There Must be Proof in That Trade Secret Pudding

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Okay, maybe the word "proof" is a bit too strong. But a recent decision from the United States District Court for the Middle District of Florida makes clear that trade secret claims must be based upon more than mere suspicion. In American Registry v. Hanaw et al., the plaintiff fell victim to a motion to dismiss complaining that the case was based upon nothing more than mere speculation.

The court's decision revolved around allegations supporting two claims frequently asserted in trade secret cases: breach of a confidentiality agreement and misappropriation of trade secrets. With respect to the contract claim, the plaintiff alleged that the defendant was privy to confidential information, agreed not to use or disclose it, and is currently acting as a competitor in the same market. Plaintiff then invoked the phrase that far too many lawyers casually overuse -- "upon information and belief." Without providing specifics, the plaintiff complained that the defendant was using the confidential information on behalf of a competitor.

Finding the conclusory allegation insufficient, the court stated that the plaintiff "failed to provide any factual content that allows the Court to reasonably infer that [defendant] is using confidential information to act as a competitor." The court continued, "Although [defendant's] use of confidential information is certainly conceivable, [applicable case law] requires 'more than a sheer possibility that a defendant has acted unlawfully.'"

Moving on to the trade secret claim, the court found similar shortcomings. It did so even though the plaintiff went to great lengths to list its trade secrets. Specifically, the plaintiff alleged that its trade secrets include, but are not limited to:

[C]ustomer lists, customer identity, customer contact information and confidential information about each customer's business, purchase and credit information, sales and operation procedures,

software, system architecture, financial data, sales and marketing strategies and data, lists, statistics, programs, research, development, employee, personnel and contractor data, information and records, and information relating to products offered by [the plaintiff].

The court was not impressed by this list. It explained: "This list is nearly identical to the list of confidential and proprietary information contained in the [confidentiality agreement] and is so broad as to be meaningless. Plaintiff need not disclose secret information in its pleadings, but must identify it with enough specificity as to give defendants notice of what was misappropriated. For example, "software," "financial data," "lists," and "information and records" are broad and generic categories of information and provide insufficient notice as to the actual trade secrets misappropriated."

Interestingly, the court reached this conclusion despite its recognition that it "is not common for a trade secret misappropriation plaintiff to know, prior to discovery, the details surrounding the purported misappropriation."

So what is a trade secret plaintiff to do? The answer is simple. Allege facts. It is not sufficient to file a complaint limited to legal conclusions. If a plaintiff says nothing more than "I have trade secret information, and the defendant misappropriated it," the complaint may be vulnerable to dismissal. Be specific in alleging what the trade secret is and how it was misappropriated.

Did the defendant copy a specific algorithm or computer program? Did the defendant utilize trade secret customer information to soliicit company clients? If so, say so. While there is no need to disclose the specific trade secret in the complaint, it is necessary to identify the specific trade secret, explain why it is a trade secret, and provide some explanation of how the defendant utilized it. Courts will not credit conclusory allegations that plaintiffs have trade secrets and defendants are using them.

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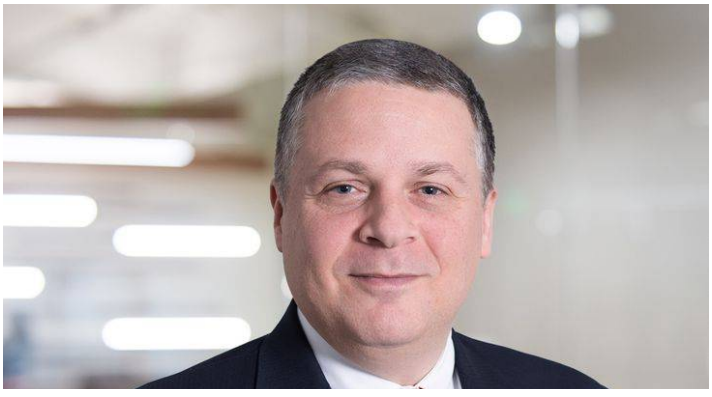

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