

## Documents Not Marked as Confidential Survived Motion to Dismiss Trade Secret Claims

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A district court in Alabama recently denied a motion to dismiss theft of trade secrets claims that an industrial maintenance management and services provider brought under the federal Defend Trade Secrets Act (DTSA) and the Alabama Trade Secrets Act after finding that the plaintiff had taken “reasonable measures” to protect the purportedly stolen assets. *See S. Field Maint. & Fabrication LLC v. Killough*, No. 2:18-cv-581-GMB, 2019 BL 28443, M.D. Ala. Jan. 29, 2019). Of particular note, the court concluded that the plaintiff had sufficiently pled that it took reasonable measures to protect the purported trade secrets even though it had not marked some of them as confidential.

Specifically, the court explained that, while some courts have held that not marking a document as confidential may preclude a finding that the company took reasonable measures—a requirement under both state and federal law—the “analysis of the measures taken to protect secrecy is fact-specific.” The court further explained that “under all the circumstances, if the employee knows or has reason to know that the owner intends or expects the information to be secret, confidentiality measures are sufficient.” Based on this reasoning, the court found the plaintiff had alleged sufficient reasonable measures because (1) the non-marked information was contained on a password-protected, limited-access server; (2) the employee had signed a written acknowledgment of his obligation to keep sensitive business information confidential; and (3) the plaintiff had discussed with the employee the need to keep confidential the proprietary information in the documents at issue.

The court’s analysis furthers the jurisprudence in a nuanced area of trade secret law because having a robust policy to mark documents as confidential can be seen as a “reasonable measure;” however, on the other hand, failing to mark documents pursuant to such a policy has been found to undercut claims for trade secret misappropriation.

**TIP: Companies need to take thoughtful, affirmative steps to devise and implement a policy regarding marking documents as confidential taking into consideration both the legal requirement that “reasonable measures” must be taken to protect trade secrets and the practical realities of ensuring documents are consistently marked.**

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