advantage over competitors who do not know or use it.

The existence of a patent does not mean that a trade secret exists.

The subject matter of a trade secret must, of course, be secret, and must not be public knowledge in the trade or business. Matters of general knowledge in an industry cannot be a trade secret. Trade secret protection is lost if the secret is disclosed to people who are not obligated to keep it secret.

In determining whether Wellogix has proven by a preponderance of the evidence that it possessed specific, identifiable trade secrets, you may consider the following factors:

(1) The extent to which the information was known outside of Wellogix's business;

(2) The extent to which the information was known by employees and others involved in Wellogix's business;

(3) The extent of measures taken by Wellogix to guard the secrecy of the information;

(4) The value of the information to Wellogix and its competitors;

(5) The amount of effort or money expended by Wellogix in developing the information; and

(6) The ease or difficulty with which the information could be properly acquired or duplicated by others.

The architecture and process flow maps of the eTrans project that other companies took part in developing are not Wellogix trade secrets.

Answer "Yes" or "No."

Answer: Yes

Answer the following question only if you answered "Yes" to Question 1. Otherwise, do not answer the following question.

QUESTION 2

Did Accenture misappropriate Wellogix's trade secrets?

In order to find that Accenture misappropriated Wellogix's trade secrets, you must find each of the following elements by a preponderance of the evidence:

(1) a trade secret exists;

(2) the trade secret was acquired through a breach of a confidential relationship or discovered by improper means;

(3) Accenture used the trade secret without authorization from Wellogix; and

(4) Wellogix suffered damages as a direct and proximate result of such use.

"Use" of a trade secret means commercial use, by which a person seeks to profit from the use of the secret.

Answer "Yes" or "No."

Answer: Yes

Answer the following question only if you answered "Yes" to Question 2. Otherwise, do not answer the following question.

QUESTION 3

By what date should Wellogix, in the exercise of reasonable diligence, have discovered that Accenture misappropriated Wellogix's trade secrets?

Answer with a date (Month, Day, Year).

Answer: May 16th, 2006

Answer the following question only if you answered "Yes" to Question 2. Otherwise, do not answer the following question.

QUESTION 4

Did Accenture commit theft by knowingly copying, or knowingly communicating or transmitting, Wellogix's trade secrets without Wellogix's effective consent?

> A person acts "knowingly" with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist.

Answer "Yes" or "No."

Answer: Yes

Answer the following question only if you answered "Yes" to Question 4. Otherwise, do not answer the following question.

QUESTION 5

On what date did Accenture commit theft of Wellogix's trade secrets?

> Answer with a date (Month, Day, Year).
>
> Answer: August 29, 2006

If you answered "Yes" to Question 2 or 4, then answer the following question. Otherwise, do not answer the following question.

QUESTION 6

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Wellogix for its damages, if any, that were proximately caused by the conduct you found in answer to Question 2 or 4?

You may award compensatory damages only for injuries that Wellogix proves were proximately caused by the allegedly wrongful conduct you found in answer to Question 2 or 4. “Proximate cause” means a cause that was a substantial factor in bringing about an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using the degree of care required of him would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

The damages that you award must be fair compensation for all of Wellogix’s damages, no more and no less. Damages are not allowed as a punishment and cannot be imposed or increased to penalize Accenture. You should not award compensatory damages for speculative injuries, but only for those injuries which Wellogix has actually suffered or that Wellogix is reasonably likely to suffer in the future.

If you decide to award compensatory damages, you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that Wellogix prove the amount of its losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit. You must use sound discretion in fixing an award of damages, drawing reasonable inferences where you find them appropriate from the facts and circumstances in evidence.

A person who claims damages resulting from the wrongful act of another has a duty under the law to use reasonable diligence to mitigate—to avoid or minimize those damages. Wellogix may not recover for any item of damage which it could have avoided through reasonable effort. If you find by a preponderance of the evidence that Wellogix unreasonably failed to take advantage of an opportunity to lessen its damages, you should deny Wellogix recovery for those damages which it would have avoided had it taken advantage of the opportunity.

You are the sole judge of whether Wellogix acted reasonably in avoiding or minimizing its damages. An injured plaintiff may not sit idly by when presented with an opportunity to reduce its damages. However, Wellogix is not required to exercise unreasonable efforts or incur unreasonable expenses in mitigating the damages. Accenture has the burden of proving the damages which Wellogix could have mitigated. In deciding whether to reduce Wellogix's damages because of its failure to mitigate, you must weigh all the evidence in light of the particular circumstance of the case, using sound discretion in deciding whether Accenture has satisfied its burden of proving that Wellogix's conduct was not reasonable.

Wellogix cannot recover lost profits which are largely speculative, as from an activity dependent on uncertain or changing market conditions, or on chancy business opportunities, or on promotion of untested products or entry into

> unknown or unviable markets, or on the success of a new and unproven enterprise.
>
> Do not add mount for interest on damages, if any.

Answer in dollars and cents for damages, if any.

Answer: <u>26,179,725.00</u>

Answer the following question only if you answered "Yes" to Question 2 or 4. Otherwise, do not answer the following question.

QUESTION 7

Do you find by clear and convincing evidence that the harm to Wellogix resulted from malice?

> "Clear and convincing evidence" means the measure of degree of proof that produce a firm belief or conviction of the truth of the allegations sought to be established. Your answer must be unanimous.
>
> "Malice" means a specific intent by Accenture to cause substantial injury or harm to Wellogix.

Answer "Yes" or "No."

Answer <u>Yes</u>

Answer the following question only if you answered "Yes" to Question 7. Otherwise, do not answer the following question.

QUESTION 8

What sum of money, if any, if paid now in cash, should be assessed against Accenture and awarded to Wellogix as exemplary damages, if any, for the conduct found in response to Question 7?

> "Exemplary damages" means an amount that you may in your discretion award as a penalty or by way of punishment.
>
> The law does not require you to award exemplary damages. In making any award of exemplary damages, you should consider that the purpose of exemplary damages is to punish a defendant for shocking conduct, and to deter the defendant and others from engaging in similar conduct in the future. It should be presumed a plaintiff has been made whole by compensatory damages, so exemplary damages should be awarded only if the defendant's misconduct, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.
>
> If you decide to award exemplary damages, you must use sound reason in setting the amount of the damages. Any award of exemplary damages must bear a reasonable relationship to Wellogix's compensatory damages. The amount of an award of exemplary damages must not reflect bias, prejudice, or sympathy toward any party.

Answer in dollars and cents, if any.

Answer: <u>68,200,000.00</u>

APPENDIX F

UNITED STATES DISTRICT COURT
S.D. TEXAS
HOUSTON DIVISION

Case No. 3:08-cv-119

WELLOGIX, INC.,
Plaintiff,
v.
ACCENTURE, LLP,
Defendant.

April 22, 2011

MEMORANDUM AND ORDER

KEITH P. ELLISON, District Judge.

Pending before the Court is Accenture's Motion for Summary Judgment (Doc. No. 210), Accenture's Motion to Exclude Wellogix's Proposed Expert Witness Kendyl Roman (Doc. No. 212), and Accenture's Motion to Dismiss (Doc. No. 206). Upon considering the Motions, all responses thereto, and the applicable law, the Court finds that the Motion for Summary Judgment must be granted in part and denied in part, the Motion to Exclude Wellogix's Proposed Expert Witness Kendyl Roman must be denied, and the Motion to Dismiss must be granted.

I. BACKGROUND

A. Wellogix's Software Offerings

Plaintiff Wellogix, Inc. ("Plaintiff" or "Wellogix") is a software company that, beginning in 1998, offered a variety of software solutions to assist companies to manage complex services. (Doc. No. 210 Ex. 6.) "Complex services" refers to a broad category of a company's business needs. Within the oil and gas industry, "complex services" can refer to services needed by an oil and gas producer, but the specific nature and amount of which are hard to define fully until the service is completed. (Philip Dep. 230:20-24.) The oil and gas industry is generally divided into the exploration and production ("E & P") sector (sometimes referred to as the "upstream" sector) and the refining and marketing ("R & M") sector (sometimes referred to as the "downstream" sector). (Kostial Dep. 30:22-31:17.) "Complex services" in the E & P sector can include tasks such as drilling and completion of oil and gas wells, which in turn requires completion of tasks like cementing and drilling mud. (Philip Dep. 231:5-13.) Wellogix's software solution included functionality called Dynamaps, which were a number of templates that addressed various tasks within the E & P sector, such as cementing, drilling fluids, mud logging, and perforating. (Doc. No. 210, Exs. 6, 9.) In addition, Wellogix offered a functionality called Electronic Field Ticket reconciliation ("eFT" or "eField-Ticket"), which provided a method by which an oil & gas producer could electronically exchange work order and field ticket documentation with a supplier. (Doc. No. 210, Exs. 6, 9; Chisholm 30(b)(6) Dep. 67:9-14.) Another Wellogix software offering was WorkFlow Navigator ("WFN"). (Doc. No. 210, Ex. 6; Chisholm 30(b)(6) Dep. 68:12.)

B. Wellogix's Work with BP America, Inc. on the "eTrans" Project

In 2000, Wellogix's predecessor company approached BP America, Inc. ("BP") about its software offerings for complex services. (Arb. Tr. 156:22-25.) Wellogix conducted a "proof of concept" test of its software with BP to demonstrate the software's ability to procure goods and services electronically. (*Id.* 157:6-11, 165:21-25.) As part of this "proof of concept" test, Wellogix delivered its software to BP. (*Id.* 157:12-14.) Wellogix was largely successful in these demonstrative efforts. (*Id.*)

In 2004, Wellogix and BP began work on a project called "eTrans," which was an attempt to implement an "electronic procurement" or a "purchase to pay" process in which procurement of complex services occurred electronically instead of using paper invoices. (Barnes Dep. 11:14-18, 12:17-25; Arb. Tr. 177:2-3.) Wellogix and BP entered into a letter of intent in 2004 regarding the eTrans project, followed by a Master Software Licensing Agreement ("MSLA"). (Arb. Tr. 158:5-9.) The MSLA was executed on April 28, 2004. (Doc. No. 210, Ex. 32.) The MSLA contained a strict confidentiality/non-disclosure provision wherein BP agreed not to disclose Wellogix's software or licensed material to any third party. (*Id.*) BP's eTrans project involved not only Wellogix, but also a number of other companies, such as SAIC, Obsidian, New Millennium, and IBM. (Barnes Dep. 12:13-16.)

The eTrans Project incorporated the products of Wellogix's "proof of concept" testing with BP, including eField-Ticket, electronic invoicing, and WorkFlow Navigator, and put them into the eTrans project. (Arb. Tr. 157:22-25.) The eTrans project did not, however, involve the use of Wellogix's Dynamaps or templates for complex services. (*Id.* 1103:21-22.) During the eTrans project, Wellogix provided its software to BP through an Internet portal. (*Id.* 1125:23-1126:2.) Wellogix stored its source and object code for WorkFlow Navigator, eField-Ticket, and Dynamps behind a firewall that BP never penetrated. (*Id.* 1126:6-11.)

BP implemented the eTrans project in two operations centers: Durango, Colorado and Farmington, New Mexico. (Barnes Dep. 13:10-11.) BP's Project Manager for the eTrans project considered the eTrans project to be successful. (*Id.* 13:13-18.) However, the eTrans project was ultimately terminated at the end of 2005 due to cost and internal integration issues. (Doc. No. 210, Ex. 15.)

C. Wellogix's Relationship with Accenture and SAP

Accenture is a global consulting firm that assists its oil and gas company clients in various ways, including the implementation of third-party software. (Arb. Tr. 72:9-11.) Beginning in 2000, Wellogix and Accenture entered into six different agreements reflecting their desire to create a marketing alliance to target potential customers, to submit joint proposals for submission in response to companies' requests for proposals, to share confidential information with each other, and to allow Accenture to license Wellogix's software. In another agreement, executed after Accenture received a contract to implement certain software at Marathon Oil Company, Accenture subcontracted with Wellogix for provision of Wellogix's software, customer service, and technical expertise during the implementation process. (Doc. No 222 Exs. 29-34.)

SAP America, Inc. and SAP A.G. (collectively, "SAP") are a global business accounting software company that offers a software solution called Supplier Relationship Management ("SRM"). (Arb. Tr. 71:23-25.) SRM allows companies to handle a large number of business processes, including accounting, human resource, financial planning and plant maintenance. (*Id.* 154:5-9.) From 2000 to 2005, SAP did not have electronic complex services functionality. (*Id.* 73:19-22.) SAP approached Wellogix to be its complex services partner and to fill the complex services solutions gap in SAP's then-current software. (*Id.* 78:4-18.) At one point, SAP's level of interest in Wellogix reached the level where SAP considered becoming an owner of Wellogix. (*Id.* 191:18-22.) SAP visited Wellogix's office to conduct due diligence regarding Wellogix's financial and technical background. (*Id.* 191:23-192:9.) SAP and Wellogix executed a NetWeaver Cooperation Agreement in March 2005. (Doc. No. 210 Ex. 30; Arb. Tr. I 189:21-25.) Under this agreement, Wellogix and SAP agreed to integrate Wellogix's complex services software into SAP's NetWeaver software platform. (Doc. No. 210 Ex. 30.)

D. Accenture's Relationship with SAP

In early 2004, Accenture and SAP began developing together a software application known as "xIEP." (Kostial Dep. 20:10-11, 34:2.) "xIEP" referred to an "integrated exploration and production" application that interfaced with SAP's software using SAP's NetWeaver software platform. (*Id.* 29:8-9, 30:3-11.) Accenture and SAP aimed xIEP at the E & P sector of the oil and gas industry. (*Id.* 30:21.) They developed two scenarios for xIEP: asset maintenance (i.e. maintaining an oil producing well or platform) and managing the life cycle of the asset. (*Id.* 34:16-35:13.) The third scenario, which was never developed, would have involved complex services. (*Id.* 35:23-25.) If the third scenario had been developed, Accenture intended to include Wellogix's complex services software solution as an integrated part of xIEP. (*Id.* 133:16-19.)

Accenture and SAP ceased development of xIEP in mid-2006 because SAP's NetWeaver platform did not function. (*Id.* 34:5-11.) BP never used xIEP or participated in the development of it. (Arb. Tr. 1192:4-5.)

E. BP's Global E & P P2P Project

In early 2004, while the eTrans project was underway, BP began developing a project called "Global E & P P2P." (Arb. Tr. 176:25, 182:11-13.) The Global E & P P2P project differed from eTrans in that eTrans focused on complex services while Global E & P P2P covered the entire supply chain of all goods and services for all business units. (*Id.* 177:2-5.)

In 2004, BP hired Accenture to be the lead integrator of the Global E & P P2P project, that is, to select the software company that would be the platform of BP's P2P project. (*Id.* 193:19-25.) The three companies that were considered as providers of the software platform were SAP, Maximo and Ariba. (*Id.* 178:3-4.) Wellogix would not have been capable of providing a software platform for the entire P2P project, but believed that it would provide the complex services component for the P2P project. (*Id.* 177:14-15, 177:19-23.) SAP submitted its bid to provide the software platform for the Global E & P P2P project to BP in April 2005. (*Id.* 1117:16-17.) In May 2005, pursuant to their partnering relationship, Wellogix and SAP made a joint presentation to BP during the BP's selection process for a software platform. (*Id.* 186:21-25; 1118:4-7.) During the May 2005 presentation, Wellogix described its eField-Ticket software, supplier collaboration capability for complex services, and complex services templates. (*Id.* 1118-1123.)

In the latter part of 2005, Wellogix first heard about the possibility that it might not be included in the building of the complex services solution of the Global E & P P2P project. (*Id.* 199:13-15, 200:17-20.) Wellogix learned that Accenture and SAP were planning to develop the complex services solution themselves. (*Id.* 199:20-22.)

BP began implementing Global E & P P2P in September 2005. (*Id.* 200:17-18.) Ultimately, Wellogix was not on the transition team that transitioned from eTrans to P2P. (*Id.* 181:21-23; 183:6-8; 1129:7-9.) During the transition process, information from eTrans was uploaded onto a website called SharePoint. (*Id.* 1185:18-20.) The eTrans SharePoint site contained various types of flow diagrams, implementation information for deployment, and interface design specifications designed by the eTrans team. (*Id.* 402-403.) At least some computer language and source code from eTrans was also on the SharePoint site. (*Id.* 406:21-407:3, 418:5-6.) BP allowed certain Accenture and SAP employees to access the SharePoint site, where BP knew many documents related to the eTrans project were stored, for the purpose of extracting lessons learned. (*Id.* 1341:15-1342:11.)

The Global E & P P2P Project ended in approximately October 2007, as BP began developing the E & P Backbone project to handle purchase to pay in its E & P sector going forward. (*Id.* 1190:16-17.)

F. BP's Backbone Project

In March 2008, BP implemented the Backbone project. (*Id.* 1190:22.) BP was assisted in the Backbone project by KPMG. (Mahmood Dep. 25:4-10.) KPMG designed the architecture for Backbone, but did not use any portion of BP's E & P P2P project in developing Backbone. (*Id.* 29:10-24, 30:1-5.)

G. Wellogix Files Suit Against BP, Accenture, and SAP

Wellogix filed suit against BP, Accenture and SAP in 2008. SAP was dismissed from the case due to improper venue. (Doc. No. 54.) Pursuant to a stipulation by the parties, Wellogix's action against BP was severed from the case against Accenture. (Doc. Nos. 106, 107.) Wellogix and BP agreed to arbitrate the claims between them, with Judge Keith P. Ellison acting as sole arbitrator. (Doc. No. 109.) Wellogix and Accenture agreed to proceed with a civil action in this Court. Wellogix's claims for relief against Accenture are: (1) breach of fiduciary duty; (2) aiding and abetting breach of fiduciary duty; (3) tortious interference with existing contracts; (4) tortious interference with prospective business relations; (5) misappropriation of trade secrets; (6) theft; (7) breach of confidence and trust; and (8) conspiracy to commit the alleged torts. (Doc. Nos. 110, 126, 205.)

H. Wellogix-BP Arbitration

From June 22, 2010 through July 2, 2010, the private arbitration between Wellogix and BP was held. The arbitrator's findings of fact and conclusions of law were issued in August 2010 (the "Arbitration Order"). Key among the Arbitration Order's findings of fact were the following items: (1) BP's eTrans project SharePoint site contained various types of information designed by the eTrans team; (2) At least some computer language and source code from eTrans was on the SharePoint site; (3) BP allowed certain Accenture and SAP employees access to the eTrans site; (4) eTrans, Global E & P P2P, and Backbone have similar or identical elements in terms of architecture and process flow, at the more general levels; (5) no expert could conclusively state that Wellogix source or object code was being used in BP's P2P or Backbone programs; and (6) at some point during 2000 to 2006, Accenture and SAP did develop complex services templates. (Arb. Order ¶¶ 40, 41, 42, 46, 47, 53.)

With respect to conclusions of law, the Arbitration Order concluded that BP had committed a breach of contract by disclosing Wellogix's confidential information on the SharePoint site, to which Accenture and SAP had access, in violation of the MSLA. With respect to the misappropriation of trade secrets claim, the Arbitrator Order held that the evidence did not demonstrate that BP used or was using trade secrets belonging exclusively to Wellogix. The evidence failed to demonstrate that the process flow maps and architectural documents developed during the eTrans project were the trade secrets of Wellogix. Wellogix's source and object code, in contrast, was kept substantially secret and constituted a trade secret. However, no expert could conclusively testify as to whether Wellogix's source and object code could be found in SAP SRM 4.0 or 5.0. Though it appeared that SAP offered complex service functionality rivaling Wellogix's functionality in SAP SRM 7.0, it was undisputed that SAP SRM 7.0 was not used by BP.

II. PRECLUSIVE EFFECT OF ARBITRATION

Accenture contends that the findings contained in the Arbitration Order are binding on Wellogix in this civil action under the doctrine of issue preclusion. Wellogix argues that issue preclusion is not applicable because the issues being litigation in the present action are not identical to the issues addressed in the prior arbitration.

Under the doctrine of collateral estoppel, or issue preclusion, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude litigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). Collateral estoppel can be used defensively—a plaintiff may be estopped from asserting a claim that the plaintiff has previously litigated and lost against another defendant—or can be used offensively—a plaintiff seeks to estop a defendant from relitigating issues that the defendant previously litigated and lost against another plaintiff. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 328, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). "Collateral estoppel applies when, in the initial litigation, (1) the issue at stake in the pending litigation is the same, (2) the issue was actually litigated, and (3) the determination of the issue in the initial litigation was a necessary part of the judgment." *Harvey Specialty & Supply, Inc. v. Anson Flowline Equip. Inc.*, 434 F.3d 320, 323 (5th Cir.2005).

This is a case of defensive non-mutual collateral estoppel. Accenture argues that Wellogix raised trade secret misappropriation and theft claims against BP in the arbitration that are virtually identical to the claims raised against Accenture in this action. Because Wellogix lost its claims in the arbitration, Accenture contends that the arbitration's findings against Wellogix have preclusive effect in the present action. Wellogix argues that there is not complete identity of issues between the claims addressed in the arbitration and the claims presented here and that additional evidence gathered during discovery after the arbitration substantiates Wellogix's claims against Accenture.

Wellogix asserted the following claims against BP during the arbitration: (1) breach of contract; (2) misappropriation of trade secrets; (3) theft; and (4) tortious interference with an existing contract. Wellogix's currently asserts the following claims against Accenture: (1) misappropriation of trade secrets; (2) theft; (3) breach of fiduciary duty; (4) aiding and abetting breach of fiduciary duty; (5) tortious interference with existing contracts; (6) breach of confidence and trust; and (7) conspiracy.[1] As an initial matter, we note that Wellogix's claims against Accenture of breach of fiduciary duty, aiding and abetting breach of fiduciary duty, breach of confidence and trust, and conspiracy were not raised vis-à-vis BP during the arbitration. Therefore, any issues of law relating to these four claims and that are presented in the current proceeding will not be precluded by findings made in the arbitration. As to issues of fact that arose during the arbitration and that are relevant to these four claims, the Court will have to address each issue of fact as it arises in the motion for summary judgment and at trial, apply the elements of collateral estoppel, and determine whether the particular issue of fact must be accorded preclusive effect.

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[1] Wellogix states that it will no longer pursue its claim of tortious interference with prospective business relations. (Doc. No. 222 at 3 n. 1.) Therefore, we will not analyze whether this claim is precluded by the findings made during the arbitration.

With respect to Wellogix's claim of misappropriation of trade secrets, Wellogix was required to prove in the arbitration that: (1) it possessed a trade secret; (2) that BP used or disclosed the trade secret after either improperly obtaining it or obtaining via a breach of a confidential relationship; and (3) that Wellogix was injured by the use or disclosure. The Arbitration Order held that there was no trade secret misappropriation because there was no evidence that BP used Wellogix's trade secrets in its Global E & P P2P project. The issue presented in the arbitration, which was whether BP used Wellogix's trade secrets, is not identical to the one presented here, which is whether Accenture used Wellogix's trade secrets. Evidence of BP's use could be found only in BP's Global E & P P2P and Backbone projects, while evidence of Accenture's use could be found in Accenture's internal documents, the xIEP application, and, to the extent that Accenture's unlawfully disclosed Wellogix's trade secrets to SAP, in SAP's software. The Arbitration Order did not focus on Accenture's use or disclosure apart from the Global E & P P2P project. Thus, we do not accord preclusive effect in this action to the Arbitration Order's finding that BP did not use Wellogix's trade secrets insofar as this holding is used to absolve Accenture of liability for trade secret misappropriation.

However, with respect to the issue of whether a trade secret exists, we do give preclusive effect to our finding that Wellogix's trade secrets do not consist of the "architecture and process flow of the eTrans project." (Arb. Order at 9.) We reached this finding because it appeared "that several companies took part in developing these maps." (*Id.*) To the extent that Wellogix claims in this action that the architecture and the process flow documents of the eTrans project constitute a trade secret, this issue was at stake in the arbitration, was actually litigated during the arbitration, and was necessary to the holding that there was no evidence of trade secret misappropriation. Further, Wellogix has had a full and fair opportunity to litigate this issue. As discussed in more detail in the Court's Memorandum and Order on Wellogix's Motion to Compel (Doc. No. 231), Wellogix had an opportunity to raise any concerns it had with BP's production of electronic data and did not timely do so. Wellogix cannot now rely on the possibility that it may not have received all of BP's electronic data to argue that it did not have a full and fair possibility to litigate the issue, especially when its expert testified without issue at the arbitration about BP's purported misappropriation of Wellogix's trade secrets. Finally, even if Wellogix was unable to decipher all of BP's electronic data, it is unclear how additional information would have changed the Arbitration Order's finding that the contribution of several companies to the architecture and process flow charts prevented these items from being Wellogix's trade secrets.

Wellogix also contends that it claims ownership over the "core process flow" documentation that it prepared and provided to Accenture in June 2005 regarding the way in which Wellogix Workflow Navigator and eField-Ticket could be integrated with SAP's software. (Doc. No. 222 at 5 n. 2; Doc. No. 222 Ex. 22.) It is unclear whether this document was presented as evidence during the arbitration. Even if it was presented, this document does not appear to be part of the "architecture and process flow [documents] of the eTrans project," which we have held are not Wellogix's trade secrets. Rather, this document was sent by Wellogix to Accenture (which did not work on the eTrans project) in June 2005, when Accenture was heavily involved in BP's Global E & P P2P project.

Moreover, this document does not appear to be the product of several companies' collaboration, but appears to have been produced only by a Wellogix employee. We cannot conclude that the Arbitration Order prevents Wellogix from arguing that the June 2005 "core process flow" documentation is a Wellogix trade secret.

With respect to Wellogix's claim of theft of trade secrets, the Arbitration Order's finding that BP did not engage in theft will not be given preclusive effect insofar as it is used to claim that Accenture did not engage in theft of trade secrets. Wellogix's theft of trade secrets claim is based on the same evidence as its trade secret misappropriation claim. Therefore, we reach this conclusion for the same reasons we do not accord preclusive effect to the Arbitration Order's finding regarding BP's misappropriation of trade secrets. As for Wellogix's theft of property and theft of services claims against Accenture, we need not rule on whether they are precluded by the Arbitration Order because we grant summary judgment to Accenture on these claims for reasons independent from the arbitration's findings.

With respect to Wellogix's claim of tortious interference with existing contracts, the claim presented in the current litigation is not identical to the claim presented in the arbitration. The arbitration focused on whether BP—through one of its employees—tortiously interfered with its own contracts with Wellogix. Here, however, we are asked to focus on whether Accenture—through its employees—tortiously interfered with Wellogix's contracts with BP and SAP. The factual and legal questions to resolve are quite different from those in the arbitration. Therefore, we will not give preclusive effect to the Arbitration

Order's finding that BP did not commit tortious interference with an existing contract insofar as this finding is used to argue that Accenture did not commit tortious interference with an existing contract.

III. MOTION TO EXCLUDE KENDYL ROMAN AS EXPERT WITNESS

Accenture has moved to exclude Wellogix's expert witness Kendyl Roman ("Roman") on a number of grounds, including his qualifications and the reliability of his expert opinions.

A. Legal Standard

Federal Rule of Evidence 702 provides for the admission of expert testimony that assists the trier of fact to understand the evidence or to determine a fact in issue. A court is charged with a "gatekeeping function" to ensure expert testimony is both reliable and relevant. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Reliability is analyzed under Rule 702, which requires that: (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. Fed.R.Evid. 702. Experts are permitted to render opinions even if based on inadmissible evidence so long as the inadmissible evidence is of the type reasonably relied upon by experts in that field. *See* Fed.R.Evid. 703; *Daubert*, 509 U.S. at 595, 113 S.Ct. 2786. Inadmissible facts or data that serve as a basis for the expert's opinion may not be disclosed to the jury by the proponent of the expert testimony unless a court determines "that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." Fed.R.Evid. 703.

Further, the expert witness must be qualified "by knowledge, skill, experience, training, or education . . . ." Fed.R.Evid. 702. A court must exclude an expert witness "if it finds that the witness is not qualified to testify in a particular field or on a given subject." *Wilson v. Woods*, 163 F.3d 935, 937 (5th Cir.1999); However, "Rule 702 does not mandate that an expert be highly qualified in order to testify about a given issue. Differences in expertise bear chiefly on the weight to be assigned to the testimony by the trier of fact, not its admissibility." *Huss v. Gayden*, 571 F.3d 442, 452 (5th Cir.2009) (citing *Daubert*, 509 U.S. at 596, 113 S.Ct. 2786).

The party seeking to rely on expert testimony bears the burden of establishing, by a preponderance of the evidence, that all requirements have been met. *Daubert*, 509 U.S. at 593, n. 10, 113 S.Ct. 2786; *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 276 (5th Cir.1998).

B. Analysis

1. Experience in Oil and Gas Industry

Accenture first challenges Roman's qualifications on the basis that he does not have experience in the oil and gas industry, and specifically, in the electronic procurement of complex services. As a result, Accenture argues, Roman is not qualified to testify that Wellogix's purported trade secrets were somehow unique or otherwise qualify as a trade secret because he does not know whether these functionalities were achievable with existing software on the market. Wellogix responds that Roman is qualified to render an opinion.

The opinions proffered in Roman's second expert report fall within one of two categories: (1) those that discuss how Wellogix's software constitutes trade secrets; and (2) those that compare Wellogix's source code and software to BP's P2P and Backbone software and to SAP's software. As to the first category of opinions, Roman mainly discusses the various characteristics and functions of Wellogix's software that he claims should qualify as trade secrets. He does not offer opinions about the state of the relevant field in the early 2000s, nor whether other companies offered similar functions in their software. As such, Roman does not attempt to testify broadly about a field—i.e., oil and gas, or procurement within the oil and gas sector—in which he has little to no experience. Rather, Roman draws upon his experience in the software development field to explain to a layperson how various components and characteristics of Wellogix's software function and why certain components and aspects might be considered a trade secret.

Regarding the second category of opinions, Roman is qualified through his years of experience as a software developer and forensic analyst to compare, analyze, and opine on the resulting matches between Wellogix source code and software, on one hand, to BP's and SAP's software and source code, on the other.

The cases cited by Accenture, while relevant, are not persuasive. In *Taylor Pipeline Cons., Inc. v. Directional Rd. Boring, Inc.*, 438 F.Supp.2d 696 (E.D.Tex.2006), the court held that a proposed expert with over 30 years of experience in the construction industry as a contractor could testify regarding the quality of construction methods, but could not testify regarding construction law topics, such as the obligations of parties to construction contracts. In *Kozak v. Medtronic, Inc.*, 512 F.Supp.2d 913, 918-19 (S.D.Tex.2007), the court held that an orthopedic surgeon with extensive training in biomedical engineering, experience designing spinal implant products, and a history of providing advice regarding the market for such products was unqualified to offer a future damages model. The court noted that, though the expert had experience generally in marketing spinal products, he did not have any experience calculating future damages or royalties based on projected future sales and market adoption/penetration rates. The connecting line between these cases is that an expert, who admittedly had years of experience performing a specific type of activity, was being asked in the case at issue to perform an admittedly new type of activity (i.e. constructing a damages model) or testify about a new area of knowledge (i.e. construction law). Here, however, Roman is providing an opinion based on a forensic analysis and comparison of software—an activity that he has performed several times in the past as an expert. In addition, he is parsing Wellogix's software into understandable terms for a layperson, an activity that he is able and qualified to do considering to his history working with various software programs. We deny Accenture's motion to exclude Roman's expert testimony on these grounds.

2. Experience with SAP Software

Accenture next argues that Roman is unqualified to render opinions regarding SAP software because he has no experience with SAP software directly and no experience with ABAP, the programming language used to write SAP source code. Wellogix responds that Roman has sufficient experience with SAP software and that his opinion is based upon sufficient information and analytical tools.

SAP uses its own programming language, ABAP, to write its software. Roman testified in his deposition that he taught himself how to read and write ABAP source code, but has not taken an instructor-led course in ABAP. (Roman Dep. 141:15-143:24.) However, Roman also testified that he compared Wellogix and SAP source code by using a software program that compares the source code and generates any literal and non-literal matches between the source codes. (Roman Dep. 87:23-88:7; 231:4-232:12.) The comparison software can process the programming languages at issue here. (Roman Dep. 236:10-17; 238:12-23; 239:17-240:7.) Roman was required to review the matches generated by the source code and to analyze them to determine whether they indicated copying. (Roman Dep. 243:7-244:12.) Roman's ability to analyze the matches admittedly requires knowledge of ABAP, but, more importantly, requires an ability to compare two different programming languages with each other and determine whether matches in the source code are significant. Roman possesses this latter experience and, from our reading of his deposition, possesses enough of the former to conduct the necessary comparison. Accenture's real issues with Roman's expert report relate to his conclusions, rather than his level of experience with ABAP, and should be addressed through cross-examination. *See MGE UPS Sys. v. Fakouri Elec. Eng'g, Inc.*, 2006 WL 680513, *3-4, 2006 U.S. Dist. LEXIS 14142, *11-*12 (N.D.Tex. Mar. 14, 2006) (experts in computer software need not be experts in electrical engineering in order to testify about software purportedly developed through electrical engineering principles).

The cases cited by Accenture do not persuade us that exclusion of Roman's expert testimony is necessary due to his purported unfamiliarity with ABAP. The

Fifth Circuit upheld the exclusion of testimony in a bankruptcy case where a party proffered as an expert the president and owner of a seafood supply company in order to establish the ordinary course of business in the baked goods industry. *In re SGSM Acquisition Co., LLC*, 439 F.3d 233, 240-41 (5th Cir.2006). The Fifth Circuit noted that "it is certainly conceivable that a fellow businessman and DSD supplier like Stephens could have provided relevant testimony for Leidenheimer despite his lack of personal involvement in the baked goods industry." *Id.* at 241. However, the expert conceded that he did not have the necessary knowledge regarding normal terms of credit for baked goods vendors. This case does not require us to exclude Roman, and, in fact, suggests that Roman can testify in matters relating to ABAP as long as his testimony is supported by sufficient information. In another Fifth Circuit case, the court upheld the exclusion of a mechanical engineer who attempted to testify regarding failures in an automobile seat belt restraint system despite never having any academic or professional experience in automobile design, manufacture, air bags, or restraint systems. *Lofton v. Gen. Motors Corp.*, 33 F.3d 1379, No. 93-5590, 1994 WL 487251, at *3 (5th Cir. Aug. 19, 1994). Here, Roman has broad experience at the general level of computer design and programming in various programming languages and computer systems, and has developed experience with ABAP specifically. We decline to exclude Roman's expert opinion on these grounds.

3. Reliability of Opinions

Accenture contends that Roman's methodology is unreliable because he is unable to testify regarding how his proprietary software matching tool worked and is unable to identify the standard tool used in the software analysis.

Roman testified that, in conducting the forensic review and analysis of source code, he used (1) a proprietary software tool; and (2) a standard took for indexing the source code. (Roman Dep. 87:25-88:7.) With respect to the proprietary tool, Roman testified that this was available on his company's website. (Roman Dep. 233:13-14.) Contrary to Accenture's argument, Roman described in his deposition how his proprietary tool worked. He testified that the proprietary software tool included a number of tools within it, including a side-by-side comparison tool (that is the subject of and explained in one of Roman's patents) and a tokenizer that parses the source code to identify meaningful tokens. (*Id.* 232:15-233:9.) He described how he and his colleagues had come up with the list of files to input into the tools, and how the tool generated percentages associated with the matches between the source code. (Roman Dep. 236:10-240:7.) Roman did not misrepresent that the proprietary tool would automatically identify identical code, but clearly stated that identification of "functionally identical" code (as opposed to literally identical code) was a "manual process." (Roman Dep. 237:25.) Roman never offered an opinion in his report or his testimony that there was 98.7% identity between Wellogix's source code and SAP's source code; rather, this was an assertion made by Wellogix's counsel in their responsive briefing. Ultimately, Accenture's arguments are that Roman's conclusions are unreliable because they contradict Accenture's expert's conclusions, which is an insufficient basis for excluding expert testimony. *See Walker v. Soo Line R.R. Co.*, 208 F.3d 581, 588-89 (7th Cir.2000). Based on Roman's qualifications and his explanations of his methodology, we are satisfied that his opinions are sufficiently reliable and that he applied the principles and methods reliably.

With respect to the standard tool, Roman testified that one of his employees would know the name of the tool. (Roman Dep. 88:8-14.) During the Court's hearing regarding this motion on March 31, 2011, Wellogix's counsel represented that Roman would provide Wellogix with the name of the standard tool. Unless Wellogix has failed to turn over the name of the standard tool to Accenture, we decline to exclude Roman's testimony on these grounds.

4. Evidentiary Basis for Roman's Opinions

Accenture argues that there is no evidentiary basis for Roman's opinions regarding misappropriation because he cannot identify any Accenture employee who had access to Wellogix's source code or any evidence that Accenture provided input into SAP's source code. In fact, Roman's Second Expert Report cites several documents that provide a basis for his assertions that Accenture employees had access to Wellogix's intellectual property via a SharePoint site and through direct communications from Wellogix to Accenture. (Roman Second Expert Report ¶¶ 276-281, 298, 313.) His expert report also cites to documents written by Accenture employees indicating that they were involved in SAP's software development efforts in Germany and transferred information to SAP. (*Id.* ¶ 274.) If Accenture believes that reliance upon these documents is misplaced, it may highlight the issues during cross-examination. We deny Accenture's motion to exclude Roman's opinion on these grounds.

5. Roman's Analysis of SRM and ECC Software

The final basis on which Accenture moves to exclude Roman's testimony is his purported failure to analyze the software that is actually at issue in this case. Accenture contends that Roman did not analyze SAP's SRM software, which the key software at issue, and instead analyzed SAP's ECC 6.0 software, which is not at issue in the case.

Roman has described SAP's software offerings as including a product called Supplier Relationship Management ("SRM"), which is part of SAP's Business Suite and is used to pay supplier invoices. (Roman Second Expert Report ¶ 141.) In addition, SAP provides software called ERP Central Component ("ECC"), which operates as the core "engine" of SAP business software. (*Id.* ¶ 144.) Roman testified that, in conducting his forensic analysis and comparison, he obtained SAP source code for "an all-in-one package that includes EEC and SRM." (Roman Dep. 71:18-19.) In response to questioning by Accenture's counsel, Roman confirmed that the SAP source code he examined was from a "standard SAP/SRM distribution" and a "standard distribution of SAP's ECC software." (*Id.* 89:1-9, 91:8-10.) When Roman identified the portions of SAP's source code that were similar to Wellogix's source code, the SAP source code containing the matches were from SAP's ECC software. (*Id.* 10:11-22.) Roman states that the ECC software was SAP's "core functionality," and that source code integrated into the core functionality made it available to SAP's SRM software as well as other SAP software. (*Id.* 258:20-259:5.)

This evidence demonstrates that Roman analyzed both SRM and ECC, and not just ECC as Accenture contends. Though Roman's report found similarity between ECC and Wellogix's source code, and not between SRM and Wellogix's source code, Roman also stated that the functionality arising from ECC's source code would be made available to SRM. Roman's opinion was not based on a faulty analysis or an analysis of completely irrelevant data. If Accenture wishes to challenge Roman's reliance on ECC to support his opinion that Wellogix and SRM contained similarities, or the significance of Roman's findings with respect to ECC, it can do so on cross-examination. These issues go to the weight of Roman's opinion and not its admissibility. We decline to exclude Roman's opinion on these grounds. In sum, we deny Accenture's motion to exclude Roman as an expert.

IV. SUMMARY JUDGMENT LEGAL STANDARD

A motion for summary judgment requires the Court to determine whether the moving party is entitled to judgment as a matter of law based on the evidence thus far presented. Fed.R.Civ.P. 56(c). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Kee v. City of Rowlett*, 247 F.3d 206, 210 (5th Cir.2001) (quotations omitted). A genuine issue of material fact exists if a reasonable jury could enter a verdict for the non-moving party. *Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 902 (5th Cir.2000). The party moving for summary judgment must demonstrate the absence of a genuine issue of material fact but need not negate the elements of the nonmovant's case. *Exxon Corp. v. Oxxford Clothes, Inc.*, 109 F.3d 1070, 1074 (5th Cir.1997). If the movant meets this burden, then the nonmovant is required to go beyond its pleadings and designate, by competent summary judgment evidence, the specific facts showing that there is a genuine issue for trial. *Id.* The Court views all evidence in the light most favorable to the non-moving party and draws all reasonable inferences in that party's favor. *Id.* Hearsay, conclusory allegations, unsubstantiated assertions, and unsupported speculation are not competent summary judgment evidence. F.R.C.P. 56(e)(1); *See, e.g., Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir.1996), *McIntosh v. Partridge*, 540 F.3d 315, 322 (5th Cir.2008); *see also Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir.1994) (noting that a non-movant's burden is "not satisfied with 'some metaphysical doubt as to the material facts.'" (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986))).

V. ANALYSIS

Accenture has moved for summary judgment on all of the claims alleged in Wellogix's third amended complaint. We address each of these claims below.

A. Misappropriation of Trade Secrets

Under Texas law, a claim of trade secret misappropriation requires a plaintiff to show that (a) a trade secret existed; (b) the trade secret was acquired through a breach of a confidential relationship or discovered by improper means; and (c) use of the trade secret without authorization from the plaintiff. *Phillips v. Frey*, 20 F.3d 623, 627 (5th Cir.1994) (citing cases); *Avera v. Clark Moulding*, 791 S.W.2d 144, 145 (Tex.App.-Dallas 1990, no writ.). The word "use," as it appears as an element of this offense, has been equated with "commercial use," and has been liberally defined to include both the sale of the trade secrets themselves, as well as the "commercial operation" of those trade secrets within profit-seeking endeavors. *See Metallurgical Indus. Inc. v. Fourtek, Inc.*, 790 F.2d

1195, 1205 (5th Cir.1986); *Global Water Group, Inc. v. Atchley*, 244 S.W.3d 924, 930 (Tex.App.-Dallas 2008, pet. denied). Recently, the Fifth Circuit has noted with approval the even more liberal construction of the term "use" contained in the Restatement (Third) of Unfair Competition Section 40: "[a]s a general matter, any exploitation of trade secrets that is likely to result in injury to the trade secret owner or enrichment to the defendant is "use" under this Section." *General Universal Systems, Inc. v. HAL, Inc.*, 500 F.3d 444, 450-52 (5th Cir.2007). We find that there are genuine issues of material fact with respect to all of the elements of the trade secret misappropriation claim.

1. Existence of Trade Secret

Wellogix has raised a fact issue as to whether its source and object code should be accorded trade secret protection. As the Arbitration Order notes, Wellogix kept its object and source code substantially secret. Even though Wellogix disclosed its object and source code to at least three companies without first obtaining a written confidentiality agreement, all of these disclosures appear to be in furtherance of the parties' economic interests. In such situations, Wellogix's object and source code may still qualify for trade secret protection. *See Phillips*, 20 F.3d at 631-32 (disclosure of trade secret without protection of express confidentiality agreement not fatal to trade secret protection where disclosure occurred during sale negotiation); *Metallurgical Industries, Inc.*, 790 F.2d at 1200-01 (limited disclosure made to further holder's economic interests does not necessarily destroy trade secret protection). In addition, Wellogix has raised a fact issue as to whether the "process workflow" for Wellogix software's integration with SAP software should be considered a trade secret. *See*

Mabrey v. SandStream Inc., 124 S.W.3d 302, 311 (Tex.App.-Fort Worth 2003, no pet.) (business models related to telecommunications architecture are trade secrets); (Doc. No. 222 Ex. 22.).

2. Use of Trade Secret

We find that there are genuine issues of material fact with respect to whether Accenture used Wellogix's trade secrets to (1) develop complex services templates for BP, (2) develop xIEP with SAP, or (3) assist SAP to enhance SRM functionality. As to the first type of use, Wellogix has submitted evidence that Accenture developed complex services templates for BP. (Doc. No. 222 Ex. 16, 18, 19, 21.) As to the second and third types of use, Wellogix has submitted evidence that Accenture may have used Wellogix's trade secrets during its work with SAP. In at least one instance, Wellogix transmitted a "process workflow" document to Accenture which contained information about how its software could be integrated with SAP's software. (Doc. No. 222 Ex. 22.). In addition, during the time that Accenture was assisting BP to implement Global E & P P2P and had access to source code on the eTrans SharePoint site, Accenture was also working with SAP to develop the xIEP application and to enhance SRM functionality. On one hand, Accenture's employee Kostial states that scenario 3 of xIEP (development of complex services templates) was never developed. (Kostial Dep. 35:23-24, 179:6-7.) This statement is contradicted by other summary judgment evidence that information was transmitted to SAP in order for SAP and Accenture to develop scenario 3. (Doc. No. 222 Ex. 15 at 1). Even though xIEP may not have been piloted, deployed, or implemented, Accenture's purported use of Wellogix's source or object code during xIEP's development can constitute a commercial use.

"Any misappropriation of trade secrets, followed by an exercise of control and domination, is considered a commercial use." *Garth v. Staktek Corp.*, 876 S.W.2d 545, 548 (Tex.App.-Austin 1994, writ dism. w.o.j.) (citing *University Computing Co. v. Lykes—Youngstown Corp.*, 504 F.2d 518, 542 (5th Cir.1974)). Finally, with respect to the third type of use, enhancing SAP's SRM to incorporate Wellogix's trade secrets, there is evidence that SRM's ECC core functionality, which feeds into SAP SRM, contains the same code as Wellogix's code. (Roman Dep. 258:20-259:5; Doc. No. 222 Ex. 3 (Roman Dep. Exs. 920A, 920B, 920C); Roman Second Expert Report at ¶¶ 354-57.) Thus, we find that there are genuine issues of material fact with respect to Accenture's "use" of Wellogix's trade secrets during and in Accenture's work for BP, Accenture's work on xIEP, and Accenture's work to enhance SRM functionality.

3. Acquisition of Trade Secret

There are genuine issues of material fact with respect to both whether Accenture acquired Wellogix's trade secrets by a breach of a confidential relationship or through improper means. Regarding the confidential relationship, it is clear that Wellogix and Accenture entered into six agreements with each other, each containing confidentiality provisions. These agreements establish that a confidential relationship existed between the two companies. *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 199 (Tex.App.-Fort Worth 2005, no pet.) (confidentiality agreement between parties supported finding of confidential relationship between parties). Further, there are genuine issues of material fact with respect to the type of information Wellogix disclosed to Accenture pursuant to these agreements, and whether this information later found its way into the complex services templates developed by Accenture, the xIEP application developed by Accenture and SAP, or enhancements to SAP SRM functionality made by incorporating Wellogix's source code into SAP's ECC core functionality. (Doc. No. 222 Ex. 22; Roman Dep. 258:20-259:5; Doc. No. 222 Ex. 3 (Roman Dep. Exs. 920A, 920B, 920C); Roman Second Expert Report at ¶¶ 354-57.).

With respect to discovering Wellogix's trade secrets by improper means, "[i]mproper means of acquiring another's trade secrets include theft, fraud, unauthorized interception of communications, inducement of or knowing participation in a breach of confidence, and other means either wrongful in themselves or wrongful under the circumstances of the case." *Astoria Indus. of Iowa, Inc. v. SNF, Inc.*, 223 S.W.3d 616, 636 (Tex.App.-Fort Worth 2007, pet. denied). Here, the Arbitration Order notes that the eTrans SharePoint site contained some source code and computer language.[2] (Arb. Order ¶ 41.) The Arbitration Order also notes that Accenture employees were allowed to access the SharePoint site. (*Id.* ¶ 42.) Summary judgment evidence shows that Accenture claimed that xIEP would have a complex services solution and pushed SAP to represent to BP that the xIEP would offer a better solution than Wellogix's complex services

[2] As Accenture did not participate in the arbitration, we do not give preclusive effect to the Arbitration Order's finding that the SharePoint site contained Wellogix's object and source code, insofar as this finding is used against Accenture. We simply note that evidence was presented during the Arbitration that led to this finding, and that this evidence raises a genuine issue of material fact with respect to whether the SharePoint site contained Wellogix's source and object code, and whether Accenture employees were allowed to and, in fact, did access the site.

software. (Doc. No. 222, Exs. 35, 36.) In addition, summary judgment evidence shows that Accenture feared being marginalized by a close relationship between SAP and Wellogix. (Doc. No. 222, Ex. 38.) Finally, summary judgment evidence shows that Accenture possessed information created by Wellogix and BP for the eTrans project and for other projects. (Greene Dep. 129:6-130:4; Doc. No. 222 Ex. 22.) Viewing this evidence in the light most favorable to Wellogix, we find that it would enable a reasonable juror to reach a conclusion that Accenture improperly obtained Wellogix's trade secrets via the SharePoint site in order to buttress its own xIEP application and enhance SRM functionality.

4. Plaintiff suffered Injury

The summary judgment evidence raises a fact issue as to whether Wellogix suffered an injury as a result of Accenture's purported use of Wellogix's trade secrets. The summary judgment evidence shows that Accenture may have used Wellogix's trade secrets in xIEP and to enhance SRM functionality. Accenture attempted to replace Wellogix's complex services functionality with its own development of a complex services solution or to enhance SRM's functionality to include complex services functions. Accenture communicated with BP and SAP to dissuade them from going forward with Wellogix's complex services solution. This evidence could lead a reasonable juror to conclude that Wellogix did not continue work with BP and SAP as a result of Accenture's use of Wellogix's trade secrets to replicate a complex services solution in xIEP and SRM. In addition, Accenture's development of complex services templates similarly may have led BP to forego a relationship with Wellogix for provision of Wellogix's complex services solution, thereby causing Wellogix an injury.

In sum, the summary judgment evidence raises fact issues with respect to all of the elements of a trade secret misappropriation claim. We deny summary judgment to Accenture on this claim.

B. Texas Theft Liability Act

Wellogix has brought three separate claims under the Texas Theft Liability Act ("TLA")—theft of property, theft of services, and theft of trade secrets. For all TLA claims, the plaintiff must establish: (1) the plaintiff had a possessory right to property or was the provider of services; (2) the defendant unlawfully appropriated property or unlawfully obtained services in violation of certain sections of the Penal Code; and (3) the plaintiff sustained damages as a result of the theft. Tex. Civ. Prac. & Rem.Code §§ 134.002(2), 134.003, 134.005(a); Tex. Penal Code §§ 31.03(a), 31.05. Deprive means, among other things, "to withhold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner." Tex. Penal Code § 31.01. "Appropriation of property is unlawful if it is without the owner's effective consent." *Id.* § 31.01(2).

With respect to theft of trade secrets, a plaintiff may establish this claim by showing (1) without Wellogix's consent; (2) Accenture stole Wellogix's trade secret, made a copy of an article representing the trade secret, or communicated or transmitted a trade secret. Tex. Penal Code § 31.05. The theft claim based on theft of trade secrets rests on the same evidence as Wellogix's trade secret misappropriation claim. *See SP Midtown, Ltd v. Urban Storage, L.P.*, 2008 WL 1991747, *7 n. 8, 2008 Tex.App. LEXIS 3364, *21 n. 8 (Tex.App.-Houston May 8, 2008, pet. denied) (though "the elements of a statutory claim and a common law claim of misappropriation are not exactly the same, we conclude the same evidence supports both causes of action.") For the same reasons we have found that genuine issues of material fact exist with respect to Wellogix's trade secret misappropriation claim, we find that genuine issues of material fact exist with respect to Wellogix's theft of trade secrets claim.

With respect to theft of property, Wellogix must demonstrate that Accenture possessed an intent to deprive Wellogix of its property permanently or for an extended period of time. Tex. Penal Code § 31.03. Wellogix has not come forward with evidence that Accenture possessed such intent. Although Accenture may have been provided with or improperly obtained copies of Wellogix's complex services solution and source and object code, there is no suggestion that Accenture prevented Wellogix from retaining copies of these items or intended to do so. Without such intent, Wellogix cannot demonstrate that Accenture committed a theft of property. We grant summary judgment to Accenture on the theft of property claim.

With respect to Wellogix's theft of services claim, Accenture contends that Wellogix did not provide it with any service, and that, even if a service was rendered, Wellogix did not seek compensation for this service. Accenture cites the deposition of Wellogix employee Ike Epley as evidence that Wellogix did not provide "services" to Accenture other than giving Accenture its "Marathon relationship." Even if we assume that Wellogix's assistance to Accenture in creating a business relationship with Marathon constitutes a service, Wellogix has not pointed to any evidence that Accenture knew that this service was provided in exchange for compensation. *See* Tex. Penal Code § 31.04(a) (element of theft of services is that defendant possesses intent to avoid payment for service that he knows is provided only for compensation). Wellogix has not shown that there is a genuine issue of fact in dispute with respect to the theft of services claim and therefore we grant summary judgment to Accenture regarding this claim.

C. Breach of Fiduciary Duty

The elements of a breach of fiduciary duty claim under Texas law are: (1) a fiduciary relationship between the plaintiff and defendant; (2) the defendant must have breached his fiduciary duty to the plaintiff; and (3) the defendant's breach must result in injury to the plaintiff or benefit to the defendant. *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 283 (5th Cir.2007). "A fiduciary relationship exists when the parties are under a duty to act for or give advice for the benefit of another upon matters within the scope of the relationship." *Stephanz v. Laird*, 846 S.W.2d 895, 901 (Tex.App.-Houston 1993, pet. denied). Texas law recognizes two types of fiduciary relationships. The first, a formal fiduciary relationship, "arises as a matter of law and includes the relationships between attorney and client, principal and agent, partners, and joint venturers." *Id.* (quoting *Abetter Trucking Co. v. Arizpe*, 113 S.W.3d 503, 508 (Tex.App.-Houston [1st Dist.] 2003, no pet.)). The second, an informal fiduciary relationship, may arise in the context of informal moral, social, domestic, or personal relationships in which one person trusts and relies on another. *Crim Truck & Tractor Co. v. Navistar Int'l*, 823 S.W.2d 591, 594 (Tex.1992). "However, a fiduciary relationship is an extraordinary one and will not be lightly created;

the mere fact that one subjectively trusts another does not, alone, indicate that he placed confidence in another in the sense demanded by fiduciary relationships because something apart from the transaction between the parties is required." *American Medical Int'l, Inc. v. Giurintano*, 821 S.W.2d 331, 339 (Tex.App.-Houston 1991, no pet.).

1. Formal Fiduciary Relationship

Accenture argues that none of the six agreements entered into between Wellogix and Accenture gives rise to a formal fiduciary relationship between the two entities. It is unclear whether Wellogix contends that these agreements create a formal fiduciary relationship.

Joint venturers owe a formal fiduciary duty to each other in dealings within the scope of the joint venture. *Rankin v. Naftalis*, 557 S.W.2d 940, 944 (Tex.1977). The elements of a joint venture are (1) mutual right of control, (2) community interest, (3) the sharing of profits as principals, and (4) the sharing of loses, costs or expenses. *Taylor v. GWR Operating Co.*, 820 S.W.2d 908, 911 (Tex.App.-Houston 1991, pet. denied). None of the agreements between Wellogix and Accenture creates a joint venture relationship between the two companies such that the agreements can be said to give rise to a formal fiduciary relationship. The Mutual Nondisclosure Agreement is merely an agreement to keep certain proprietary information confidential. (Doc. No. 222 Ex. 29.) The Marketing Alliance Agreement provides that Wellogix and Accenture engage in a joint marketing plan of Wellogix's software and Accenture's integration services to target companies in the oil and gas E & P sector. Each company was to bear its own costs. (Doc. No. 222 Ex. 30.) Wellogix's Subcontract with Accenture involves Accenture paying Wellogix a fixed sum of money in exchange for Wellogix's provision of software and technical services during the implementation of Wellogix's software at Marathon Oil Company. (Doc. No. 222 Ex. 31.) The Subscription Agreement between Wellogix and Accenture grants Accenture a license to use Wellogix's software and services. (Doc. No. 222 Ex. 32.) Finally, the two Teaming Agreements simply provide that Wellogix and Accenture would work together to submit joint proposals to oil companies that had issued requests for proposals. Both agreements provide that each party would bear their own expenses and costs. (Doc. No. 222 Ex. 33, 34.) We conclude that, on the basis of these agreements, Wellogix and Accenture did not have a formal fiduciary relationship.

2. Informal Fiduciary Relationship

Accenture also argues that the six agreements between Wellogix and Accenture do not give rise to an informal fiduciary relationship. Wellogix contends that six agreements are evidence that an informal fiduciary relationship existed between Accenture and Wellogix such that Accenture was obligated to exercise good faith and fair dealing towards Wellogix.

Generally, "while a fiduciary relationship or confidential relationship may arise from the circumstances of a particular case, to impose such a relationship in a business transaction, the relationship must exist prior to, and apart from the agreement made the basis of the suit." *Willis v. Donnelly*, 199 S.W.3d 262, 277 (Tex.2006) (quoting *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 177 (Tex.1997)). Mere subjective trust alone is not enough to transform arms-length dealing into a fiduciary relationship. *Crim Truck & Tractor Co.*, 823 S.W.2d at 595. A fiduciary relationship may arise either as a result of dominance on the part of one, or weakness and dependence on the part of the other, such as may exist in contractor/subcontractor relationships. *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 507 (Tex.1980). Whether such a duty exists depends on the circumstances. *Lundy v. Masson*, 260 S.W.3d 482, 501 (Tex.App.-Houston 2008). The existence of an informal fiduciary relationship is ordinarily a question of fact, but when the underlying facts are undisputed, it becomes a question of law. *Crim Truck & Tractor Co.*, 823 S.W.2d at 594; *Anglo-Dutch Pet. Int'l v. Smith*, 243 S.W.3d 776, 782 (Tex.App.-Houston 2007, pet. denied).

As an initial matter, we decline to send to the jury the issue of whether an informal fiduciary relationship existed. The material issues of fact relevant to this inquiry are undisputed. Wellogix relies on the six agreements between Wellogix and Accenture as the basis for the informal fiduciary relationship. It does not cite any other evidence as support for the existence of the fiduciary relationship. Accenture does not dispute that these agreements exist. In turn, Accenture relies upon Wellogix employees' professed distrust of Accenture as evidence that no informal fiduciary relationship existed. Wellogix does not dispute its employees' attitudes towards and characterization of Accenture. The only dispute between the parties is whether this collection of evidence—the six agreements and the emails of Wellogix employees—establishes an informal fiduciary relationship. This is an issue of law that is appropriate for the Court to decide at this juncture since Wellogix has not identified any genuine issues of material fact that should be presented to the jury.

Neither party has identified the agreement, if any, between Wellogix and Accenture that serves as the basis of this suit. Rather, the allegations of a breach of fiduciary duty appear to be based upon Accenture's actions while acting as BP's agent in selecting software platform vendors during BP's Global E & P P2P project, which began in 2004. In order to determine whether an informal fiduciary relationship existed between Wellogix and Accenture, we must determine whether the parties' relationship prior to 2004 and separate from the Global E & P P2P activities gave rise to a fiduciary obligation.

The Mutual Nondisclosure Agreement, the Marketing Alliance Agreement, the two Teaming Agreements were all agreements between Accenture and Wellogix to jointly exchange information with each other in order to develop business opportunities to which both would contribute particular expertise and from which both would benefit. As such, these agreements are "arms-length transactions entered into for the parties' mutual benefit, and thus do not establish a basis for a fiduciary relationship." *Meyer v. Cathey*, 167 S.W.3d 327, 331 (Tex.2005) (citing *Associated Indem. Corp. v. CAT Contr.*, 964 S.W.2d 276, 288 (Tex.1998)). The Subscription Agreement is merely a license agreement in which Accenture obtained a license to use certain intellectual property owned by Wellogix in exchange for a fee. The Subcontract between Accenture and Wellogix does not reflect a relationship in which Accenture was a dominant party and Wellogix a weak one. Wellogix provided the key software for implementation at Marathon and Accenture implemented that software. Wellogix was compensated for its software and services. The Teaming Agreements are not subcontractor agreements and explicitly provide that each party is an independent contractor.

Any expectation that Wellogix may have had under the Subcontract that Accenture would act in its best interests was contradicted by the express language of other agreements. In the Mutual Nondisclosure Agreement, Wellogix acknowledged that Accenture retained the right to develop, use, and market products and services competitive and similar to Wellogix's own products, subject to the confidentiality and nondisclosure provisions in the agreement. In the Marketing Alliance Agreement, Wellogix acknowledged that the alliance between the two companies was not exclusive.

Finally, Wellogix argues that the confidentiality and non-disclosure provisions in the agreements created a special relationship of trust and confidence between the parties to support the existence of a *fiduciary* relationship. These confidentiality provisions related to Wellogix's proprietary information, including intellectual property and software, and limited Accenture's ability to use, disclose, or rely upon Wellogix's proprietary information. The agreements certainly gave rise to Wellogix's expectation that Accenture would abide by the confidentiality provisions contained in them. However, "[r]eliance on another party to perform its obligations under an agreement is not sufficient to establish a confidential relationship." *Swinehart v. Stubbeman*, 48 S.W.3d 865, 882 (Tex.App.-Houston 2001, pet. denied). The agreements here do not automatically create fiduciary duties simply because they were confidentiality agreements. *See Anglo-Dutch Pet. Int'l, Inc.*, 243 S.W.3d at 783 ("To the extent Smith's position equates a confidentiality agreement to a relationship of trust and confidence giving rise to a fiduciary duty, he has cited, and we have found, no authority supporting the notion that confidentiality agreements can create fiduciary relationships.") Rather, the dealings between the parties must show that one part is justified in relying on the other to act in his best interest. *Stephanz*, 846 S.W.2d at 902. The confidentiality agreements and provisions do not support such a conclusion.

Therefore, we find that no informal fiduciary relationship existed between Wellogix and Accenture. Without the existence of either a formal or informal fiduciary relationship, Wellogix cannot make out a claim for breach of fiduciary duty. We need not examine the second and third elements of this claim—i.e., whether a breach occurred and whether Wellogix was injured or Accenture benefited. We grant summary judgment to Accenture on Wellogix's claim of breach of fiduciary duty.

D. Aiding and Abetting a Breach of Fiduciary Duty

In its complaint, Wellogix alleges that Accenture aided and abetted a breach of fiduciary duty. Specifically, Wellogix's third amended complaint states that Accenture knew that SAP's actions constituted a breach of fiduciary duty to Wellogix, and that Accenture assisted and encouraged SAP in its breach of fiduciary duty. Accenture has moved for summary judgment on this claim. In its response brief, Wellogix does not address the fiduciary duty alleged owed to it by SAP. Instead, Wellogix focuses on the fiduciary duty owed to it by BP and Accenture's acts that aided and abetted BP's breach of fiduciary duty. In its reply brief, Accenture argues that Wellogix failed to plead an aiding and abetting claim based on BP's breach of fiduciary duty, and that Wellogix has abandoned its claim of aiding and abetting SAP's breach of fiduciary duty.

Texas law recognizes that, "where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tort-feasor with the fiduciary and is liable as such." *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (1942). We address each of Wellogix's factual theories in turn.

1. Aiding and Abetting SAP's Breach of Fiduciary Duty

Key to Wellogix's claim that Accenture aided and abetted SAP's breach of fiduciary duty is the existence of a fiduciary relationship between SAP and Wellogix. The evidence cited by Accenture as relevant to the existence of a fiduciary relationship between SAP and Wellogix is the NetWeaver Cooperation Agreement executed in March 2005, personal relationships between Wellogix's executives and SAP's employees, and participation by Wellogix's executives in SAP's product conferences. Wellogix does not dispute that this evidence is relevant or cite any evidence that might give rise to a genuine issue of material fact.

We find that this evidence does not support the existence of a formal fiduciary relationship. The NetWeaver Cooperation Agreement expressly disclaims the creation of a partnership or joint venture relationship between SAP and Wellogix. (Doc. No 210 Ex. 30 § 8.4; Doc. No. 210 Ex. 31 § 18.3.) In addition, the agreement provides that each party shall bear its own costs with respect to their own activities under the agreement. (Doc. No. 210 Ex. 30 § 3.5.) We do not believe that this agreement creates a joint venture relationship that would give rise to a formal fiduciary duty. *See Rankin*, 557 S.W.2d at 944.

With respect to an informal fiduciary relationship, the relationship between Wellogix and SAP must have existed prior to and apart from the agreement that is the basis of the suit. *See Willis*, 199 S.W.3d at 277. Here, the NetWeaver Cooperation Agreement, and SAP's alleged failure to comply with its terms, serves as the basis of Wellogix's suit. Wellogix has not come forward with any evidence that Wellogix and SAP entered into agreements or engaged in activities prior to and separate from the NetWeaver Cooperation Agreement that would give rise to SAP's fiduciary obligation to Wellogix. Therefore, we find that Wellogix was not engaged in an informal fiduciary relationship with SAP. Without either a formal or informal fiduciary relationship, Wellogix cannot show that SAP breached its fiduciary duty towards Wellogix. In turn, without a breach of a fiduciary duty, Wellogix cannot show that Accenture aided and abetted the breach of a fiduciary duty.

2. Aiding and Abetting BP's Breach of Fiduciary Duty

It is clear that Wellogix did not plead a claim for aiding and abetting breach of fiduciary duty that is based on BP's breach of fiduciary duty. Even if it had timely pled this claim, Wellogix has not cited any evidence sufficient to establish or raise a genuine issue of material fact with respect to the existence of a fiduciary relationship between BP and Wellogix.

With respect to a formal fiduciary relationship, the MSLA does not create a joint venture relationship between Wellogix and BP. Instead, the MSLA is a license agreement under which Wellogix provided a license to BP for use of Wellogix's software and software-related services in exchange for a license fee. With respect to an informal fiduciary relationship, we must examine the relationship between Wellogix and BP as it existed prior to and separate from the MSLA, which serves as the basis of Wellogix's claim that BP breached its fiduciary duty to Wellogix. Although there were a number of agreements between Wellogix and BP beginning in 2000 and leading up to the MSLA's execution in 2004, none of these agreements is anything other than an arms-length transaction entered into for the parties' mutual benefit. *Meyer*, 167 S.W.3d at 331. Although the agreements impose confidentiality provisions upon the parties, these provisions are insufficient to transform a contractual relationship into a fiduciary relationship. *Anglo-Dutch Pet. Int'l*, 243 S.W.3d at 782. Again, without the existence of a formal or informal fiduciary relationship, Wellogix cannot show a breach of a fiduciary relationship or Accenture's aiding and abetting of the breach.

Thus we grant summary judgment to Accenture on Wellogix's claims of aiding and abetting a breach of fiduciary duty.

E. Breach of Confidence and Trust

Accenture has moved to dismiss Wellogix's claim of breach of confidence and trust and has also moved for summary judgment on this claim. (Docs. No. 206, 210.) Wellogix has not opposed either the motion to dismiss or the motion for summary judgment regarding this claim.

Contrary to Accenture's argument, Texas courts have recognized that a breach of confidence claim may be brought separately from a trade secret misappropriation claim. *See United States Sporting Prods. v. Johnny Stewart Game Calls*, 865 S.W.2d 214, 218 (Tex.App.-Waco 1993, pet. denied); *see also Tavana v. GTE Southwest*, 1999 WL 512624, *3, 1999 Tex.App. LEXIS 5365, *7 (Tex.App.-Dallas July 21, 1999). However, Texas courts also have noted that a "breach of confidence" claim based upon a defendant's use of plaintiff's trade secrets in violation of a confidential relationship that results in plaintiff's injuries is identical to a trade secret misappropriation claim. *Hyde Corp. v. Huffines*, 158 Tex. 566, 587, 314 S.W.2d 763 (1958); *K & G Oil Tool & Service Co. v. G & G Fishing Tool Svc.*, 158 Tex. 594, 610, 314 S.W.2d 782 (1958); *Tavana*, 1999 WL 512624 at *3, 1999 Tex.App. LEXIS 5365 at *7. The allegations in Wellogix's complaint corresponding to the breach of confidence and trust claim simply restate the allegations that serve as the basis of Wellogix's trade secret misappropriation claim. Therefore, Wellogix's factual allegations in this regard shall be analyzed in an identical fashion to Wellogix's trade secret misappropriation claim. We grant Accenture's motion to dismiss and dismiss Wellogix's breach of confidence and trust claim.

F. Tortious Interference with an Existing Contract

To establish tortious interference with an existing contract, a plaintiff must show: (1) plaintiff had a valid contract; (2) the defendant willfully and intentionally interfered with that contract; (3) the interference proximately caused the plaintiff damage; and (4) the plaintiff suffered actual damage or loss. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 207 (Tex.2002). "Establishing causation requires that the plaintiff bring forth sufficient facts so that the evidence, and logical inferences drawn from the evidence, support a reasonable probability that the defendant's acts or omissions were a substantial factor in bringing about injury." *Richardson-Eagle, Inc. v. William M. Mercer, Inc.*, 213 S.W.3d 469, 474 (Tex.App.-Houston 2006, pet. denied).

In its complaint, Wellogix alleged that Accenture had interfered with the MSLA between Wellogix and BP and with the NetWeaver Cooperation Agreement between Wellogix and SAP. Accenture moved for summary judgment on both these claims. In its response, Wellogix focused only upon Accenture's alleged interference with the BP contract and did not address its claim regarding the SAP contract. As such, we find that Wellogix has abandoned its theory of tortious interference with the NetWeaver Cooperation Agreement. *See Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1164 (5th Cir.1983) (plaintiff abandoned theory pleaded in complaint but not raised in opposition to summary judgment motion).

As for the remaining theory—interference with the MSLA—Accenture argues that there is no evidence to support Wellogix's claim that Accenture interfered with this agreement or any others between Wellogix and BP. With respect to the first element of tortious interference, the existence of a valid contract between Wellogix and BP (i.e., the MSLA) does not appear to be in dispute. In addition, Wellogix cites to other agreements between Wellogix and BP, and Accenture does not contest that these agreements exist and are valid.

With respect to the second element, Wellogix has not come forward with evidence showing a genuine issue of material fact with respect to Accenture's interference with the MSLA or any other agreement that existed between Wellogix and BP. Wellogix cites emails among Accenture and SAP in which Accenture strenuously opposes Wellogix's participation in xIEP meetings. (Doc. No. 222 Exs. 10, 11, 12.) These emails, however, do not pertain to eTrans project, the MSLA, or Wellogix's relationship with BP generally. They do not support an inference that Accenture acted improperly with respect to Wellogix's business relationship with BP. Another email from an Accenture employee expressing hope that Wellogix loses favor with BP does not amount to direct action by Accenture towards BP to interfere with Wellogix's relationship with BP. (Doc. No. 222, Ex. 14.) An email between Accenture and Wellogix that expresses frustration over the companies' mutual dealings and over each companies' relationship with SAP does not provide evidence that Accenture conducted activities vis-a-vis BP. (Doc. No. 222, Ex. 13.) Finally, an email among Accenture employees that expresses their fears of being marginalized by Wellogix focuses specifically on Wellogix's potential sale to SAP, not Wellogix's relationship with BP. (Doc. No. 222 Ex. 38.) This email does not provide support for the claim that Accenture somehow interfered with Wellogix's contracts with BP. All of this summary judgment evidence shows that Accenture harbored suspicion towards Wellogix's relationship with SAP and perhaps acted in a way to prevent Wellogix from moving forward with SAP or on the xIEP project. However, this evidence does not raise genuine issues of material fact regarding any interference by Accenture of Wellogix's relationship with BP.

Without evidence of interference by Accenture of Wellogix's relationship with BP, we need not examine whether BP's breach of the MSLA was caused by Accenture's interference, nor whether Wellogix was damaged by the interference or breach. We grant summary judgment to Accenture on Wellogix's claim of tortious interference with an existing contract.

G. Tortious Interference with Prospective Business Relations

Accenture has moved for summary judgment on Wellogix's tortious interference with prospective business relations claim. Wellogix has stated that it will not be pursuing a claim for tortious interference with prospective contracts. (Doc. No. 222 at 3 n. 1.) Thus, we grant summary judgment to Accenture on Wellogix's claim of tortious interference with prospective business relations.

H. Conspiracy

To prevail on a claim of conspiracy, a plaintiff must establish: (1) a combination of two or more persons; (2) an object to be accomplished (an unlawful purpose or a lawful purpose by unlawful means) (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result. *Insurance Co. of N. Am. v. Morris*, 981 S.W.2d 667, 675 (Tex.1998); *see also Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 857 (Tex.1968) ("There must be an agreement or understanding between the conspirators to inflict a wrong against, or injury on, another, a meeting of minds on the object or course of action, and some mutual mental action coupled with an intent to commit the act which results in injury; in short, there must be a preconceived plan and unity of design and purpose, for the common design is of the essence of the conspiracy.").

We first examine whether Wellogix has raised a genuine issue of material fact regarding a meeting of the minds between Accenture and SAP to commit the intentional torts in this case—trade secret misappropriation, theft, and tortious interference with an existing contract. Accenture has submitted summary judgment evidence from Accenture and SAP employees denying that they had any agreement or intent to steal Wellogix's trade secrets or prevent Wellogix from fulfilling its contracts. In opposition, Wellogix cites deposition testimony showing that Accenture contained a division of employees that implemented SAP, employed individuals known as SAP specialists, developed xIEP in tandem in with SAP, and established a knowledge sharing center at SAP's office in Germany. Wellogix also cites emails among Accenture and BP employees discussing potential litigation between Wellogix and SAP over the use of Wellogix's intellectual property. (Doc. No. 222 Exs. 23, 24, 25, 26, 27, 28.) Wellogix cites emails among Accenture employees (and one email between Accenture and Wellogix) regarding Accenture's position towards Wellogix, fears over Wellogix's potential acquisition by SAP, and concerns over Wellogix's business relationship with SAP and BP. (Doc. No. 222 Exs. 7, 13, 14, 15, 37, 38.) Wellogix has also cited to emails regarding work that Accenture performed for BP on the creation of complex services templates. (Doc. No. 222 Exs. 16, 18-22.) None of this evidence, however, establishes SAP's intention to do anything with respect to Wellogix's intellectual property or Wellogix's contracts with BP. Rather, this evidence simply shows that Accenture and SAP had a close working relationship. In addition, Accenture was wary of Wellogix's potential to edge Accenture out of a role at SAP and at BP. Though Accenture may have moved forward in committing wrongful acts, this evidence does not establish that SAP intended to join Accenture in doing so.

There are a few pieces of summary judgment evidence that deserve further discussion. In one email sent among Accenture employees, an Accenture employee recounts a discussion she had with an SAP employee (Doc. No. 222, Ex. 35). As summarized in the email, the SAP employee does not express any thoughts suggesting stealing or misappropriating Wellogix's intellectual property. In addition, what the SAP employee planned to discuss with BP does not include comments that would interfere with BP's contracts with Wellogix. Similarly, there is an email written by an Accenture employee to an SAP employee expressing concern over competition posed by Wellogix to xIEP. (Doc. No. 222, Ex. 36.) However, this email does not reflect SAP's intention to commit any wrongful act with respect to Wellogix's intellectual property or Wellogix's contracts. Finally, a group of emails among Accenture and SAP employees discuss Accenture's position regarding a Wellogix/SAP solution and a Wellogix/xIEP solution. (Doc. No. 222, Exs. 8, 9, 10, 11, 12.) These emails show that SAP intended to continue partnering with Wellogix, even going as far as to ensure that Wellogix would be invited to participate in a xIEP partners meeting despite Accenture's objection. Far from suggesting that SAP had a meeting of the minds with Accenture to steal or misappropriate Wellogix's trade secrets or interfere with Wellogix's contracts, these emails in fact show that SAP and Accenture parted ways significantly in their approach to Wellogix.

In sum, Wellogix has not raised a genuine issue of material fact with respect to the "meeting of the minds" element of conspiracy. As such, we need not review the other elements of the conspiracy claim. Summary judgment is granted to Accenture on Wellogix's conspiracy claim.

VI. CONCLUSION

Accenture's Motion for Summary Judgment, (Doc. No. 210), is GRANTED IN PART and DENIED IN PART:

(1) Summary judgment is denied on Wellogix's claim of trade secret misappropriation;

(2) Summary judgment is denied on Wellogix's claim of theft of trade secrets. Summary judgment is granted to Accenture on Wellogix's claims of theft of property and theft of services;

(3) Summary judgment is granted to Accenture on Wellogix's claim of breach of fiduciary duty;

(4) Summary judgment is granted to Accenture on Wellogix's claim of aiding and abetting a breach of fiduciary duty;

(5) Summary judgment is denied on Wellogix's claim of breach of confidence and trust;

(6) Summary judgment is granted to Accenture on Wellogix's claim of tortious interference with an existing contract;

(7) Summary judgment is granted to Accenture on Wellogix's claim of tortious interference with prospective business relations; and

(8) Summary judgment is granted to Accenture on Wellogix's claim of conspiracy.

Accenture's Motion to Exclude Wellogix's Proposed Expert Witness Kendyl Roman (Doc. No. 212) is DENIED. Accenture's Motion to Dismiss (Doc. No. 206) is GRANTED. Wellogix's breach of confidence and trust claim is DISMISSED.

IT IS SO ORDERED.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[filed 01/16/2014]

No. 11-20816

WELLOGIX, INCORPORATED,
Plaintiff-Appellee,

v.

ACCENTURE, L.L.P.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 5/15/13, 5 Cir., _____, _____, F.3d _____)

Before DeMOSS, SOUTHWICK, and HIGGINSON, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED R. APP. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED R. APP. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Stephen Higg
UNITED STATES CIRCUIT JUDGE