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Template Civil Jury Instructions Under the Defend Trade Secrets Act

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Since its May 11, 2016 enactment, the Defend Trade Secrets Act (“DTSA”) has been alleged in several thousand federal lawsuits. At the time of this publication, the U.S. District Court for the Central District of California in Los Angeles had nearly 350 active trade secret matters, and the federal courts in Chicago, Manhattan, and San Francisco each had well over 200 active trade secret matters. <https://law.lexmachina.com/court/>.

However, there are very few approved pattern jury instructions.

In 2017, the U.S. Court of Appeals for the Eleventh Circuit approved five civil DTSA instructions. <https://pji.ca11.uscourts.gov>. Likewise, in 2017, the U.S. Court of Appeals for the Ninth Circuit

approved criminal jury instructions under the Economic Espionage Act that define “trade secrets” under the DTSA. https://www.ce9.uscourts.gov/juryinstructions/sites/default/files/WPD/Criminal_Instructions_2021_3.pdf.

As more civil matters make their way to verdict, the need for approved pattern DTSA jury instructions becomes evident. The following template jury instructions are intended for both plaintiff and defense practitioners, and derive primarily from the Ninth Circuit’s DTSA rulings. The template jury instructions also cross reference the California Civil Jury Instructions Series 4400 regarding California’s Uniform Trade Secrets Act.

IN THE UNITED STATES DISTRICT COURT FOR THE [LOCATION]	
DISTRICT OF [LOCATION]	
PLAINTIFF,	CASE NO. _____
Plaintiff,	
vs.	
DEFENDANT,	JURY INSTRUCTIONS ON TRADE SECRET MISAPPROPRIATION
Defendant.	

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Below please find the [*proposed*] jury instructions on the misappropriation claims, after consideration of all arguments and submissions to date. The Court reserves the discretion to revise these instructions and a further conference on them will be held near the end of the trial evidence.

1.0 Elements of a Trade Secrets Claim

To succeed on its claim for misappropriation of any given Alleged Trade Secret, Plaintiff must prove all of the following:

1. That the Plaintiff was the owner or licensee of the Alleged Trade Secret;
2. That the Alleged Trade Secret is related to a product or service used in, or intended for use in, interstate or foreign commerce;

3. That the Alleged Trade Secret qualified as a trade secret at the time it was allegedly misappropriated;
4. That the defendant improperly acquired, used and/or disclosed the Alleged Trade Secret;’
5. That such unlawful acquisition, use, or disclosure was a substantial factor in harming the plaintiff;
6. That the plaintiff sustained actual losses from the misappropriation [*or*] the defendant was unjustly enriched by the misappropriation.

Authority.

18 U.S.C. § 1836(b)(1); *Attia v. Google, LLC*, 983 F.3d 420, 424 (9th Cir. 2020) [elements of claim].

The interstate commerce requirement is jurisdictional. *Officia Imaging, Inc. v. Langridge*, Case No. SA

CV 17-2228-DOC (DFMx), 2018 WL 6137183, *8 (N.D. Cal. Aug., 7, 2018) [compiling cases].

Bellwether Community Credit Union v. Chipotle Mexican Grill, Inc., 353 F.Supp.3d 1070, 1086 (D. Colo. 2018) Addressing the use in foreign or interstate commerce. (citing *Space Systems/Loral, LLC v. Orbital ATK, Inc.*, 306 F. Supp. 3d 845, 853 (E.D.Va. 2018)); *Bartlett v. Bartlett, R.I.C.O. Bus. Disp. Guide* (CCH) P 12973, 2017 WL 5499403, *5 (S.D. Ill. 2017).)

CACI 430, 4400, 4401.

2.0 Trade Secrets Defined

A “trade secret” involves information that the plaintiff owned or licensed and covers any form of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing, if:

- (1) For Plaintiff’s federal claim, the information is not generally known to, or readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information;
- (2) The owner thereof has taken reasonable measures to keep such information secret;
- (3) The information derives independent economic value, actual or potential, from being secret; and
- (4) Whether or not any particular information qualifies as a trade secret depends upon factors that I will describe in a moment but, by way of introduction, I want you to understand that a trade secret concerns information.

Authority.

Ninth Circuit Criminal Jury Instructions 8.141C – “Trade Secret” Defined. 18 U.S.C. §1839(3). “[T]he definition of a trade secret consist of three elements: (1) information, (2) that is valuable because it is unknown to others, and (3) that the owner has attempted to keep secret.” *InteliClear,*

LLC v. ETC Global Holdings, Inc., 978 F.3d 653, 657 (9th Cir. 2020).

Attia v. Google, LLC, 983 F.3d 420, 424 (9th Cir. 2020) [elements of claim].

2.1 Trade Secrets May Include Information that Is Learned or Memorized

Trade secret information can also include information that is learned or memorized, and there is no requirement that the information be found in hard copy or electronic records.

Authority.

18 U.S.C. § 1839(3).

Mai Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 521 (9th Cir. 1993) [applying California Uniform Trade Secrets Act: the fact that defendant “never physically took any portion of [a] customer data base . . . need not be established.”] *Morlife, Inc. v. Perry*, 56 Cal.App.4th 1514, 1522 (1997) [citing *Greenly v. Cooper* 77 Cal. App. 3d 382, 392 (1978)]; *Nowogrowski v. Rucker*, 971 P.2d 936 (Wash. Sup. Ct. 1999) [“The form of the information whether written or memorized is immaterial under the trade secrets statute; the Uniform Trade Secrets Act makes no distinction about the form of trade secrets.”]; *Pelican Bay Forest Prods. v. W. Timber Prods.*, 297 Or. App. 417 (2019) [same].

2.2 Plaintiff’s Alleged Trade Secrets

This trial concerns Plaintiff’s Alleged Trade Secrets [*identify by description*], which are defined in [*reference (e.g., Plaintiff’s Complaint, Plaintiff’s Code of Civil Procedure section 2019.210 Disclosure and/or discovery responses, or the parties may decide to assign a numerical code to the trade secrets to preserve confidentiality during court proceedings)*]. Plaintiff contends that Defendant misappropriated these Alleged Trade Secrets.

Instructions for Use.

The parties should agree upon a protocol regarding the use of trade secret information at trial.

Authority.

“Plaintiffs may not simply rely upon ‘catchall’ phrases or identify categories of trade secrets they intend to pursue at trial.” *Imax Corp. v. Cinema Techs, Inc.*, 152 F.3d 1161, 1167 (9th Cir. 1993) [defendants need “concrete identification” to prepare a rebuttal].

InteliClear, LLC v. ETC Holdings, Inc., 978 F.3d. 653, 659 (9th Cir. 2020) [reversing grant of summary adjudication for lack of sufficient particularity in defining trade secret].

2.3 Level of Secrecy

The secrecy required to prove that something is a trade secret does not have to be absolute secrecy in the sense that no one else in the world possessed the information at the relevant time. It may have been disclosed to employees involved in the owner's use of the trade secret as long as they were instructed to keep the information secret. It may also have been disclosed to nonemployees if they were obligated to keep it secret, including by way of a non-disclosure or other confidentiality agreement.

Authority.

18 U.S.C. § 1839(3)(A).

See *InteliClear, LLC v. ETC Holdings, Inc.*, 978 F.3d. 653, 661 (9th Cir. 2020) (citing *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 521 (9th Cir. 1993) [finding that a confidentiality agreement supported "reasonable efforts"].)

It is also "well established that 'confidential disclosures to employees, licensees, or others will not destroy the information's status as a trade secret.'" *InteliClear, LLC v. ETC Holdings, Inc.*, *supra*, 978 F.3d. at 661 (citing *United States v. Nosal*, 844 F.3d 1024, 1043-44 (9th Cir. 1993).)

CACI 4403.

2.4 Reasonable Efforts to Maintain the Secrecy Explained

Reasonable efforts to keep the information secret are the efforts that would have been made by a reasonable individual or business in the same situation, and with the same knowledge and resources, as the alleged owner, exercising due care to protect important information of the same kind.

In determining whether or not the owner made reasonable efforts to keep the information secret, the listed factors should be considered, among any other factors pertinent to the issue. The presence or absence of any one or more of these factors is not determinative, and the importance of any single factor depends upon all the circumstances.

- a. Whether the owner required employees or others with access to the information to sign confidentiality or nondisclosure agreements;
- b. Whether products, hardware, documents or computer files containing the information were marked with confidentiality warnings;
- c. Whether the owner instructed its employees to treat the information as confidential;
- d. Whether the owner limited the access or use of the Alleged Trade Secrets to those who had a need to know the information;
- e. Whether the owner kept the information in a restricted or secured area;
- f. Whether the owner used passwords, firewalls, encryption or other electronic means to protect the information;
- g. Whether the owner took any action to protect the specific information, or whether it relied on general measures taken to protect its information or assets;
- h. The extent to which any general measures taken by the owner would prevent the unauthorized disclosure of the information; and
- i. Whether there were other reasonable measures available to the owner that it did not take.

Authority.

18 U.S.C. § 1839(3)(A).

InteliClear, LLC v. ETC Holdings, Inc., 978 F.3d. 653, 661 (9th Cir. 2020) (citing *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 521 (9th Cir. 1993) [finding that a confidentiality agreement supported "reasonable efforts" under the California Uniform Trade Secrets Act].)

CACI 4403.

2.5 Trade Secrets Concern Information

By its definition, a "trade secret" concerns information. By contrast, an employee's general knowledge, skills, experience, talents, or abilities cannot be trade secrets.

Authority.

18 U.S.C. §1839(3).

Mattel, Inc. v. MGA Entertainment, Inc., 782 F.Supp.2d 911, 968 (C.D. Cal. 2011) (quoting *Metro Traffic Control, Inc. v. Shadow Traffic Network*, 22 Cal. App. 4th 853, 862 (1994) “[A] stable of trained and talented at-will employees does not constitute an employer’s trade secret.”)].

Leads Club, Inc. v. Peterson, Civil No. 05cv1717 J (JMA), 2005 WL 8173326, *8 (S.D. Cal., Dec., 1, 2005) [“California courts have recognized that while ‘a former employee may use general knowledge, skill, and experience acquired in his or her former employment in competition with a former employer, the former employee may not use confidential information or trade secrets in doing so.”]

Trade secrets must consist of confidential information, and not “general knowledge, skill and experience acquired in his or her former employment.” *The Retirement Group v. Galante*, 176 Cal. App. 4th 1226, 1237 (2009) (citing *Continental Car-Na-Var Corp. v. Mosely*, 24 Cal.2d 104, 110 (1944).)

2.6 “Negative Trade Secrets”

The results of research and development efforts, which prove that a certain process will *not* work, can qualify as an enforceable trade secret. This type of negative information is sometimes called “negative know how.” It is for the jury to determine whether negative information qualifies as a trade secret.

Authority.

See e.g., *Waymo LLC v. Uber Technologies, Inc.*, No. C 17-00939 (WHA), 2018 WL 466510, *2 (N.D. Cal. Jan. 18, 2018); *Vendavo, Inc. v. Price F(x) AG*, No. 17-cv-06930-RS, 2018 WL 1456697, *3 (N.D. Cal. Mar. 23, 2018); *Pixon Imaging, Inc. v. Empower Technologies Corp.*, No. 11-CV-1093-JM (MDD), 2011 WL 3739529, 4 (S.D. Cal. Aug. 24, 2011).

2.7 “Independent Economic Value Explained”

A trade secret has independent economic value if it would have given the owner an actual or potential business advantage over others who did not know the information and who could have obtained economic value from

that information. In determining whether the information had actual or potential independent economic value because it was secret, you may consider the following list. The presence or absence of any one or more of these factors is not determinative.

- a. The extent to which the owner obtained or could have obtained economic value from the information by keeping it secret;
- b. The extent to which others could have obtained economic value from the information if it was not secret;
- c. The amount of time, money, or labor that the owner expended in developing the information; and
- d. The amount of time, money, or labor that defendant saved by using the information.

Authority.

18 U.S.C. §1839(3)(B).
CACI 4412

2.8 “Readily Ascertainable by Proper Means” Under the Federal and State Trade Secret Acts

Under the federal statute that defines a “trade secret,” information that is generally known in the field or is readily ascertainable by proper means by those skilled in the art at the time of the alleged misappropriation cannot qualify as a trade secret. There is no fixed standard for determining what is “readily ascertainable by proper means.” For example, information is readily ascertainable if it is available in trade journals, reference books, or published materials. On the other hand, the more difficult information is to obtain, and the more time and resources that must be expended in gathering it, the less likely it will be readily ascertainable by proper means.

The definition of a “trade secret” under California law does *not* concern whether information is “readily ascertainable by proper means.” You should consider the California definition of a “trade secret” separately from the federal definition, in the context of a claim for misappropriation under the California Uniform Trade Secrets Act.

Authority.

18 U.S.C. § 1839(3)(B).

For a claim under the California Uniform Trade Secrets Act [“CUTSA”], the “readily ascertainable by proper means” standard was *not* adopted by the Legislature in the definition of a “trade secret”:

The phrase ‘and not being readily ascertainable by proper means by’ was included in the section as originally proposed by the National Conference of Commissioners of Uniform State Laws. It was removed from this section in favor of the phrase ‘the public or to.’ This change was made because the original language was viewed as ambiguous in the definition of a trade secret. However, the assertion that a matter is readily ascertainable by proper means remains available as a defense to a claim of misappropriation. (Civ. Code, § 3426.1, Legis. Comm. Comment (Senate), 1984 Addition.)

(*ABBA Rubber Co. v. Seaquist*, 235 Cal. App. 3d 1, 21 (1991) [on the California Legislature’s rationale for not adopting the “readily ascertainable” standard in the CUTSA]; *IMAX Corp. v. Cinema Technologies, Inc.*, 152 F.3d 1161, 1168 (9th Cir. 1998) [on proper scope of defendant’s factual burden of showing reverse engineering to controvert claim of misappropriation]; *SEIU v. Rosselli*, No. C 09–00404 WHA, 2009 WL 1382259, *4 (N.D. Cal. May 14, 2009) [defense based “on the absence of a misappropriation.”]; *Brescia v. Angelin*, 172 Cal. App. 4th 133, 147 (2009) [The defense of independent derivation is a defense to the element of misappropriation.])

3.0 “Misappropriation” of Alleged Trade Secrets

Plaintiff must also prove that the Alleged Trade Secret was “misappropriated,” which means it was acquired by improper means or used or disclosed by a defendant without Plaintiff’s consent.

Authority.

18 U.S.C. § 1839(5)–(6).

3.1 Acquisition by Improper Means of a Trade Secret

A defendant can be liable for a misappropriation of a trade secret if, at the time of use, he/she/

it knew or had reason to know that the trade secret was acquired by “improper means.”

Authority.

18 U.S.C. § 1839(5)(A), (6).

3.1.1 “Improper Means” Defined

Improper means is defined as theft, misrepresentation, breach or inducing a breach of a duty to maintain secrecy, or espionage through electronic or other means.

“Improper means” does not include reverse engineering, independent derivation or any other lawful means of acquisition. Thus, if a defendant shows that it reconstructed the information without using the Plaintiff’s Alleged Trade Secret, that reconstruction is lawful and proper.

Authority.

18 U.S.C. § 1839(6). *IMAX Corp. v. Cinema Technologies, Inc.*, 152 F.3d 1161, 1168 (9th Cir. 1998) [on proper scope of defendant’s factual burden of showing reverse engineering to controvert claim of misappropriation]; *SEIU v. Rosselli*, No. C 09–00404 WHA, 2009 WL 1382259, *4 (N.D. Cal. May 14, 2009) [defense based “on the absence of a misappropriation.”]; *Brescia v. Angelin*, 172 Cal. App. 4th 133, 147 (2009) [The defense of independent derivation is a defense to the element of misappropriation.]

CACI 4405.

3.1.2 Independent Development and Reverse Engineering

Competitors have the right to independently develop their own information without the benefit of someone else’s trade secrets. Therefore, even if one company has a protectable trade secret in certain information, other companies are free to independently develop and use similar information on their own. Competitors are also entitled to lawfully obtain a competitor’s product or service, and try to deconstruct it to determine its component parts. A competitor cannot, however, misappropriate a competitor’s trade secrets and claim it engaged in lawful independent development or reverse engineering.

Authority.

18 U.S.C. § 1839(6).

CACI 4405. *IMAX Corp. v. Cinema Technologies, Inc.*, 152 F.3d 1161, 1168 (9th Cir. 1998) [on proper scope of defendant’s factual burden of showing

reverse engineering to controvert claim of misappropriation]; *SEIU v. Rosselli*, No. C 09–00404 WHA, 2009 WL 1382259, *4 (N.D. Cal. May 14, 2009) [defense based “on the absence of a misappropriation.”]; *Brescia v. Angelin*, 172 Cal. App. 4th 133, 147 (2009) [The defense of independent derivation is a defense to the element of misappropriation.].

3.1.3 “Knew or had reason to know”

A person who knows of the misappropriation has actual knowledge.

A person who, under all the circumstances, has knowledge of sufficient facts to put him/her/it on inquiry as to the misappropriation, has “constructive knowledge” when, if he/she/it had made that inquiry, he/she/it would have discovered the misappropriation.

Authority.

California Civil Code § 19.

CACI 1011, 4406, 4407.

3.2 Misappropriation by Use of the Trade Secret

Misappropriation by use requires the unauthorized use of the Alleged Trade Secret.

Use requires the productive use of the Alleged Trade Secret. For example, [*provide examples of use based on the facts of the dispute*]. Merely possessing the Alleged Trade Secret without utilizing it is not “use.”

Misappropriation by use can make liable not only the defendant who improperly acquired and used the Alleged Trade Secret, but also other defendants who used the trade secret and, at the time of the use, knew or should have known that the Alleged Trade Secret was acquired by improper means or that, before a material change in his/her/its position, knew or had reason to know that the Alleged Trade secret had been acquired by mistake.

Authority.

18 U.S.C. § 1839(5)(B).

CACI 4407.

3.3 Misappropriation by Disclosure of the Trade Secret

Misappropriation by disclosure requires the unauthorized disclosure of the Alleged Trade Secret.

The disclosure may be within the Defendant’s business to co-workers; there is no requirement that the disclosure be made outside the Defendant’s

business to third parties. The disclosure must be made without Plaintiff’s authorization.

Misappropriation by disclosure can make liable not only the defendant who improperly acquired and disclosed the Alleged Trade Secret, but also other defendants who disclosed the Alleged Trade Secret and, at the time of the disclosure, knew or should have known that the Alleged Trade Secret was acquired by improper means.

Authority.

18 U.S.C. § 1839(5)(B).

CACI 4406.

4.0 Harm and Resulting Damages: Substantial Factor Causation

The misappropriation must be a substantial factor in causing harm to Plaintiff.

A substantial factor in causing harm means a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause for the harm.

Authority.

CACI 430.

4.1 Damages Caused by the Misappropriation

The trade secret laws allow recovery of “actual losses” caused by the unlawful acquisition, use, or disclosure of its Alleged Trade Secrets. [*Describe the types of damages which Plaintiff claims are its actual losses.*]

[or]

The trade secret laws allow recovery of the defendant(s) “unjust enrichment,” caused by the unlawful acquisition, use, or disclosure of its Alleged Trade Secrets. [*Describe the types of damages which Plaintiff claims are the Defendant(s) unjust enrichment.*]

Authority and Directions for Use.

18 U.S.C. § 1836(b)(3)(B)(i)(I), (II).

CACI 4409.

Under 18 U.S.C. § 1836(b)(3)(b)(ii) the court may award royalties, in lieu of damages measured by any other methods, if the jury finds that the plaintiff’s injuries were caused by the misappropriation but cannot quantify damages.

4.2 Actual Loss or Unjust Enrichment

To decide the dollar amount of any actual losses sustained by the plaintiff, first determine the dollar

value of the injury caused by the misappropriation. Then subtract from that amount plaintiff's reasonable expenses that it would have incurred had the misappropriation not occurred.

[or]

To decide the dollar amount of any unjust enrichment to a defendant, first determine the dollar value of that defendant's actual benefit from the misappropriation. Then subtract from that amount that defendant's reasonable expenses associated with the benefit it received.

Authority.

18 U.S.C. § 1836(b)(3)(B)(i)(I), (II).
CACI 4409, 4410.

"[I]n lieu of damages measured by any other methods, the damages caused by the misappropriation measured by imposition of liability for a reasonable royalty for the misappropriator's unauthorized disclosure or use of the trade secret." 18 U.S.C. § 1836(b)(3)(B)(ii).

4.3 Misappropriation Damages Not Quantifiable

If you find, as to any Alleged Trade Secret, that it was used or disclosed but that Plaintiff has failed to prove a calculable dollar amount, we may have a short supplemental instruction and supplemental closing argument to assist you in arriving at an alternative form of award.

Authority.

18 U.S.C. § 1836(b)(3)(B)(ii).
CACI 4409.

4.4 Exemplary Damages

If you find that any defendant engaged in the misappropriation of one or more Alleged Trade Secrets and that that defendant is liable for actual losses [or *unjust enrichment*], then you may also decide whether that defendant's misappropriation of the Alleged Trade Secrets was willful and malicious. If you find that the misappropriation was willful and malicious by clear and convincing evidence, then you may award exemplary damages. Exemplary damages are intended to punish and to deter misappropriation of trade secrets. You may determine an amount of exemplary damages up to two times any amount awarded.

For conduct to be both willful and malicious, there must be clear and convincing evidence of the following:

Conduct is "willful" if done with a purpose or willingness to commit the act or engage in the conduct in question, and the conduct was not reasonable under the circumstances at the time and was not undertaken in good faith.

Conduct is "malicious" if done with an intent to cause injury or was despicable and done with a willful and knowing disregard for the rights of others. Conduct is despicable when it is so vile or wretched that it would be looked down upon and despised by ordinary decent people. Someone acts with knowing disregard when he/she/it is aware of the probable consequences of their conduct and deliberately fails to avoid those consequences.

"Clear and convincing evidence" means evidence that is highly and substantially more likely to be true than untrue; the fact finder must be convinced that the contention is highly probable.

Authority and Directions for Use

18 U.S.C. § 1836(b)(3)(C).

Mattel, Inc. v. MGA Entertainment, Inc., 801 F.Supp. 950, 953 (C.D. Cal. 2011); *Bladeroom Group Limited v. Emerson Electric Co.*, Case No. 5:15-cv-01370-EJD, 2019 WL 1117538, *1 (N.D. Cal. Mar. 11, 2011).

Colorado v. New Mexico, 467 U.S. 310, 317, 104 S.Ct. 2433, 2438, (1984) [clear and convincing standard].

CACI 201, 4411.

This instruction may be given only if the plaintiff demonstrates compliance with the Defend Trade Secret Act's so-called "whistleblower" provisions. 18 U.S.C. § 1833(b)(3)(C).

IT IS SO ORDERED

Dated: _____, 202_

UNITED STATES DISTRICT JUDGE

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