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BLOG

The DTSA as a Predicate Act for Civil RICO

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Since its inception on May 11, 2016, the Defend Trade Secrets Act (DTSA) has been an enumerated predicate for the civil Racketeer Influence and Corrupt Organizations (RICO) Act. This means that plaintiffs can bring lawsuits claiming a conspiracy "through a pattern of racketeering activity" when theft of trade secrets is at least one of the underlying claims. We have identified a total of nine lawsuits (via Bloomberg and Westlaw) from 2016 to present claiming both DTSA and RICO. Of those nine cases, five were denied at the Motion to Dismiss stage. And thus far in 2019, federal judges have already dismissed two such cases.

On February 28, 2019, a Pennsylvania Federal Court held that a Plaintiff alleging civil RICO and using DTSA as the only predicate offense must plead two or more acts of trade secret theft that occurred *after* May 11, 2016 (when DTSA became a predicate act for RICO) to withstand a motion to dismiss. *Magnesita Refractories Co. v. Tianjin New Century Refractories Co., Ltd.*, 2019 WL 100623, at *8 (M.D. Pa. Feb. 28, 2019). Plaintiff alleged that a former employee forwarded himself valuable trade secrets via email just before his retirement from the company in 2014, and then gave the trade secrets to the beneficiary-defendant company who used them in a November 2016 PowerPoint presentation to prospective customers. However, only the November 2016 act was post-May 2016 when DTSA became a predicate act for RICO. Therefore, the Court held that Plaintiffs had not alleged *two* predicate acts occurring *after* May 11, 2016, and dismissed the RICO claim.

Second, in *Attia v. Google LLC*, 2019 WL 1259162, at *3 (N.D. Cal. March 19, 2019), a Judge found that Plaintiff's RICO claim in its Fifth Amended Complaint warranted dismissal for two reasons: (1) Plaintiff did not allege two or more predicate acts that occurred *after* May 11, 2016, (because the alleged trade secret misappropriations occurred in 2012), and (2) the Plaintiff failed to allege a "pattern of racketeering" activity. In order to adequately plead RICO, plaintiffs must show "criminal acts" with "the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated…and are not isolated events" to prove a "pattern" of racketeering. *Id.* (internal citation omitted). In *Attia*, the California Federal Court found that Plaintiff's attempt to show a "pattern" by merely citing two other lawsuits Defendant was involved in (one of which was a copyright-infringement matter) was insufficient.

Conversely, in *Brand Energy & Infrastructure Servs., Inc. v. Irex Contracting Group*, 2017 WL 1105648, at *8 (E.D. Pa. March 24, 2017), a Pennsylvania Judge allowed Plaintiff's RICO claim to proceed, finding that Plaintiff had adequately alleged "a plausible pattern of racketeering activity." Plaintiff Brand Energy claimed that former employees left the

company and moved to another company, taking with them valuable trade secrets. Plaintiff alleged that a conspiracy to steal trade secrets from Brand Energy began in 2014, and continued consistently through 2017. The Court found these claims to be plausible and held that continuing misappropriations that began prior to—but continued after—the DTSA's enactment was sufficient. *Id.* Significantly, Plaintiff Brand Energy did not rely *solely* on the DTSA as the predicate RICO acts, but also claimed various wire and mail fraud violations.

TIP: As we move further away from the DTSA's implementation date, we expect to see more RICO cases alleging DTSA violations as predicate acts survive early motion practice.

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