9th Circ. Ruling Exposes A Flaw In Federal Trade Secrets Law

By **Dylan Wiseman and Brian Weikel** (August 12, 2026)

On July 14, the U.S. Court of Appeals for the Ninth Circuit[1] **addressed** the difference between the statutory definition of trade secrets under the federal Defend Trade Secrets Act[2] and California's Uniform Trade Secrets Act in Comet Technologies USA Inc. v. XP Power LLC.[3]

Dylan Wiseman

In doing so, the Ninth Circuit reversed a $40 million jury verdict and $17 million in attorney fees because the trial court misapplied the burden of proof on a central element of the plaintiff's DTSA claim.

Brian Weikel

Specifically, the Ninth Circuit found the trial court incorrectly instructed the jury that the defendant, and not the plaintiff, had the burden to establish a prima facie element of the definition of a trade secret. In doing so, the Ninth Circuit exposed a major problem with the DTSA.

A Brief Primer on the DTSA and CUTSA

To appreciate the significance of Comet Technologies, it is important to have a working understanding of how the DTSA and CUTSA define what qualifies as a trade secret. Both statutory schemes provide definitions of what must be initially shown to prove that information is a trade secret.

Under the federal DTSA, a trade secret means

all forms and types of financial, business, scientific, technical, economic, or engineering information ... whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if:

(A) the owner there has taken reasonable measures to keep such information secret; and

(B) the information derives independent economic value, actual or potential from not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.[4]

Under CUTSA, a trade secret means

information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[5]

Notably, when it enacted CUTSA in 1985, California did not adopt the "not being readily ascertainable by proper means" language. At the time, California's high-tech industry groups argued that such a standard would "'muddy the meaning of a trade secret' and 'invite various parties to speculate on the time needed to discover a trade secret.'"[6] Accordingly, the California Legislature rejected the so-called readily ascertainable test, and the test is not found in CUTSA's definition of a trade secret.

Indeed, the decision to remove the readily ascertainable test from CUTSA helped fuel California's innovation economy by not burdening plaintiffs with an additional, murky standard in the definition of a trade secret. Avoiding the allegedly muddy readily ascertainable test, CUTSA reviews what actually happened, not whether the information could have been found from other sources. That fact-driven economic certainty drives California's investment-backed innovation economy.

In contrast, as discussed in Comet Technologies, the plaintiff in a DTSA case suffers the burden of proving an opaque, hypothetical element as part of the plaintiff's prima facie case.

The Underlying Lawsuit

Three senior engineers left their jobs at the computer components manufacturer Comet Technologies to work for a competitor, XP Power. The engineers brought thousands of confidential documents and files that detailed Comet's products, research and development strategy, and the underlying technologies. The former Comet Technologies engineers were able to deliver complete designs and a development plan for XP's new products in only nine days.

Shortly thereafter, Comet filed suit in the U.S. District Court for the Northern District of California and alleged claims under the DTSA and CUTSA for misappropriation of trade secrets. The district court narrowed the alleged 20 trade secrets to five trade secrets. At trial, Comet Technologies voluntarily dismissed its CUTSA claims, leaving only the DTSA claims with its readily ascertainable test.

At trial, the district court instructed the jury that plaintiff Comet had the burden of showing that: (1) it owned the alleged trade secret, (2) XP misappropriated them and (3) they were in fact trade secrets at the time of the misappropriation.

The district court also instructed the jury, over XP's timely objection, that defendant XP had the burden of proving its affirmative defense that the alleged trade secrets were readily ascertainable by proper means.

Comet obtained a $40 million verdict for compensatory and punitive damages, permanent injunction against any further use of Comet's trade secrets by XP, and $17 million in attorney fees.[7]

The Erroneous Jury Instruction

XP brought its appeal, and the Ninth Circuit determined that the trial court improperly instructed the jury about the burden of proof for the readily ascertainable test.[8] Specifically, the district court erroneously determined that defendant XP, not plaintiff Comet Technologies, was required to prove that the alleged trade secrets were readily ascertainable.

Because Comet Technologies proceeded only on its DTSA claim, the DTSA definition of a trade secret applied. As always, it was the plaintiff's burden to establish that the information qualifies as a trade secret. Under the DTSA's definition of a trade secret, the plaintiff must establish that the information was not "readily ascertainable by proper means."

However, in Comet Technologies, the trial court incorrectly determined it was the defendant's burden to prove the definitional element of the plaintiff's DTSA claim. The Ninth Circuit concluded that the error was material because under the DTSA, the "jury had to decide whether XP or others could have reversed-engineered the alleged trade secrets, not whether XP had actually done so."[9] The Ninth Circuit found that XP did not invite the error because it objected and proposed a correct instruction, rather than remaining silent.

In response, Comet Technologies argued that the error was harmless because the instructions were accurate as a whole and the evidence was overwhelming, so the jury could not have ruled any other way.

Specifically, Comet Technologies argued that the jury instructions regarding its burden of proof on another element, independent economic value, necessarily proved that its trade secrets were not readily ascertainable.

The court remained unconvinced. First, the court held that Comet's theory would effectively rewrite the DTSA's distinct statutory elements. Second, the sufficiency of evidence is not enough to show an instructional error as harmless because the "jury had to decide whether XP or others could have reverse-engineered the alleged trade secrets, not whether XP had actually done so."[10] XP's misconduct, including the jury's award of damages and punitive damages, did not depend on the plaintiff satisfying the readily ascertainable element.

Accordingly, the Ninth Circuit reversed the district court's judgment, including the compensatory damages, exemplary damages, a permanent injunction, and the award of attorney fees and costs, and remanded for a new trial.

Lessons to Be Learned: Needed Legislative Reform

Comet Technologies, which reversed a multimillion-dollar jury verdict, should cause lawyers and businesses to have serious concerns about proceeding with litigation under the DTSA.

The DTSA places the burden on the injured plaintiff to make a theoretical showing that its claimed trade secrets were not readily ascertainable. This showing is based on speculation of what could have occurred, not what actually transpired. Thus, the readily ascertainable test is inherently problematic.

Congress should amend the DTSA to remove the readily ascertainable test from the definition of a trade secret. Certainly, in an era of artificial intelligence, leaving the readily ascertainable test in the definition of a trade secret hampers technological innovation and growth.

The facts in Comet Technologies were egregious, and the jury awarded punitive damages. Nonetheless, the Ninth Circuit still concluded that the plaintiff must establish a murky, theoretical element of its claim to prevail.

In contrast, CUTSA's definition of a trade secret does not contain the readily ascertainable test, and thus focuses on what actually happened.

Several other states have followed California's lead, and have not adopted the readily ascertainable standard. In particular, North Carolina, Illinois and Oregon have not adopted the readily ascertainable test in their statutory definitions of a trade secret. Like California, those jurisdictions have thriving tech economies.

Unfortunately, numerous states have adopted the readily ascertainable test in their state-law definitions of a trade secret.[11] Those states face the same definitional concerns and burden of proof problems found in the DTSA. In this AI era, those states should also take action to remove the readily ascertainable standard from their trade secret statutes.

Businesses claiming their trade secrets have been misappropriated should, where possible, avoid claims under the DTSA. If possible, plaintiffs seeking to address trade secret misappropriation should proceed under CUTSA or under the laws of the states that followed California's lead and declined to adopt the readily ascertainable test.

Conclusion

Comet Technologies exposes a major definitional problem under the DTSA. Plaintiffs alleging trade secrets claims should generally avoid the DTSA or face proving an opaque, muddy prima facie element that California rejected over 40 years ago.

Dylan Wiseman is a partner and Brian Weikel is an associate at Buchalter PC.

[1] Comet Techs. USA, Inc. v. XP Power, LLC, No. 23-15601, 2026 WL 2028303 (9th Cir. July

14, 2026).

[2] 18 U.S.C.A. § 1836 et seq.

[3] Cal. Civ. Code § 3426 et seq.

[4] 18 U.S.C.A. § 1839(3).

[5] Cal. Civ. Code § 3426.1(d).

[6] Abba Rubber Co. v. Seaquist, 235 Cal.App.3d 1, 21 (1991) (quoting from Senate Comm. on Judiciary, Selected Bill Analyses (1984) A.B. 501, pp. 5–6).

[7] Comet Techs. USA, Inc. v. XP Power, LLC, No. 23-15601, 2026 WL 2028303 (9th Cir. July 14, 2026) at *3.

[8] Id. at *3–4.

[9] Id. at *19.

[10] Id. at *7.

[11] Alaska Stat. § 45.50.940(3); Arizona Rev. Stat. Ann. § 44.401(4); Arkansas Code Ann. § 4-75-601(1); Connecticut Gen. Stat. Ann. 35; 51(d); Delaware Code Ann. § 2001(4); Florida Stat. § 688.002(4); Georgia Code Ann. 10-176(4); Hawaii Rev. Stat. § 4828-2; Idaho Code Ann. 48-80(5); Indiana Code § 24-2-3-2; Iowa Code Ann. § 550.2(4); Kansas Stat. Ann. § 60-3320(4); Kentucky Rev. Stat. Ann. § 365.880(4); Louisiana Stat. Ann. § 1431(4); Maine Rev. Stat. Ann. § 1542(3); Maryland Code Ann. Com. Law § 11-1201(e); Massachusetts Gen. Laws § 42(4); Michigan. Comp. Laws Ann. § 445.1902(b); Minnesota Stat. Ann. § 325C.01(5); Mississippi Code Ann. § 75-26-3(d); Missouri Ann. Stat. § 417.453(1)(4); Montana Code Ann. § 30-14-402(4); Nebraska Rev. Stat. § 87-502(4); Nevada Rev. Stat. § 500A.030(5); New Hampshire Rev. Stat. § 350-B(iv); New Jersey Stat. Ann. § 56:15-2; New Mexico Stat. Ann. § 57-3A-2(D); North Dakota Cent. Code § 47-25.1(4); Ohio Rev. Code Ann. § 1333.01(D); Oklahoma Stat. Ann. § 86(4); Oregon Rev. Stat. Ann. § 646.461(d); Pennsylvania 12 Pa. Stat. and Cons. Stat. Ann. § 5302; Rhode Island Gen. Laws Ann. 6-41-1(4); South Carolina Code Ann. § 39-8-20(5); South Dakota Codified Laws § 37-29-1(4); Tennessee Code Ann. § 47-25-1702(4); Texas Civ. Prac. & Rem. Code Ann. § 134A002(6); Utah Code Ann. § 13-24-2(4); Vermont Stat. Ann. § 4601(3); Virginia Code Ann. § 59.1-336;

Washington Rev. Code Ann. § 19.108.010(4); West Virginia Code Ann. § 47-22-1(c); Wisconsin Stat. Ann. § 134.90(1)(c); and Wyoming Stat. Ann. § 40-24-101(4).