Prove it or Lose it – Courts are Upping Evidentiary Standards in Trade Secrets Litigation

Client Alert
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In recent cases, federal courts have made it clear that they are looking for stronger evidence when plaintiffs attempt to prove that their trade secrets have been misappropriated. Or, for that matter, that they have trade secrets to begin with.

Under most statutes pertaining to trade secret misappropriation, plaintiffs must first prove that the information in question meets the legal definition of a "trade secret." To do this, they must show that the information has "independent economic value" derived *from its secrecy*. In other words, the information, recipe, formula, or any other secret's value comes from the very fact that the trade secret is just that—*secret*.

It is precisely this definition that some courts are targeting.

Show Me The Value

If you're going to say a trade secret has value, you will have to back it up with strong evidence. In *Synopsys, Inc. v. Risk Based Sec., Inc.*, 70 F.4th 759 (4th Cir. 2023), a plaintiff software corporation had 75 different alleged trade secrets. When it came time to value those trade secrets, the company attempted to rely upon its acquisition valuation as the value of all its trade secrets, collectively.

The Fourth Circuit disagreed with this attempted valuation. The federal court held that simply tying the value of the entire company to the value of all the alleged trade secrets was insufficient. The district court "observed that the acquisition price did not provide a relevant marker of any asserted trade secret's value because [the plaintiff] had not shown how a value for the entire company on the date of its recent sale reflected the value of any of the trade secrets." Instead, proving trade secrets "requires proof not just of value, but of value specifically tied to

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secrecy."

The court emphasized that the company needed to provide evidence that the alleged trade secrets *themselves* held independent economic value "arising from [the alleged trade secrets] *remaining secret*." In addition, the court held that the plaintiff must establish the value of each individual trade secret on a "per trade secret" basis.

At the very least, the court held that the company's purchase price cannot – as a matter of law – serve as the basis for satisfying this element of the definition of trade secret.

"It's Valuable Because I Say It Is"

Additionally, courts are going to need more than just a company's own sworn statement to show that a trade secret has independent economic value due to its being maintained in secrecy. In *Health Care Facilities Partners, LLC v. Diamond*, No. 5:21-CV-1070, 2023 WL 3847289 (N.D. Ohio June 5, 2023), a plaintiff corporation attempted to show independent economic value of its trade secrets solely through an affidavit of its CEO. The CEO attested to his belief that the trade secrets were valuable. The court, however, was unimpressed.

The court held that "a plaintiff's mere belief in the confidentiality of its information, however fervent, does not transform that information into trade secrets." The court also called the CEO's affidavit "conclusory" and held that, standing alone, it did nothing to persuade the court that there was any value in the alleged trade secrets. This was especially so where the affidavit "lacked detail and basically just articulated [ ] truisms." Rather than merely "subjective" testimony, the court ruled that it must review "facts and evidence in the record" for "some objective indicia of (or rational for) independent economic value derived from secrecy."

Because the plaintiff did not "come forward with specific facts and evidence that would substantiate a finding of independent economic value," the court held that "there is no evidence from which a reasonable jury could conclude that the" information in question met the definition of trade secrets. Thus, it granted the Motion for Summary Judgment and dismissed the case.

Plaintiffs Must Establish Independent Economic Value in Their Trade Secrets

Together, these cases explain that courts are going to require objective, independent, and unbiased evidence to establish the existence of a trade secret by—in part—establishing its value. And, going further, a party must establish how that value is derived specifically *from keeping the information secret*.

If you are seeking to prosecute a trade secret claim, you should begin gathering any evidence that indicates that your trade secrets are objectively valuable. Conversely, defendants in trade secret matters should be sure to hold plaintiffs to a higher evidentiary standard than merely stating that their information is a trade secret, *ipse dixit*. And, both parties should target the valuation of an alleged trade secret—and why it is considered to be valuable—throughout discovery and in pleading the

proofs of a case.

Butzel often helps clients audit their trade secrets. And if you believe your company does not have any trade secrets, you are likely mistaken. Nearly every company does. If you would like to discuss how to identify, value, and protect your trade secrets, you can contact any attorney in Butzel's Non-Compete/ Trade Secret group.

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