The DTSA's Ex Parte Seizure Remedy – Two Years Later

Insights
8.07.18

Enacted in May 2016, the federal Defend Trade Secrets Act (DTSA) created a new remedy that was not available under any state's Uniform Trade Secrets Act (UTSA) – the *ex parte* civil seizure. This remedy permitted plaintiffs to obtain a seizure order *ex parte* from a federal court. Upon entry of the order, U.S. marshals would be dispatched, without notice to the defendant, to seize the evidence.

The remedy is set forth in 18 U.S.C. § 1836(b)(2). The court may only issue the remedy in "extraordinary circumstances" after the plaintiff meets a number of specific requirements:

- a Rule 65 order is inadequate because the defendant would "evade, avoid, or otherwise not comply with such an order";
- immediate and irreparable injury will occur if seizure is not ordered;
- the harm to plaintiff in denying the application outweighs the harm to defendants and substantially outweighs any harm to third parties;
- plaintiff is likely to succeed on the merits of the misappropriation claim;
- the defendant is in actual possession of the trade secret and/or property,
- the plaintiff has identified with reasonable particularity the matter to be seized and to the extent possible the location;
- if given notice, defendant, or persons acting in concert, would destroy, move, hide, or otherwise make inaccessible the trade secret;
- the plaintiff has not publicized the requested seizure

18 U.S.C. § 1836(b)(2)(A)(ii).

The *ex parte* seizure remedy was one of the most controversial aspects of the DTSA and enacted to much fanfare. There was much debate amongst the legal community about how the remedy would be applied and if it would be a positive development for trade secrets litigation. Critics suggested that the remedy could be abused to harass defendants and disrupt businesses. Proponents suggested that the remedy could be used to preserve evidence in high stakes litigation, and pointed to the high bar set by the statute to obtain the remedy.

As we now stand over two years since the enactment of the DTSA, we are starting to see how courts

will apply the remedy. Not surprisingly, numerous courts have denied applications. Many have held that a seizure order under Rule 65 is adequate and an *ex parte* seizure order is not necessary. *See, e.g., 000 Brunswick Rail Mgt. v. Sultanov*, 2017 WL 67119, Civ. Action No. 5:17-cv-00017 (N.D. Cal. Jan. 6, 2017) (denying request for civil seizure instead ordering preservation of devices at issue pursuant to Rule 65); *Dazzle Software II, LLC v. Kinney*, Civ. Action No. 1:16-cv-12191 (E.D. Mich. July 18, 2016) (same).

One way to show that a seizure order is necessary and Rule 65 order is inadequate is by establishing that the defendant is likely to destroy evidence. Bare allegations are not sufficient. *Balearia Caribbean Ltd. Corp. v. Calvo*, Civ. Action No. 1:16-cv-23300 (S.D. Fla. Aug 5, 2016) (plaintiff may not rely on bare assertions that the defendant, if given notice, would destroy relevant evidence. Rather, the plaintiff must show that the defendant, or persons involved in similar activities, had concealed evidence or disregarding court orders in the past"). Rather, in cases where civil seizure orders have been granted, there was evidence of documents destruction in the past. *Axis Steel Detailing, Inc. v. Prilex Detailing LLC*, No. 2:17-CV-00428-JNP, 2017 WL 8947964, at *1 (D. Utah June 29, 2017) (defendants "had a high level of computer technical proficiency, and there had been attempts by the defendants in the past to delete information from computers, including emails and other data."). Courts also appear to be more inclined to grant seizure orders if the defendant has not been honest or deceitful. *Solar Connect, LLC v. Endicott*, No. 2:17-CV-1235, 2018 WL 2386066, at *2 (D. Utah Apr. 6, 2018) (in addition to computer and technical proficiency and attempts to delete information in the past "Defendants have also shown a willingness to provide false and misleading information, including false information to conceal their identity [and] a willingness to hide information and move computer files rather than comply with requests to cease use of Plaintiff's proprietary materials."); *Mission Capital Advisors LLC v. Romaka*, Civ. Action No. 16-cv-5878 (S.D.N.Y. July 29, 2016) (defendant claimed he deleted files but forensics later discovered a "trove" of misappropriated files); *Blue Star Land Servs., LLC v. Coleman*, Civil Action No. 17-cv-931 (W.D. Okla. Dec. 8, 2017) (defendants misappropriated 20,000 documents while employed after learning of a large new project and threatened to usurp opportunity if not given 66% of company among other misconduct).

In sum, the *ex parte* seizure remedy is a powerful tool for a trade secrets litigator and under the right circumstances can be deployed to preserve crucial evidence.