

Ninth Circuit Rules That the Identification of a Trade Secret May Be Developed Through Discovery

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The Ninth Circuit recently reversed a lower court's grant of summary judgment to a defendant alleged to have misappropriated trade secrets, incorporating California's reasonable particularity standard while leaving the door open to expanding the identification of trade secrets through discovery. *InteliClear, LLC v. ETC Global Holdings, Inc.*, No. 19-55862 (9th Cir. Oct. 15, 2020).

The Ninth Circuit's ruling departs from the rule under California state law that identifying the trade secret with reasonable particularity is a *prerequisite* to discovery. Although the "reasonable particularity" standard is statutorily mandated under CUTSA, federal courts had not previously imposed the same requirement on plaintiffs suing in federal court under the DTSA.

The plaintiff, InteliClear, sued its former licensee, ETC Global Holdings, alleging that ETC had misappropriated its securities tracking database and therefore, violated both the federal Defend Trade Secrets Act (DTSA) and California's Uniform Trade Secrets Act (CUTSA). *Id.* at *6. ETC allegedly built its own securities tracking system utilizing InteliClear's trade secrets. *Id.* at *5–6. The district court granted ETC's motion for summary judgment, finding that InteliClear had failed to identify trade secrets with sufficient particularity in its sealed declaration filed in opposition to defendant's summary judgment motion. *Id.* at *7. The lower court reasoned that because InteliClear had identified only some trade secrets using a high-level of generality, the ambiguity over whether ETC may have misappropriated *additional* trade secrets meant that InteliClear had failed to meet the required particularity standard. *Id.* at *11–12.

The Ninth Circuit disagreed, holding that sufficiently identifying at least one trade secret was enough to create triable issue of fact. *Id.* at *12–13. Moreover, the Ninth Circuit left open the possibility that the identification of a trade secret could be expanded or refined through discovery, and that "hedging language" may still provide sufficient notice to defendants. *Id.* at *12, 17. The Circuit Court found that the lower court had abused its discretion in prematurely granting summary judgment without giving the plaintiffs any opportunity for discovery as provided under Federal Rule of Civil Procedure 56(d). *Id.* at *4.

TIP: Plaintiffs should be careful to identify the nature of the trade secrets at issue with reasonable particularity to survive dismissal or summary judgment.

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