CAUSE NO. 2016-24818

SUPERIOR ENERGY SERVICES, INC., STABIL DRILL SPECIALTIES, L.L.C., and SESI, L.L.C.	§	IN THE DISTRICT COURT
Plaintiffs,	§	
v.	§	OF HARRIS COUNTY, TEXAS
CHRISTOPHER J. RUSSO, MARTIN A. LEBLANC, ET. AL.,	§	
Defendants.	§	
	§	295th JUDICIAL DISTRICT

RUSSO DEFENDANTS' MOTION FOR A NEW TRIAL

Pursuant to Texas Rule of Civil Procedure 320, the Russo Defendants[1] file this Motion for a New Trial. In the interest of justice and fairness, the Court should grant their request.

I. INTRODUCTION

Plaintiffs Superior Energy Services, Inc. ("Superior"), Stabil Drill Specialties, L.L.C. ("Stabil Drill"), and SESI, L.L.C. ("SESI") (collectively, the Plaintiffs") sued multiple Defendants raising numerous claims. The gravamen of these allegations was that Chris Russo and Martin LeBlanc breached their fiduciary duties to Stabil Drill. After several years of discovery and motion practice, the case proceeded to trial against the Russo Defendants and the Leblanc Defendants.[2] Following a six-week trial, the jury returned a verdict for the Plaintiffs finding that Chris Russo breached his fiduciary duty, committed fraud, and misappropriated trade

[1] The Russo Defendants are Christopher J. Russo; Triple RRR Investments, LLC; Basket Specialties, LLC; Gulf Coast Wireline, LLC; Longhorn Bits, LLC; Prime 337, LLC; Russo Energy, LLC; and Russo Exploration, LLC. The "Russo Entities" are all the foregoing defendants except Christopher J. Russo.

[2] The LeBlanc Defendants are Martin A. LeBlanc; LeBlanc Real Estate Investments, LLC and Shorty's Outdoor Adventures.

secrets. The jury awarded $26,890,867 in actual damages.[3] On April 9, 2019, the Court signed a judgment for the Plaintiffs and awarded profit disgorgement and prejudgment interest in addition to the actual damages amount found by the jury.

The Russo Defendants now file this Motion for a New Trial, which the Court should grant for the following reasons:

1. The Court abused its discretion by failing to compel Perry McGraw's testimony when he incorrectly invoked his Fifth Amendment privilege. As the United States Supreme Court has noted, "[i]t is black-letter law that a witness cannot assert a Fifth Amendment privilege not to testify if the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness." *Pillsbury Co. v. Conboy*, 459 U.S. 248, 273 (1983) (Blackmun, J., concurring) (quotations omitted). Because the testimony sought from Mr. McGraw—confirming the contents of a statement made by a senior Superior executive concerning Mr. Russo—could not possibly be used as a basis for, or in aid of, a criminal prosecution against Mr. McGraw, the Court was required to compel Mr. McGraw. This error resulted in the exclusion of highly probative evidence on a material issue of fact—Plaintiffs' knowledge, and therefore, waiver, of Mr. Russo's alleged breaches of fiduciary duty and fraud—likely resulting in the rendering of an incorrect verdict on Mr. Russo's affirmative defenses. A new trial, therefore, is necessary to correct this mistake.

2. But even assuming that the Court properly excluded (it did not) Mr. McGraw's testimony, the Russo Defendants independently presented sufficient evidence at trial to support a finding of waiver. Because the jury's answers to the waiver—questions 3, 18, and 32—were against the great weight and preponderance of the evidence and are manifestly unjust, the Court should grant a new trial.

3. Additionally, the jury's answers on Questions 29, 30 and 38 were against the great weight and preponderance of the evidence and are manifestly unjust. Plaintiffs have presented virtually no evidence to support a finding that Stabil Drill had a trade secret in the DSV, that Chris Russo misappropriated it, and that Superior was harmed.

4. Finally, the Court should grant a new trial because Plaintiffs engaged in an improper and prejudicial jury argument. Courts have held that the use in argument of inflammatory epithets such as ""liar," "fraud," "faker," "cheat," and "imposter" constitute improper jury argument. *See, e.g., Standard Fire Ins. Co. v.*

[3] This amount reflects the proportionate responsibility findings assigned by the jury.

> *Reese*, 584 S.W.2d 835, 840 (Tex. 1979). By arguing that Chris Russo and Marty LeBlanc were, among other things, "ferocious wolves," who "came seeking money, greed, dishonesty," and "breached every moral of society, every rule that we live by," Plaintiffs' counsel deliberately inflamed the jury. Moreover, he requested that the jury "send a message" by awarding damages. This form of jury argument was not invited or provoked. And while taken in isolation, some, or perhaps even several of these prejudicial statements may have been cured through an appropriate instruction, their cumulative effect could not be. Accordingly, a new trial should be granted.

For each of these independent reasons, a new trial is necessary.

II. ARGUMENT

A. The Court's failure to compel Mr. McGraw's testimony was erroneous and likely resulted in an incorrect verdict.

Because all parties should have a reasonable opportunity to litigate a civil case fully, courts should seek out ways to permit "as much testimony as possible to be presented in the civil litigation, despite the assertion of the privilege." *Davis-Lynch, Inc. v. Moreno*, 667 F.3d 539, 547 (5th Cir. 2012). By improperly allowing Mr. McGraw to invoke his Fifth Amendment privilege in response to questions that had no tendency to implicate him in a crime, the Court committed error. This error deprived the Russo Defendants of integral testimony on a material issue of fact, thus undercutting their ability to litigate their case fully. Consequently, a strong likelihood exists that the jury rendered an inaccurate verdict. Therefore, a new trial is warranted.

1. Legal Standard underlying the assertion of the Fifth Amendment.

The Supreme Court has explicitly noted that the Fifth Amendment privilege against self-incrimination may be asserted in a civil action as well as a criminal one. *See Pillsbury Co. v. Conboy*, 459 U.S. 248, 256–57 (1983). The privilege extends to answers that would "in themselves support a conviction" or "would furnish a link in the chain of evidence needed to prosecute the claimant . . . ." *Hoffman v. U. S.*, 341 U.S. 479, 486 (1951).

However, the right not to answer questions is not absolute. "The prohibition against compelling the testimony of a witness in any setting is predicated upon there being a *real danger that the testimony might be used against the witness in later criminal proceedings*." *Andover Data Services, a Div. of Players Computer, Inc. v. Statistical Tabulating Corp.*, 876 F.2d 1080, 1082 (2d Cir. 1989) (emphasis added); *see also Pillsbury*, 459 U.S. at 273 (Blackmun, J., concurring) ("[i]t is black-letter law that a witness cannot assert a Fifth Amendment privilege not to testify 'if the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness."). A witness is "not exonerated from answering [questions] merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination." *Hoffman*, 341 U.S. at 479. Rather, it is "for the court to say whether his silence is justified, and to require him to answer if it clearly appears to the court that he is mistaken." *Id.* (internal quotations omitted).

Moreover, "[a]lthough the witness may have a valid claim to the privilege with respect to some questions, the scope of that privilege may not extend to all relevant questions." *United States v. Goodwin*, 625 F.2d 693, 701 (5th Cir. 1980). Therefore, the privilege against self-incrimination must be asserted in response to each specific question and rests on its own circumstances; blanket assertions of the privilege against self-incrimination are generally not allowed. *In re Espinoza*, 2007 WL 4180216, at *3 (Tex. App.—San Antonio Nov. 28, 2007, no pet.) (citing *In re Speer,* 965 S.W.2d 41, 45–46 (Tex. App.—Fort Worth 1998, orig. proceeding)). Thus, the trial court must "study each question for which the privilege is claimed and must forecast whether an answer could tend to incriminate the witness in a crime." *In re Espinoza*, 2007 WL 4180216, at *3.

2. As a threshold matter, the Court erred by placing the burden upon the Russo Defendants to show that Mr. McGraw's Privilege did not apply.

The Court abused its discretion by applying the wrong legal standard to determine the admissibility of Mr. McGraw's testimony.

On November 14, 2018, the Russo Defendants' called Mr. McGraw, the former head of North American operations for Stabil Drill to testify. Because Mr. McGraw expressed his intention to invoke the Fifth Amendment privilege against self-incrimination, the Court held an in-camera hearing outside the presence of the jury to evaluate Mr. McGraw's claim of privilege. Prefacing the hearing, the Court stated:

> "In light of the fact that [Mr. McGraw] is not a party and he is a third party witness and in a civil case [the privilege] is not something that can be commented on in front of the jury with a witness who is not a party, **I am going to be putting the burden likely on [Russo Defendants'] counsel who is asking the questions to show me why he should have to waive his right on certain questions, if he pleads the Fifth**.

(November 14, 2018 Trial Tr. 161:7–14.) During the proceeding, the Court questioned Russo Defendants'—rather than Mr. McGraw's—counsel: "Mr. Clarke . . . what is the . . . what are the circumstances around that question whether or not this is a question that would tend to incriminate Mr. McGraw?" (*Id.* at 164:11–15.)

The Court's decision to place the burden upon the Russo Defendants' to prove that Mr. McGraw's testimony would not incriminate him was inappropriate and legally inaccurate. Where, as here, there is "nothing suggestive of incrimination about the setting in which a seemingly innocent question is asked, the *burden* of establishing a foundation for the assertion of the privilege should *lie with the witness* making it." *In re Morganroth*, 718 F.2d 161, 169 (6th Cir. 1983) (citing *United States v. Melchor Moreno*,

536 F.2d 1042, 1045 (5th Cir. 1976), *opinion supplemented on denial of reh'g*, 543 F.2d 1175 (5th Cir. 1976)) (emphasis added).

There is nothing suggestive of incrimination about the setting in which Mr. McGraw was questioned. Mr. McGraw was called as a witness in a civil case and not a criminal one. Mr. McGraw was questioned by a private plaintiff and not a prosecutor, or even a government attorney. Nor was the testimony that the Russo Defendants intended to solicit designed to implicate Mr. McGraw in a crime. *See* November 14, 2018, Trial Tr. 162:15-17 (Russo's counsel: "the direct will be three questions . . . none of which will involve anything that incriminates him."). Accordingly, the burden rested—or rather, should have rested—on Mr. McGraw to establish the validity of his privilege assertion. *See*, *e.g.*, *Camelot Group, Ltd. v. W. A. Krueger Co.*, 486 F. Supp. 1221, 1225 (S.D.N.Y. 1980) (collecting cases).

Regardless of its impact, "placing an unwarranted burden of proof on one party" is legal error. *Boles Trucking, Inc. v. United States*, 77 F.3d 236, 241 (8th Cir. 1996). And in Texas, such an error—like in virtually every locale—constitutes an abuse of discretion that generally requires reversal. *USX Corp. v. Union Pac. Res. Co.*, 753 S.W.2d 845, 855 (Tex. App.—Fort Worth 1988, no writ) ("placing the burden as to a material issue upon the wrong party is generally reversible error."); *see also DeLeon v. State*, 1999 WL 718024, at *3 (Tex. App.—Houston [14th Dist.] Sept. 16, 1999, no pet; *Bargsley v. Pryor Petroleum Corp.*, 196 S.W.3d 823, 829 (Tex. App.—Eastland 2006, pet. denied) (finding that improperly placing the burden of proof upon the wrong party constitutes an abuse of discretion). Because the Court placed the burden of proof upon

the Russo Defendants, rather than on Mr. McGraw, regarding the admissibility of Mr. McGraw's testimony, the Court not only erred, it abused its discretion. And as explained further below, since this error pertains to an issue of material fact, it is reversible. The Court should grant a new trial.

3. The Trial Court erred by failing to compel Mr. McGraw's testimony in response to questions having no tendency to incriminate him.

The Court committed error when it refused to compel Mr. McGraw's testimony concerning the contents of a statement made by Christine Chaney, an employee of Superior. Initially, the Court (correctly) required Mr. McGraw to acknowledge meeting face-to-face with a woman named Christine Chaney in 2016. *See* (Ex. 1, November 14, 2018 Trial Tr. 167:11-168:4.) However, when Russo Defendants' counsel asked "**Did Christine Chaney** tell you that, quote, **Guy Cook wouldn't let me near Stabil Drill**," (*Id.* 168:5-6) (emphasis added), the Court allowed Mr. McGraw to invoke his Fifth Amendment Right. (*Id.* at 168:24) ("The objection is sustained."). In explaining its decision, the Court noted that although this specific question concerning Ms. Chaney's statement did not incriminate Mr. McGraw, the Court was required to consider the:

> context under which a question occurred . . . [,] I don't think I can divorce the context under which they had that conversation or that discussion or that event. I have to consider, I think, the circumstances surrounding that event about which you're asking the question; and that's why I mentioned what I did about the fact that it was in the context of an investigation, he was being interviewed about the very allegations that are in this lawsuit.

(*Id.* at 173:15-174:2.) The Court's reasoning, and consequently, its decision was wrong.

In a civil suit, a "witness's decision to invoke the privilege is not absolute." *In re Ferguson*, 445 S.W.3d 270, 275 (Tex. App.—Houston [1st Dist.] 2013, no pet.).[4] Thus, an individual "cannot avoid his duty to testify merely by voicing his own fears of self-incrimination and reciting the Fifth Amendment's familiar terms." *United States v. Rivas-Macias*, 537 F.3d 1271, 1277 (10th Cir. 2008). Instead, the Court must review a witness' assertions of the privilege on a question-by-question basis to "determine whether answers to the questions might tend to reveal that the witness has engaged in criminal activities. If the answers *could not be incriminatory*, the witness must answer." *In re Corrugated Container Anti-Tr. Litig.*, 620 F.2d 1086, 1091 (5th Cir. 1980) (citing *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472 (1972)) (emphasis added). Questions are deemed incriminatory only "if an answer to a question, on its face, calls for the admission of a crime or requires that the witness supply evidence of a necessary element of a crime or furnishes a link in the chain of evidence needed to prosecute." *In re Morganroth*, 718 F.2d at 167.

The question posed by Mr. Russo's counsel—seeking confirmation of Ms. Chaney's statement—did not have any tendency to incriminate Mr. McGraw. First, the answer does not require Mr. McGraw to admit committing a crime. Second, any answers that Mr. McGraw provides will not serve as evidence of a necessary element of a crime that he participated in. And finally, the contents of a Superior executive's statements regarding Chris Russo do not furnish a link in the chain of evidence needed to prosecute Mr. McGraw. *Cf. United States v. Di Mauro*, 441 F.2d 428, 434 (8th Cir. 1971) (noting that "the tendency of the answers to

[4] This is especially the case when the witness's assertion of the Fifth Amendment may undermine a separate, but no less important constitutional value: the right of a defendant to establish a defense. *See United States v. Rivas-Macias*, 537 F.3d 1271, 1277 (10th Cir. 2008).

incriminate others" is "situation to which the Fifth Amendment does not reach."). Absent some showing to the contrary from Mr. McGraw—which never occurred—the Court should have compelled Mr. McGraw to answer the question. Failing to do so was error.

The Court's explanation of its decision underscores its misapplication of the governing legal principles. While the Court correctly notes that the context of a question may be relevant for determining whether the Fifth Amendment privilege attaches, the touchstone of the inquiry remains whether an answer to a question has a tendency to incriminate. *See Hoffman*, 341 U.S. at 485–487. Thus, "even a witness with legitimate Fifth Amendment concerns must respond to questions that do not require him to divulge incriminating information." *S.E.C. v. Reyes*, 2007 WL 420115, at *2–3 (N.D. Cal. Feb. 6, 2007) (citing *Zicarelli*, 406 U.S. at 478).[5] Even accepting the premise underlying the Court's position—that the fact that Mr. McGraw was being interviewed by his employer was itself incriminatory—neither the Russo Defendants' question nor Mr. McGraw's answer would have revealed any information concerning the "context under which they had that conversation or that discussion or that event." (Ex 1, November 14, 2018 Trial Tr. at 173:15-174:2.) Nothing about the question, calling for a "yes" or "no" answer, suggested that Mr. McGraw was being interviewed by Superior personnel in connection with an investigation into the wrongdoing alleged in this litigation. Nor does the question or answer implicate Mr. McGraw, or tie him, in any way to the conduct of the Russo Defendants which was at issue in this litigation. Furthermore, Mr. McGraw had already executed a confession of judgment attesting to much of the information that the Court was concerned about.

[5] Moreover, as explained above, the burden lies with the witness to demonstrate to the court that he has "reasonable cause to apprehend danger from a direct answer." *Hoffman*, 341 U.S. at 486.

Rather, Russo Defendants' question, like the answer it solicited, was entirely divorced from the context of Superior's investigation. And while it may well be the case—as the Court suggested—that subsequent questions could have touched upon information having the possibility to implicate Mr. McGraw, it is inconceivable—nor has the Court or Mr. McGraw articulated a way—that this particular question was incriminatory or could otherwise be used as a link in a chain of evidence to convict Mr. McGraw. "Unless [Mr. McGraw] can fulfill his burden of showing his apprehension of self-incrimination is reasonable with respect to each individual question, he may not refuse to answer them." *Colon v. Town of Cicero*, 2015 WL 4625003, at *3 (N.D. Ill. Aug. 3, 2015). Mr. McGraw never met this burden with respect to *this individual question*. Therefore, he had no basis for refusing to answer Russo Defendants' question, and the Court should not have tolerated it.

4. A new trial is necessary to correct the Court's error.

For the exclusion of evidence to constitute reversible error, the party must show that the trial court committed error and "that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment." *McCraw v. Maris*, 828 S.W.2d 756, 757 (Tex. 1992). The Texas Supreme Court has recognized "the impossibility of prescribing a specific test for determining whether any error" mandates reversal. *Lorusso v. Members Mut. Ins. Co.*, 603 S.W.2d 818, 821 (Tex. 1980). It has, however, articulated a few guiding principles. As a threshold matter, "it is not necessary for the complaining party to prove that 'but for' the exclusion of evidence, a different judgment would necessarily have resulted." *McCraw*, 828 S.W.2d at 758. Instead, exclusion of evidence generally "requires reversal if it is both controlling on a material issue and not cumulative." *Williams Distrib. Co. v. Franklin*, 898

S.W.2d 816, 817 (Tex. 1995). Testimony is controlling if it concerns a central issue of a case. *See Mentis v. Barnard*, 870 S.W.2d 14, 16 (Tex. 1994). Because the Court's exclusion of Mr. McGraw's testimony related to a controlling issue—whether Plaintiffs waived their right to recover—a new trial must be granted.

Mr. McGraw's testimony was critical to Russo Defendants' showing that Plaintiffs waived their right to recover. Had Mr. McGraw been compelled to testify, he would have affirmed that "Ms. Chaney expressly stated to [Mr. McGraw] that Guy Cook wouldn't let her anywhere near Stabil Drill" after Mr. McGraw "expressed issues regarding Chris Russo's actions[.]" (Ex. 1, November 14, 2018, Trial Tr. 180:1-6.) The exclusion of this evidence probably caused the rendition of an improper verdict because it represented the most conspicuous example of a Superior employee's knowledge—which may be attributed to the corporation—of Mr. Russo's conduct, and its subsequent failure to take action consistent with claiming its right to recover in this litigation. Had the jury considered Mr. McGraw's testimony, the jury likely would have found that Plaintiffs waived their right to recovery. Therefore, a new trial is necessary.

B. Notwithstanding the Court's error, the jury was presented with considerable evidence of waiver. By ignoring it, the jury rendered a verdict that was against the great weight and preponderance of the evidence.

Even if the Court was correct in failing to compel Mr. McGraw's testimony, a new trial is nonetheless warranted. The evidence presented at trial indicated that Plaintiffs waived their right to recover for the Russo Defendants' breach of fiduciary duty, fraud, and misappropriation of trade secrets. Thus, the jury's answers to questions 3, 18, and 32 are against the great weight and preponderance of the evidence and are manifestly unjust.

Waiver requires an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right. *Sun Exploration & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987). Waiver can be established by a party's express renunciation of a known right, by its conduct, or by silence or inaction over a period of time long enough to show an intention to yield the known right. *Comiskey v. FH Partners*, LLC, 373 S.W.3d 620, 639 (Tex. App.—Houston [14th Dist.] 2012, pet. denied). Knowledge for purposes of waiver can be constructive—as opposed to actual. *Vinewood Capital, LLC v. Sheppard Mullin Richter & Hampton, LLP*, 735 F. Supp. 2d 503, 519 (N.D. Tex. 2010).

The evidence in this case revealed a 15 year pattern of conduct by Superior that was inconsistent with the exercise of its right to recover damages from the Russo Defendants. On multiple occasions Superior—through several corporate officers—discovered that Mr. Russo engaged in breaches of his fiduciary duty—and similar conduct. Rather than suing, terminating, or even investigating Mr. Russo, Superior promoted him, raised his salary, paid him bonuses, and continued to entrust him with significant purchasing decisions. These actions typify conduct inconsistent with claiming a known right.

Numerous examples permeate the record. For instance:

Marty LeBlanc Testimony. Mr. LeBlanc testified that he informed Sammy Russo—a Superior officer—about Chris engaging in conflict of interest transactions, to which Sammy Russo responded: "what do you expect Superior to do about it? Have you ever - - have you seen how much money we're making?" (Ex. 2, November 27, 2018 Trial Tr. 88:21-23). Mr. LeBlanc further testified that he informed Guy Cook that Chris Russo was operating a wireline company. (*Id.* at 134:23-135) ("Chris is storing wireline units at Stabil Drill and he's using a Stabil Drill

truck. I just passed a Stabil Drill truck with a wireline unit on it"). Indeed, according to Mr. Leblanc, he notified Mr. Cook twice about the wireline company and that Mr. Russo continued to operate it even after it was shut down. (*Id.* at 136:1-25). Instead of terminating or disciplining Mr. Russo, Superior continued to give him raises and pay bonus, while simultaneously granting him unfettered purchasing authority.

Guy Cook Admissions. When testifying, Mr. Cook admitted that he knew about Superior Inspections—an inspection service that Mr. Russo operated while employed by Stabil Drill. (Ex. 3, Cook Dep. 123:8-12). Similarly, Mr. Cook stated that he was aware of Gulf Coast Wireline. (*Id.* at 133:23-134:2; 190:13-16.) Mr. Cook also admitted that he knew that Mr. Russo and Mr. LeBlanc were investors in Renegade, which they owned with Scott Kerstetter, the owner of Laguna Oil Tools—one of Stabil Drill's largest suppliers. (*Id.* at 67:11-12; 153:19-22; 155:1-5; 169:1-7.) The evidence presented at trial also indicated that Mr. Cook was aware that Mr. Russo and Mr. LeBlanc owned an airplane with Mr. Kerstetter—a related party transaction approved by Superior. (*Id.* at 38:22-39:14; 40:22-41:21.) And finally, Mr. Cook acknowledged that he harbored suspicions concerning Mr. Russo and Mike Sheffield's relationship. (*Id.* at 189:16-25.) Despite Mr. Cook's direct knowledge—which may be imputed to Superior—of certain related-party transactions, as well as his acknowledged suspicions of others, Superior took no action to investigate or discipline Mr. Russo. Instead, Mr. Russo was *promoted*, and his compensation was increased.

Shelby Campbell Testimony. Mr. Campbell's testimony was critical to establishing Superior's knowledge of Mr. Russo's conduct, and subsequent failure to take meaningful action. Specifically, Mr. Campbell testified that he informed Superior about Mr. Russo running Superior

Inspections while employed at Stabil Drill. (Ex. 4, Campbell Dep. 36:07-14.) Moreover, Mr. Campbell attested to a meeting that had with Superior's human resources personnel. During that meeting, Mr. Campbell testified that Superior employees repeatedly questioned about Mr. Russo's involvement with Gulf Coast Wireline, scrap sales, and other activities, most of which are the subject of this litigation. (Ex. 4, Campbell Dep. 93:02-16; 93:21-94:09; 95:09-11.) Despite Mr. Campbell's testimony establishing Superior's knowledge of Mr. Russo's conduct, Superior took no action against Mr. Russo.

Hal Williams Statements. Indeed, even Hal Williams, the former head of Internal Audit at Superior testified that he had informed Christine Chaney, the Vice President of Ethics and Compliance—the first compliance manager ever employed by Superior—about Mr. Russo's ownership interest in Laguna Oil Tools in May or June of 2015. (Ex. 5, Williams Dep. 158:22-25). Again, rather than taking action, Superior continued to employ Mr. Russo, increasing his salary and paying him larger and larger bonuses.

In sum, the greater weight of the evidence indicated that Superior had extensive knowledge of Mr. Russo's conduct—conduct which gave rise to Plaintiffs' causes of action. However, rather than taking action consistent with its intention to claim its right to recover, Superior failed to sue Mr. Russo; Superior failed to terminate him; and Superior did not even bother investigating Mr. Russo's conduct further to assuage suspicions. At trial, the Russo Defendants established each element of waiver. But by failing to find in favor of the Russo Defendants' on their affirmative defense of waiver, the jury rendered a verdict that was against the greater weight and preponderance of the evidence. To avoid manifest injustice, the Court should grant a new trial.

C. There was factually insufficient evidence to support the jury's findings on the misappropriation of Plaintiffs' trade secret.

To prevail on a trade secret claim, Plaintiffs must establish: (1) existence of a trade secret; (2) misappropriation of the trade secret; and (3) injury if the plaintiff is seeking damages. *Morgan v. Clements Fluids S. Texas, LTD.*, 2018 WL 5796994, at *4 (Tex. App.–Tyler Nov. 5, 2018). Under TUTSA, a trade secret means information including a formula, pattern, compilation, program, device, method, technique, process, financial data, or list of actual or potential customers or suppliers, *that*:

> (A) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
>
> (B) the information 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.

TEX. CIV. PRAC. & REM. CODE Ann. § 134A.002(6). Subsection 134A.002(3) defines "misappropriation" as "disclosure or use of a trade secret of another without express or implied consent by a person who . . . at the time of the disclosure or use, knew or had reason to known that the person's knowledge of the trade secret was . . . acquired under circumstances giving rise to a duty to maintain the secrecy of or limit the use of the trade secret." *Id.*

To state a claim for a trade secret, a plaintiff must "specifically identify[ ] the trade secrets allegedly misappropriated." *Washburn v. Yadkin Valley Bank & Tr. Co.*, 660 S.E.2d 577, 585 (N.C. Ct. App. 2008); *see also Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 897 (Minn. 1983) (holding that in order to sustain an action for misappropriation, plaintiff must specifically identify its claimed trade secrets and must introduce evidence of the supposedly secret information). And, "[i]t is worth reiterating that just because information is

non-public does not mean that is a trade secret." *Beach v TCM Management, LP*, 2015 WL 2127116, at *13 (Sup. Ct. May 05, 2015) (citing 91 Am. Jur. Proof of Facts 3d 95 (2006) ("The intention to keep information a secret is not enough to make the information a 'trade secret.'")).

Plaintiffs needed to show that they took "reasonable measures under the circumstances to keep the information secret" and that the information at issue "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." *See* TEX. CIV. PRAC. & REM. CODE § 134A.002(6).

The jury's finding regarding the DSV fail to meet this test. Plaintiffs failed to present sufficient—if any—evidence that it took reasonable steps to keep the DSV secret. Moreover, Plaintiffs failed to present sufficient—if any—evidence that the DSV derived independent economic value from remaining a secret. In contrast there was considerable evidence presented by the Russo Defendants that the trade secret was not, in fact, a secret. This is especially the case when the Russo Defendants showed that Mr. Kerstetter, not a Stabil Drill or Superior employee, designed and created the DSV. In light of the evidence in the record, the jury's findings were against the great weight and preponderance of the evidence and manifestly unjust.

D. Plaintiffs' counsel engaged in improper and prejudicial jury argument, mandating a new trial.

Mr. Kruse, Plaintiffs' counsel, made several objectionable statements in his closing remarks to the jury. These statements were inflammatory and prejudicial. Their cumulative effect was substantial and ultimately incurable. Therefore, a new trial is warranted.

Incurable jury argument exists when the argument is so prejudicial or inflammatory that an instruction to the jury to disregard cannot eliminate the harm. *Otis Elevator Co. v. Wood*, 436

S.W.2d 324, 333 (Tex. 1968). Therefore, when a jury argument is incurable, no objection is necessary to preserve error. *Clark Equip. Co. v. Pitner*, 923 S.W.2d 117, 125 (Tex. App.—Houston [14th Dist.] 1996, writ denied). In order to show the jury argument is incurable, the complainant must prove: (1) an improper argument was made; (2) that was not invited or provoked; (3) that was not curable by an instruction, a prompt withdrawal of the statement, or a reprimand by the trial court; and (4) that by its nature, degree, and extent, constituted reversibly harmful error based on an examination of the entire record to determine the argument's probable effect on a material finding. *Id.*

First, Plaintiffs' counsel analogized Mr. Russo to a false prophet, who "c[ame] to you in sheep's clothing, but inwardly [he is a] ferocious *wol[f]*. Beware of those in sheep's clothing." (Ex. 6, December 3, 2018 Trial Tr. at 100:24-101:03). He continued to refer to Mr. Russo as a "sheep who is really a wolf . . . ." *Id.* at 102:1. And did not stop. *Id.* at 106:18 ("Is he a sheep or is he a wolf?"); *id.* at 133:12-15 ("We all strive to be angels and the better angels of our nature that Lincoln talked about. These gentlemen did not. They were wolves."). According to Plaintiffs' counsel, Mr. Russo "came seeking money, greed, dishonesty." *Id.* at 133:14-15. And Mr. Russo apparently "breached every possible duty, *every moral of society, every rule that we live by* . . ." (emphasis added). *Id.* at 111:24-112:2. As such, Plaintiffs' counsel requested that the jury "send a message in this case." *Id.* at 112:13.

While a litigant is entitled to have his counsel argue the facts of the case to the jury and discuss the reasonableness of the evidence as well its probative impact, *Tex. Sand Co. v. Shield*, 381 S.W.2d 48, 57–58 (Tex. 1964), Plaintiffs' counsel's statements to the jury crossed the line into improper jury argument. "Unsupported, extreme, and personal attacks on opposing parties

can compromise the basic premise that a trial court provides impartial, equal justice." *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 840 (Tex. 1979). The use of the epithets, such as "liar," "fraud," "faker," "cheat," and "imposter" have been held to be harmful. *Id.* Similarly, Mr. Russo is not a wolf. He did not come in sheep's clothing. Nor did he breach every moral and rule of society. These unsubstantiated personal attacks, with explicit religious overtones, are "designed to inflame the emotions of the jury rather than prompt a logical analysis of the evidence in light of the applicable law." *R.J. Reynolds Tobacco Co. v. Calloway*, 201 So. 3d 753, 760–61 (Fla. Dist. Ct. App. 2016) (citations and quotations omitted). And they are repeated over and over again. *Standard Fire Ins.*, 584 S.W.2d at 840 (noting that a factor to consider when evaluating whether an argument is incurable is how long the argument continued, whether it was repeated or abandoned, and whether there was cumulative error).

Because Plaintiffs' counsel's statements were intended solely to inflame the emotions of the jury, were not based in evidence, and their cumulative effect could not be cured by an adverse instruction, a new trial should be granted.

III. CONCLUSION

For each of these independent reasons, the Russo Defendants respectfully request that the Court grant a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was delivered to all counsel of record on May 8, 2019 via the Court's CM/ECF filing system.

/s/ David Isaak
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