Growing Consensus that Trade Secret Claims Must Be Pleaded with Particularity in New York and Elsewhere

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Key Takeaways:

- Federal courts in New York, and elsewhere, are increasingly requiring plaintiffs in trade secret cases to describe their trade secrets with specificity.
- This heightened standard makes it even more important for counsel to thoroughly investigate, and understand, a client's trade secrets so that he or she can carefully craft a complaint that complies with applicable pleading standards.

Under conventional pleading standards, courts generally allowed plaintiffs to describe their trade secrets with a level of generality when filing a complaint in a trade secret case. It often sufficed for plaintiffs to provide a rough description of the allegedly protected secrets along with allegations that the material was held as a secret and possessed "independent economic value" by virtue of being secret. This enabled plaintiffs to shield their trade secrets from the public and gave plaintiffs some flexibility in developing the trade secrets case as the litigation progressed.

But over the last several years, federal courts in New York—and California, Delaware, and Massachusetts, among others—are requiring plaintiffs to describe their trade secrets with greater detail or face dismissal.[1] In fact, Massachusetts codified this requirement in 2018.[2]

Momentum for a heightened pleading standard began to appear in New York with the cases of *Elsevier Inc. v. Doctor Evidence*, LLC, 2018 U.S. Dist. LEXIS 10730 (S.D.N.Y. 2018) and *Zirvi v. Flatley*, 433 F. Supp. 3d 448 (S.D.N.Y. 2020).[3] In those cases, the courts "require[d] that plaintiffs plead their trade secrets with sufficient specificity to inform the defendants of what they are alleged to have misappropriated." *Zirvi*, 433 F. Supp. 3d at 465 (citations omitted). The decisions acknowledged that the existence of a trade secret is generally a question of fact, but "a party alleging that it owns a trade secret must put forth specific allegations as to the information owned and its value." *Elsevier*, 2018 U.S. Dist. LEXIS 10730, at *11. Applying this standard, the court in *Zirvi* scrutinized the plaintiff's allegation that its trade secret has value, finding it "difficult to see how negative trade secrets consisting of unsuccessful efforts to develop trade secrets and experimental dead ends, can have independent economic value when the end result of the process, the positive trade secrets, have in fact been uncovered." *Zirvi*, 433 F. Supp. 3d at 465. In each case, the court dismissed the plaintiffs' trade secret claims.

A similar result was reached more recently in *Zurich Am. Life Ins. Co. v. Nagel*, 20-cv-11091, 2021 U.S. Dist. LEXIS 89781 (S.D.N.Y. May 11, 2021), where the plaintiff failed to state a claim for trade secret misappropriation because the broad descriptions of the allegedly misappropriated material were insufficiently precise to demonstrate the existence of a trade secret. According to the decision, "nebulous" categories of documents, without more, did not give rise to a plausible inference that the defendant emailed himself trade secret information. *Id.* at *14. The *Zurich* court did not allow for amendment because the case arose under the Defend Trade Secrets Act – "DTSA" – and there was no dispute that the defendant had authorized access to the information at the time he obtained it. Notably, the Third Circuit also has recently weighed in, clarifying the pleading requirements to allege trade secret misappropriation under DTSA and requiring "that information alleged to be a misappropriated trade secret must be identified with enough specificity to place a defendant on notice of the bases for the claim being made against it," although a plaintiff may avoid details so long as the alleged trade secret is separated from matters of general knowledge or special knowledge of those skilled in the trade. *Oakwood Labs. LLC v. Thanoo*, 999 F.3d

892, 906 (3d Cir. 2021) (citations omitted).

New York federal courts are now increasingly calling on plaintiffs to plead their trade secret infringement claims with greater specificity. In the first half of this year alone, three courts have echoed the holdings in *Elsevier* and *Zirvi*.[4] As one court put it, plaintiffs must do more than "plead broad categories of information," and they must show "how their [trade secrets] particular value derives from their secrecy."[5] In each case, the courts found that the plaintiff had failed to meet the specificity standard, disposing of the plaintiffs' claims.

Practically speaking, this new heightened standard amplifies the need for counsel to thoroughly investigate and understand a client's trade secret before filing a claim. Only then can counsel carefully craft a complaint to meet this heightened specificity requirement. The greater specificity in turn creates opportunities for defendants to argue at the pleading stage that, as a matter of law, the information described does not constitute a trade secret.

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[1] *See, e.g.*, *Cisco Sys. v. Wilson Chung*, 462 F. Supp 3d. 1024 (N.D. Cal. 2020)*; Lithero, LLC v. AstraZeneca Pharms. LP*, 2020 U.S. Dist. LEXIS 145592 (D. Del. Aug. 13, 2020); *Moog, Inc. v. ClearMotion, Inc.*, 2020 U.S. Dist. LEXIS 194913 (D. Mass. 2020).

[2] Mass. Gen. Laws ch. 93, § 42D(b) ("in alleging trade secrets misappropriation a party must state with reasonable particularity the circumstances thereof, including the nature of the trade secrets and the basis for their protection.")

[3] *Zirvi v. Flatley*, 433 F. Supp. 3d 448 (S.D.N.Y. 2020); *Elsevier Inc. v. Doctor Evidence*, LLC, 2018 U.S. Dist. LEXIS 10730 (S.D.N.Y. 2018).

[4] *Beijing Neu Cloud Oriental Sys. Tech. Co. v IBM, 2022 U.S. Dist. LEXIS 54348, at *9 (S.D.N.Y. Mar. 25, 2022); Kumaran v Northland Energy Trading, LLC, 2022 U.S. Dist. LEXIS 42071, at *22 (S.D.N.Y. Mar. 9, 2022); Altman Stage Light., Inc. v Smith, 2022 U.S. Dist. LEXIS 22699, at *11 (S.D.N.Y. Feb. 8, 2022).*

[5] *Beijing Neu, 2022 U.S. Dist. LEXIS 54348, at *10-11.*

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