

Affirmed as Modified in Part; Reversed and Rendered in Part; Reversed and Remanded in Part; and Opinion filed June 26, 2025.



In the

Fourteenth Court of Appeals

NO. 14-23-00410-CV

JUSTIN COE, MICHAEL COMRIE, RUSSELL DAUPHIN, KALE GARRETSON, RYAN HIBBETTS, MICHAEL KASPAR, JACOB LEWALLEN, BRIAN MADISON, BRUCE WAYNE STEUBING, MICHAEL WHEELER, RYAN WHEELER, BO YOUNG, AND TOBY EOFF, Appellants

V.

DNOW LP D/B/A DISTRIBUTIONNOW, Appellee

**On Appeal from the 434th Judicial District Court
Fort Bend County, Texas
Trial Court Cause No. 22-DCV-294327**

O P I N I O N

Plaintiff DNOW sued competitor Permian Pump & Valve, Permian's owner Clayton Kenworthy, and thirteen former DNOW employees, alleging that the employees copied DNOW's confidential information and trade secrets for Permian and improperly caused the "mass exodus" of about thirty DNOW employees.

DNOW sought to hold all of the appellants liable, either individually for a proportionate share of responsibility or jointly and severally as co-conspirators, for misappropriation of trade secrets under the Texas Uniform Trade Secrets Act. DNOW asserted a duplicative claim under the Texas Theft Liability Act, and against four appellants, an additional claim for breach of fiduciary duty.

The jury returned favorable findings against various appellants under all three causes of action. The trial court rendered judgment awarding DNOW actual and exemplary damages for conspiracy to misappropriate trade secrets. For breach of fiduciary duty, the trial court also ordered four appellants to forfeit all compensation received from DNOW in 2022. Finally, the trial court held all thirteen appellants jointly and severally liable for all of DNOW's attorneys' fees.

We reverse the trial court's judgment. In an issue of first impression for this Court, we hold that the Texas Uniform Trade Secrets Act preempts other claims and theories of liability that rely on proof of the misappropriation of statutorily defined "trade secrets." This includes DNOW's claim of conspiracy to misappropriate trade secrets and its other claims to the extent that they rely on proof of the same facts.

We further hold that legally sufficient evidence supports only one of the damage categories found by the jury, and there is no evidence of civil theft when measured against a correct charge. Although there is some evidence of breach of fiduciary duty, we cannot be reasonably sure that jurors' findings were not significantly influenced by a legally invalid theory of liability or other charge error. Finally, we agree with the appellants that the trial court used an incorrect date in assessing prejudgment interest; that DNOW's attorneys' fees in connection with its trade-secret claims must be reassessed; that the appellants are entitled to recover their own attorneys' fees in connection with DNOW's unsuccessful civil-theft claims; and that costs and interest must be reassessed.

I. BACKGROUND

Toby Eoff's family founded Odessa Pumps, and Eoff grew the business before selling it to DNOW in 2015. After the sale, Eoff became a vice president at DNOW. The twelve other appellants in this case—Justin Coe, Michael Comrie, Russell Dauphin, Kale Garretson, Ryan Hibbetts, Michael Kaspar, Jacob Lewallen, Brian Madison, Bruce Wayne Steubing, Michael Wheeler, Ryan Wheeler,¹ and Bo Young—also worked for Odessa Pumps after DNOW bought the company, and some worked for it before the sale as well. Clayton Kenworthy, a former employee of the original Odessa Pumps, ran Odessa Pumps after DNOW bought it, but he left a few years later when he purchased Permian.

A. DNOW Employees Depart to Join Permian

In January 2022, Eoff formally announced that he would retire from DNOW on April 1st of that year.

Brian Madison was the branch manager in charge of operations at Odessa Pump's Odessa location, and when he learned of Eoff's impending retirement, he contacted Kenworthy, saying, "[I]'ve got the best 5 from my store ready to work for eoffworthy pipe & equip. thoughts?" By "eoffworthy," Madison was suggesting some sort of enterprise involving Eoff and Kenworthy. Madison met with Kenworthy that day and began plans to move to Permian.

Although Permian's business did not then involve pump sales, Kenworthy wanted to expand the business into that area and compete directly with DNOW's Odessa Pumps. While employed by DNOW, Madison spoke with Wheeler and Young about moving with him to Permian. To further assist Permian in recruiting

¹ As between brothers Michael and Ryan Wheeler, we need discuss individual claims only against Michael Wheeler, so our references to "Wheeler" refer to him.

DNOW employees, Madison passed information to Kenworthy about other DNOW employees' compensation, commissions, and accrued vacation time. He also copied his DNOW hard drive to flash drives and took their contents with him to Permian.

In preparing for the move, Young, too, energetically copied DNOW information. He sent copies of working files to his personal email, including 645 proprietary drawings and every manager's report in Young's possession dating back to October 2015.

Like Madison and Young, Wheeler also planned as early as January 2022 to leave DNOW for Permian. He, too, spoke with other DNOW employees about moving to Permian and copied DNOW's information. Wheeler later admitted that he had lied under oath when he denied copying DNOW's information and using it after he joined Permian.

In the first week of April 2022, nine DNOW employees left for Permian. After this first wave of departures, DNOW began increasing employees' compensation and offering retention bonuses to prevent further resignations. Only three employees left DNOW for Permian in May 2022, but on June 1, 2022, ten more DNOW employees departed for Permian, including nearly all of DNOW's San Angelo branch. Another DNOW employee quit that weekend, followed by six more on June 13, 2022. A week later, DNOW filed this suit.

B. The Lawsuit

The parties agreed to a forensic protocol for the examination of the cell phones, computers, and flash drives the appellants used in communicating with one another or in copying DNOW's information. As a result, the record contains hundreds—possibly thousands—of text messages and emails between various combinations of appellants concerning Permian's plans to compete with DNOW.

Certainly, many appellants emailed, texted, or otherwise transmitted copies to themselves of at least some DNOW information, and there is direct evidence that some shared that information among themselves or with Permian and Kenworthy. As DNOW characterized it at trial, the copied or relayed information filled 32 boxes.

DNOW's theory at trial was that the appellants' possession of the 32 boxes of information, however characterized, ultimately caused a "mass exodus" of about thirty employees leaving to work for Permian in the period from April 1—June 13, 2022, and that DNOW was damaged by the departure of so many employees in a such a short span of time. DNOW argued that the appellants' conduct violated both the Texas Uniform Trade Secrets Act and the Texas Theft Liability Act and caused DNOW the same injuries under either statute. DNOW also sued Permian and Kenworthy on these same statutory claims but settled with them before the case went to the jury.

In addition, DNOW alleged that such conduct, and perhaps other unspecified conduct, also breached the fiduciary duties that two appellants owed to DNOW as "high-level managerial employees": Eoff, who was an executive vice president, and Madison, who was a branch manager of Odessa Pumps. During trial, the trial court granted DNOW leave to amend its pleadings to assert breach-of-fiduciary-duty claims against two more of the appellants: Odessa Pumps' sales director Russell Dauphin and its regional manager Michael Wheeler.

The jury returned favorable findings under all three causes of action. For the trade-secret and civil-theft claims, the jury made identical findings of actual damages, but differing conspiracy and proportionate-responsibility findings. The claims also differed in that the jury assessed exemplary damages for trade-secret misappropriation. The trial court overruled the appellants' post-judgment motions,

and at DNOW's request, rendered judgment for DNOW on its claims of conspiracy to misappropriate trade secrets and breach of fiduciary duty.

II. ISSUES

The appellants present approximately fifty issues and sub-issues for review, but to dispose of DNOW's three causes of action, we need discuss only their issues concerning preemption, legal sufficiency of the evidence, and charge error. We will then briefly address the appellants' arguments about pre-judgment interest and costs.

III. DNOW'S CLAIMS UNDER THE TEXAS UNIFORM TRADE SECRETS ACT

The jury found that each appellant misappropriated trade secrets. The Texas Uniform Trade Secrets Act governs the misappropriation of "trade secrets," defined to include "all forms and types of information" meeting two requirements. First, the owner must have "taken reasonable measures under the circumstances to keep the information secret." TEX. CIV. PRAC. & REM. CODE § 134A.002(6). Second, the information must "derive[] independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information." *Id.*

A person misappropriates a trade secret if the person acquires it knowing, or having reason to know, that it was acquired by improper means. *See id.* § 134A.002(3)(A). Alternatively, a person can misappropriate a trade secret by using or disclosing it without the owner's express or implied authorization if the person (a) used improper means to acquire it; or (b) had reason to know at the time of use or disclosure that the person's knowledge of the trade secret was (i) derived from or through another who acquired it through improper means, (ii) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or

(iii) derived from or through a person who owed the claimant such duties. *Id.* § 134A.002(3)(B)(i)–(ii). “Improper means” includes, among other things, “theft, bribery, misrepresentation, [and] breach or inducement of a breach to maintain secrecy, to limit use, or to prohibit discovery of a trade secret.” *Id.* § 134A.002(2).

A claimant who prevails in a statutory trade-secret claim can recover for actual losses caused by the misappropriation. *See id.* § 134A.004(a). If “willful and malicious misappropriation exists,” then the trial court additionally may award reasonable attorneys’ fees to the prevailing party. *Id.* § 134A.005(3). “Willful and malicious misappropriation” is defined as “intentional misappropriation resulting from the conscious disregard of the rights of the owner of the trade secret.” *Id.* § 134A.002(7). And if willful and malicious misappropriation is proven by clear and convincing evidence, then the fact finder may award exemplary damages of not more than double the amount of damages awarded for actual loss as well as for any unjust enrichment that is not taken into account in computing actual loss. *See id.* § 134A.004.

The jury’s findings on trade-secret misappropriation, and the judgment rendered on those findings, are as follows:

Appellants and *settling parties	Percent responsible	Conspiracy	Willful & malicious (by clear & convincing evidence)	Exemplary damages	Held liable in the judgment for exemplary damages	Held liable for attorneys’ fees
Justin Coe	0%	Yes	Yes	\$50,000	Yes	Yes
Michael Comrie	0%	No	No	\$0		Yes
Russell Dauphin	0%	Yes	No	\$0		Yes
Toby Eoff	0%	Yes	Yes	\$0		Yes
Kale Garretson	0%	No	Yes	\$25,000	Yes	Yes

Ryan Hibbetts	0%	No	Yes	\$25,000	Yes	Yes
Michael Kaspar	0%	No	Yes	\$25,000	Yes	Yes
Jacob Lewallen	0%	Yes	Yes	\$25,000	Yes	Yes
Brian Madison	0%	Yes	Yes	\$100,000	Yes	Yes
Bruce Wayne Steubing	0%	No	No	\$0		Yes
Michael Wheeler	0%	Yes	Yes	\$75,000	Yes	Yes
Ryan Wheeler	0%	No	Yes	\$0		Yes
Bo Young	5%	Yes	Yes	\$100,000	Yes	Yes
* Permian	45%					
*Clayton Kenworthy	50%					

We begin our review of the judgment on DNOW's trade-secret claims with the appellants' argument that the Texas Uniform Trade Secrets Act preempts DNOW's conspiracy theory of liability, so that, DNOW can recover, if at all, only from Bo Young, the sole appellant found to be individually liable. We will then address the appellants' contentions that DNOW cannot recover against Young because there is legally insufficient evidence to support the damage and proportionate-responsibility findings. Finally, we will address the effect that our disposition of these issues has on DNOW's ability to recover the exemplary damages and attorneys' fees assessed by the jury before moving on to DNOW's civil-theft claims.

A. Preemption Under the Texas Uniform Trade Secrets Act

A statute's preemptive effect, like other questions of statutory construction, is a question of law, which we review de novo. *See Tex. Mut. Ins. Co. v. PHI Air Med., LLC*, 610 S.W.3d 839, 846 (Tex. 2020). "Our primary objective is to determine the Legislature's intent which, when possible, we discern from the plain meaning of the words chosen." *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006). We apply the text's plain meaning unless (1) the legislature has prescribed definitions, (2) the words have acquired a technical or particular meaning, (3) a contrary intention is apparent from the context, or (4) a plain-meaning construction would lead to nonsensical or absurd results. *In re Tex. Educ. Agency*, 619 S.W.3d 679, 687 (Tex. 2021) (orig. proceeding). We interpret the statute's terms consistently throughout the statute. *Sunstate Equip. Co., LLC v. Hegar*, 601 S.W.3d 685, 690 (Tex. 2020).

The Texas Uniform Trade Secrets Act's preemption provision states,

- (a) Except as provided by Subsection (b), this chapter displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret.
- (b) This chapter does not affect:
 - (1) contractual remedies, whether or not based upon misappropriation of a trade secret;
 - (2) other civil remedies that are not based upon misappropriation of a trade secret; or
 - (3) criminal remedies, whether or not based upon misappropriation of a trade secret.

TEX. CIV. PRAC. & REM. CODE § 134A.007.

To determine the scope of the Act's preemption provision, we must begin by ascertaining the proper test for preemption, which is a matter of first impression for this Court.

1. Claims based on the same facts are preempted.

Every Texas court to have considered the matter has concluded that the Act preempts claims that rely on the same facts as a trade-secret-misappropriation claim; thus, if proof of some other theory of liability would also prove misappropriation of a trade secret, then the claim is preempted.² Under this rationale, a claim that the appellants were part of a conspiracy to misappropriate trade secrets is preempted, because it requires proof of the misappropriation.

Although preemption of conspiracy theories of liability have not yet been addressed by another Texas court, federal district courts applying Texas law have used the same “compare the facts” test and concluded that the Act preempts claims for conspiring to misappropriate trade secrets.³

Because the Texas Uniform Trade Secrets Act is a uniform act that is to “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,” we also consider the

² See, e.g., *Palliative Plus LLC v. A Assure Hospice, Inc.*, No. 03-23-00770-CV, 2025 WL 284920, at *10 (Tex. App.—Austin Jan. 24, 2025, no pet.) (mem. op.) (common-law breach-of-fiduciary-duty claims preempted to the extent that the claims are based on trade-secret misappropriation); *Reynolds v. Sanchez Oil & Gas Corp.*, No. 01-18-00940-CV, 2023 WL 8262764, at *16–17 (Tex. App.—Houston [1st Dist.] Nov. 30, 2023, no pet.) (mem. op. on reh’g) (the Act preempts claims for assisting and encouraging, and assisting and participating in, breaches of fiduciary duty by the misappropriation of trade secrets); *UATP Mgmt., LLC v. Leap of Faith Adventures, LLC*, No. 02-19-00122-CV, 2020 WL 6066197, at *7 (Tex. App.—Fort Worth Oct. 15, 2020, pet. denied) (mem. op.) (the Act preempts claims for interference with business relations by poaching employees to obtain their knowledge of trade secrets); *Title Source, Inc. v. HouseCanary, Inc.*, 612 S.W.3d 517, 532–34 (Tex. App.—San Antonio 2020, pet. denied) (on remand) (claims of fraud based on trade-secret misappropriation are preempted); *Super Starr Int’l, LLC v. Fresh Tex Produce, LLC*, 531 S.W.3d 829, 843 (Tex. App.—Corpus Christi–Edinburg 2017, no pet.) (stating, in dicta, that breach of fiduciary duty is preempted if the breach consisted of trade-secret misappropriation).

³ See, e.g., *DeWolff, Boberg & Assocs., Inc. v. Pethick*, No. 3:20-CV-3649-L, 2024 WL 1396267, at *2 (N.D. Tex. Mar. 31, 2024); *BKL Holdings, Inc. v. Globe Life Inc.*, 660 F. Supp. 3d 602, 611 (E.D. Tex. 2023).

holdings of the courts of other states. *See* TEX. CIV. PRAC. & REM. CODE § 134A.008. *See also* TEX. GOV'T CODE § 311.028 (same); *Nathan v. Whittington*, 408 S.W.3d 870, 873 (Tex. 2013) (per curiam) (applying this principle to the Texas Uniform Fraudulent Transfer Act). Although the Act's interpretation falls short of uniformity, it appears that the highest court of every state to have adopted the Uniform Trade Secret Act's preemption provision and to have considered the appropriate test for preemption has followed the “compare-the-facts test” and concluded that if the claim is based on trade-secret misappropriation and does not fall within one of the statute's exceptions, it is preempted. Of those eleven states—Arkansas, Connecticut, Delaware, Georgia, Hawaii, Kansas, Mississippi, Nevada, New Hampshire, Ohio, and South Dakota⁴—four were specifically presented with the issue of whether civil conspiracy is preempted, and all four—Arkansas, Connecticut, Delaware, and Nevada⁵—held that it was.

Although the Act was intended to achieve uniformity only among the *states* enacting it, most federal appellate courts have reached the same conclusion. Of the four federal appellate courts to have considered the matter, the three that follow the

⁴ *See R.K. Enter., LLC v. Pro-Comp Mgmt., Inc.*, 356 Ark. 565, 574, 158 S.W.3d 685, 690 (2004); *Dur-A-Flex, Inc. v. Dy*, 349 Conn. 513, 605–09, 321 A.3d 295, 350–53 (2024); *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 898 (Del. 2002); *Robbins v. Supermarket Equip. Sales, LLC*, 290 Ga. 462, 466, 722 S.E.2d 55, 58 (2012); *BlueEarth Biofuels, LLC v. Hawaiian Elec. Co., Inc.*, 123 Hawaii 314, 322–23, 235 P.3d 310, 318–19 (2010); *Wolfe Elec., Inc. v. Duckworth*, 293 Kan. 375, 401–02, 266 P.3d 516, 532–33 (2011); *Fred's Stores of Miss., Inc. v. M & H Drugs, Inc.*, 725 So. 2d 902, 908 (Miss. 1998); *Frantz v. Johnson*, 116 Nev. 455, 465, 999 P.2d 351, 357–58 (2000); *Mortg. Specialists, Inc. v. Davey*, 153 N.H. 764, 778–79 & 780, 904 A.2d 652, 665 & 666 (2006); *Hanneman Family Funeral Home & Crematorium v. Orians*, 2023-Ohio-3687, 174 Ohio St. 3d 130, 136, 235 N.E.3d 361, 367; *Weins v. Sporleder*, 2000 S.D. 10, ¶¶ 13-14, 605 N.W.2d 488, 491–92.

⁵ *R.K. Enter., LLC*, 356 Ark. at 574, 158 S.W.3d at 690; *Dur-A-Flex, Inc.*, 349 Conn. at 605–09, 321 A.3d at 350–53; *Savor, Inc.*, 812 A.2d at 898; *Frantz*, 116 Nev. at 465, 999 P.2d at 357–58.

“compare the facts” test have all found that civil conspiracy to misappropriate trade secrets is preempted.⁶

The Tenth Circuit is the exception. It determines whether a claim is preempted by comparing the elements of the claims, and if a claim requires proof of some additional element in addition to misappropriation of trade secrets, then it is not preempted. Because conspiracy requires the additional element of an agreement among the conspirators, the Tenth Circuit holds that the Act does not preempt conspiracy as a theory of liability. *See Hertz v. Luzenac Grp.*, 576 F.3d 1103, 1116 (10th Cir. 2009) (following *Powell Prods., Inc. v. Marks*, 948 F. Supp. 1469 (D. Colo. 1996) (Colorado law)).

DNOW argues for the minority view, maintaining that the proper test for preemption is to compare the elements of the claims, and if one claim requires proof of an additional element, then it is not preempted. But as the Supreme Court of Texas has recognized in other contexts, “the law should not reward artful pleading.” *Pitts v. Rivas*, 709 S.W.3d 517, 525 (Tex. 2025). “Courts . . . must look not merely to the labels chosen by the plaintiff but instead to the gravamen of the facts alleged to determine how to treat the claim.” *Id.* at 523. Thus, if the gravamen of a complaint against an attorney is really that of professional negligence, a plaintiff may not “fracture” it into other claims such as fraud, breach of contract, or breach of fiduciary duty. *See id.* at 524. Similarly, a plaintiff who wishes to assert a health-care-liability claim cannot avoid application of the Texas Medical Liability Act by pleading it as an ordinary negligence claim “based on the same facts.” *Yamada v. Friend*, 335 S.W.3d 192, 196–97 (Tex. 2010). The Supreme Court of Texas has consistently

⁶ *See, e.g., H&H Pharm., LLC v. Chattem Chems., Inc.*, No. 23-15055, 2024 WL 1734134, at *1–2 (9th Cir. Apr. 23, 2024) (Nevada law); *Campfield v. Safelite Grp., Inc.*, 91 F.4th 401, 415 (6th Cir. 2024) (Ohio law); *MicroStrategy Inc. v. Bus. Objects, S.A.*, 429 F.3d 1344, 1364 (Fed. Cir. 2005) (Virginia law).

directed courts to look to the substance of the facts alleged rather than to the way a claim is pleaded.⁷

We conclude that the “compare-the-facts” or “same conduct” test employed by the majority of courts is more consistent with the Act’s language and with Texas law. We accordingly determine whether DNOW’s claims and theories of liability are preempted by comparing the facts on which they are based.

2. DNOW’s civil-conspiracy theory of trade-secret liability is preempted.

Civil conspiracy is a theory of liability, not an independent cause of action. *See Agar Corp., Inc. v. Electro Circuits Int’l, LLC*, 580 S.W.3d 136, 142 (Tex. 2019). It “is connected to the underlying tort and survives or fails alongside it.” *Id.* at 141. It consists of “(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result.” *Tri v. J.T.T.*, 162 S.W.3d 552, 556 (Tex. 2005).

Here, DNOW alleges that the “unlawful, overt act” at issue is the misappropriation of trade secrets; thus, proof of DNOW’s civil-conspiracy theory requires proof of trade-secret misappropriation.

DNOW argues that this should not foreclose the appellants’ liability under a conspiracy theory because the Act only displaces “conflicting” law that provides a

⁷ See, e.g., *Lennar Homes of Tex. Land & Constr., Ltd. v. Whiteley*, 672 S.W.3d 367, 377 (Tex. 2023) (determining whether claimant seeks direct benefits from a contract containing an arbitration clause); *Taylor v. Tolbert*, 644 S.W.3d 637, 647 (Tex. 2022) (determining whether attorney immunity applies); *Lake Jackson Med. Spa, Ltd. v. Gaytan*, 640 S.W.3d 830, 837 (Tex. 2022) (determining whether a claim is governed by the Texas Medical Liability Act); *In re Facebook, Inc.*, 625 S.W.3d 80, 90 (Tex. 2021) (orig. proceeding) (determining whether a claim is governed by the Communications Decency Act); *Univ. of Tex. M.D. Anderson Cancer Ctr. v. McKenzie*, 578 S.W.3d 506, 513 (Tex. 2019) (determining whether claim falls within the Texas Tort Claims Act’s waiver of immunity); *Pinto Tech. Ventures, L.P. v. Sheldon*, 526 S.W.3d 428, 437 (Tex. 2017) (determining whether claim falls within a forum-selection clause).

civil remedy for trade-secret misappropriation, and a conspiracy theory of liability does not “conflict” with the Act.

We disagree. The Act makes one who “misappropriates” a trade secret liable for the actual loss caused by the misappropriation, but under a conspiracy theory, all who conspire in another’s misappropriation of a trade secret are jointly and severally liable with the tortfeasor, even if the conspirators’ conduct caused no damage or did not itself violate the Act. *See Agar Corp.*, 580 S.W.3d at 41 (absent the civil-conspiracy theory of liability, “there would be no grounds for recovery against co-conspirators who did not commit the underlying unlawful act”).

DNOW says that such reasoning should not apply in this case, because when asked whether each defendant misappropriated a trade secret, the jury answered “yes” as to each one. But, the conspiracy theory of liability conflicts with the Act not only in holding someone liable who did not commit misappropriation; it also conflicts with the Act in that it allows recovery of actual losses from a person who was found to have no responsibility for causing or contributing to such losses. That is precisely what has happened here.

We conclude that the Texas Uniform Trade Secrets Act preempts the civil-conspiracy theory of liability, and thus, none of the appellants can be held liable to DNOW for actual damages, exemplary damages, or attorneys’ fees based on findings that they conspired in trade-secret misappropriation. Thus, DNOW can recover damages caused by acts constituting trade-secret misappropriation only to the extent of each individual wrongdoer’s responsibility.⁸

⁸ The Texas Uniform Trade Secrets Act does not limit recovery to actual losses. A plaintiff also can obtain injunctive relief and can recover amounts by which the liable defendant was unjustly enriched. *See* TEX. CIV. PRAC. & REM. CODE § 134A.004(a). Also, “[i]n lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator’s unauthorized disclosure or

The jury found that settling parties are responsible for 95% of DNOW's actual losses and Bo Young is responsible for the remaining 5%. We therefore turn next to the appellants' arguments that there is legally insufficient evidence to support the damages found by the jury or to support Young's proportionate responsibility.⁹

B. Legal Sufficiency of the Damage and Causation Evidence

Our legal-sufficiency review of a given finding begins with the jury's charge. In the absence of an objection to the charge, we measure the sufficiency of the evidence against the charge as submitted. *See Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000). If there is an objection to the charge or a request for submission of a different or additional question, definition, or instruction, we review the ruling on the objection or request for abuse of discretion. *See Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 727–28 (Tex. 2016). If the trial court submits a matter with an erroneous question, instruction, or definition over a preserved objection or request, then we measure the sufficiency of the evidence against the charge that the

use of a trade secret.” *Id.* Here, however, the trial court denied DNOW's request for a permanent injunction; the jury failed to find that any of the appellants or settling parties were unjustly enriched; and DNOW did not seek to recover a reasonable royalty. Thus, only “actual loss caused by misappropriation” is at issue. *See id.*

⁹ When a jury returns favorable findings on two or more alternative theories, the prevailing party may seek recovery under an alternative theory if the judgment is reversed on appeal. *Boyce Iron Works, Inc. v. Sw. Bell Tel. Co.*, 747 S.W.2d 785, 787 (Tex. 1988). If alternative theories are briefed on original submission, the reviewing court may address them. *See Energy Maint. Servs. Grp. I, LLC v. Sandt*, 401 S.W.3d 204, 218 n.9 (Tex. App.—Houston [14th Dist.] 2012, pet. denied). DNOW elected to recover for trade-secret misappropriation under a conspiracy theory of liability and asks that if we reverse the judgment rendered on that theory, we affirm the judgment based on the jury's findings of conspiracy under the Texas Theft Liability Act. However, the parties have joined issue on the appellants' challenges to the jury's findings under theories of both conspiracy and proportionate responsibility as to DNOW's claims under the Texas Trade Secrets Act and under the Texas Theft Liability Act. For the sake of clarity, we address all of the challenges to the findings under the Texas Trade Secrets Act before moving on to the challenged findings under the Texas Theft Liability Act.

trial court should have given. *See St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 530 (Tex. 2002).

Whether we are measuring the evidence against the charge as submitted or against the charge that should have been submitted, we review the evidence in the light most favorable to the verdict, crediting the evidence supporting the verdict if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). Evidence is legally insufficient if (1) there is a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of the vital fact. *Id.* at 810. The ultimate test is whether the evidence at trial would enable reasonable and fair-minded people to reach the answer under review. *Id.* at 827.

Conclusory evidence, however, is no evidence at all. *See Windrum v. Kareh*, 581 S.W.3d 761, 770 (Tex. 2019). Even if made by a credentialed expert, a witness's statement or opinion is conclusory if the witness offers no basis for the opinion, or if the bases offered do not actually support the opinion, or if the jury has only the witness's word that the bases offered to support the opinion actually exist or support it. *Id.* at 769.

1. Legally insufficient evidence supports the lost-profits findings.

To recover lost profits, the evidence must support a reasonable inference that the lost-profits resulted from the defendant's conduct. *Hunter Bldgs. & Mfg., L.P. v. MBI Glob., L.L.C.*, 436 S.W.3d 9, 18 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). But DNOW's damages expert Sheila Enriquez attempted to link DNOW's

damages only to the resignations of thirty employees, not to the misappropriation of trade secrets. She simply assumed that DNOW's damages were attributable to "the collective actions of the Defendants." She did not distinguish damage caused by misappropriation of trade secrets from damage caused by misappropriation of confidential information that is not a trade secret,¹⁰ or by breach of fiduciary duties. She could identify no defendant with the misappropriation of any particular trade secret or who used any trade secret to recruit any employee.

Although Enriquez assumed that misappropriation of trade secrets caused so many DNOW employees to move to Permian, she did not compare the difference in the employee turnover rate during the period she examined with any other turnover rate. She did not consider the employee attrition rate of the market in general, the industry in general, or even DNOW's historical attrition rate. She did not consider whether the compensation that DNOW had been paying the departing employees had kept pace with the compensation paid by its competitors. She did not consider whether a given employee's move from DNOW to Permian was self-initiated.

To arrive at her opinions regarding lost profits, Enriquez considered only the San Angelo and Corpus Christi branches of Odessa Pumps. She compared the average profit that each of those two branches made in the eleven-month period from July 2021 through May 2022, and in the five-month subset of that period from January through May 2022, with those branches' profits from June 1, 2022 through

¹⁰ The appellants argue that the Texas Uniform Trade Secrets Act preempts claims based on the misappropriation not only of trade secrets, but also of information that is merely confidential. As discussed further *infra*, we disagree. We do not discuss that argument in connection with the appellants' challenges to the trade-secret-misappropriation damages because the jury was instructed on the statutory definition of "trade secret," and told to assess damages caused by trade-secret misappropriation. The jury likewise was instructed to assign responsibility only to those whose trade-secret misappropriation caused or contributed to causing such damages. Because the record does not demonstrate otherwise, we assume the jury followed this instruction. See *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 771 (Tex. 2003).

December 31, 2022. She did not look further back than July 2021, because based on her conversations with DNOW's management, DNOW's lower profits before that date were attributable to the Covid-19 pandemic and to lower oil prices.

Although she testified that she started calculating damages from April 1, 2022, because that is when people began resigning from DNOW, she actually included April and May 2022 in the comparison period rather than the damages period for the purpose of calculating lost profits. She offered no explanation for treating the lost-profit damage period as extending through December 31, 2022. The arbitrary basis of this time period is even more obvious when one considers that Rawlinson testified on January 31, 2023, that Odessa Pumps' workforce started 2022 with just 195 or 196 employees, but now had 230 employees. From this testimony, it appears that DNOW added more than twice the number of employees it lost to Permian. But Enriquez did not consider when any of DNOW's former employees were replaced.

That is not the only problem. Where, as here, lost profits relate to the allegedly wrongful interference with the employment of particular individuals, the "evidence estimating those lost profits must be tied to the performance of that employee." *Horizon Health Corp. v. Acadia Healthcare Co., Inc.*, 520 S.W.3d 848, 865 (Tex. 2017). Enriquez's testimony did not make that connection. She stated that she looked only at the Corpus Christi and San Angelo branches because four employees quit the Corpus Christi branch on a single day to work for Permian and nine quit the San Angelo branch on the same day. But six employees left the Odessa branch for Permian on the same day, and DNOW did not claim that the Odessa branch suffered lost profits. Moreover, the number of employees who quit the Corpus Christi branch in 2022 was not four, but eight, half of whom went to work for Permian and half of whom joined other companies. Enriquez did not consider the effect of lawful competition; she admitted that she merely assumed that the four employees who left

to work for Permian caused 100% of that branch's lost profits, while the four who left to work for other competitors caused none.

Enriquez also could identify no customer or sale that DNOW lost as a result of any appellant's actions. *See Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 85 (Tex. 1992) (evidence of lost profits was legally insufficient where the plaintiff "was not able to specify which contracts they lost, how many they lost, how much profit they would have had from the contracts, or who would have awarded them contracts"). But DNOW offered no evidence that it had orders for products or services from the San Angelo or Corpus Christi branches that it was unable to fulfill due to inadequate staffing, or that a lack of staff left those branches unable to pursue opportunities for more work. Rawlinson testified that he worked with DNOW's finance team "to provide some reports that showed the profitability of our branches and our overall branches," but he provided only monthly financial statements and data, not information about specific lost jobs.

This is true even as to DNOW's San Angelo branch, which simultaneously lost all but one or two employees to Permian. Rawlinson testified that the San Angelo branch does "a lot of service work. It's a higher [profit] margin." He explained that the San Angelo branch's recovery was "just about replacing the people, and then ensuring we get out in front of our customers and ensure them we're still there and we're doing everything we can to service their needs." But the evidence showed that the replacement branch manager was interviewed within about a week, and DNOW offered no evidence as to when the branch's remaining employees were replaced. When asked how service requests received by the San Angelo branch were handled after so many employees had quit, Rawlinson testified, "most of them were fulfilled by us sending our techs from Odessa But we just send our techs from Odessa to cover any pending jobs. And we book jobs just like we book orders. . . . We just

used techs everywhere we could, and some of them, we couldn't get to." But no one could identify any orders for products or services *from the San Angelo branch* that DNOW "couldn't get to." To the contrary, Rawlinson stated, "[I]t's highly likely we missed some jobs that were *in Odessa* because our techs were down in San Angelo."¹¹

Because the damage-causation evidence is conclusory, the trial court erred in awarding lost profits to DNOW.

2. *Legally insufficient evidence supports the finding of retraining and lost-productivity damages.*

Enriquez testified that replacing employees entails three costs: recruitment, retraining, and lost productivity. But the evidence and the jury charge do not align. Enriquez testified as to the costs of recruitment and lost productivity, but neither Enriquez nor any other witness testified to the costs of retraining. The jury, however, was asked to assess damages for the costs of retraining and lost productivity, but not the costs of recruitment. Because there is no evidence regarding the costs of retraining, and no finding that incorporates the cost of recruitment, our legal-sufficiency inquiry on this element of damages concerns only the evidence of lost productivity.¹²

¹¹ Emphasis added.

¹² Even if the costs of recruitment could somehow be included as part of the damages assessed for the costs of retraining and lost productivity, that evidence would be legally insufficient because Enriquez's testimony about the cost of recruitment is conclusory. She testified that she interviewed Ms. Vaishali Mendon from DNOW "in terms of how they are valuing recruiting costs. And identified that internal recruiting is estimated at 10 percent of compensation." Enriquez then calculated 10% of the compensation that each departing employee had been receiving from DNOW and added the numbers together. No one contends that any data supports the 10% figure, and causing a credentialed witness to repeat Mendon's unsupported estimate does not make it any less conclusory. *See Glattly v. Air Starter Components, Inc.*, 332 S.W.3d 620, 633 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (expert witness's testimony based on an assumption she was

Enriquez’s opinion about the costs of lost productivity is wholly conclusory. She simply asserted that “when you bring in a new person, it is going to take them a couple of months to get up to speed.” She then calculated the value of lost productivity as equal to one-third of each departing employee’s average total monthly compensation each month for two months.

But Enriquez offered no explanation for any of these assumptions. She did not even explain what “lost productivity” measures, and she identified no way in which “lost productivity” had any effect on DNOW at all.

“[A] claim will not stand or fall on the mere *ipse dixit* of a credentialed witness.” *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999). “Credentials qualify a person to offer opinions, but they do not supply the basis for those opinions.” *Id.* at 236. Because there is no basis for Enriquez’s opinion about DNOW’s lost-productivity damages, no evidence supports this finding. *See Pike v. Tex. EMC Mgmt., LLC*, 610 S.W.3d 763, 791 (Tex. 2020).

3. *Legally sufficient evidence supports the retention-bonuses finding.*

In arguing that the evidence is legally insufficient to support the jury’s finding that trade-secret misappropriation caused DNOW to incur the cost of paying retention bonuses, the appellants focus primarily on the absence of evidence that trade secrets were used to solicit DNOW employees and on the shortcomings of the expert testimony.

But for this category of damages, fact witnesses provided evidence of a different causal link. Specifically, there is evidence that Permian could not hire staff from DNOW’s San Angelo branch unless it first had a Master Service Agreement

told to use was legally insufficient where the witness “did no independent work to verify this assumption”).

(MSA) with Pioneer, the customer who provided much of that branch's work. And the evidence also allowed the jury to reasonably conclude that Permian wrongfully used DNOW's trade-secret information to obtain an MSA with Pioneer.

Permian had done valve-repair work for Pioneer, but wanted their pump business as well. On January 29, 2022, Madison texted Kenworthy, asking if Permian had an MSA with Pioneer, and Kenworthy told him it did not, but that Permian would "have to have it in place beforehand. At least for the San Angelo stuff." According to messages exchanged among various appellants, Permian's plan was to obtain the MSA and then hire all, or nearly all, of DNOW's San Angelo employees. DNOW additionally presented evidence that Permian did not have the revenue to hire the San Angelo staff without the MSA.

Significantly, the jury also heard evidence that pump companies like DNOW and Permian must provide their rates to a customer to obtain an MSA. On March 8, 2022, Madison texted Kenworthy that "[P]ioneer is looking for a rate sheet." Madison obtained from John Anderson, manager of DNOW's San Angelo branch, the rates that DNOW's San Angelo and Odessa branches were charging Pioneer.¹³ Anderson messaged Madison, "I think if we match price and can deliver our mechanics and parts [at] a slightly lower rate we can choke the market in 6 months with them." Although both Anderson and Madison were still working for DNOW at the time, the "we" to which Anderson referred was Permian.

Madison forwarded the message and rates to Kenworthy at Permian, and at Kenworthy's request, Madison prepared a rate sheet for Pioneer using the rates from DNOW's Master Service Agreement with Pioneer. Madison admitted at trial that he did this so that Permian could enter into a similar agreement. In fact, in mid-May of

¹³ DNOW sued Anderson in a separate suit.

2022, one of the San Angelo employees wanted to notify DNOW of his intention to quit, but was told to wait until Permian obtained an MSA with Pioneer.

On May 27, 2022, Permian obtained the agreement, and on June 1, 2022, nine of DNOW's San Angelo branch's employees quit to work for Permian, leaving only one or two DNOW employees at the San Angelo branch. After the defection of the San Angelo employees, DNOW began offering more retention bonuses to prevent additional employees from leaving.

The jury reasonably could infer that the information about the rates DNOW charged Pioneer was a misappropriated trade secret that Permian used in obtaining the MSA, without which Permian could not have hired nearly the entire staff of DNOW's San Angelo branch at one time. We accordingly conclude that the evidence is legally sufficient to support the conclusion that trade-secret misappropriation enabled Permian to hire DNOW's San Angelo employees, which in turn caused DNOW to incur additional retention-bonus costs to prevent more such sudden and simultaneous losses of personnel to Permian.

4. Legally sufficient evidence supports the jury's finding that Young is 5% responsible for causing or contributing to DNOW's trade-secret-misappropriation damages.

Chapter 33 of the Texas Civil Practice and Remedies Code, entitled "Proportionate Responsibility," applies to claims for misappropriation of trade secrets. *See Hunter Bldgs. & Mfg., L.P.*, 436 S.W.3d at 15. The appellants contend, however, that the jury's finding that Young is 5% responsible for the damages caused by trade-secret misappropriation cannot stand because no witness could tie Young to the use of specific trade-secret information, much less to a use that was linked to the damages found by the jury. We disagree.

DNOW's engineering drawings were prepared by Stephen Fritsche, who was good friends with Bo Young. When Young left DNOW to work for Permian, he took with him copies of over 600 such drawings, many or most of which had been drawn by Fritsche. Each of Fritsche's drawings included a statement such as, "This document and its contents are proprietary to Odessa Pumps & Equipment Inc. Any reproduction, disclosure or use of this document is expressly prohibited except as otherwise agreed in writing." Young testified that although he now knows it was wrong to copy the drawings, he believed at the time that Fritsche owned the drawings, and that because Young had used them for years, he, Young, had the right to continue doing so.

Although Young took with him to Permian copies of all of the drawings that were included in the working files saved on his DNOW work computer, Fritsche had done other engineering drawings that were saved to a folder Young could not access. While working for Permian, Young asked Fritsche for a copy of one of those drawings, but Fritsche refused. Young offered to buy a copy of the drawing, but Fritsche did not respond. Fritsche wanted to join Young at Permian, even after DNOW increased his pay, and on June 5, 2022—four days after Permian hired nearly all of the staff of the Odessa Pump's San Angelo branch—Fritsche asked Young for an offer letter in writing. Young sent Fritsche an offer letter the next day, and Fritsche signed it on June 8, 2022, indicating a start date of June 13, 2022. Fritsche changed his mind only after DNOW offered him a \$225,000 retention bonus—the same amount found by the jury as retention-bonus damages for misappropriation of trade secrets.

From this evidence, the jury could conclude that Fritsche's drawings meet the statutory definition of a trade secret. The jury reasonably could conclude that DNOW had taken reasonable measures under the circumstances to keep the

drawings secret, and Young's offer to buy the drawing is some evidence that the engineering drawings had "independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information." *See* TEX. CIV. PRAC. & REM. CODE § 134A.002(6). Although the evidence is uncontroverted that Fritsche approached Permian for a job, the jury reasonably could conclude that, given Young's erroneous belief that Fritsche owned the hundreds of engineering drawings Young had copied from DNOW, Young caused Permian to make Fritsche an offer in order to legitimate its use of the drawings Young had already misappropriated.

In sum, we conclude that DNOW's recovery of actual damages for trade-secret misappropriation is limited to Bo Young's 5% responsibility for the \$225,000 cost of retention bonuses, an amount totaling \$11,250 (before applying settlement credits).

We next consider the effect that this change has on DNOW's recovery of attorneys' fees and exemplary damages.

C. Attorneys' Fees and Exemplary Damages

The jury found, both by a preponderance of the evidence and by clear and convincing evidence, that Young's misappropriation of trade secrets was willful and malicious.¹⁴ Thus, the trial court had discretion to award DNOW reasonable attorneys' fees, and the jury was authorized to assess exemplary damages of no more than double the amount of its actual-damage award. *See* TEX. CIV. PRAC. & REM. CODE §§ 134A.004.–.005.

¹⁴ The jury was not asked whether misappropriation by the other responsible parties (settling parties Kenworthy and Permian) was willful and malicious.

1. The issue of attorneys' fees on DNOW's trade-secret-misappropriation claim must be remanded.

Whether a particular amount of attorneys' fees is reasonable is a question of fact. *See Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). We review the factfinder's resolution of that issue for legal and factual sufficiency of the evidence, just as we do with other findings of fact. *See id.* The Texas Trade Secrets Act states that the trial court "may award reasonable attorney's fees to the prevailing party if . . . willful and malicious misappropriation exists,"¹⁵ and because the statute provides that the trial court "'may' award" such fees, the trial court has discretion in deciding whether to award them. *Id.* at 20. We accordingly review for abuse of discretion the trial court's decision about the extent to which reasonable attorneys' fees should be awarded. *See id.*

In connection with DNOW's trade-secret claims, we have concluded that DNOW can recover only one category of damages, and can recover solely against an appellant who is responsible for only 5% of the damages.¹⁶ After these reductions, DNOW's recovery is less than 1% of the total damages originally assessed for those claims, and DNOW is no longer the prevailing party as to twelve of the thirteen appellants.

We therefore conclude that the issue of attorneys' fees must be remanded for the factfinder to determine a reasonable amount of attorneys' fees under these changed circumstances, and for the trial court to exercise its discretion in deciding the amount, if any, of reasonable attorneys' fees to award DNOW.

¹⁵ TEX. CIV. PRAC. & REM. CODE § 134A.005(3).

¹⁶ The jury assigned the remaining 95% of responsibility to the settling parties.

2. *The exemplary-damage award must be capped.*

The Texas Uniform Trade Secrets Act caps exemplary damages at double the damages assessed for unjust enrichment and for actual damages or a reasonable royalty. TEX. CIV. PRAC. & REM. CODE § 134A.004(b). The jury had assessed actual damages of \$1,760,097 for trade-secret misappropriation, with Young being responsible for 5% of that amount, that is, for \$88,004.85. The jury also assessed exemplary damages against Young in the amount of \$100,000. Because there is legally sufficient evidence to support only \$225,000 of actual damages, Young is now responsible for actual damages of only \$11,250. Thus, the exemplary-damage award against Young is now nearly nine times larger than the amount of actual damages for which he is responsible.

The appellants have asked us to vacate the award of exemplary damages if DNOW is unable to recover on its trade-secret claims, but they have not addressed the effect on the exemplary-damage award in the event that DNOW can recover only some of its trade-secret damages against only a single appellant.

We can, however, grant “lesser included relief.” *Amneal Pharm., Inc. v. Cnty. of Dallas*, 694 S.W.3d 875, 892 n.8 (Tex. App.—Houston [14th Dist.] 2024, no pet.) (quoting *Gardner v. U.S. Imaging, Inc.*, 274 S.W.3d 669, 671 n.1 (Tex. 2008) (per curiam)). When reversing a trial court’s judgment, we must “render the judgment that the trial court should have rendered,” unless remand is required. TEX. R. APP. P. 43.3. We accordingly apply the statutory cap on exemplary damages, which limits Young’s liability for exemplary damages to twice his liability for compensatory damages, that is, \$22,500.

IV. DNOW’S CLAIMS UNDER THE TEXAS THEFT LIABILITY ACT

We address this cause of action because DNOW asked that if we reversed the judgment on its claims for conspiracy to misappropriate trade secrets, we instead

render judgment on its claims under the Texas Theft Liability Act. As with DNOW's trade-secret claims, the jury held various appellants liable under the Texas Theft Liability Act under both a conspiracy theory of liability and under proportionate responsibility.

The appellants argue that the trade-secret statute preempts DNOW's civil-theft claims and that the evidence is legally insufficient to support the jury's theft-liability findings. Because the civil-theft statute mandates the award of attorneys' fees to the prevailing party,, the appellants further contend that the trial court erred in failing to award them their attorneys' fees in the amount found by the jury.

We agree that there is no evidence of theft under a correct jury charge; thus, without addressing the merits of the appellants' preemption argument, we hold that DNOW cannot recover on this claim and instead is liable for the appellants' attorneys' fees.

A. Legal Sufficiency of the Evidence of “Appropriation”

Once again, we begin our legal-sufficiency analysis with the jury charge. We agree with the appellants that the trial court erred in refusing to include in the jury charge the appellants' requested instruction on the meaning of “appropriation,” and that there is no evidence to support liability under a correct instruction.

The Texas Theft Liability Act states that “[a] person who commits theft is liable for the damages resulting from the theft.” TEX. CIV. PRAC. & REM. CODE § 134.003(a). It defines “theft” as “unlawfully appropriating property or unlawfully obtaining services as described by Section 31.03, 31.04, 31.06, 31.07, 31.11, 31.12, 31.13, or 31.14, Penal Code.” *Id.* § 134.002(2). Given the allegations in this case, the appellants could be liable under the Texas Theft Liability Act only if they unlawfully appropriated property “as described by Section 31.03” of the Texas Penal

Code,¹⁷ which addresses theft of property generally. This provision states, “A person commits an offense if he unlawfully appropriates property *with intent to deprive the owner of property*.” TEX. PENAL CODE § 31.03(a) (emphasis added).

From its original enactment in 1989 through August 31, 2013, the Texas Theft Liability Act defined “theft” to include unlawfully appropriating property as described by Section 31.05 of the Texas Penal Code.¹⁸ Section 31.05 addresses the felony offense of theft of trade secrets, under which a person commits an offense if, without the owner’s effective consent, the person “(1) steals a trade secret; (2) makes a copy of an article representing a trade secret; or (3) communicates or transmits a trade secret.” *Id.* § 31.05(b). One can therefore find cases addressing copying or theft of trade secrets under the Texas Theft Liability Act in which the wrongful conduct allegedly occurred before September 1, 2013.¹⁹

But the legislature included in its 2013 adoption of the Texas Uniform Trade Secrets Act an amendment deleting the Texas Theft Liability Act’s incorporation of Texas Penal Code section 31.05.²⁰ Beginning on September 1, 2013, the Texas Theft Liability Act ceased imposing liability for copying, communicating, transmitting, or otherwise misappropriating trade secrets, absent the intent to deprive the owner of access to the same information.

¹⁷ See TEX. CIV. PRAC. & REM. CODE § 134.002(2).

¹⁸ See Act of February 22, 1989, 71st Leg., R.S., ch. 2, § 4.05(a), sec. 134.002(2), 1989 TEX. GEN. LAWS 123, 125.

¹⁹ See, e.g., *Spear Mktg., Inc. v. BancorpSouth Bank*, 844 F.3d 464, 467 (5th Cir. 2016); *Horizon Health Corp.*, 520 S.W.3d at 883; *IBP, Inc. v. Klumpe*, 101 S.W.3d 461, 472 (Tex. App.—Amarillo 2001, pet. denied).

²⁰ See Adoption of the Uniform Trade Secrets Act, 83d Leg., R.S., ch. 10, § 2, 2013 TEX. GEN. LAWS 12, 14 (eff. Sept. 1, 2013).

Nevertheless, the trial court instructed the jury as follows, and over appellants' objections, failed to include an instruction or definition informing the jury that intent to deprive the owner of the property is a necessary part of "appropriation":

Did any of the Defendants named below commit theft of DNOW's property?

Defendants committed theft if they—

1. appropriated property; and
2. the appropriation was without the consent of the owner; and
3. Defendants intended to appropriate the property.

Defendants appropriated property if they—

1. acquired the property; or
2. otherwise exercised control over the property.

Answer "Yes" or "No" as to each Defendant.

The appellants requested the following instruction regarding intent to appropriate, which tracks the instruction in the pattern jury charge:

The defendant intended to appropriate the property if they had the conscious objective or desire to—

1. withhold the property from the owner permanently; or
2. withhold the property from the owner for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner; or
3. restore the property only on payment of reward or other compensation; or
4. dispose of the property in a manner that makes recovery of the property by the owner unlikely.²¹

The trial court denied the request.

²¹ See COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., *Texas Pattern Jury Charges: General Negligence* PJC 7.2 (2022).

We agree with the appellants that the trial court erred in omitting this definition. “Appropriation by itself does not establish theft—there must also be an intent to deprive the owner of the property” *Izen v. Move-It Self Storage, LP*, No. 14-21-00089-CV, 2023 WL 2808119, at *2 (Tex. App.—Houston [14th Dist.] Apr. 6, 2023, no pet.) (mem. op.) (quoting *State v. Ford*, 537 S.W.3d 19, 24 (Tex. Crim. App. 2017)). Intent is an essential element of the offense, and the correct definition of the requisite intent was necessary to avoid misleading the jury, because the word “appropriate” is used differently in the Texas Uniform Trade Secrets Act and in the Texas Theft Liability Act. In connection with the trade-secret-misappropriation claims, the jury already had been informed that a trade secret is misappropriated if it is acquired by improper means and “disclosed or used” without the owner’s consent—definitions that did not require that the information be withheld from DNOW or that DNOW be deprived of its use. Thus, unless the jury was instructed in the very different meaning of “appropriate” as used in the Texas Theft Liability Act, the jury improperly could hold the defendants liable under that statute for copying DNOW’s files or relaying trade secrets with no intention of depriving DNOW of their use.

In fact, that is exactly what DNOW asked the jury to do, stating in closing argument, “copying DNOW’s confidential information and taking it with you when you walk out the door is theft.” Further, the jury was asked to find, and did find, identical injuries and damages for claims under both statutes.

Because the appellants properly preserved their objection to the trial court’s failure to define “appropriate” as used in the Texas Theft Liability Act by its incorporation of Texas Penal Code section 31.03, we determine the legal sufficiency of the evidence as if the correct definition had been given.

There is no evidence that any of the appellants intended to or in fact withheld DNOW's property, disposed of it, or deprived DNOW of its use, nor does DNOW contend otherwise. All of its civil-theft claims rely on the copying or communication of trade secrets or confidential information without depriving DNOW of the use of the originals. Such conduct does not constitute "theft" under the Texas Theft Liability Act.

Because no evidence supports the jury's findings of liability under the civil-theft statute, DNOW cannot recover damages or attorneys' fees on those claims.

B. Mandatory Award of Appellants' Attorneys' Fees

The civil-theft statute states, "Each person who prevails in a suit under this chapter shall be awarded court costs and reasonable and necessary attorney's fees." TEX. CIV. PRAC. & REM. CODE § 134.005(b). These awards are mandatory. *See id.*; *Agar Corp.*, 580 S.W.3d at 148. A party defending against a claim under the Texas Theft Liability Act is the prevailing party "when the plaintiff loses with prejudice, whether on the merits or for some other reason." *Agar Corp.*, 580 S.W.3d at 148. All thirteen appellants are now the prevailing parties on DNOW's civil-theft claims, and they contend they are entitled to recover their attorneys' fees in the amounts found by the jury.

DNOW argues that the appellants are not entitled to recover attorneys' fees under the Texas Theft Liability Act if those claims are preempted by the Texas Uniform Trade Secrets Act.²² They offer no explanation or authority for this

²² Because no evidence supports DNOW's claims under the civil-theft statute, it was unnecessary to address the merits of the appellants' preemption argument. However, it is unclear whether DNOW contends that preemption precludes appellants from recovering attorneys' fees regardless of whether the appellants can prevail on the civil-theft claims on other grounds, such as legal insufficiency. Given this uncertainty, we will assume that this is DNOW's position and we will address DNOW's argument about the effect of preemption.

contention, which is contrary to the governing law. If a plaintiff loses with prejudice, then the defendant is the prevailing party regardless of whether it attained that status through the plaintiff's failure to prove all essential elements of its claim or through the defendant's own success in proving an affirmative defense such as preemption.²³

Citing *Diakiw v. Stites Management, L.L.C.*, DNOW additionally argues that under this Court's precedent, a party is entitled to recover attorneys' fees under the Texas Theft Liability Act only if the party prevails "in a suit," not merely on the TTLA claim. 693 S.W.3d 582 (Tex. App.—Houston [14th Dist.] 2023, pet. denied). DNOW suggests that even if a particular appellant is a prevailing party as to DNOW's civil-theft claim, that appellant cannot recover attorneys' fees under the statute unless he also is the prevailing party on DNOW's other claims, that is, DNOW's claims for trade-secret misappropriation and breach of fiduciary duty.²⁴

But DNOW reads *Diakiw* too broadly. In *Diakiw*, 4-S Manufacturing pleaded claims under the Texas Theft Liability Act for theft of services and theft of property against Robert Diakiw and two companies under his control (collectively, the "Diakiw Parties"). *See id.* at 609. In the jury charge, however, 4-S submitted its claim for theft of property but did not pursue its claim for theft of services. *See id.* The jury found in favor of 4-S for theft of property. On appeal, the Diakiw Parties argued that, because 4-S's pleaded claim for theft of services was not submitted, the

²³ *See Agar Corp.*, 580 S.W.3d at 148; *see also City of Mont Belvieu v. Enter. Prods. Operating, LP*, 222 S.W.3d 515, 520 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (unlike "forum preemption," which is jurisdictional, "choice of law" preemption is an affirmative defense (citing *Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d 542, 545–46 (Tex. 1991))); *see also SJF Forest Lane, LLC v. Phan*, No. 05-22-00905-CV, 2024 WL 2796279, at *6 (Tex. App.—Dallas May 31, 2024, no pet.) (mem. op.) (where contract entitles "prevailing party" to attorneys' fees, defendant who proves an affirmative defense is the prevailing party).

²⁴ This argument has no application to appellants Coe, Comrie, Garretson, Hibbetts, Kaspar, Lewallen, Steubing, and Ryan Wheeler, because the judgment against them is based solely on DNOW's trade-secret and civil-theft claims, and for the reasons previously explained, DNOW cannot prevail against them on either theory.

Diakiw Parties were the prevailing parties as to that claim and entitled to recover their attorneys' fees, despite the fact that 4-S was the prevailing party on the only civil-theft claim submitted to the jury. *See id.* In support of its position, the Diakiw Parties relied on *Brown v. Kleerekoper*, No. 01-11-00972-CV, 2013 WL 816393 (Tex. App.—Houston [1st Dist.] pet. denied) (mem. op.). In *Brown*, as in *Diakiw*, the claimant pleaded claims for both theft of services and theft of property, but unlike in *Diakiw*, both claims were submitted to the jury in *Brown*, and the plaintiff prevailed on only one of the claims. *See Diakiw*, 693 S.W.3d at 610 (citing *Brown*, 2013 WL 816393, at *1). The trial court allowed the defendant to recover its attorneys' fees for successfully defending against the other statutory theft claim, reasoning that the different claims “are completely separate.” *Id.* (citing *Brown*, 2013 WL 816393, at *4). The *Diakiw* court rejected the argument that *Brown*'s treatment of two submitted TTLA claims as “completely separate” meant that the Diakiw Parties could recover on an unsubmitted TTLA claim. From this, DNOW appears to reason that submitted non-TTLA claims are not “completely separate” from submitted TTLA claims, so that a party is a prevailing party under the TTLA only if the party prevails on *all* claims submitted to the jury.

We find DNOW's argument unpersuasive. To clarify, the *Brown* court identified the prevailing party under the statute separately as to each type of theft or theft “cause of action” alleged between the same parties. We declined to do so in *Diakiw*, because the statute refers to the prevailing party in a “‘suit’ *under the TTLA*.” *See id.* (emphasis added). In that case, the theft-of-services and theft-of-property claims were both “under the [Texas Theft Liability Act],” and the prevailing party was the one who prevailed on the only TTLA claim submitted. Here, however, only theft of property was alleged or submitted, and each appellant prevailed on the only TTLA claim against him under the statute. DNOW's other claims were not

“under the TTLA,” so whether or not the appellants prevailed on those claims does not affect our analysis.

We conclude that the appellants must be awarded their attorneys’ fees for claims under the Texas Theft Liability Act in the amounts found by the jury. This brings us to DNOW’s sole remaining cause of action: breach of fiduciary duty.

V. BREACH OF FIDUCIARY DUTY

In its live pleading before trial, DNOW pleaded claims for breach of fiduciary duty against “Defendants” from whom they sought “forfeiture and disgorgement relief” in the amount of their compensation from DNOW and Permian. DNOW did not name the defendants at issue but identified them only as “executive, managerial, and high-level employees of DNOW.” Appellants did not specially except. Eoff was an executive vice president of DNOW; Dauphin was Odessa Pump’s sales director; Wheeler was a regional manager; and Madison was the manager of the Odessa branch of Odessa Pumps.

DNOW initially argued for fiduciary liability only as to Eoff and Madison. But after Dauphin and Wheeler testified at trial that they owed fiduciary duties to DNOW, DNOW sought leave to amend its pleadings to assert breach-of-fiduciary-duty claims against them. Over Dauphin’s and Wheeler’s objections, the trial court agreed.

Eoff did not dispute that he owed fiduciary duties to DNOW, and the jury found that Dauphin, Madison, and Wheeler also owed fiduciary duties to DNOW. Based on the jury’s finding that all four breached fiduciary duties to DNOW, the jury was asked to find the amount of each man’s total compensation from DNOW in 2022. The trial court concluded that “the remedy of disgorgement is appropriate,

equitable, and just under these circumstances,” and awarded DNOW the full amount of compensation it had paid to Dauphin, Eoff, Madison, and Wheeler in 2022.

On appeal, these four—the “fiduciary appellants”—argue that they are entitled to rendition of judgment on these claims because (a) the trial court erred in permitting DNOW to amend its pleadings during trial to assert breach-of-fiduciary-duty claims against Dauphin and Wheeler; (b) the Texas Uniform Trade Secrets Act preempts these claims; (c) fee forfeiture or disgorgement of compensation is not an available remedy; and (d) the trial court refused to submit the correct instruction on the scope of fiduciary duty, under which no evidence supports the liability finding.

A. Trial Amendment of Claims Against Dauphin and Wheeler

Appellants contend that the trial court erred in allowing DNOW to amend its pleadings during trial to assert breach-of-fiduciary-duty claims against Wheeler and Dauphin because the claims against them were not tried by consent. But that is not a sufficient basis on which to conclude that the trial court erred.

The trial court must permit a trial amendment of the pleadings “when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the allowance of such amendment would prejudice him in maintaining his action or defense upon the merits.” TEX. R. CIV. P. 66. A trial court has no discretion to refuse a trial amendment unless the opposing party presents evidence of surprise or prejudice, or the amendment is prejudicial on its face because it asserts a new cause of action or defense, and the opposing party objects to the amendment. *Tanglewood Homes Ass’n, Inc. v. Feldman*, 436 S.W.3d 48, 64 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). A trial amendment is prejudicial on its face if (1) the amendment asserts a new substantive matter that reshapes the nature of the trial itself; (2) the new matter is of such a nature that the opposing party could not have anticipated it in light of the development of the case

up to the time the amendment was requested; and (3) the opposing party's presentation of its case would be detrimentally affected by the amendment. *Id.* at 64–65.

The trial amendments did not assert new substantive matters that reshaped the nature of the trial, and the claims could have been anticipated. Both Wheeler and Dauphin acknowledged in their testimony that they had fiduciary duties to DNOW, but as they point out, that testimony was relevant to whether they acquired DNOW's confidential information (which includes trade secrets) by “improper means,” which includes “breach of a duty.”

More importantly, however, DNOW had already pleaded claims for breach of fiduciary duty against “Defendants,” identified only as “executive, managerial, and high-level employees of DNOW.” Thus, the trial amendment appears to have clarified the claims already pleaded. Under the circumstances, we conclude that the trial court did not abuse its discretion in permitting the trial amendments.

Wheeler and Dauphin additionally argue that the amendments detrimentally affected their presentation of their case because “[t]hey now had to dispute whether their *compensation* resulted from a breach of duty—a new substantive matter, as disgorgement is not a TUTSA remedy.”²⁵ But their premise is mistaken: equitable remedies for the breach of fiduciary duties do not require proof of causation. *See First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 221 (Tex. 2017). Compensation forfeiture is such an available equitable remedy. *See id.* (“[A] person in a trust relationship who does not provide the loyalty bargained for fails to fulfill his agreement and is not entitled to be paid in full.”). Thus, the claims that

²⁵ TUTSA is the common acronym for the Texas Uniform Trade Secrets Act.

Wheeler and Dauphin breached fiduciary duties to DNOW did not place at issue the question of whether their compensation was the result of such a breach.

B. Preemption of Trade-Secret Claims

The appellants objected to the submission to the jury of DNOW's breach-of-fiduciary-duty claims, arguing that the claims are based on the same facts as DNOW's trade-secret claims and are therefore preempted. The appellants are only partially correct.

An employee who owes fiduciary duties to the person's employer can breach those duties by misappropriating the employer's trade secrets. *See* TEX. CIV. PRAC. & REM. CODE § 134A.002(2) (a trade secret acquired by "improper means" is misappropriated, and "improper means" includes the "breach or inducement of *a breach of a duty* to maintain secrecy, to limit use, or to prohibit discovery of a trade secret." (emphasis added)). Moreover, the two causes of action permit conflicting remedies. Under the trade-secret statute, a successful claimant can recover for actual loss and unjust enrichment "caused by misappropriation," but one who prevails on a claim for breach of fiduciary duty can obtain additional equitable remedies such as fee forfeiture without proof of causation. *See, e.g., Grant Me the Wisdom Found., Inc. v. Boyar*, –S.W.3d–, No. 14-23-00849-CV, 2025 WL 478189, at *7 (Tex. App.—Houston [14th Dist.] Feb. 13, 2025, pet. denied). Thus, DNOW's breach-of-fiduciary-duty claims are preempted to the extent that they rely on the misappropriation of trade secrets.

The appellants additionally argue that the Texas Uniform Trade Secrets Act preempts not only claims based on the misappropriation of trade secrets, but also claims based on the misappropriation of confidential information that does not qualify for trade-secret protection. We disagree.

Although some courts—including some courts applying Texas law²⁶—have read the Act’s preemption provision this broadly, such a broad reading is contrary to its plain meaning, for it unambiguously states that the Act “does not affect . . . other civil remedies that are not based upon misappropriation of a trade secret.” TEX. CIV. PRAC. & REM. CODE § 134A.007(b)(2). As previously discussed, “trade secret” is statutorily defined to mean all forms and types of information that (1) the owner has taken reasonable measures under the circumstances to keep secret, and (2) derives independent economic value, actual or potential, “from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.” *Id.* § 134A.002(6). Information that is shown to be confidential may satisfy the first of these two requirements, but unless the information derives actual or potential economic value from that confidentiality, the information is not a trade secret and claims about its misappropriation are not preempted by the Texas Uniform Trade Secrets Act.²⁷

²⁶ See, e.g., *BKL Holdings, Inc.*, 660 F. Supp. 3d at 610 (“TUTSA preempts all claims based on the alleged improper taking of trade secret and confidential business information.”); *ScaleFactor, Inc. v. Process Pro Consulting, LLC*, 394 F. Supp. 3d 680, 684 (W.D. Tex. 2019) (“TUTSA preempts claims based on the unauthorized use of confidential information that was not a trade secret.”). Courts have made similar statements about information that the parties characterize only as confidential or proprietary but that appears to meet the definition of “trade secret.” See, e.g., *Reynolds*, 2023 WL 8262764, at *18 (“As pleaded by the Sanchez parties, however, even the confidential and proprietary information at issue in this case falls within TUTSA’s definition of a trade secret.”).

²⁷ The highest courts of states holding that the trade-secrets act applies to all proprietary or confidential information rely on the principal of promoting uniformity among the states who have enacted the statute. See, e.g., *Robbins*, 290 Ga. at 466, 722 S.E.2d at 58 (preemption also applies to confidential or proprietary information that is not a trade secret); *BlueEarth Biofuels*, 123 Hawai’i at 327, 235 P.3d at 323 (same); *Davey*, 153 N.H. at 777, 904 A.2d at 664. But there is no such uniformity, and it seems that the states’ highest courts increasingly follow the same “plain language” approach we adopt here. See, e.g., *Orca Commc’ns Unlimited, LLC v. Noder*, 236 Ariz. 180, 181, 337 P.3d 545, 546 (2014) (Uniform Trade Secrets Act “does not displace common-law claims based on alleged misappropriation of confidential information that is not a trade secret”);

Because the jury could find a breach of fiduciary duty on grounds other than misappropriation of trade secrets, the trial court properly overruled the objection that breach of fiduciary duty should not be submitted at all.

C. Availability of Compensation Forfeiture as a Remedy

The appellants contend that DNOW cannot recover against them for breach of fiduciary duty because the only relief DNOW ultimately sought was forfeiture of the compensation they received from DNOW. They argue that this relief is unavailable because (1) DNOW did not obtain findings that they profited from the breach of fiduciary duties, and (2) forfeiture of compensation violates the Texas Labor Code. Whether a particular remedy is available is a question of law. *See Pressil v. Gibson*, 477 S.W.3d 402, 408 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). Statutory construction is likewise a question of law, and we review questions of law de novo. *HNMC, Inc. v. Chan*, 683 S.W.3d 373, 380 (Tex. 2024).

Equitable remedies such as forfeiture of compensation are not primarily intended to compensate the one to whom the duty is owed, but to protect relationships of trust by discouraging a fiduciary’s disloyalty. *See Parker*, 514 S.W.3d at 221. In arguing that DNOW was required to obtain findings that a fiduciary profited from the breach, the appellants rely on cases discussing profit disgorgement, which is a distinct remedy.²⁸

Integrated Direct Mktg., LLC v. May, 2016 Ark. 281, 4, 495 S.W.3d 73, 75 n.2 (2016) (same); *Wolfe Elec., Inc. v. Duckworth*, 293 Kan. 375, 384, 266 P.3d 516, 523 (2011) (same); *Am. Biomedical Grp., Inc. v. Techtrol, Inc.*, 2016 OK 55, ¶ 23, 374 P.3d 820, 827 (same); *Burbank Grease Servs., LLC v. Sokolowski*, 2006 WI 103, ¶¶ 33–34, 294 Wis. 2d 274, 296–98, 717 N.W.2d 781, 793 (same, and reversing a prior decision that held otherwise).

²⁸ *See, e.g., Longview Energy Co. v. Huff Energy Fund LP*, 533 S.W.3d 866, 877 (Tex. 2017) (“Delaware law limits disgorgement to a fiduciary’s profit.”); *ERI Consulting Engineers, Inc. v. Swinnea*, 318 S.W.3d 867, 873 (Tex. 2010) (“[C]ourts may disgorge all ill-gotten profits from a fiduciary when a fiduciary agent usurps an opportunity properly belonging to a principal, or competes with a principal.”); *Diakiw*, 693 S.W.3d at 603 (“A fiduciary must account for, and

Appellants Dauphin, Madison, and Wheeler further contend that they cannot properly be ordered to disgorge all compensation they received from DNOW in 2022 because Texas Labor Code sections 61.011–.020 forbid it. The cited provisions require an employer to designate paydays and notify employees of those dates. The provisions also specify the intervals at which an employer must pay wages, the form of payment, the means of delivering payment, and the consequences to the employer of failing to pay an employee’s wages as required. Finally, the statute states that “[a]n employer may not withhold or divert any part of an employee’s wages unless the employer . . . is ordered to do so by a court of competent jurisdiction.” TEX. LAB. CODE § 61.018(1). In sum, the cited provisions address only an employer’s obligations regarding payment of wages. Dauphin, Madison, and Wheeler do not contend that DNOW failed to pay them in accordance with these statutory provisions, which do not address fee forfeiture or disgorgement of wages previously paid.

D. Legal Sufficiency of the Evidence of Breach

The appellants next contend that the charge imposes higher fiduciary duties than they actually owed, and that there is no evidence of breach under a correct charge. The challenged part of the charge is as follows:

Did any of the defendants named below fail to comply with their fiduciary duty to DNOW?

While high-level managerial employees of DNOW, the defendants named below owed DNOW a fiduciary duty.

yield to the beneficiary, any profit he makes *as a result of* his breach of fiduciary duty.”); *Shannon Med. Ctr. v. Triad Holdings III, L.L.C.*, 601 S.W.3d 904, 916 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (“Texas law limits profit disgorgement to the amount of a fiduciary’s profits obtained as a result of the fiduciary’s breach of duty.”); *Happy Endings Dog Rescue v. Gregory*, 501 S.W.3d 287, 293 (Tex. App.—Corpus Christi–Edinburg 2016, pet. denied) (profit disgorgement “is properly measured by the defendant’s unjust gains, not the plaintiff’s loss”).

To prove the defendants named below failed to comply with their fiduciary duty, DNOW must show—

1. Their actions were not fair and equitable to DNOW; or
2. They did not make reasonable use of the confidence that DNOW placed in them; or
3. They failed to act in the utmost good faith or exercise the most scrupulous honesty toward DNOW; or
4. They placed their own interests before DNOW's, used the advantage of their positions to gain a benefit for themselves at the expense of DNOW, or placed themselves in a position where their self-interest might conflict with their obligations as a fiduciary; or
5. They failed to fully and fairly disclose all important information to DNOW.

This is the instruction given to determine if a *transaction* between a fiduciary and beneficiary breached a fiduciary duty; in subpart number 1, the words “their actions” have been substituted for “the transaction.”²⁹ But we agree with the appellants that this is not the standard applicable here.

This is not an accurate statement of the law applicable to this case, because even a fiduciary employee “may plan to compete with his employer and take certain steps toward that goal without disclosing his plans to the employer.” *PAS, Inc. v. Engel*, 350 S.W.3d 602, 613–14 (Tex. App.—Houston [14th Dist.] 2011, no pet.). Although an employee may secretly join other employees in the plan to compete with the employer, an employee may not “solicit” the departure of other employees during that employment. *See Eurecat US, Inc. v. Marklund*, 527 S.W.3d 367, 381–82 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *see also Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 201 (Tex. 2002) (stating that an at-will employee

²⁹ *See* COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., Texas Pattern Jury Charges: Business, Consumer, Insurance & Employment PJC 104.2 (2022).

may properly plan to go into competition with the employer, may take active steps to do so while still employed, and may join with other employees in the endeavor without violating any duty owed to the employer). “[T]he commonly understood meaning of ‘solicit’ includes more than merely to ask.” *Eurecat*, 527 S.W.3d at 381 (quoting *In re Athans*, 478 S.W.3d 128, 135 (Tex. App.—Houston [14th Dist.] 2015) (orig. proceeding)). A supervisor–manager may not act as “corporate pied piper” and lure away all of his employer’s personnel and thereby destroy the employer’s business. *Abetter Trucking Co. v. Arizpe*, 113 S.W.3d 503, 510, 511–12 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

The appellants accordingly requested the following instruction:

A high-level managerial employee owes his employer a fiduciary duty to act solely for the employer’s benefit with regard to the responsibilities assigned to him. Thus, the employee cannot solicit the company’s customers while still working for the company.

However, the employee does not owe an absolute duty of loyalty to the company. The law does not preclude the employee from making preparations for a future competing business venture, nor do such preparations necessarily constitute a breach of a fiduciary duty. The employee can properly plan to compete with his employer and can take active steps to do so while still employed by that employer. The employee has no general duty to disclose his plans to the employer; he can secretly join with other employees in the endeavor without violating any duty to the employer, and after resigning from his employment, the employee can actively compete with the former employer.

We agree with the appellants that this instruction is substantially correct and was necessary to avoid misleading the jury about the duties the fiduciary appellants owed to DNOW. We accordingly conclude that the trial court abused its discretion in refusing the instruction, and we measure the sufficiency of the evidence as though the instruction had been given. The question is whether there is legally sufficient evidence that each fiduciary appellant breached fiduciary duties to DNOW, given

that breach does not include misappropriation of trade secrets, taking steps to prepare to compete with DNOW, or secretly joining with other employees in plans to compete with DNOW.

Because few fiduciary duties outlast employment in a fiduciary role, we consider this issue as to each fiduciary appellant in the order in which they resigned. Eoff, Madison, and Wheeler each resigned on April 1, 2022, and Dauphin resigned on May 2, 2022.

1. Legally sufficient evidence supports the finding that Toby Eoff breached fiduciary duties to DNOW.

Viewing the evidence in the light most favorable to the jury’s finding that Eoff breached fiduciary duties to DNOW, reasonable jurors could credit Eoff’s testimony that by May 23, 2022, he was “somewhat committed to investing” in Permian or “partnering with” it, but by the time of trial, he still was neither an investor nor an employee. Nevertheless, two weeks before Eoff’s resignation, Kenworthy emailed an offer letter intended for Brian Madison to Eoff’s wife. Kenworthy messaged Eoff that he had sent the document and asked Eoff, “If you have some time would you take a look at it?” Three hours later, Eoff texted Kenworthy, “Can you talk?”

Jurors reasonably could infer from this that Eoff was advising one of DNOW’s competitors on the terms of an employment offer that a DNOW employee would be likely to accept. Jurors further could conclude that in mid-March of 2022, Eoff was not making plans to compete with DNOW himself, much less to join with others in doing so. Considering that Eoff never invested in Permian or was employed by it, jurors could view his interest in the company at that time as purely personal, arising from his particularly close relationship with Kenworthy.³⁰ Under this view, Eoff

³⁰ When asked if Kenworthy was “like a son” to him, Eoff said, “Clayton is a very fine young man, yes. I would have him as a son.”

breached his duty of loyalty by actively advising another company about the employment terms to offer a DNOW employee. We conclude this evidence is legally sufficient to support the jury's finding that Eoff breached a fiduciary duty to DNOW.

2. *Legally sufficient evidence support the findings that Michael Wheeler and Brian Madison breached fiduciary duties to DNOW.*

As a regional manager for Odessa Pumps, Wheeler was Madison's supervisor. Nevertheless, more than three weeks before Wheeler resigned from DNOW, he sent a message to Madison's DNOW phone, stating "Need a rate sheet for [Pioneer] ASAP." He later added, "Clayton [Kenworthy] was supposed to be working on it already."

As previously discussed, Permian could not afford to hire DNOW's San Angelo staff until it had an MSA with Pioneer. In effect, then, Wheeler was instructing a DNOW employee under his supervision to perform work for a competitor while both were still employed by DNOW. Moreover, by sending the message to Madison's DNOW phone, Wheeler used DNOW assets to convey the assignment.

Madison not only accepted the assignment; he also worked on designs for a new logo for Permian and shared them with Wheeler and others using his DNOW cell phone. Neither reported these improper uses of DNOW property.

By these actions, both Wheeler and Madison breached DNOW's code of conduct, which prohibits employees from using company cell phones for their own or another's personal gain and requires employees to report communications they receive in violation of the code.

Under the applicable standard of review, we conclude this is more than a scintilla of evidence that Wheeler and Madison breached their fiduciary duties of loyalty to DNOW in ways other than by misappropriating trade secrets, by preparing

to compete with DNOW in the future, or by making plans with other employees to compete.

3. *Legally sufficient evidence supports the finding that Dauphin breached fiduciary duties to DNOW.*

DNOW's evidence that Dauphin breached fiduciary duties to DNOW concerns a very brief period of time. Viewing the evidence in the light most favorable to DNOW, reasonable jurors could find that on April 11, 2022, Dauphin accepted a job offer from Permian that included 6% equity in the company. On Tuesday, April 26, 2022, Dauphin made the ninety-minute drive to Eoff's lake house where he was to meet with Eoff, Kenworthy, and Lewallen. He arrived shortly after 4:00 p.m. and left the following morning.³¹ There is evidence that during the meeting, Dauphin agreed to a strategy in which Permian would hire some of Odessa Pumps' best employees, then sell Permian to DNOW at a profit. In effect, this would enrich those with an equity interest in Permian for allowing DNOW to retain or reacquire its own present and former employees.

On Thursday, April 28th, Eoff spoke with DNOW's CEO David Cherechinsky. Cherechinsky testified that he gathered from the conversation that Dauphin and Lewallen were at risk of leaving. Dauphin's imminent resignation was confirmed the next day, when Dauphin informed his superior that he was planning to leave DNOW. DNOW immediately offered Dauphin a retention bonus of \$1 million in stock, but Dauphin quit on the next business day.

Three days later, Kenworthy offered to sell Permian to DNOW for \$30 million. DNOW declined.

³¹ We point out these times because DNOW argued that Dauphin traveled to and attended the meeting during hours he was supposed to be working for DNOW.

Jurors reasonably could conclude that if DNOW had accepted the offer, Dauphin would have effectively resumed employment by DNOW but would have been entitled to a percentage of the sales price in an amount considerably larger than the value of the retention bonus DNOW offered. Under this view of events, jurors could construe Dauphin's resignation not as a move to legitimately compete with DNOW, but as a means to pressure DNOW to buy his continued services at a premium far exceeding the offered retention bonus.

We conclude that, under a correct charge, there is legally sufficient evidence to support the finding against Dauphin on grounds that are not preempted.

E. Charge Error

The charge permitted the jury to find breach of fiduciary duty on legally invalid bases, such as the preempted ground that the fiduciary appellants misappropriated trade secrets, planned to compete with DNOW after resigning, or failed to disclose the plans of themselves or others to work for or invest in Permian in the future. On this record, we cannot be reasonably certain that the jury was not significantly influenced by the error. *See Horton v. Kan. City S. Ry. Co.*, 692 S.W.3d 112, 138–39 (Tex. 2024).

We accordingly reverse the portion of the judgment addressing DNOW's claims against Eoff, Madison, Wheeler, and Dauphin for breach of fiduciary duty, and we remand those claims for a new trial.

VI. INTEREST AND COSTS

The trial court specified in the judgment that prejudgment interest on actual damages began to accrue when the suit was filed on June 21, 2022, and awarded DNOW all costs of court. The appellants contend that prejudgment interest accrues against a particular defendant when that person was added to the case, and that the

trial court had previously ordered the parties to split the cost of forensic examination and remediation of the defendants' electronic devices. We review the trial court's assessment of interest and costs for abuse of discretion.³²

A. Prejudgment Interest

There are two legal bases for prejudgment interest: (1) an enabling statute, and (2) general principals of equity. *Quartaro v. Strategic Outsourcing, Inc.*, No. 14-09-00567-CV, 2010 WL 2901736, at *2 (Tex. App.—Houston [14th Dist.] July 27, 2010, no pet.) (mem. op.). “The enabling statute, Texas Finance Code section 304.104, only applies to wrongful death, personal injury, and property damage cases.” *Id.* (quoting *Citizens Nat’l Bank v. Allen Rae Invs., Inc.*, 142 S.W.3d 459, 487 (Tex. App.—Fort Worth 2004, no pet.)). But if the trial court decides to award equitable prejudgment interest, the trial court must follow the accrual rule set forth in the statute. *Citizens Nat’l Bank*, 142 S.W.3d at 486.

The statute provides that, with exceptions inapplicable here, “prejudgment interest accrues on the amount of a judgment during the period beginning on the earlier of the 180th day after the date the defendant receives written notice of a claim or the date the suit is filed.” TEX. FIN. CODE § 304.104. “Though the statute uses the term ‘the date suit is filed,’ to calculate prejudgment interest on a claim the plaintiff did not plead in the original petition, courts use the date that the plaintiff first filed a pleading in which the plaintiff asserted the claim.” *Ho & Huang Props., L.P. v. Parkway Dental Assocs., P.A.*, 529 S.W.3d 102, 123 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

³² See *Quartaro v. Strategic Outsourcing, Inc.*, No. 14-09-00567-CV, 2010 WL 2901736, at *2 (Tex. App.—Houston [14th Dist.] July 27, 2010, no pet.) (mem. op.) (pre-judgment interest); *Debo Homes, LLC v. Miller*, No. 14-18-00546-CV, 2020 WL 1026413, at *2 (Tex. App.—Houston [14th Dist.] Mar. 3, 2020, pet. denied) (mem. op.) (post-judgment interest); *Furr’s Supermarkets, Inc. v. Bethune*, 53 S.W.3d 375, 376 (Tex. 2001) (costs).

Young was not added to the suit until DNOW filed its Eighth Amended Petition on October 6, 2022, and DNOW does not contend that he had written notice of the claim against him more than 180 days before that date. We accordingly agree with appellants that prejudgment interest on the actual damages for which Young is liable³³ began to accrue on October 6, 2022, and that the trial court abused its discretion in ordering an earlier accrual date.

B. Costs

The general rule is that “[t]he successful party to a suit shall recover of his adversary all costs incurred therein.” TEX. R. CIV. P. 131. Where DNOW previously was the sole prevailing party, the appellants are now the prevailing parties on DNOW’s civil-theft claims, for which an award of the appellants’ court costs is mandatory. *See* TEX. CIV. PRAC. & REM. CODE § 134.005(b). All of the appellants except for Young are also prevailing parties on DNOW’s trade-secret claims, though the prevailing parties on DNOW’s fiduciary-duty claims remain to be seen. Thus, costs must be reassessed on remand.

The appellants point out on appeal that the parties agreed before trial to a particular protocol for the forensic examination and remediation of their electronic devices, but did not agree about who was to bear those costs. The trial court stated at a pretrial hearing, “I’m going to order that the cost be split at this time,” but did not include such an order in the final judgment. The appellants accordingly argue that DNOW should be required to bear half of those examination and remediation costs.

³³ Prejudgment interest does not accrue on exemplary damages. *See* TEX. CIV. PRAC. & REM. CODE § 41.007.

These expenses are neither court costs nor damages, and the appellants identify no authority that requires such expenses to be borne by anyone other than the person who incurred them. Although the allocation of the expenses may have been submitted to the trial court's discretion, the trial court's oral ruling was interlocutory, and the trial court could—and apparently did—decide the matter differently based on the outcome of the case. Because the outcome has now changed again, the parties may, if they wish, ask the trial court on remand to allocate those costs differently.

VII. CONCLUSION

To summarize our disposition of the issues, we

- A. reverse the judgment against appellants Coe, Comrie, Dauphin, Eoff, Garretson, Hibbetts, Kaspar, Lewallen, Madison, Steubing, Michael Wheeler, and Ryan Wheeler for trade-secret-misappropriation damages, exemplary damages, and attorneys' fees;
- B. modify the judgment against Bo Young to hold him individually liable (before settlement credits) for actual trade-secret-misappropriation damages of \$11,250 and exemplary damages of \$22,500;
- C. reverse the award of DNOW's attorneys' fees;
- D. reverse the judgment against Eoff, Madison, Wheeler, and Dauphin for breach of fiduciary duty;
- E. render judgment, in part, that DNOW takes nothing by its claims under the Texas Theft Liability Act, and we instead award appellants their attorneys' fees under the TTLA in the amounts found by the jury; and
- F. remand the case to the trial court for
 - 1. redetermination of DNOW's reasonable attorneys' fees in successfully prosecuting its trade-secret-misappropriation claim against Young, and for the trial court to exercise its discretion in determining the extent to which to award those fees;
 - 2. relitigation of the breach-of-fiduciary-duty claims against Toby Eoff, Brian Madison, Michael Wheeler, and Russell Dauphin; and

3. rendition of judgment after applying settlement credits, recalculating interest, and reapportioning costs.

/s/ Tracy Christopher
Chief Justice

Panel consists of Chief Justice Christopher and Justice Wise.³⁴

³⁴ This case was submitted for oral argument on November 21, 2024, to a panel originally consisting of Chief Justice Christopher and Justices Wise and Hassan. Justice Hassan's term of office ended on December 31, 2024. If a case has been argued but a panel member cannot participate in deciding the case, then the panel's two remaining justices may decide the case where, as here, they agree on the judgment. *See* TEX. R. APP. P. 41.1(b).