IN THE

Court of Appeals of Virginia

RECORD NO. 1399-22-4

PEGASYSTEMS INC.,

Appellant,

v.

APPIAN CORPORATION,

Appellee.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Two things can both be true: Appian did not want Pega viewing its BPM platform, yet Pega learned no trade secrets when an ordinary app developer demonstrated things every other developer could see. Appian cites no evidence that it ever treated as trade secrets the sorts of features Zou demonstrated—until this litigation. If it had, Appian would have cited contracts clearly defining those features as secret, distinguishing them from information Appian concedes was not secret, and securing promises of secrecy from each of the thousands of people with access. Appian cites not one. And Appian would have had no trouble telling the jury and this Court what its crown jewel secrets were rather than repeating vagaries about unspecified "architecture and design."

Instead, Appian repeatedly retreats to deference to the jury. AB2-3, 16-20. But deference gives no refuge where the jury was misinstructed on the law and deprived of key facts. Appian's response confirms just how utterly unprecedented the trial court's decisions were when it prevented the jury from considering that thousands had access to the purported trade secrets; from seeing with their own eyes that Pega's software did not contain the alleged secrets; and from learning that Appian bore the burden to prove causation and damages. And Appian cannot defend a misreading of an interrogatory that resulted in the trial court gutting Pega's damages case. The judgment should be overturned.

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ARGUMENT

I. Appian Failed To Prove Its Purported Secrets Were Trade Secrets.

A. Appian failed to adequately identify alleged secrets.

We begin with Appian's failure to identify its alleged secrets because

Appian exploits this imprecision throughout its response. The jury (and this Court)

cannot possibly evaluate Appian's claims that it protected its alleged secrets, *see*

infra I.B., without knowing what those purported secrets were. Despite stating that

"VUTSA imposes no particularity requirement," Appian concedes it had to be

specific enough to "allow the fact-finder to determine if it met the statutory

requirements." AB29; OB26-32. If Pega truly copied trade secrets, Appian easily

could have satisfied this standard. All it had to do was cite (1) where it told the

jury *what information* in its 400 pages of documentation was secret; and (2) where

it explained what about its "architecture and design" was secret. Yet instead of

stating what the purported secrets were, Appian directs the court to "over 800

transcript pages" that it asserts is "plainly sufficient." AB30.

1. Appian says that at trial it highlighted two *documents* within its *400*

pages of documentation. AB32. But "identifying documents alone [is] not … an

adequate substitute for detailed identification of the trade secrets therein." *Loop AI*

Labs Inc. v. Gatti, 195 F. Supp. 3d 1107, 1116 (N.D. Cal. 2016); *see InteliClear,*

LLC v. ETC Glob. Holdings, Inc., 978 F.3d 653, 658 (9th Cir. 2020). That is

because "information"—not a document—constitutes a "trade secret." Code § 59.1-336. Appian still has never explained what information within those documents was secret. OB27-28. Moreover, Appian never said at trial that these were the only two documents that it claimed to be secret, leaving the jury free to reach a verdict on anything within the 400 pages.

2. Appian acknowledges that its alleged "improvement" secrets are neither the *capabilities* of each function (which it concedes were known) nor the source code (which Pega never saw). AB28 n.7; OB29-30. Apparently, it is something in between. But instead of specifying what, Appian deploys the same deficient boilerplate for each alleged secret. AB8-13. First, Appian describes what the known feature *does*—which it concedes is not the secret. AB28 n.7. Next, Appian highlights videos of Zou demonstrating how an ordinary app developer with no insider knowledge would use the feature and asserts the demonstrations somehow revealed unspecified secret "architecture and design" "under the … 'hood.'" AB24. Finally, Appian asserts that a subsequent version of Pega's platform had a similar capability—which, even if true, does not mean Appian identified a trade secret.

It is easy to see how this sleight of hand swayed the jury. But Appian's boilerplate is no substitute for what the law requires—a description that enables the jury to meaningfully apply VUTSA's elements to each purported secret. Appian

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confuses matters by citing cases suggesting that a program's "architecture and design" can be a trade secret. AB31. Of course it can. But that does not mean—and those cases do not say—that the plaintiff can just repeat the mantra "architecture and design" and call it a day. Rather, as Appian concedes, it was required to give the jury "specific examples of protectable elements," not "catchall phrases" like "formulas." AB29-31; OB26-27, 30. In each of the cases Appian cites (AB31-32), the plaintiff got far more specific. Here, Appian did not.

Appian tries to convey the impression that it got specific by slathering its brief with record cites. But its cites never get more specific than the catchall.

Smart Services. Appian cites Zou briefly demonstrating Smart Services. AB8-9; R.36920. But Appian does not identify what in this demonstration shows *how* Appian created the known capability. Appian also cites screenshots of Appian's app-creation interface (the "process modeler"), AB9—but at trial, Appian conceded this was not a trade secret, R.36908-09, 37473-77.

Custom data types. Appian does not dispute that CDTs were ubiquitous. OB32; AB10. Yet it baldly asserts the alleged secret was "Appian's unique CDTs," without ever explaining what was different and secret about them. AB9.

Edit button. Here, Appian cites only a video showing Zou clicking an edit button, in passing, to correct a mistake. AB11. Appian does not explain how this shows anything beyond the known capability. OB30.

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Mobile. The only evidence Appian cites is a snippet of conversation where

Zou says apps work on mobile and PCs without additional programming. AB11-

12; PLT-855 at 23:30-24:19. That is just the definition of "'out-of-the-box'

mobile." AB11. Zou says nothing about *how* Appian created that capability. *Id.*;

OB31. Appian then cites Pega documents comparing other aspects of Appian's

and Pega's mobile offerings—not the out-of-the-box capability. AB11-12.

Social view. Here, Appian cannot even settle on what the purported secret is

about. At times, Appian suggests the secret Pega copied was a well-known "view

like" Appian's end-user interface. AB13 (quoting R.43983); OB31. Elsewhere,

Appian says the secret was *not* the social view interface any end user would see.

Infra 8-9. Beyond that, Appian simply cites demonstrations showing the widely

known capability—a social view with worklists and tasks. AB13.

B.   Appian's purported secrets are not trade secrets because Appian exposed them widely without requiring confidentiality.

Appian seems to embrace the controlling legal rule: "If an individual

discloses his trade secret to others who are under no obligation to protect the

confidentiality of the information … his property right is extinguished."

Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1002 (1984); *see* AB20-27; OB20-21

& n.2. Undisputed evidence confirms Appian did exactly that—in three separate

ways, each independently dispositive.

Prospective customers. Here, two indisputable facts establish that Appian

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forfeited the protection it claims: (1) Appian delegated authority to resellers to demonstrate all aspects of its platform to prospective customers; and (2) prospective customers had no confidentiality obligation. OB21-23; AB22-23.

Appian does not dispute point (2). So Appian's claim depends on its response to (1): that resellers were contractually prohibited from displaying what Zou showed Pega. Appian asserts that it authorized resellers to demonstrate only "their own applications," never the Appian BPM platform. AB22-23. That is false. The agreements separately permit resellers to demonstrate *both* "the Appian Software … ; and … [reseller] prototypes." R.51086-87, 51262-63; OB21-22. In fact, Appian granted the same rights to resellers who did not even make their own apps. OB22; *see* R.38285-87, 40937-41, 51086. The agreement's plain text controls. *See Babcock & Wilcox Co. v. Areva NP, Inc.*, 292 Va. 165, 208 (2016) (setting aside trade-secret verdict based on contract's plain text).

Appian only weakens its case by noting the agreements designated "an object code version of Appian's software" confidential. R.51086; AB23. Precisely. The contracts deem the code confidential, but expressly authorize *demonstrations* of the software's capabilities and sharing documentation. OB21 (citing R.51086). Appian insists (AB23-24) resellers would have known not to share what Zou demonstrated because of limitations on reverse engineering "structure" and providing training on the platform. How? Nothing in the contracts

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distinguishes visible "structure" that is secret from structure or observable features that were concededly not secret. OB21-23. Nor do the contracts even mention secret architecture or design, let alone define it. If Appian still cannot describe to this Court where the zone of secrecy lay, it could not reasonably expect resellers to independently divine the same line. *Supra* 3-5.

Finally, Appian faults Pega for not proving specific instances in which resellers actually demonstrated the alleged secrets. AB25. But the legal question is whether Appian imposed *obligations* to protect its alleged secrets. Surrendering control over disclosure defeats secrecy. *See* OB22-23 (collecting cases); *Turret Labs USA, Inc. v. CargoSprint, LLC*, 2021 WL 535217, at *5 (E.D.N.Y. Feb. 12, 2021), *aff'd*, 2022 WL 701161 (2d Cir. Mar. 9, 2022) (summary order). Moreover, *Appian* bore the burden to prove it protected any secrets. But Appian could not have proved that because it did not even bother to keep records of who received the demonstrations or what they saw, R.38396—further negating its claim that it treated anything that could be demonstrated as secret.

Developers. This too is undisputed—and separately dispositive: Thousands of developers had the same access to Appian's BPM platform as Zou, and *not one* signed *any* promise to keep the platform secret. OB23-26; *see* AB25-27. Yet Appian posits that somehow every developer would have known both that they had a confidentiality obligation and that it covered the alleged secrets Appian is still

unable to identify. AB25-27.

Appian starts with terms of use, which Appian concedes say nothing about confidentiality. AB26. Appian then cites the Appian-Serco license agreement. *Id*. But no developer signed such an agreement; Appian assumes they would all have known both that their employer signed one and what it said. Not that that would have mattered: The agreement nowhere says that Appian's BPM platform or its features are confidential. OB25-26. Finally, Appian invokes an agreement between Zou and his employer that contains another generic confidentiality provision. AB26-27; R.43682. The provision did not even mention Appian, its BPM platform, or anything about software, much less describe which aspects were secret among the numerous aspects Appian acknowledges were not. It merely said you must keep confidential information confidential. R.43682. So that agreement could not ensure Zou (and thousands of developers like him) knew what Appian now claims was secret and agreed not to share it.

End users. Appian does not dispute that it exposed the end-user-facing social interface to multitudes. OB23-24. Appian responds that the interface is not the secret. AB25. But elsewhere Appian says the opposite. *E.g.*, AB13 ("should just create a view like this"); R.37544, 42971. Which comes full circle, *supra* 5: Appian cannot prevail by cultivating ambiguity about what its alleged secrets were.

Given that Appian exposed its alleged secrets in these three ways, passwords

and other security measures Appian discusses (AB25-26) are "beside the point."

Turret Labs, 2021 WL 535217, at *4. The most sophisticated window locks are

worthless if you keep your front door wide open and authorize thousands to roam

around.

II.   The Trial Court's Erroneous Jury Instructions And Evidentiary Rulings Require A New Trial.

A.   The court improperly prevented the jury from considering that thousands had access to the alleged trade secrets.

The trial court instructed the jury that the number of people granted access to

a purported secret is *categorically* irrelevant. OB34-35; Feb.Add.13; R.8918 (Pega

arguing evidence relevant to the reasonableness of efforts to maintain secrecy).

Appian fails to find any case excluding such evidence, much less instructing a jury

that it has no relevance. Affirmance would make Virginia the lone outlier.

With no supporting authority, Appian and its amici cite cases addressing a

different question: Is it permissible for a factfinder to find that confidentiality

provisions were so clear as to preserve trade secrecy despite disclosure to

numerous trusted people? AB34-35; NOVA Chamber Br. 6-11. Those cases say

yes. But critically none prohibited the *factfinder* from making that determination

based on many factors, including the number of people with access to the alleged

secret, when the adequacy of confidentiality measures was disputed. OB34. When

the trial court here prohibited the jury from considering that thousands had access

to Appian's alleged secrets, the jury had made no finding that Appian's purported confidentiality measures were so robust that it did not matter how many people had access. The court improperly decided that critical question for the jury. OB34-35.

Appian's brief shows how the excluded evidence easily could have made a difference. A jury that knew Appian lost count of how many resellers enjoyed the right to demonstrate the software could have rejected Appian's argument that those resellers would all have intuited what information Appian hoped to keep secret. AB23-25; OB21, 34. Likewise a jury that knew Appian disclosed its alleged secrets to well over *6000* developers could have concluded it was unreasonable to expect all developers to realize they had (unspecified) obligations to keep certain unidentified features secret. *Supra* 7-8; OB34.

Appian also argues that this evidence would have confused the jury by suggesting that "there exists some threshold over which trade-secret protection was lost" regardless of protection taken. AB37-38. But the trial court ruled only on relevance, not confusion. R.42860; Jan.Add.35. And confusion could be no basis for excluding highly probative evidence when a limiting instruction would have allayed any confusion. *See Bond v. Baker Roofing Co.*, 81 Va. Cir. 439 (2010).

B. The court improperly excluded Pega's BPM software.

Appian's response confirms the trial court's exclusion of Pega's software was also utterly unprecedented. Appian cites no case prohibiting a party from

introducing—let alone even *attempting* to authenticate—software evidence on the ground that the software resides on a medium different from the one used to transmit it in discovery. Nor does Appian explain why it was appropriate for the court to prohibit Pega from using the software on that basis when Appian's expert displayed the software on a different medium earlier at trial. OB36-37; AB41.

Appian never defends the trial court's actual rationale for exclusion, which (as Appian acknowledges) was that the computer Pega brought to trial "was not 'the laptop [Pega] gave [Appian].'" AB40 (quoting R.37232). Appian does not contest that the relevant evidence was the *software*; the laptop was just the device to store it and display it to the jury. Appian cites no authority requiring a party to use the copy produced to its opponent in discovery. If this were a voicemail, no one would suggest that the defendant had to use the plaintiff's copy of the recording. There is no different rule for software. OB37.

With no support for what the trial court did, Appian recasts the trial court's decision in three ways. First, it attributes to the court a "finding that Pega's exhibit list did not put Appian on notice of Pega's new … laptop." AB41. Appian cites nothing for this "finding," because the trial court did not make it. *Id.* Pega timely disclosed the evidence. OB36. And Appian had the relevant evidence—the *software*—which it used at trial without the transmitting laptop. *Id.*; AB39.

Appian next recasts the trial court's order as a discovery sanction based on a

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purported "finding" of "gamesmanship." AB39, 42. This also is false. R.39225.

Appian sought no such sanction during discovery, and the trial court imposed

none. Nor could it have. Right after learning that Dr. Marshall had difficulty

using the discovery laptop, Pega's technical support helped him access the

software, which he moved to the (different) computer he used to record

demonstrations of Pega's software he played at trial. R.37428, 39213-14.

Appian recharacterizes the ruling yet a third time, insisting that the "court

merely applied Rule 2:901's authentication requirement." AB42. But prohibiting

a party from authenticating evidence is the opposite of applying the authentication

rule. None of Appian's cases prevented authentication *at trial* through the normal

process.[1] Appian does not contest Pega's proffer that Bixby had first-hand

knowledge that the software was what Pega represented it to be and "the exact

same thing" Pega produced in discovery. R.39212-14. That is all authentication

requires. OB38. "[S]peculati[on]" about "tampering," if that was Appian's

concern, goes "to the weight of the evidence rather than to its admissibility."

LeBlanc v. Commonwealth, 2022 WL 2919857, at *3 (Va. Ct. App. July 26, 2022).

Appian tries to minimize the impact of the ruling. AB43. But Appian fully

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[1] *See United States v. Browne*, 834 F.3d 403, 412-13 (3d Cir. 2016) (collecting cases); *Knowles v. Commonwealth*, 1998 WL 743695, at *4 (Va. Ct. App. Oct. 27, 1998) (holding authentication *at trial* insufficient where witness lacked knowledge of "records' immediate origin").

understood that showing the software was critical, which is why Appian fought to exclude it and exploited its absence in closing: "[S]how me, where is it? They haven't *shown you* a thing.… *That's how you tell, you look at the platform*." R.42986-87 (emphasis added). Appian cannot now argue that telling is just as good as showing.

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

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

1. Appian concedes the burden-of-proof issue when it repeatedly says: "The parties … agree" that VUTSA imposed on Appian an "obligation to prove causation in the first instance." AB51 (quotation marks omitted); *see* AB43. The jury received no such instruction. That is why, in 59 pages, Appian could not bring itself to quote even once the trial court's flawed burden-of-proof instruction.

Instead, Appian quotes several places where the jury instructions list "the *issues* before … the jury" and instruct, as Instruction 14 does, that the jury must *find* "the amount of unjust enrichment caused by misappropriation." AB53 (emphasis changed). But saying a jury must *find* something is not the same as saying Appian has the *burden of proving* it. Only one sentence in the instructions addresses Appian's burden: The instruction that Appian refuses to quote says, "Appian has the burden of establishing by greater weight of the evidence Pegasystems' sales." Feb.Add.14. Then the burden shifts to Pega. *Id.* Not once

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did the court instruct the jury that Appian had the additional burden Appian now concedes.

The only natural reading of Instruction 14 is that once Appian demonstrated Pega's total sales, its burden was satisfied. And that is precisely what Appian told the jury: "We just got to show all the money that flowed in, the 6 billion plus from their customers, right?" R.43206-07. That is why the leading, independent authority on intellectual-property law pans the instruction for "the missing element of the plaintiff proving causation," AIPLA Br. 8, and two of the most prominent IP scholars call it "deeply flawed," IP Scholars Br. 5. This alone requires a new trial.

2. The jury instruction was flawed in shifting *any* part of the burden of proving causation and damages to Pega. Any burden-shifting contradicts VUTSA's explicit direction that the "complainant … prove … damages." Code § 59.1-338(A); OB41-44.[2] Appian urges the Court to ignore the key language—"if a complainant is unable to prove"—arguing that it appears in a sentence that "says nothing about unjust enrichment," but "relat[es] to a different remedy." AB44 (quotation marks omitted). That is wrong. While the sentence eventually turns to another measure of damages ("reasonable royalty"), the first clause explicitly

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[2] Appian cites Pega's position on burden-shifting in another litigation, but that case was in a different state applying a different statute—one not even modeled on the Uniform Trade Secrets Act—that lacked Virginia's unique language expressly assigning the burden of proof to complainant. *See* AB47-48.

refers to unjust enrichment: It is about the "complainant['s]" inability to "prove" damages by "*other methods* of measurement," i.e., the "actual loss" and "unjust enrichment" methods introduced in the immediately prior sentence.

Appian affords no meaning to the "[i]f a complainant is unable to prove" clause, in defiance of bedrock Virginia principles strongly disfavoring interpretations that strip statutory language of meaning. OB42. Appian's argument rewrites the statute, by effectively substituting "unable to recover" for "unable to prove." And its perfunctory dismissal of the General Assembly's unique departure from the Uniform Act—as a "distinction without a material difference," AB45—is both textually wrong and flatly contradicted by the case law, OB43; *Cornell v. Benedict*, 878 S.E.2d 191, 195 (Va. 2022).

Similarly surprising is the back of the hand Appian gives to two Supreme Court opinions on VUTSA. Pega's brief demonstrated how the Supreme Court's analysis in *MicroStrategy* turned on the following syllogism: "The plain language of [VUTSA] does not provide any burden-shifting requirement," so the "burden does not shift." 258 Va. at 265. Appian does not disagree. It merely responds that *MicroStrategy* concerned an "entirely different" element of a VUTSA claim (misappropriation). AB48. But Appian never explains why *MicroStrategy*'s no-shifting rule does not apply equally to causation and damages. Moreover, Appian concedes there is no burden-shifting for lost-profit (i.e., actual loss) damages under

VUTSA. AB48 (citing *Banks v. Mario Indus. of Va., Inc.*, 274 Va. 438, 455 (2007)). Its sole response is another cryptic sentence observing that lost profits are "not at issue" here. *Id.* That again fails to explain why this would matter, where VUTSA treats lost profits and unjust enrichment in the same breath and identically: They are both the "other methods of measurement" that a complainant must "prove."

3. Spurned by Virginia law, Appian urges this Court to "adopt[] the burden-shifting framework" from other jurisdictions that *have not* departed from the Uniform Act. AB45. Appian needs to invoke a vague "framework" because no court in any jurisdiction has ever approved the total-sales *instruction* adopted here. The only court to confront such an instruction rejected it, because it was obviously wrong to "allow the plaintiff to satisfy its burden with gross sales data" rather than requiring proof of causation. *ADA Motors, Inc. v. Butler*, 432 P.3d 445, 450-51 (Wash. Ct. App. 2018). That is why amici agree the instruction is "unprecedented." OB41; *see* AIPLA Br. 7-9; IP Scholars Br. 25.

Appian is wrong to say that the instruction "track[ed] the Restatement nearly word-for-word." AB49. It tracked just one sentence in one comment—eschewing the Restatement's multi-factored approach. And for reasons Pega has explained (with no response from Appian) there is no basis for Appian's assumption that it captures all of § 45, or even all of comment *f*. OB48.

Beyond that, Appian sows confusion by rebutting an argument Pega did not make. AB49-51. Pega used the phrase "sales causation" to describe a plaintiff's obligation to prove the overall *amount* (or "share") of the defendant's sales that was caused by the misappropriation. OB45-47. Yet Appian and its amici construct a strawman, redefining "sales causation" as a requirement that the plaintiff prove "proximate causation for *each individual sale*." AB51 (emphasis added); *see* Perlman Br. 6-7 (echoing Appian's new definition). That is not Pega's position. Pega's brief (OB47) invoked the position Pega advocated in its alternative proposed jury instruction: Appian's burden is to prove "the *amount of Pega's sales* proximately caused" by the alleged misappropriation. Feb.Add.68 (emphasis added). Pega repeatedly advanced the same rule, drawn from Supreme Court authority, that a trade-secret plaintiff must "prov[e] with reasonable certainty the *amount* of damages," based on a "[p]roximate cause" standard. OB44-45 (emphasis added) (quoting *Banks*, 274 Va. at 455; *Saks Fifth Ave., Inc. v. James, Ltd.*, 272 Va. 177, 188 (2006)).

The closest Appian comes to critiquing Pega's actual proposed rule is a suggestion that Appian was not required to prove proximate cause, but rather to "demonstrate[]" nothing but "*a nexus*," which entails a "show[ing]" that sales are "reasonably related to the infringement." AB50 (quotation marks omitted). Of course, even that diluted standard cannot salvage the verdict because Appian

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sought and obtained an instruction under which its only burden was to show "Pegasystem's sales," period—no "nexus" and no "reasonably related."

Appian has no choice but to offer a more diluted standard because its damages expert conceded that he *did not* opine on "what would have happened but for use of the trade secrets." OB52 (quoting R.37746). Under Appian's "nexus" standard, a plaintiff could claim all of its competitor's sales merely by showing that the competitor made some improvement based on even one purported trade secret, regardless of how trivial.

This loosey-goosey "nexus" standard is wrong. A plaintiff's burden is to prove proximate cause. OB44-45. As amici explained (again, without any response from Appian), when alleged trade secrets are "a small part of a much larger work," "it would be absurd to presume that the presence of the [allegedly] infringing material caused the sale." IP Scholars Br. 25. It is especially improper here because, as Appian's expert admitted, Pega's platform had "numerous capabilities" that drove sales and that "ha[d] nothing to do with the case," OB52 (quoting R.42624-25)—another point to which Appian fails to respond.

4. Appian does not dispute that a new trial is required if a "properly instructed [jury] … *might have* returned a different verdict." *Rhoades v. Painter*, 234 Va. 20, 24 (1987) (emphasis added). Even the court stated its instruction, if erroneous, "cause[d] significant prejudice." OB52 (quoting R.43493-94).

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Juries are presumed to follow the instructions, and the jury here surely applied the burden-shifting rule the trial court adopted. *See Gilliam v. Immel*, 293 Va. 18, 26 (2017). A correct instruction would have compelled Appian to prove that any alleged misappropriation "was the proximate cause of Appian's damages." Feb.Add.52. Stripped of the incorrect instruction, there is no reason to believe a jury necessarily would have reached the same verdict.

This is especially true where the jury was (correctly) instructed that it could "discard all or part of the testimony" from Appian's witnesses. Feb.Add.1. For example, Appian cites "Dr. Marshall's assessment … that if Pega had not copied … , Pega's platform would have become 'obsolete and irrelevant'" overnight. AB55. But a jury could easily have rejected Marshall's bare assertion and found for Appian based solely on the erroneous instruction. The notion that a BPM industry leader would have fallen off a cliff and made no new BPM sales without a few allegedly misappropriated features is patently absurd—and, sufficient for present purposes, Marshall's speculative prediction was hotly contested. Marshall offered no data and applied no methodology to support this overnight-obsolescence theory. *See* R.37077-79, 42549-51, 43024-26. He failed to consider the fact—established by his own testimony—that Pega's BPM platform was rich with valuable features that had nothing to do with this case. *See* OB52-53; R.42623-28. And Appian's damages analysis failed to account for products

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unrelated to the alleged trade secrets—like Antenna, a company Pega acquired that had independently developed mobile solutions. R.37307-09, 39020-21, 39768, 40372-73. A properly instructed jury could easily have reached a different result.

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

Appian does not dispute that Pega proffered extensive evidence demonstrating that "much of Pega's revenue was attributable to products with which Appian did not compete," OB53; that this evidence was highly relevant to causation, OB55; and that barring this evidence "left the jury with the crucial misimpression that Pega had no defense to Appian's claim that it was entitled to the benefit of every Pega sale," OB59. Yet, Appian barely defends the trial court's ruling against either of the flaws Pega identified—namely, the trial court's lack of authority and its erroneous reading of the interrogatory and response.

Appian does not contest the general rule that an interrogatory response is not a basis for excluding evidence because "[r]esolution of any inconsistencies and discrepancies is peculiarly within the province of the jury." *TransiLift Equip. Ltd. v. Cunningham*, 234 Va. 84, 93 (1987); *see* OB56. Appian's two unpublished cases provide no basis for violating this principle. In both, the exclusion was a sanction for violating a *court order*. *See Spaid v. Spaid*, 2022 WL 14156360, at *5 (Va. Ct. App. Oct. 25, 2022) (affirming discovery sanction "after the circuit court ordered" compliance); *Moore v. Moore*, 2020 WL 6277427, at *11 (Va. Ct. App.

Oct. 27, 2020) ("[W]ife violated the scheduling order."). There was no such order

here and thus no violation.

Nor does Appian address the plain meaning of Interrogatory 18. Pega's

brief explained that the trial court's interpretation missed a fundamental distinction

between different *products* (the subject of Pega's excluded evidence) and different

"*versions*" of the same product (the subject of Appian's interrogatory). OB57.

Appian does not refute any aspect of that analysis. It just substitutes a highly

misleading paraphrase, claiming that it asked for "all revenues and expenses

'relating to [the Pega platform].'" AB57 (alteration Appian's; misquoting

R.47525). That is not what the interrogatory asked. It asked for revenues "relating

to Pega 6.3, Pega 7.0 and any subsequent *version* broken out by year and *version*

of the software." R.47525 (emphasis added). Appian does not explain how it was

possible to read those words as requiring revenue broken down by products.

Appian's misreading of an interrogatory could not justify any remedy against Pega,

let alone one as draconian as gutting Pega's damages defense case.

Appian's protests of being "unfairly prejudiced" and "sandbagging," AB57,

are unfounded. Appian alone was responsible for how it framed its question, and it

was always free to ask for a breakdown of revenue by product, rather than by

version. Moreover, Appian does not contest that long before trial Pega's damages

expert provided a report breaking out revenue attributable to unique Pega product

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offerings as opposed to any alleged misappropriation. OB58. Appian had every

opportunity to examine the underlying data and depose him on it.

IV.   Reversing Any Trade Secret Or On Damages Requires A Full Retrial.

If the Court holds that Appian failed to identify or prove any subset of its

alleged secrets or sets aside the damages award, the Court should award a new trial

on all VUTSA issues, including liability. Appian ignores the fundamental problem

mentioned twice in Pega's opening brief (OB32, 59-60): This Court cannot know

on which purported secrets the first jury found liability and awarded damages, so

the only way for a new jury to connect damages to liability is to have that new jury

decide liability as well. In other words, liability "is not separable from the issue of

damages," and must be tried together. *Sampson v. Sampson*, 221 Va. 896, 902

(1981) (vacating damages; ordering new liability trial). None of the cases Appian

cites grappled with this problem. AB33.

Moreover, Appian offers no reason to treat multiple theories of trade secret

liability differently from the distinct theories of negligence liability in *Exxon* where

the Court awarded a new trial after determining that one theory was legally

impermissible. OB32; *Exxon Mobil Corp. v. Minton*, 285 Va. 115, 133 (2013). In

both instances, there is the same intolerable risk that the verdict rested on an

impermissible legal basis.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

In compliance with Rule 5A:22, I certify that on the 3rd day of May, 2023, I caused this reply brief to be filed electronically through VACES with the Court of Appeals of Virginia, and sent by email to counsel of record for the Appellee:

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This brief contains 5,183 words and 22 pages, and complies with this Court's April 4, 2023 order permitting the filing of a reply brief "not to exceed the longer of 22 pages or 3,850 words in length." Counsel does not wish to waive oral argument.

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