Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **15th day of February, 2023** are as follows:

BY Crichton, J.:

2021-C-01196
C/W
2021-C-01207

VESTA HALAY JOHNSTON, ET AL. VS. SUSAN HALAY VINCENT, ET AL. (Parish of Calcasieu)

REVERSED IN PART. AFFIRMED IN PART. REMANDED FOR FURTHER PROCEEDINGS IN ACCORDANCE HERE WITH. SEE OPINION.

Weimer, C.J., dissents in part, concurs in part and assigns reasons and concurs in the dissent in part by Crain, J.
Hughes, J., dissents in part and assigns reasons.
Crain, J., dissents in part and assigns reasons.

SUPREME COURT OF LOUISIANA

No. 2021-C-01196

VESTA HALAY JOHNSTON, ET AL.

VS.

SUSAN HALAY VINCENT, ET AL.

On Writ of Certiorari to the Court of Appeal, Third Circuit, Parish of Calcasieu

CRICHTON, J.

In this consolidated matter, Lake Charles Rubber and Gasket Co., L.L.C. ("Lake") and its sole owner, Vesta Halay Johnston (together with Lake, the "Plaintiffs"), and Gulf Coast Rubber and Gasket, L.L.C. ("Gulf") and Bryan Vincent (together with Gulf, the "Defendants"), both appeal certain rulings of the court of appeal. Specifically, Defendants assert that the court of appeal failed to correctly apply the manifest error standard of review in reversing the district court's findings that certain Lake information in Gulf's possession did not constitute "trade secrets" or that their misappropriation was not otherwise a violation of the Louisiana Unfair Trade Secrets Act, La. R.S. 51:1431, *et seq.* ("LUTSA"). They further argue that the court of appeal erred in increasing the damages award from $700,000 to $19,574,884, *i.e.*, a multiple of nearly 28, where ample evidence in the record supports the district court's judgment as to damages. For their part, Plaintiffs argue the court of appeal erred on rehearing by eliminating the treble damages applied to its award for unjust enrichment and dismissing Vesta Johnston's claim for diminution in value of her ownership interest in Lake.

For the reasons set forth herein, we reverse the court of appeal in part as to its finding that Lake's parts numbering system and descriptions constituted a trade secret under LUTSA. We further reverse the court of appeal as to the increase in the

amount of lost profit damages. We remand to the district court for a recalculation of lost profit damages giving consideration to the violations of LUTSA related to Gulf's misappropriation of Lake's customer lists and inventory usage history with respect to the Sasol customer contract.

While we reverse in part as stated above, we also affirm the court of appeal in part insofar as it determined Lake's actual damages must be trebled, that some amount must be awarded for unjust enrichment, and that the unjust enrichment damages are not trebled under Louisiana Unfair Trade Practices Act, La. R.S. 51:1401, *et seq.* ("LUTPA"). We further affirm the court of appeal ruling on rehearing that dismissed Vesta Johnston's claims arising out of her ownership of Lake. We thus also remand to the district court for a determination of unjust enrichment damages and further proceedings in accordance herewith.

FACTS AND PROCEDURAL HISTORY

Mike Halay formed Lake, a business that would ultimately supply gaskets, hoses, fittings, fasteners and other parts and materials to local petrochemical industry clients, in 1957. In 1987, Mr. Halay hired defendant Bryan Vincent, husband to his daughter (and also a defendant) Susan, to work for Lake. Bryan Vincent became the company's general manager after four years, in 1991. Mr. Halay also hired Mark Johnston, husband to his daughter and plaintiff here, Vesta, who would ultimately serve as Lake's vice president of sales. By 2010 and subsequent to their father's death, Mr. Halay's three daughters – Susan Halay Vincent, Vesta Halay Johnston, and Kathy Valay Heinen[1] – became equal owners of Lake and three other businesses.

[1] Mike Halay also employed Kathy Heinen's husband, but neither of the Heinens are involved in the present litigation.

Beginning around 2011, conflict arose among the sisters as to the management of Lake,[2] leading to litigation[3] and a number of changes in Lake's management and ownership. On September 25, 2014, Vesta Johnston and Kathy Heinen entered into a joint written consent of members whereby they terminated Bryan Vincent after he failed to appear to the annual member meeting. That same day, Moby Goodwin, the leading salesman at Lake who had worked there for over 20 years, also resigned.[4] In accordance with a mediation term sheet signed on October 14, 2014, Susan Vincent sold her ownership interests in all four of the companies to her sisters in exchange for payment of $8,615,000, plus certain accumulated dividends and distributions, pursuant to four acts of sale, each dated as of January 12, 2015.[5] During the mediation the Vincents offered terms for a non-compete agreement between Lake and Bryan Vincent, but the offer was not accepted.[6] Following this initial sale of interests, Vesta Johnston and Kathy Heinen each held a 50% ownership interest in

[2] At trial, emails were submitted into evidence establishing that as early as 2011, Vesta Johnston began complaining to her sister Kathy Heinen about Bryan Vincent's management of Lake and insisting that action be taken, despite Lake's revenues growing consistently each year under Bryan Vincent's leadership. It was also established by Vesta's testimony and that of others that Vesta would frequently come into Lake and speak directly to employees about their complaints and relay those to Kathy. Ultimately, Vesta and Kathy began as early as 2012 to issue actions by unanimous written consent in accordance with Lake's operating agreement, as they represented a majority of its members. These written consents directed certain performance requirements of Bryan Vincent and limited his managerial authority. The last of these written consents was a compromise between Vesta and Kathy in which Kathy conditioned her agreement to terminate Bryan Vincent on Vesta's agreement that her husband, Mark Johnston, would also not work at Lake any further. Days later, however, the sisters terminated Bryan Vincent after he failed to appear at the annual member meeting for Lake and the other companies held by the Halay sisters.

[3] Susan Halay Vincent filed two lawsuits against her sisters that were resolved through mediation and agreement to sell her interests in the four companies to her sisters, discussed *infra*.

[4] Vesta Johnston acknowledged at trial that Moby had indicated to her previously that if Bryan Vincent left, he would also leave. Similarly, Steven Haymon testified that he told Vesta Johnston that if they fired Bryan Vincent, they would leave Lake, and Craig Trosclair testified he told Vesta Johnston that he would not be interested in working under a different manager.

[5] The acts were dated as of January 12, 2015 but made effective as of close of business October 14, 2014. The "interest" sold "include[d] any and all rights related to or associated with the interest so that seller's interest is transferred such that the company remains a going concern, including the goodwill, rights to profits, losses and distributions, save and except those distributions paid contemporaneously herewith."

[6] In her testimony at trial, Vesta Johnston indicated that no agreement on terms occurred due to her belief that the price Bryan demanded for the non-compete was unreasonable.

Lake for a short period until June 30, 2015, when Vesta Johnston acquired Kathy Heinen's interests in Lake and became its sole owner.[7]

On or about October 15, 2014 – the day after the mediation – Bryan and Susan Vincent held a meeting with certain current and former Lake employees. Bryan informed the attendees that he was starting a new company, Gulf, and would be hiring. Nearly all of those attending, including almost the entirety of the outside and inside sales teams, would eventually leave the current company for which they were employed (Lake or otherwise) to work for Gulf.

On October 14, 2015, Plaintiffs filed a Petition for Damages and Injunctive Relief, naming the following defendants: Gulf, Susan Vincent, Bryan Vincent, and Moby Goodwin. As amended, the petition sought to recover damages allegedly caused by various violations of law including, *inter alia*, breach of contract, breach of fiduciary duties, defamation, unfair trade practices, and trade secret violations. It is undisputed that the Attorney General's office provided notice to Gulf by letters dated March 10, 2016, and June 23, 2017, triggering the potential application of La. R.S. 51:1409(A) ("If the court finds the unfair or deceptive method, act, or practice was knowingly used, ***after being put on notice by the attorney general***, the court shall award three times the actual damages sustained.") (emphasis added).

Plaintiffs sought an expedited contradictory hearing to consider whether an order should be issued to preserve evidence and quarantine electronic devices until Lake's computer forensic expert was allowed unimpeded access to copy all data and metadata. The parties agreed upon a preservation order requiring defendants to create and preserve a digital image of all data existing at the time of the order, which

[7] Kathy and Vesta began negotiating separating their business interests shortly after acquiring Susan's interest. In emails introduced at trial, Kathy indicates to Vesta that she does not want to be partners.

the district court put in place by consent judgment signed on November 18, 2015 (the "Preservation Order").

Relevant to Plaintiffs' entitlement to trebled damages, the Preservation Order created a duty among the parties "to preserve documents, information, data and other electronic or digital communications or compilations of data which are or may be relevant to issues in this litigation" including but not limited to "any and all business records pertaining to the operations of [Lake] before October 14, 2015 and to the operations of [Gulf] from October 15, 2014." The parties agreed therein (i) "to take appropriate measures to preserve and prevent from deletion, destruction or alteration any and all records and content pertinent to plaintiffs' claims or defendants' defense" found on certain devices and in emails of the parties; (ii) that on-line storage and direct access storage devices containing electronic data files existing as of October 12, 2015, relevant to the litigation "should not be modified (including the modification of metadata) or deleted unless a true and correct copy of each such electronic data file has been made and steps have been taken to ensure that such a copy will be preserved and accessible for purposes of the plaintiffs' claims and defendants' defenses"; and (iii) that they would ensure all relevant electronic data has been preserved in an accessible, usable form and that "[e]ven a computer that the parties believe has no relevant information should not be reformatted or altered in such a way as to make deleted electronic data and documents non-recoverable unless all relevant electronic data has already been preserved in an accessible, usable form." The Preservation Order stayed in effect until December 11, 2018.

Trial Proceedings

A bench trial commenced on January 16, 2018. After Plaintiffs rested, the named defendants moved for judgment in their favor dismissing, with prejudice and at Plaintiffs' cost, all of Plaintiffs' claims pursuant to a petition for involuntary

dismissal on July 13, 2018. *See* La. C.C.P. art. 1672(B).[8] The district court entered judgment on September 18, 2018, granting the motion in part and dismissing, with prejudice: (1) claims of defamation as to defendant Moby Goodwin; (2) Louisiana Unfair Sales Law claims as to all defendants; (3) claims of breach of contract as to defendants Susan Vincent and Bryan Vincent; (4) claims of violation of LUTSA and LUTPA as to defendants Susan Vincent and Moby Goodwin; and (5) claims for treble damages pursuant to LUTPA as to all defendants.[9] Defendants' motion was denied, in part, with respect to Plaintiffs' claims of violations of LUTSA and LUTPA as to defendants Bryan Vincent and Gulf.[10] Plaintiffs filed supervisory writs with the Third Circuit Court of Appeal, which found the district court erred in dismissing Plaintiffs' claims for treble damages. *Johnston v. Vincent*, 2018-691 (La. App. 3 Cir. 9/4/18) (unpublished writ decision). On remand, trial proceedings resumed on the remaining claims against Bryan Vincent and Gulf, including Plaintiffs' allegations of LUTSA and LUTPA violations and related damages. Defendants rested on January 25, 2019, over one year after trial originally commenced.

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[8] La. C.C.P. art. 1672(B) provides:

> In an action tried by the court without a jury, after the plaintiff has completed the presentation of his evidence, any party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal of the action as to him on the ground that upon the facts and law, the plaintiff has shown no right to relief. The court may then determine the facts and render judgment against the plaintiff and in favor of the moving party or may decline to render any judgment until the close of all the evidence.

[9] On January 3, 2018, the district court granted various motions for partial summary judgment filed by Defendants. By virtue of pre-trial motions, Plaintiffs' claims of defamations were dismissed as to Bryan Vincent, Susan Vincent, and Gulf. The only defamation claim remaining, then, was against Moby Goodwin. Also by pretrial motions, any and all claims of breach of contract against Moby Goodwin and Gulf were dismissed. Only Plaintiffs' claims of breach of contract against Susan Vincent and Bryan Vincent remained.

[10] Between the trial court's issuance of its reasons for judgment and its signing of the final judgment, the Third Circuit rendered its judgment in the appeal from Susan Vincent's involuntary dismissal. With only the plaintiffs' evidence before it, the Third Circuit reversed, reinstated plaintiffs' claims against Susan Vincent, and remanded these claims to complete their trial. *Johnston v. Vincent*, 2019-55 (La. App. 3 Cir. 5/20/20), 317 So. 3d 623, writ denied, 2020-1344 (La. 2/9/21), 310 So. 3d 182. That trial has not yet been held.

Plaintiffs' expert in digital forensics, Brian Wilson, testified that a former Lake employee, Steven Haymon, backed up his work-related files at Lake to his personal cloud-storage accounts. Several emails were introduced evidencing that other employees, including Bryan Vincent, knew that Steven Haymon had Lake files in his possession and that Gulf employees requested that he share certain files related to old bids, and vendor or customer history of Lake. Similarly, Mr. Wilson testified that former Lake employee Daniel Mayes inserted a USB device into the Lake WaterJet computer (a computerized machine that cuts gaskets to precise dimensions or specifications with a high pressure water stream) on November 3, 2014 – the day he resigned from Lake – and plugged the same USB into a Gulf computer later that same day. In addition to the above methods by which Gulf came into possession of Lake documents and files, evidence was introduced that Bryan Vincent's emails from Lake were backed up on his personal computer. Mr. Wilson opined that these various methods of storing Lake files resulted in 14,532 unduplicated Lake business files – including excel spreadsheets, WaterJet drawings, and emails – being located on Defendant's computers.

To undercut the significance of this evidence, Defendants demonstrated by testimony that the WaterJet drawings were usually provided by the customer and, if not, they were produced by dimensions provided by the customer; thus, they were obtainable through other means. Nevertheless, for those products that were produced in-house by Gulf through the WaterJet machine, these drawings would have enabled Gulf to cut certain products by machine without requesting the product drawings or dimensions from the customer. The benefit of the Lake database of drawings, then, was one of convenience and service – customers knew that by working with Lake they could sometimes forgo providing drawings or dimensions for their product needs because Lake already held that information in its possession. Unlike the files in Steven Haymon's possession, Plaintiffs did not submit evidence that Gulf

employees used the WaterJet drawings. On cross-examination, Defendants also elicited testimony from expert Brian Wilson that, in determining which files were "business" files, he relied on determinations of Mark Johnston, Plaintiff's husband, and Cliff Moncrief, the then-general manager of Lake. Defendants introduced multiple examples of files – such as sermons written by Steven Haymon (who also worked as a pastor) – that were included in the 14,532 count but were clearly personal.

Plaintiffs sought to further establish that Gulf copied Lake's comprehensive and integrated software system, TrulinX, through which either company could generate invoices, maintain a history of every sale or purchase of an inventory item, and retrieve this historical data by typing in the part number. Lake operated without a parts numbering system from 1957 to 2007, when Steven Haymon and Bryan Vincent worked together to create parts numbers that were necessary for use of TrulinX, on which Bryan Vincent testified he worked with the software developers to develop to Lake's use. At the direction of (or, at the very least, with the consent of) Bryan Vincent, Steven Haymon copied the parts numbers and descriptions when setting up Gulf's TrulinX account. Gulf was thus able to use Lake's parts numbers and descriptions without having to create its own. Multiple witnesses testified, however, that Gulf employees were not able to access historical information about purchases and sales in the Lake TrulinX records. Beyond the parts numbers and descriptions, Gulf's TrulinX account included only the data input by Gulf as to its own purchases and sales.

Substantial evidence was introduced as to Gulf's efforts to win the bid with one of Lake's major customers, Sasol. Specifically, in 2015, Sasol terminated its longstanding contract with Lake and submitted a request for bids to multiple vendors, including Gulf and Lake. Gulf ultimately won the contract, including the right to furnish inventory for Sasol's self service centers (SSCs). During the bidding

process, Sasol responded to both companies with conditioned prices – *i.e.*, reduced prices from the figures bid by Lake and Gulf on certain items – which Gulf accepted in part and Lake did not. Emails submitted into evidence at trial showed that one of Gulf's employees, Craig Trosclair, worked with Sasol after the contract was awarded to obtain information about the inventory counts necessary to supply the Sasol SSCs – *i.e.*, historical information about inventory provided by Lake in previous years. Sasol employees requested this information from Lake and then forwarded the information to Gulf. Because the Lake document indicated that it was confidential and proprietary, Craig Trosclair responded to Sasol to indicate it could not use the document and requested something new. Sasol returned the same document with the confidentiality disclaimer removed.

Plaintiffs' forensic accounting expert, Jason MacMorran, testified as to the damages to which he believed Lake or Vesta Johnston were entitled due to the alleged LUTSA and LUTPA violations. He concluded that Lake's lost profit damages for the period from November 1, 2014 through June 30, 2017, totaled $3,850,046; Lake's unjust enrichment damages were $8,024,746 for the period ending December 31, 2016; and the lost diminution in value damages for Vesta Johnston's interest in Lake totaled $2,702,157 through June 30, 2015. Mr. MacMorran acknowledged that he did not take into account that Lake lost its general manager of the last 23 years and almost the entirety of his outside and inside sales force, among other key personnel, into his calculations. Even though Bryan Vincent was terminated prior to the formation of Gulf, Mr. MacMorran stated that he could not disassociate any of the damages suffered by Lake, nor any of the profits attained by Gulf, from the fact that Gulf misappropriated trade secrets and otherwise engaged in unfair trade practices.

Mr. MacMorran also acknowledged that he did not know about, and thus also had not taken into consideration in his calculations, multiple contracts that had been

lost to third parties around this same time. Specifically, Lake lost certain fastener contracts – such as the Louisiana Pigment and Westlake fastener accounts – when former Lake employee Eddie Hebert left Lake to work for another competitor, STS Industrial ("STS"). Bryan Vincent testified that Hebert had been hired by Lake because of his knowledge of fasteners, and Hebert's exit was prior to and unrelated to the formation of Gulf. Similarly, Mr. MacMorran was unaware that the Axiall account had been lost to Virginia Sealing Products, a newer competitor. Nor was he aware that Lake had made an error on its services for the account with customer W.R. Grace, which resulted in Lake agreeing to pay certain amounts of money to W.R. Grace and to provide discounts on future sales. In each case, Mr. MacMorran confirmed that neither Cliff Moncrief, Lake's general manager, nor Mark Johnston, had informed him of these issues, all of which contributed to Lake's losses during the relevant period of Mr. MacMorran's report calculating damages suffered by Lake. While in his original report Mr. MacMorran calculated the lost profits through June 30, 2017 at $4,083,046, at trial he recalculated the losses to $3,850,046 by excluding the Westlake fasteners account and the Axiall account, which were lost to third-party competitors STS and Virginia Sealing Products, not Gulf.

In rebuttal to Mr. MacMorran's testimony, defense witness Dr. Joseph Mason – admitted as an expert in financial economics – testified that Mr. MacMorran's calculations as to both lost profits and unjust enrichment were flawed due to his assumption that all of Gulf's profits and all of Lake's losses were caused by Gulf's misappropriation of Lake's trade secrets. In support of this conclusion, Dr. Mason offered the general economic principle that any damage calculation must be derived from a direct causal relationship with the alleged act, not external factors. Among external factors that should have been considered by Mr. MacMorran, he opined, were the loss of key personnel to Gulf and significant increase in lawful competition in the Lake Charles rubber and gasket supply market. Dr. Mason further testified

that Mr. MacMorran should have calculated lost profits using a ten year average for annual revenue, not a three year average, because of the cyclical nature of the industry.[11]

Buttressing Dr. Mason's testimony, defense witnesses testified about how their extensive knowledge and experience about the rubber and gasket industry contributed to Gulf's success. Specifically, Bryan Vincent testified about the knowledge he had acquired in his 23 years of experience as general manager (and 27 years total) at Lake and as a former president of RAGCO, a national co-operative for group purchasing of rubber and gasket and other related products. He explained the knowledge that he and his employees had acquired through their combined experience related to the work required to operate a rubber and gasket supply company, including, *inter alia*, how to obtain product for resale, cut gaskets, obtain and utilize the WaterJet machine,[12] generate competitive bids, create and input parts numbers and descriptions through TrulinX, and to otherwise utilize that software system. Bryan Vincent also testified that Gulf had expanded the types of product that it would supply to its customers beyond those supplied by Lake and that a large portion of its business was through individual sales unrelated to larger contracts like those held at Lake.

Gulf employees, including Steven Haymon and Craig Trosclair, testified about the knowledge and experience they had acquired through decades of combined experience as outside and inside sales representatives at Lake. Trosclair testified about his relationship with Sasol and how that relationship transcended the connection Sasol had with Lake. When Trosclair left Lake to work for competitor

[11] Defendants note that two of the three years used for Mr. MacMorran's calculation of "average" annual revenue – 2012, 2013, and 2014 – were also the most profitable years of Lake's history.

[12] Like the TrulinX software system, Vincent testified that he had worked with the creators of the WaterJet in providing feedback for the rubber and gasket supply industry's needs and was able to acquire a machine quickly due to his relationships in the industry.

Setpoint (before Bryan Vincent's termination at Lake), he grew Setpoint's annual Sasol revenues from $50,000 to $4.2 million. Similarly, when Trosclair once again moved to Gulf, the Sasol representative worked with Trosclair to facilitate Gulf obtaining the Sasol contract. Finally, evidence was provided that PCA – a long term account held by Allen Billups at Lake (Billups had worked at Lake for over forty years prior to moving to Gulf) – not only canceled its contract with Lake after Mr. Billups' departure but *only* requested a bid from Gulf.

District Court Judgment

Noting that he had witnessed over 54 days of trial and reviewed nearly 250 pages of post-trial briefs, the district court judge found that Gulf violated provisions of LUTSA and LUTPA and awarded Plaintiffs $700,000 in lost profits. The court denied Plaintiffs' claims for unjust enrichment, future damages, treble damages, and attorney fees, and required Defendants to pay some, but not all, costs. The district court's written reasons for judgment, signed on July 31, 2019, addressed each decision in turn.

As to the trade secret violations alleged, the district court observed multiple violations of LUTSA and LUTPA, finding that Plaintiffs established that thousands of Lake's documents were available to Gulf and "some of this information was used to help [Gulf] get up to speed more quickly than it could have done otherwise." The court held: (1) Haymon's copying of the Lake parts numbering system by accessing Lake documents, which Bryan Vincent knew or should have known occurred, constituted an unfair trade practice under LUTPA; (2) the parts numbering system was not a trade secret because Haymon and Vincent – who created the original parts numbering system – could have easily created the same or similar system using their knowledge and experience; (3) Gulf misappropriated the WaterJet drawings, which was a violation of both LUTSA and LUTPA, and much of this information could not have been recreated "without years in the business"; (4) Gulf's acceptance of

Sasol's conditioned pricing request was not an unfair trade practice, as Gulf provided evidence it was still making profit off the contract even though losing money on particular items; (5) any claim under LUTPA or LUTSA for the inventory counts and usage reports from Lake given to Sasol is not an unfair trade practice by Gulf and must instead be brought against Sasol; (6) finally, as to the thousands of documents in Gulf's computer systems, the court found the information contained in them was not advantageous to Gulf once templates were set up for new current market prices. The templates could, just as with the parts numbers, accelerate entry, but such would be short lived as TrulinX creates templates with current inventories and prices that would have been obtained in short order.

Despite finding that multiple instances of LUTSA/LUTPA violations had occurred, the court recognized that questions of causation existed as to many of Plaintiffs' causes of action. The district court disagreed with Plaintiffs' characterization of Gulf as an ordinary startup company because Bryan Vincent and the other Gulf employees were part of Lake's growth for many years and had extensive knowledge and experience in the field. They thus were able to start Gulf with the benefit of understanding the business model for the rubber and gasket industrial supply company and had knowledge related to the job positions and software necessary to compete. The court held that this knowledge and experience was relevant for purposes of calculating damages, explaining:

> While the Plaintiffs argue that the monetary damage award should include the total value of the contracts received by the Defendants, the Court does not agree. While the information used by [Gulf] did help accelerate its creation, the contracts would have been lost eventually. Certain relationships between the individuals at the respective companies were always going to win out, and the contracts were going to eventually follow those connections if suppliable. It appears from argument that multiple contracts came up for bid involving both companies. [Gulf] was successful on two of these bids, and [Lake] was successful on the others. The two contracts that were taken were tied to sales representatives who had left [Lake] for [Gulf]. Those individuals had proven themselves to the respective companies as being valuable in their own right to the companies.

> The individuals who created [Gulf] had years of experience and knowledge in the field. They helped create the information and databases. In addition, they had developed numerous strong relationships with their clients.

The two bids awarded to Gulf – Sasol and PCA – were good examples of how important the relationships with the salesmen were, the court reasoned, as evidence at trial "overwhelmingly supported that the purchasing agent from Sasol wanted to follow Craig Trosclair when he left [Lake]. The purchasing agent aided [Gulf] in the bidding process, shared inside information, and changed the approved manufacturing list. Further, after Allen Billups left [Lake] for [Gulf], PCA's purchasing agent decided to have their contract re-bid, only allowing [Gulf] to bid on the supply contract."

The court thus found that it would not have taken Gulf the same number of years to create Gulf as it did to create Lake, as "[w]hile the extensive history was not there, [Gulf] could compete at a high level in a short period of time." Although thousands of Lake documents were available to Gulf, "many of the documents were stale and from years prior." Hence, the information in most of these documents "was not advantageous to [Gulf] to compete once templates were set up for new current market prices." Nevertheless, because Gulf was able to "get up to speed more quickly than it could have done" had it not taken information from Lake, the court awarded Plaintiffs $700,000 for its lost profits. The district court declined to award damages for Vesta Johnston's claims for loss in ownership value and declined to award damages for unjust enrichment, again because of its finding that Lake's contracts would have eventually gone to Gulf.

Because of the Preservation Order in place as of December 11, 2018, the court order to destroy all Lake information in Gulf's possession by February 15, 2019, and the lack of evidence that Defendants were in violation of these orders, the court found it would be inappropriate to award royalties. *See* La. R.S. 51:1432(B) ("If the

court determines that it would be unreasonable to prohibit future use, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time the use could have been prohibited."). And with regard to treble damages, the district court noted that the Preservation Order – which was agreed upon by all parties – prevented the Defendants from being able to fully comply with the statute, and any attempt to change the parts numbering system or other information taken and used by Gulf would have been a direct violation of the order. The court therefore declined to award treble damages.

Court of Appeal Proceedings

Plaintiffs appealed, assigning five errors of the district court: (1) the finding that the vast majority of the information held and/or used by Defendants was not a trade secret, including, *inter alia*, its inventory/parts classification system, its customer list with annual revenues each customer generated, current and historical contracts, designs, and drawings; (2) the rejection of Plaintiffs' expert damage calculations; (3) the refusal to award future damages or to enjoin continued use of the stolen information; (4) the refusal to treble Plaintiffs' damages; (5) the refusal to award Plaintiffs their attorney's fees; and (6) the refusal to award Plaintiffs their costs. Defendants answered the appeal and asserted that the district court erred in (1) finding Defendants' conduct was the cause of any damage to Plaintiffs; (2) finding Bryan Vincent personally liable for any conduct alleged against Gulf; and (3) awarding lost profits to Vesta Johnston, individually.

The court of appeal first addressed Lake's claims as to the LUTSA and LUTPA violations. *Johnston v. Vincent*, 2020-357 (La. App. 3 Cir. 5/5/21), -- So. 3d --, 2021 WL 1782967. It held the district court manifestly erred in not finding that Lake's customer lists and Lake's "integrated inventory system" on TrulinX, inclusive of parts numbers, were trade secrets. *Id.* at 12. It further held that Gulf's misappropriation of Lake's inventory and usage lists for stocking the Sasol SSCs

constituted a violation of LUTSA and LUTPA. *Id.* at 12. Noting that LUTSA and LUTPA overlap to some extent, the court of appeal held the misappropriation of Lake's trade secrets and use of Lake's business information as deceptive and unethical conduct under LUTPA and a breach of Bryan's fiduciary duty as a former general manager of Lake. *Id.* at 15-16.

Turning to damages, the court of appeal again found the district court abused its vast discretion in awarding only $700,000 to Plaintiffs for lost profits, reasoning:

> The trial court's conclusion that the only benefit [Gulf] derived from its taking and use of [Lake's] extensive business information was getting it up to speed more quickly to successfully compete against [Lake] completely disregards [Gulf's] continuous and extensive use of [Lake] information when soliciting business from [Lake's] competitors and that [Gulf's] personnel regularly requested, shared, and used [Lake's] contract bid and pricing information, including its bids on contracts it won with Sasol and the contract [Lake] was not invited to bid on, as well as the inventory information to satisfy its contractual obligations for Sasol's SSCs and sales [Gulf] made to other [Lake] customers.

Id. at 19. In view of what it deemed to be unrebutted testimony of expert Jason MacMorran, the court of appeal increased the damages awards to the amounts Mr. MacMorran calculated: $3,850,046 for lost profits; $8,024,746 for unjust enrichment; and $2,702,157 for diminished value of Vesta's ownership interest in Lake. *Id.* at 19-20. The court declined to award future damages, finding Lake can pursue an award for future damages in the district court. *Id.* at 20-21.

Significantly increasing the amount awarded, the court of appeal found the district court also erred in not trebling the actual damages suffered by Lake because evidence was presented at trial that the Gulf employees continued to use the TrulinX inventory system that had been copied from Lake and that they had never been instructed to change how they performed their work at Gulf even after receiving notice from the Attorney General. *See* La. R.S. 54:1407, La. R.S. 54:1409(A) ("If the court finds the unfair or deceptive method, act, or practice was knowingly used, after being put on notice by the attorney general, the court shall award three times

the actual damages sustained."). Furthermore, Gulf "could have obtained court approval to comply with the attorney general's notice and had its computer experts remove [Lake's] information from its computers to ensure its compliance with the attorney general's notices." *Id.* at 22-23.

Reviewing its original opinion on rehearing, the court of appeal found merit in three issues raised by Defendants and found that it had erred in its original opinion in (1) awarding judgment against Susan Vincent; (2) not clarifying that only the award for actual (*i.e.*, lost profits) damages is trebled pursuant to La. R.S. 51:1409; and (3) awarding damages in favor of Vesta Johnston for diminution in the value of her ownership interest in Lake. *See* La. R.S. 12:1320(C). The court declined to find error in the actual damages award and the unjust enrichment award in favor of Lake. The court of appeal thus granted in part and denied in part the Defendants' motion for rehearing and amended the original disposition to state:

> Lake Charles Rubber & Gasket, Co., L.L.C. is awarded judgment against Gulf Coast Rubber & Gasket Co., L.L.C. and Martin Bryan Vincent in the amount of $3,850,046 for lost profits, which award is trebled as provided by La. R.S. 51:1409(A) for a total of $11,550,138; $8,024,746 for unjust enrichment; reasonable attorney fees; and all court costs. Vesta Halay Johnston's claim for damages is denied. The matter is remanded to the trial court to determine Lake Charles Rubber & Gasket, Co., L.L.C.'s reasonable attorney fees.

Id.

Both parties sought review, and this Court granted and consolidated the writ applications. *Johnston v. Vincent*, 2021-1196 (La. 12/21/21), 328 So. 3d 1163; *Johnston v. Vincent*, 2021-1207 (La. 12/21/21), 328 So. 3d 1164.

DISCUSSION

The issues in this case are complex and numerous. Stated simply, the questions before the Court are (1) whether and to what extent Defendants violated LUTSA; (2) whether and to what extent the court of appeal erred in its changes to the awards for lost profits and unjust enrichment; (3) whether unjust enrichment

must be trebled; and (4) whether Vesta Johnston may recover for diminution in value of her ownership interest in Lake.

We find the court of appeal failed to properly apply the manifest error standard of review as to whether Defendants violated LUTSA with respect to the parts numbering system and reverse insofar as the court of appeal held the district court erred in that respect. We further find the court of appeal erred in amending the district court's damages award for lost profits to equal that estimated by Plaintiffs' expert. We therefore remand to the district court for reconsideration of the amount awarded given the additional LUTSA violations recognized by the court of appeal and affirmed herein for misappropriation of Lake's customer lists and inventory usage history for Sasol's SSCs.[13] We also find the court of appeal correctly held that *some* unjust enrichment must be awarded given the facts set forth in this case, but we remand for a determination of the amount of that award by the district court.

We agree with the court of appeal insofar as it found that the district court legally erred in not trebling the lost profits award for Defendants' knowing violation of LUTPA. As to Plaintiffs' assignments of error – namely, that unjust enrichment must be trebled and diminution in value awarded – we affirm the court of appeal's rejection of these arguments. We therefore reverse in part and affirm in part and remand for a recalculation of damages and for further proceedings in accordance with the holdings set forth herein.

Both Plaintiffs and Defendants sought review here and assert the court of appeal erred in multiple respects. Defendants argue that the Third Circuit failed to properly apply the manifest error standard of review and substituted its findings for those of the district court, disregarding substantial evidence supporting the district

[13] As discussed, *infra*, we do not necessarily find that the district court must increase the actual damages award for these additional violations, but we remand to the district court for clarification of its factual finding given the discussion of law set forth herein.

court's findings. Specifically, they assert the district court could reasonably find that Gulf never had Lake's entire "integrated inventory system" in its TrulinX system, that Lake's customer list was not a trade secret, and that Sasol's sharing of information about its own purchases from Lake was not a trade secrets violation. As to damages, Defendants assert the court of appeal disregarded substantial evidence supporting the district court's award of $700,000 for lost profits, and its refusal to award unjust enrichment. They argue that the district court was not required to accept the testimony of Lake's expert on damages, and the district court could reasonably find that most of Lake's lost sales and Gulf's profits were caused by lawful competition. Finally, Defendants assert the court of appeal erred in awarding treble damages, as the district court could reasonably find that Defendants did not engage in conduct warranting the same.

Plaintiffs' application focuses on the court of appeals' reduction of damages in its rehearing opinion. They assert the court of appeal erred in retracting the award of treble damages for unjust enrichment and the award of diminution in value of Vesta Johnston's ownership interest in Lake. We address each of the foregoing arguments in turn.

Standard of Review – LUTSA Violations and Damages

Because the issues involved in reviewing the alleged LUTSA violations involve questions of fact, the appropriate standard of review by an appellate court is the manifest error-clearly wrong standard, pursuant to which an appellate court cannot set aside a district court's finding of fact unless the finding is "clearly wrong" in light of the record reviewed in its entirety. *Hayes Fund for First United Methodist Church of Welsh, LLC v. Kerr-McGee Rocky Mountain, LLC*, 2014-2592, p. 8 (La. 12/8/15), 193 So. 3d 1110, 1115, citing *Cenac v. Public Access Water Rights Ass'n*, 2002-2660, p. 9 (La. 6/27/03), 851 So. 2d 1006, 1023.

In reversing a district court's factual conclusions with regard to causation, the appellate court must find that there is no reasonable factual basis for the district court's conclusion, such that it is "clearly wrong." *See Stobart v. State through Dept. of Transp. & Dev.*, 617 So. 2d 880, 882 (La. 1993). This requires more than reviewing the record for some evidence supporting or controverting the district court's finding. *Id.* And where, as here, findings are based on determinations regarding credibility of witnesses, "the manifest error-clearly wrong standard demands great deference to the trier of fact's findings; for only the factfinder can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said." *Rosell v. ESCO*, 549 So. 2d 840, 841 (La. 9/12/89). The manifest error-clearly wrong standard is not easily met, as it is rare that no reasonable basis exists to support a finding of a district court. *See Hayes*, 193 So. 3d at 1116; *Menard v. Lafayette Ins. Co.*, 2009-1869, p. 21 (La. 3/16/10), 31 So. 3d 996, 1011.

At the outset, we highlight the theories of the case presented by each party. Plaintiffs sought to prove that the benefits Gulf experienced and the losses suffered by Lake were related entirely to the misappropriation of trade secrets. Gulf, for its part, sought to prove that (1) the data found on its computers were not "trade secrets" because they were readily ascertainable or within the knowledge and experience of its personnel, (2) Lake's losses were in part related to the termination of its general manager of 23 years, who had achieved increased profits year after year during his tenure at Lake and maintained a significant reputation for his knowledge in the rubber and gasket industrial supply business, and (3) Lake's losses suffered were at least in part due to the fact that nearly all of the inside and outside Lake salesmen left Lake due to their loyalty to Bryan Vincent, not Plaintiffs, thereby taking their experience and clients loyal *to them*, not Lake, with them.

In reviewing the questions before the Court, we are mindful that the district court judge in this case was engaged throughout the 54-day bench trial proceedings and was sharply attuned to the issues before the Court and the nuances created by the momentous evidence before him. While there was overwhelming documentary evidence demonstrating the misappropriation of Lake's computer files, the questions before this Court turn largely on witness credibility, requiring that we give great deference to the district court's appraisal of the testamentary evidence's weight. Our role is to uphold the district court's findings unless there was no reasonable basis in support thereof, regardless of whether we may have found differently.

LUTSA Claims

As a general rule, an employee who has not signed an agreement not to compete is free, upon leaving employment, to engage in competitive trade. *Orkin Exterminating Co. v. Foti*, 302 So. 2d 593, 596 (La. 1974) ("In the absence of an enforceable contract to other effect, an employee has the absolute right to enter the employment of another and actively compete with his former employer."), *citing Jones & Ernst & Ernst*, 172 La. 406, 134 So. 375 (La. 1931). The employee may freely use general knowledge, skills, and experience acquired under his or her former employer. However, the former employee remains under a duty not to use or disclose, to the detriment of the former employer, trade secrets acquired in the course of previous employment. La. R.S. 51:1431, *et seq*. "The law recognizes that, at some point, an employee may wish to leave his position and 'try his hand' at competing with his former boss, free enterprise being the cornerstone of American democracy." *Huey T. Littleton Claims Serv., Inc. v. McGuffee*, 497 So. 2d 790, 793 (La. App. 3 Cir. 1986); *Orkin*, 302 So. 2d at 596 (favoring the right of individual freedom and of individuals to better themselves is essential in our free-enterprise society, where liberty of the individual is guaranteed). Yet, "[w]hile a former employee's right to

compete must be protected, so must the right of the existing business to fair play be maintained." *Huey T. Littleton*, 497 So. 2d at 793.

In the instant case, the record establishes that Vesta Johnston and Kathy Heinen declined an offer from Bryan Vincent to sign a non-compete agreement for a fee. Likewise, Lake did not have non-compete or non-solicitation agreements with any of the employees who left Lake to work for Gulf. According to well-established principles of this state favoring lawful competition, we must address whether and/or what activity engaged in by Defendants was unlawful and to what extent any unlawful activity contributed to damages suffered by Plaintiffs.

In 1981, Louisiana adopted the Louisiana Uniform Trade Secrets Act, La. R.S. 51:1431, *et seq.*, which provides various remedies to plaintiffs whose trade secrets have been misappropriated. *See* La. R.S. 51:1432; La. R.S. 51:1433. A threshold issue to any trade secrets violation is that a trade secret exists. *Johnson Controls, Inc. v. Guidry*, 724 F. Supp. 2d 612, 628-29 (W.D. La. 2010); *Advance Prods. & Sys., Inc. v. Simon*, 2006-609, pp. 11-12 (La. App. 3 Cir. 2006), 944 So. 2d 788, 794-95. Whether information qualifies as a trade secret is a question of fact. *NCH Corp. v. Broyles*, 749 F.2d 247, 252 (5th Cir. 1985). A plaintiff seeking damages for misappropriation of a trade secret under LUTSA has the burden of proving both the existence of a legally protectable trade secret and a legal basis upon which to predicate relief. *See, e.g., Pontchartrain Medical Labs, Inc. v. Roche Biomedical Lab'ys, Inc.*, 95-2260, p.7 (La. App. 1 Cir. 6/28/96), 677 So. 2d 1086, 1090, *citing Engineered Mechanical Servs. v. Langlois*, 83-1384 (La. App. 1 Cir. 12/28/84), 464 So. 2d 329, 333.

A "trade secret" is defined under LUTSA as:

> [I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> (a) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper

> means by other persons who can obtain economic value from its disclosure or use, and
>
> (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

La. R.S. 51:1431(4).

There are thus three qualifications necessary for "information" to be considered a "trade secret." First, the "information" must have "independent economic value." La. R.S. 51:1431(4)(a). Second, it must derive this "independent economic value" from not being "generally known or readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use." *Id.* Finally, it must be subject to reasonable efforts to maintain its secrecy. La. R.S. 51:1431(4)(b).

1. Parts Numbers

Defendants dispute the court of appeal's ruling that the parts numbers entered into TrulinX qualify as a trade secret and that Gulf misappropriated Lake's "integrated inventory system." The parts numbers and their descriptions unquestionably constitute "information" and thus may be considered trade secrets if meeting the requirements of La. R.S. 51:1431(4).[14] We agree with the district court that the parts numbering system was not a trade secret under LUTSA, however, because the system held no "independent economic value."

In reversing the district court on this finding, the court of appeal reasoned that the district court ignored the "significant importance of Lake part numbers to the integrated system," stating:

> [T]hey provide access to the extensive information contained in the inventory system and were likened to the combination to a safe. As a result, a part number provided to a customer who does not have access to [Lake's] inventory system is just a number. Such is not the case with

[14] We need not reach the issue of whether Lake undertook reasonable efforts to maintain secrecy of the parts numbers. Nonetheless, we note that Gulf employees acknowledged that the information on the TrulinX database was password protected, but evidence also demonstrated that the parts numbers and descriptions were listed on invoices.

> [Gulf], which substantially copied [Lake's] inventory system. Furthermore, [Lake's] inventory system includes special customer pricing which may also be a trade secret. The trial court manifestly erred in holding that [Lake's] inventory system, including its part numbers and special customer pricing, is not a trade secret and/or an unfair trade practice.

Johnston v. Vincent, 2020-357 at p. 13, 2021 WL 1782967 at *5 (internal citations omitted).

The problem with the court of appeal's position is that it both ignores the reasonable basis for the district court's finding of fact and overstates evidence in support of Plaintiffs' position. The record shows that *at Lake* the parts numbers served as "a combination to a safe" to Lake's information. As each purchase or sale is made, the TrulinX system records and stores that data under the part number, just as if it were within a file on the database. However, *at Gulf*, multiple witnesses testified that Gulf employees could only access Gulf's data, such as its purchase and sale history, through these numbers. Merely inputting a part number used by another TrulinX user does not pull up such other TrulinX user's purchase or invoice history.[15] Plaintiffs submitted no evidence that Gulf could access Lake's integrated TrulinX system through its own or that other Lake data beyond the parts numbers and descriptions was input therein.

As recognized by the district court, Steven Haymon's copying of the parts numbers and descriptions certainly saved time and labor, but ultimately the evidence could support the reasonable interpretation of the information as not having "independent economic value." Witness testimony established that Haymon and other Gulf employees would have been able to create a similar system at Gulf without using the exact numbers, as Bryan Vincent and Haymon were aware of how

[15]At one point during the trial, the trial court asked Lake's counsel point blank, "Is there a document on Gulf Coast Rubber and Gasket computers or one of those Exhibits that has that type of entry, not bits and pieces here and there, but that entirety of the TrulinX info?" After hearing Plaintiffs' counsel's response, the trial court commented, "As to my specific question, I'll take that as a no. . . ."

to create a logical structure to parts numbers and because Haymon was the person who did so at Lake. Reinforcing this evidence, multiple witnesses also testified that Lake operated without a parts numbering system from 1957 until 2007, when Bryan Vincent made the decision to acquire use of the TrulinX software to streamline Lake's operations.

In sum, implicit in the district court's finding that the copying of the parts numbering system and descriptions did not constitute a violation of LUTSA is the finding that the parts numbering system and descriptions did not have independent economic value. We agree. Based on the record, misappropriation and use of the parts numbers by Gulf did not give Gulf any advantage in competing for bids. Accordingly, the court of appeal failed to apply the correct manifest error standard of review and erred in reversing the district court ruling in this respect.

2. Customer Lists

The court of appeal also found that Lake's customer lists were trade secrets.[16] The relevant question, here, is whether the customer list in this case contained information that was "readily ascertainable" such that it is not a trade "secret."

Information in a customer list is not a trade secret when it is common knowledge for the industry, albeit conveniently compiled, or easily discoverable. *NCH Corp.*, 749 F. 2d at 252 ("While some [of the customer information misappropriated] may be obtainable from other sources, as a whole, the evidence supports the [district] court's conclusion that the information in the books goes beyond what is generally known or readily ascertainable."); *Bernhard MCC, LLC v. Zeringue*, 2019-529, p. 8 (La. App. 5 Cir. 9/9/20), 303 So. 3d 372, 378 ("The estimating tools, customer list, employee information, company forms, and historical bid summaries Defendants took from [plaintiff]" were not trade secrets

[16] The district court made no express finding on this issue.

because they "were common knowledge for their industry, albeit conveniently compiled, or easily discoverable."); *Ed Nowogroski Ins., Inc. v. Rucker*, 137 Wash. 2d 427, 441, 971 P.2d 936, 944 (1999) ("If information is readily ascertainable from public sources such as trade directories or phone books, then customer lists will not be considered a trade secret and a prior employee, not subject to a noncompetition agreement, would be free to solicit business after leaving employment.").[17] Consideration is given to the amount of effort expended by the employer to solicit and acquire the list of customers in the former employee's possession. *Nat'l Oil Service of La., Inc. v. Brown*, 381 So. 2d 1269, 1273 (La. App. 4 Cir. 1980) ("A former employee who enters business in competition with his former employer necessarily utilizes the experience he acquired and the skills he developed while in his former employment.").

In the instant case, the Lake customer list circulated by Bryan Vincent to multiple Gulf employees included hundreds of customer names and provided a dollar amount correlated to each. It appears unreasonable to conclude, then, that this list is limited to information that was "common knowledge" or readily ascertainable due to the limited Lake Charles market, as characterized by Defendants. While Defendants were able to establish an extensive knowledge of the Lake Charles market, they did not establish their ability to recount such a large number of customers. Instead, this information is more akin to those cases where courts have held that a customer list is a trade secret because it contains information that has been compiled through work and diligence of the original company's sales force and could not be recounted by memory alone. *E.g.*, *Nat'l Oil Serv. of La., Inc.*, 381 So. 2d at 1273.

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[17] LUTSA directs that its provisions "shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Chapter among states enacting it" – *i.e.*, we are directed to look to other states' implementation to apply LUTSA uniformly. La. R.S. 51:1438.

Most significantly, the list also included some allocation of revenues received from these customers. Even if Defendants were able to ascertain hundreds of customers without using Lake's customer list (and the evidence insinuates that they did), it would be difficult if not impossible to conclude that such a list with company revenues per customer is not "secret" but instead "common knowledge." *See NCH Corp., supra*; *Cf. Zoecon Indus., a Div. of Zoecon Corp. v. Am. Stockman Tag Co.*, 713 F.2d 1174, 1179 (5th Cir. 1983) ("[T]o qualify as a trade secret the information cannot be generally known by others in the same business nor readily ascertainable by an independent investigation. Thus, a customer list of readily ascertainable names and addresses will not be protected as a trade secret."). Defendants were able to prove their knowledge of the relative value major customers provided to Lake, but they did not provide evidence of the awareness of the values of hundreds of customers. Accordingly, we agree the district court manifestly erred in failing to find (at least expressly) that these lists are trade secrets and their misappropriation a violation of LUTSA.

3. Sasol Usage Reports

It is undisputed that, *after* the Sasol contract was awarded to Gulf, Craig Trosclair requested Sasol provide its inventory count sheets for Sasol's SSCs.[18] When Sasol's representative did not have this information, Mr. Trosclair suggested that Sasol obtain the information from Lake. The document was obtained from Lake but contained a disclaimer that it contained Lake's proprietary information. When Mr. Trosclair advised Sasol that he could not use the document with such declaration, the same or similar document was returned with the disclaimer removed.

While the district court held that such misappropriation of a trade secret, if one existed, could constitute a violation of LUTSA only by Sasol, the definition of "misappropriation" under LUTSA clearly provides otherwise. It states that

[18] Inventory count sheets are worksheets used to keep up with the minimum and maximum stocking requirements for each part that the plant uses out of the SSCs.

misappropriation includes "acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means." La. R.S. 51:1431(2). "Improper means" is defined to include "theft, bribery, misrepresentation, breach, or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means." La. R.S. 51:1431(1). The statute therefore contemplates the misappropriation present here.

Damages

Having affirmed in part and reversed in part the court of appeal rulings as to Defendants' LUTSA violations, the question remains whether the court of appeal correctly held that the district court was bound to adopt the Plaintiffs' expert testimony as to damages and thus erred in awarding only $700,000 in damages. Further, we must determine whether the court of appeal correctly reversed the district court's refusal to award damages for unjust enrichment. Defendants argue, and the district court held, that the damages suffered by Lake were minimally caused by the LUTSA/LUTPA violations in this case. In rejecting the Plaintiffs' claim for unjust enrichment, the district court held that Gulf would have obtained the purchases and new clients with or without the misappropriated trade secrets in time.

LUTSA provides that, in addition to or in lieu of injunctive relief, a complainant may recover damages for actual loss and unjust enrichment caused by the misappropriation. La. R.S. 51:1433. Recovery is limited to the period it would have taken the misappropriator to discover the trade secret without misappropriation. *Id.*, cmt (a), *citing Carboline Co. v. Jarboe*, 454 S.W. 2d 540 (Mo. 1970).[19] Further, Louisiana law places the burden on the plaintiff to establish a "factual, causal relationship between the defendant's actions and his injuries, i.e., a cause in fact." *Roberts v. Benoit*, 605 So.2d 1032, 1042 (La. 1991). "In the assessment of damages

[19] *See* Note 17, *supra*.

in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the judge or jury." La. C.C. art. 2324.1.

Questions of credibility are for the trier of fact, even when applied to expert testimony. *Ryan v. Zurich Am. Ins. Co.*, 2007-2312, p. 12 (La. 7/1/08), 988 So. 2d 214, 222. The trier of fact may accept or reject any expert's opinion, in whole or in part, and may substitute its common sense and judgment for the expert's opinion when the substitution appears warranted on the record as a whole. *Id.* Indeed, the concept that a court must accept wholesale an expert's testimony runs contrary to the policy favoring discretion to district courts in admitting expert testimony. *See Blair v. Coney*, 2019-00795, p. 9 (La. 4/3/20), 340 So. 3d 775, 781 (Addressing the deference given to district courts in admitting expert testimony and stating "we recognize that '[v]igorous 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.'"), *citing Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Where, as here, competing experts provide alternative analyses of a case, we have explained:

> Where the testimony of expert witnesses differ, it is the responsibility of the trier of fact to determine which evidence is the most credible. *Theriot v. Lasseigne,* 93–2661 (La.7/5/94), 640 So.2d 1305, 1313. The reviewing court must always keep in mind that if the trial court's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse, even if convinced that had it been sitting as trier of fact, it would have weighed the evidence differently. *Syrie v. Schilhab,* 96–1027 (La.5/20/97), 693 So.2d 1173, 1176; *Sistler v. Liberty Mutual Ins. Co.,* 558 So.2d 1106, 1112 (La.1990).

Rando v. Anco Insulations Inc., 2008-1163, p. 30 (La. 5/22/09), 16 So. 3d 1065, 1088.[20]

[20] When ruling on admissibility of Dr. Mason's testimony, the district court stated "the Court has heard statements from both experts [Dr. Mason and Mr. MacMorran] at this time where they have

We agree with Defendants that the district court was not required to accept the "unrebutted" testimony of Lake's expert. As we have repeatedly recognized, a party can effectively limit the weight of expert testimony through effective cross-examination. *See Blair*, *supra*. Such was the case here. Counsel for the defense drew out flaws in Mr. MacMorran's report, including the fact that he relied on incomplete information provided by Lake; he did not take into account that some of the accounts (PCA and Sasol) were clearly intent on leaving Lake to follow the Gulf salesmen. It was also reasonable and within its discretion for the district court to reject Mr. MacMorran's opinion that the fact that Gulf lost its general manager of 23 years had no effect on Plaintiffs' finances.

Nor was Mr. MacMorran's testimony "unrebutted," as asserted by the Plaintiffs and the court of appeal. Gulf presented Dr. Joseph Mason, an expert in financial economics, who testified, *inter alia*, that Mr. MacMorran's projections for lost profits and unjust enrichment were unreliable because they assumed that Gulf's alleged misconduct caused the entirety of Lake's losses and Gulf's sales. Mr. MacMorran refused to take into account the fact that Lake lost key personnel (the majority of its outside and inside sales force), among other factors at play, such as third party competition newly moved into the Lake Charles market. Because the district court found that these factors contributed to Lake's losses, the district court could reasonably diverge from Mr. MacMorran's calculations. Dr. Mason further testified that Mr. MacMorran should have used ten of Lake's past years, not three, when determining its average financial position. Notably, Lake's profits the last three years prior to the termination and departure of Bryan Vincent were record highs.

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given qualified testimony or been argumentative to the point that it has caused the Court some pause" and that "in all probability information received from both will go to the ultimate opinion."

As to the customer lists, Bryan Vincent testified as to the general amounts of revenue each of the major customers provided to Lake, which in large part profited from a few, major clients. It appears inconceivable based on his knowledge and testimony that he would not know the ranking of the major competitors on the list. Similarly, the Sasol contract had already been awarded to Gulf at the time that Craig Trosclair asked for and received Lake's inventory usage counts for Sasol's SSCs. While this again enabled Gulf to service this account more easily (and likely, seamlessly) than it would have done without this information, the damages suffered by Lake and/or unjust enrichment enjoyed by Gulf is limited by the fact that Sasol had already contractually agreed that Gulf would provide the inventory for the SSCs, and no evidence was presented that Sasol entered into such agreement only because it believed that Gulf would obtain this information. There was also evidence at trial that at least some, if not all, of the Waterjet drawings that were taken from Lake could have been obtained through other means – *i.e.*, through the customers themselves – but that the endeavor would take additional time and effort.

Ultimately, Plaintiffs' assertion that "the record contains uncontradicted proof that the stolen information was so indispensable that [Gulf] could never have opened for business without it" is, in fact, unsubstantiated by the record. To the contrary, there is significant evidence in the record that Bryan Vincent and his team held considerable knowledge about the rubber and gasket business – that Bryan Vincent himself was one of the leading experts in the industry nationally. The Gulf personnel had strong relationships with key customers who were loyal to Gulf's team and had the requisite skills to open and operate a competitive business in short time. Lake did not have non-competition agreements with Bryan Vincent or the key employees who left Lake to join him at Gulf, and Vesta Johnston was apprised by multiple key employees – including the top salesmen – that if Bryan Vincent were terminated, they would leave. Their ability to do so is in accord with Louisiana's strong public

policy favoring the right of individual freedom and the right of individuals to better themselves in our free-enterprise society. *Orkin*, 302 So. 2d at 596.

In short, while it is clear that some of the damage suffered by Lake was due to Gulf's wrongful acts, some of the damage was also clearly attributable to Lake's decision to terminate its general manager of 23 years, knowing that several key employees would leave when he was terminated. In finding that the district court was not bound to accept Mr. MacMorran's calculations, we do not condone Gulf's actions that constituted violations of LUTSA and/or LUTPA, nor do we find that Gulf is not liable to Lake for its lost profits. However, the district court did not abuse its discretion in rejecting Mr. MacMorran's testimony that *all* of Lake's losses and *all* of Gulf's profits were attributable to the misappropriation of certain trade secrets. There is evidence to support the reasonable conclusion that Gulf could have succeeded relatively quickly at competing against Lake regardless of whether it used this information and, in fact, did so after this suit was filed. Indeed, it is within reason that on remand the district court may find that this additional information caused little, if any, additional damages to Plaintiffs.[21]

We affirm the court of appeal, however, insofar as it found that it was an abuse of discretion for the district court to conclude Gulf gained no unjust enrichment due to its misappropriation of Lake's trade secrets. La. R.S. 51:1433 ("A complainant also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss."). While the district court was not bound to award the amount estimated by Mr. MacMorran for unjust enrichment where the district court reasonably disagreed with the opinion that *all* of Gulf's profits were related to the trade secrets misappropriation, just as it could depart from lost profits calculation, the failure to award any damages for unjust

[21] *See* Note 13, *supra*.

enrichment is contrary to the district court's finding that the misappropriated secrets helped Gulf get up to speed more quickly than it could have done without them. Therefore, we remand for the district court to calculate unjust enrichment in accordance with its original judgment and with our findings here. As set forth above, we further remand for a recalculation of lost profits in light of our holding that the customer lists were trade secrets and that Gulf misappropriated the Lake inventory usage counts for Sasol's SSCs.

Treble Damages

Louisiana law declares unlawful "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." La. R.S. 51:1405. While expressly providing authority to the attorney general to bring an action for injunctive relief and to seek penalties in the name of the state, *see, e.g.*, La. R.S. 51:1407, any person suffering ascertainable loss of money or immovable property as a result of a LUTPA violation may bring an action individually to recover actual damages. La. R.S. 51:1409(A).

If the court finds the unfair or deceptive method, act, or practice was knowingly used after being put on notice by the attorney general, the court shall treble the actual damages sustained. *Id.* "Knowingly" means "the act or practice used was such that a reasonably prudent businessman knew or should have known that the act or practice was a violation of [LUTPA]." La. R.S. 51:1402(7). An award of treble damages under LUTPA is penal in nature and accordingly must be strictly construed. *See B&G Crane Serv., LLC v. Duvic*, 2005-1798, p. 10 (La. App. 1 Cir. 5/5/06), 935 So. 2d 164, 170.

The district court held that Gulf's compliance with the Preservation Order required it to continue using the parts numbers and therefore did not award treble damages, stating:

> The Court believes the Preservation Order put into place at the beginning of this litigation prevented the Defendants from being able to fully comply with the statute. Any attempt to change the parts numbering system or other information that was taken and used by the Defendants would have been a direct violation of that Order. The Court will not award treble damages for the Defendants following an Order that was agreed to by both the Plaintiffs and the Defendants.

We agree with the court of appeal that the district court erred in finding the Preservation Order shielded Defendants from compliance with LUTPA following Gulf's receipt of the Attorney General notices. The Preservation Order directed that Defendants "take appropriate measures to preserve and prevent from deletion, destruction or alteration any and all records and content pertinent to plaintiffs' claims or defendants' defense" found on certain devices and in emails of the parties. The Preservation Order did not, in any possible reading, ***require*** that Defendants continue using the TrulinX software, regardless of how expensive or inconvenient it may have been to do otherwise. To interpret the Preservation Order as thus limiting Defendants would contradict the strong public policy disfavoring continued LUTPA violations following notice thereof that is enunciated in La. R.S. 51:1409(A). *See Gertz v. Robert* Welch, *Inc.*, 418 U.S. 323, 350 (1974) (punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries ***to punish reprehensible conduct and to deter its future occurrence.***") (emphasis added). We therefore direct the district court to assess treble damages to the actual damages awarded – *i.e.* the amount awarded for lost profits – on remand.

Treble Damages for Unjust Enrichment

Plaintiffs' first assignment of error is that the court of appeal should have maintained its original position (prior to changing its decision on rehearing) that an award for unjust enrichment in this case must be trebled under La. R.S. 51:1409(A). The standard of review for the legal question of whether damages for unjust enrichment may be trebled is *de novo*. *See, e.g., Wooley v. Lucksinger*, 2009-571, p. 49 (La. 4/1/11), 61 So. 3d 507, 554.

Louisiana Revised Statute 51:1409(A) provides in pertinent part: "If the court finds the unfair or deceptive method, act, or practice was knowingly used, after being put on notice by the attorney general, the court shall award three times ***the actual damages*** sustained." (Emphasis added.) Here, the unjust enrichment damages Plaintiffs seek to treble were assessed pursuant to La. R.S. 51:1433, which provides that a complainant may recover for actual loss by misappropriation of trade secrets – here, loss profits – and "also may recover for the unjust enrichment caused by misappropriation ***that is not taken into account in computing damages for actual loss***." (Emphasis added.)

Stated simply, because the damages for unjust enrichment are not "actual damages" by the plain language of La. R.S. 51:1433, they are not to be trebled pursuant to La. R.S. 51:1409(A). *See* La. C.C. art. 9 ("When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature."). Accordingly, we affirm the court of appeal ruling that only Plaintiffs' lost profits damages may be trebled.

Diminution in Value Claim

Plaintiffs' second assignment of error also fails. Plaintiffs argue that Vesta Johnston, as the sole member of Lake, may recover for loss in value of her ownership interests in Lake. Generally, an owner of a membership interest in a limited liability company owns no direct, personal right of action to enforce the entity's claim. *See* Glenn G. Morris & Wendell H. Holmes, 8 LA. CIV. L. TREATISE, Business Organizations § 34:1 ("Generally speaking, a corporate shareholder owns no direct, personal right of action to enforce a corporate claim."). In accordance with this principle, Louisiana courts have unanimously held that members of a limited liability company do not have the individual right to sue for damages sustained by the juridical entity. *See, e.g., Montgomery v. Lester*, 2016-192, p. 4-5 (La. App. 3 Cir.

9/28/16), 201 So. 3d 966, 969-70 ("The law governing juridical persons is clear. . . . members of the LLC . . . are not exposed to personal liability for the debts of the LLC, with limited exception. . . . As a corollary to that, the members likewise have no interest in the LLC's property. La.R.S. 12:1329.5 Thus, the rule of law is that the members of an LLC do not have the individual right to sue for damages sustained by the LLC."); *American Rebel Arms, LLC v. New Orleans Hamburger & Seafood Co.*, 2015-599, p. 7 (La. App. 5 Cir. 2/24/16), 186 So. 3d 1220, 1224 (members have no interest in a limited liability company's property, La. R.S. 12:1329, and thus have no right to sue personally for damages to limited liability company property); *Zeigler v. Housing Auth. of New Orleans*, 2012-1168, p. 8 (La. App. 4 Cir. 4/24/13), 118 So. 3d 442, 450 (same).

Where the alleged loss to the individual member or shareholder is the same loss that would be suffered by others – such as a decline in the value of their shares – the loss is considered indirect, and the member or shareholder does not have the right to sue individually. *See, e.g., Lopez Languirand v. Lopez*, 2018-245, pp. 5-6 (La. App. 5 Cir. 12/12/18), 261 So. 3d 1054, 1059; *Lawly Brooke Burns Trust v. R K R, Inc.*, 96-1231, p. 8 (La. App. 1 Cir. 3/27/97), 691 So. 2d 1349, 1353. To hold otherwise would permit duplicative damages, as the person holding ownership interests in a business will benefit indirectly from the increase in its assets due to recovery of damages in a lawsuit.

In the instant case, the loss suffered by Vesta Johnston for diminution in value of her ownership interest in Lake is indirect, as it is based entirely in the loss suffered by the limited liability company itself and the diminution in its assets. According to well-established principles, the claim for damages resulting in Gulf's LUTSA and LUTPA violations is held by Lake, not its owner. We therefore affirm the lower courts' rejection of Vesta Johnston's individual claims for diminution in value of her

membership interests, which are based entirely on the loss suffered by Lake for which recovery is already granted directly.

CONCLUSION

For the reasons set forth herein, we reverse the court of appeal in part as to its finding that Lake's parts numbering system and descriptions constituted a trade secret under LUTSA. We further reverse the court of appeal as to the increase in the amount of lost profit damages. We remand to the district court for a recalculation of lost profit damages giving consideration to the violations of LUTSA related to Gulf's misappropriation of Lake's customer lists and inventory usage history with respect to the Sasol customer contract.

While we reverse in part as stated above, we also affirm the court of appeal in part insofar as it determined Lake's actual damages must be trebled, that some amount must be awarded for unjust enrichment, and that the unjust enrichment damages are not trebled under LUTPA. We further affirm the court of appeal ruling on rehearing that dismissed Vesta Johnston's claims arising out of her ownership of Lake. We thus also remand to the district court for a determination of unjust enrichment damages and further proceedings in accordance herewith.

REVERSED IN PART; AFFIRMED IN PART; REMANDED FOR FUTHER PROCEEDINGS IN ACCORDANCE HEREWITH.

SUPREME COURT OF LOUISIANA

No. 2021-C-01196

VESTA HALAY JOHNSTON, ET AL.

VS.

SUSAN HALAY VINCENT, ET AL.

On Writ of Certiorari to the Court of Appeal, Third Circuit, Parish of Calcasieu

WEIMER, C.J., dissenting in part.

For the following reasons, I find that the district court did not manifestly err in implicitly finding that Lake's customer lists did not constitute a trade secret under the Louisiana Unfair Trade Secrets Act. Because of Lake's loss of "key personnel (the majority of its outside and inside sales force),"[1] many of whom joined Gulf's workforce, I believe that the record contains reasonable support for the district court's apparent finding that the customer lists were confined to information that was readily ascertainable due to the limited Lake Charles market via the collective memories of the majority of the sales force and/or outside resources such as a telephone book, the internet, and social media. The record shows that over the years, Bryan Vincent and his team gained:

> considerable knowledge about the rubber and gasket business – that Bryan Vincent himself was one of the leading experts in the industry nationally. The Gulf personnel had strong relationships with key customers who were loyal to Gulf's team and had the requisite skills to open and operate a competitive business in short time.

Johnston v. Vincent, 21-1196 (La. 1/--/23), slip op. p. 31. Accordingly, I would reverse the court of appeal's finding that Lake's customer lists were trade secrets under LUTSA.[2]

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[1] **Johnston v. Vincent**, 21-1196 (La. 1/--/23), slip op. p. 30.

[2] I also concur in the dissent in part by Justice Crain.

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Hughes, J., dissents in part.

I dissent in part for the reasons assigned by Weimer, C.J., and Crain, J.

February 14, 2023

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Crain, J., dissents in part and assigns reasons:

I would reinstate the trial court's decision as I believe no manifest error occurred. I agree that the numbering system was not a trade secret under LUTSA. However, I disagree that the customer list was a trade secret. Lake's profits were largely from a few large customers as testified to by Vincent. That means that the largest number of customers on the customer list did not generate the largest profits for Lake. Additionally, nearly all of Lake's outside and inside sales team left to work for Gulf. They knew their customers, and it is not unreasonable that they also knew the volume of sales to their customers. It was not manifestly erroneous for the trial court to decline to find a LUTSA violation relating to the customer list. I dissent on this issue.

Regarding damages, I would reinstate the trial court's lost profits award. The trial court rejected the opinions of plaintiffs' forensic accountant and relied more on defendants' economic expert. There was no manifest error in that choice.

I also would not make an independent award for unjust enrichment, and would not require treble damages on the amount awarded for lost profits. I agree with the trial court, any violation after notice from the Attorney General was attributable to the preservation order agreed to by both the plaintiffs and the defendants. Gulf

should not suffer punitive damages for not asking the court for relief from the order the plaintiffs agreed to. I dissent in part.