HP's Lawsuit Against Mark Hurd -- An Uphill Battle?

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Much has been written about Hewlett-Packard's recently filed case against its former CEO Mark Hurd following his acceptance of a job as president of Oracle. At first blush, observers seem quick to assume that HP is dead in the water because California has unequivocally rejected the inevitable disclosure doctrine. *See Whyte v. Schlage Lock Company*, 101 Cal.App.4th 1443 (2002). And if you read HP's complaint, it sounds an awfully lot like an inevitable disclosure case: "[Hurd] cannot perform his job at Oracle without disclosing or utilizing HP's trade secrets and confidential information." (For a copy of the Complaint click on the pdf at the bottom of this post.)

But a careful read of the California Court of Appeal decision in *Whyte v. Schlage*, which is where California first rejected the inevitable disclosure doctrine, suggests the case may not be as clear cut as it seems. In *Schlage*, the court made clear that it was considering (and rejecting) the inevitable disclosure doctrine "as an alternative to proof of actual or threatened misappropriation [pursuant to the California Uniform Trade Secrets Act]...." Schlage first argued that it had presented enough evidence from which the court could infer "actual or threatened misappropriation," but the appellate court heavily emphasized that it was constrained by an appellate standard of review to view the facts favorably in support of the lower court's decision denying an injunction. The court next turned to and rejected Schlage's inevitable disclosure argument. Implicit in the appellate court's opinion is that under California law, there is a difference between "threatened misappropriation" under the CUTSA, on the one hand, and inevitable disclosure, on the other hand. The lower court could have found a threatened misappropriation and issued relief pursuant to the CUTSA. So the question becomes, what remedy can a California court employ to enjoin threatened misappropriation?

A close review of the prayer for relief in HP's complaint indicates that HP did not ask the court for an injunction precluding Hurd from accepting any employment at Oracle. Rather, HP asked for an injunction to preclude Hurd from "holding a position with a competitor in which he will utilize or disclose HP's trade secrets and confidential information." In this case, that may be a distinction without a difference, but the choice of words does not appear to be unintentional.

HP's objective at this point has to be getting to discovery. In California, a trade secret plaintiff must identify its trade secrets with "reasonable particularity" before it can commence discovery on a trade secret misappropriation claim. (*See* Section 2019.210 of the Code of Civil Procedure) If HP survives a motion to dismiss and gets an opportunity to conduct discovery, they'll need to look for conduct indicating untrustworthiness – so far they have simply alleged that Hurd failed to comply with his agreement to notify HP if he accepts employment with a competitor. According to HP

with his agreement to notify HP if he accepts employment with a competitor. According to HP, "Hurd's failure to provide such notice before it was publicly announced by Oracle, gives rise to a reasonable inference that he is violating his trade secret protection agreements with HP...." – and that may be enough to survive a motion to dismiss and get to discovery.

HP v Hurd.pdf (3.05 mb)

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