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Apportionment of Trade Secret Damages: Will Phillips 66 Ask A Six Hundred Million Dollar Question?

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In a trade secret misappropriation action, a complainant is required to prove the amount of its damages with reasonable certainty and that this amount has been caused by the misappropriation. Therefore, the trade secret owner should be prepared to explain how its claimed or awarded damages are sufficiently apportioned to the trade secrets alleged or found to have been misappropriated. Easy to say in principle, harder to execute in real life.

Last month at a trade secret conference in Boston, I co-presented a panel discussion featuring the issue of damages apportionment in trade secret cases. We discussed how a trade secret owner may need to tease out the economic contribution of the stolen trade secrets from non-protected product features. We further explained how a mixed jury verdict on liability might strike a fatal blow to a trade secret owner's claimed damages. For example, in *Versata v. Ford Motor Co.*, 2023 WL 3175427 (E.D. Mich. May 1, 2023), a jury returned a verdict that three of the four asserted trade secrets had been misappropriated and awarded $22 million in damages. The problem? The trade secret owner presented a damages claim based on the misappropriation of all four alleged trade secrets. Thus, the district court struck the damages award for lack of sufficient apportionment.

Against this backdrop, we arrive at a $604.9 million issue. This week, a state court jury in California applying California state law awarded Propel Fuels – a seller of low-carbon fuels in California – $604.9 million in unjust enrichment damages in a trade secret misappropriation

action against Phillips 66. *See Propel Fuels, Inc. v. Phillips 66 Company*, No. 22-cv-007197, in the Superior Court of the State of California, County of Alameda, Verdict Form (Oct. 16, 2024). The alleged misappropriation follows a somewhat time-tested theme: the defendant acquires confidential information during discussions about acquiring the plaintiff and ultimately uses that information for its own ends. While the backstory might be entertaining (a Phillips 66 executive reportedly conceded the use of a trade secret in making the decision to pursue this business line), this is a post about damages apportionment.

By this point, your apportionment light bulb should be flickering! The verdict form asked a single damages question: "What is the amount of Phillips 66's unjust enrichment?"[1] $604.9 million. In addition, the jury determined that the misappropriation had been willful and malicious, which could support an enhancement of damages of up to two times.

Does Propel have an apportionment problem? The jury verdict form at least sets up a potential *Versata*-esque fact pattern. Phillips 66 filed a motion on October 1 to exclude Propel's damages expert's opinions for failure to apportion damages when Propel reduced its asserted trade secrets from 121 to 88. Propel responded that it was not required to apportion damages among the trade secrets asserted in this case under California law. Propel also argued that liability for the misappropriation of the narrowed set of trade secrets (i.e., 88) would support the same damages calculation based on the same head start period. In other words, the amount of unjust enrichment attributable to any trade secret cannot be disaggregated from the whole set of trade secrets. How the court precisely resolved this motion is unclear, but Propel clearly presented a damages claim to the jury.

The jury's finding of liability on only 77 of 88 alleged trade secrets at least increases the likelihood of a renewed failure to apportion damages challenge. One could imagine an argument based on a break in the causal nexus between the adjudicated misappropriation and the amount of unjust enrichment claimed. Whether Propel's damages theory satisfies damages causation requirements, including apportionment, will almost certainly be tested given the size of the damages award.

Considering these potential apportionment issues, this case also reinforces the importance of a well-crafted jury verdict form in trade secret cases. At the same trade secret conference in Boston last month, one federal judge commented that, in his opinion, trial counsel may not spend enough time shaping the jury verdict form in trade secret cases. Another federal judge suggested an approach similar to that applied in the *Propel* case in order to obtain a reviewable liability finding while also maintaining the integrity of the trade secret.

1. Under California law, "a complainant may recover damages for the actual loss caused by misappropriation. A complainant also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss." Cal. Civ. Code § 3426.3(a)

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