

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 10-1336 AG (PJWx)	Date	August 4, 2014
Title	DIRECT TECHNOLOGIES, LLC v. ELECTRONIC ARTS, INC.		

Present: The Honorable ANDREW J. GUILFORD

Lisa Bredahl

Not Present

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

**Proceedings: [IN CHAMBERS] ORDER GRANTING RENEWED
MOTION FOR SUMMARY JUDGMENT**

This case concerns a USB drive Plaintiff Direct Technologies, LLC (“DT”) designed for Defendant Electronic Arts, Inc. (“EA”) through an intermediary, Lithomania, Inc. (“Lithomania”) The Court previously granted summary judgment in favor of EA as to DT’s first and second claims, and denied summary judgment on DT’s third claim. (“First MSJ Order,” Dkt. No. 89.) EA has conducted further discovery on the third claim and filed a Renewed Motion for Summary Judgment on DT’s third claim. (“Motion,” Dkt. No. 95.) The Motion is GRANTED.

BACKGROUND

The facts of this case are described more thoroughly in the First MSJ Order. Some relevant facts are described here.

EA makes video games. (Second Amended Complaint, “SAC,” Dkt. No. 57, ¶ 6.) One of its most popular games is called “Sims.” (*Id.*) Before Sims 3 was released in 2009, EA contracted with Lithomania to make a custom USB drive (“USB”) in the shape of the Sims PlumbBob. (*Id.* ¶¶ 7–8.)

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Lithomania’s job was to turn 2-D images of the PlumbBob into a 3-D sculpture with a USB drive inside it. (*Id.* ¶ 9.) Lithomania recruited DT to help with the design. (*Id.* ¶ 10.) DT designed the USB, and EA reviewed DT’s designs and sent comments and suggestions through Lithomania. (*Id.* ¶ 11; Declaration of Erik Jones, “Jones Decl.,” Dkt. No. 101, ¶¶ 3, 7-8.) On July 10, 2008, DT sent Lithomania an invoice for five PlumbBob USB prototypes. (Declaration of Robert N. Klieger, “Klieger Decl.,” Dkt No. 95-2, Exhibit B at DT00169.)

But then, without DT knowing, Lithomania went to look for a different company to produce the USBs, and chose TREK 2000 (“TREK”). (*Id.* ¶¶ 15-16.) Lithomania sent DT’s prototype to TREK on September 10, 2008 so that TREK would replicate and manufacture it. (*Id.* ¶¶ 15, 40; Plaintiff’s Response to Defendant’s Statement of Uncontroverted Facts, “PSUF,” Dkt. No. 99, ¶ 1.)

LEGAL STANDARD

Summary judgment is appropriate where the record, read in the light most favorable to the nonmoving party, indicates “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Material facts are those substantive law identifies as necessary to prove or defend a claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

In deciding a motion for summary judgment, courts believe the nonmovant’s evidence and draw all justifiable inferences in the nonmovant’s favor. *Id.* at 269. “A moving party without the ultimate burden of persuasion at trial—usually, but not always, a defendant—has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment.” *Nissan Fire & Marine Ins. Co. v. Fritz Co., Inc.*, 210 F.3d 1099, 1103 (9th Cir. 2000). To carry its initial burden of production, “the moving party must either produce evidence negating an essential element of the

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nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Id.* If, and only if, the moving party meets its burden, the nonmoving party must produce enough evidence to rebut the moving party's claim and create a genuine dispute of material fact. *Id.* If the nonmoving party meets this burden, summary judgment is inappropriate. *Id.*

ANALYSIS

DT's third claim is for trade secret misappropriation under California's Uniform Trade Secrets Act ("CUTSA"). (SAC ¶¶ 38–41.) In this claim, DT alleges that Lithomania and EA misappropriated DT's trade secrets by sending DT's prototypes to TREK and asking TREK to duplicate DT's work. (PSUF ¶ 1; *see* SAC ¶ 39.)

The Court previously denied EA summary judgment on the trade secrets claim because the Court found there was a genuine dispute as to whether DT's efforts to keep the samples secret were reasonable under the circumstances. (First MSJ Order at 12.) EA argues that summary judgment is now appropriate because new evidence shows that "DT cannot prove that it took *any steps* (much less reasonable steps) to protect the secrecy of the prototypes." (Motion at 7:13-15.) EA further argues that even if DT did undertake reasonable efforts to protect the prototypes, the prototypes had no independent economic value because they "were inseparable from EA's copyrighted PlumbBob design." (*Id.* at 7:15-18.) Because the Court rules that summary judgment is appropriate based on the argument concerning reasonable efforts, the Court does not address the argument concerning independent economic value. The Motion is GRANTED.

To qualify as a trade secret under CUTSA, information must be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Cal Civ. Code. § 3426.1(d). Reasonable efforts to maintain secrecy may include telling employees something is a trade secret, limiting access to the trade secret, creating confidentiality agreements, and marking the trade secret with warnings or reminders of confidentiality.

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In re Providian Credit Card Cases, 96 Cal. App. 4th 292, 304 (2002); Cal. Civ. Code §3426.1 (Committee Comments). “[P]ublic disclosure of information through display, trade journal publications, advertising, or other carelessness can preclude protection.” Cal. Civ. Code §3426.1 (Committee Comments). But “courts do not require that extreme and unduly expensive procedures be taken to protect trade secrets against flagrant industrial espionage.” *Id.*

As stated, EA argues that summary judgment is appropriate because DT took no steps to protect the secrecy of the prototypes. EA cites evidence from the depositions of DT’s owner and corporate designee, Erik Jones, and two DT employees, Shaun Secours and Kyle Sarfaraz. These people testified that they didn’t limit what Lithomania could do with the prototypes, and that they weren’t aware of anyone else doing so. (Motion at 9-14.) EA’s evidence, together with the underlying assertion that there is a lack of evidence reflecting reasonable efforts, meets EA’s initial burden to produce evidence negating an essential element of DT’s claim or show that DT doesn’t have enough evidence to carry its ultimate burden of persuasion at trial.

In response, DT argues four things raise a genuine dispute of material fact about DT’s efforts:

- (1) There was “substantial communication” about an NDA (Opposition at 7:23-26);
- (2) Lithomania knew it would be inappropriate to send a designer’s ideas to a competitor (Opposition at 8:13-16);
- (3) DT told its employees to keep things confidential (Opposition at 8:19-22); and
- (4) EA asked Lithomania to have DT sign a confidentiality agreement (Opposition at 8:25-26).

The Court analyzes each in turn to determine whether any rebut EA’s showing and create a genuine dispute of material fact. The Court concludes that none of these create a genuine dispute of material fact because none of them reflect efforts by *DT* to keep the

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prototypes, which again were sold to Lithomania in June 2008, secret.

1.1 “Substantial Communication”

DT first argues that before EA and Lithomania sent DT’s designs to TREK on September 10, 2008, “there was substantial communication between the parties about getting an NDA signed by everybody.” (Opposition at 7:23-26.) DT identifies various communications, including a voicemail and emails dated August 25 to 29, 2008, showing that “there were significant discussions of the need for confidentiality and non-disclosure.” (PSUF ¶¶ 1-2; Jones Decl. ¶¶ 10-12; Exhibits 14, 77 (under seal), 78.)

But as EA points out, all of these communications happened a month and a half after DT sold the prototypes to Lithomania on July 10, 2008. (Reply at 7:5-8.) The Court’s focus here is on whether there is a genuine dispute of material fact about whether DT took reasonable efforts to protect the prototypes. DT’s focus on the time that Lithomania sent the prototypes to TREK—well after DT sent the prototypes to Lithomania—is unhelpful in that analysis. (*See, e.g.*, Opposition at 1:21-23 (“Well before EA and its broker, Lithomania, misappropriated DT’s designs, the parties had significant communications on this subject. . . .”); *id.* at 10:1-6 (“There were substantial discussions before the misappropriation about the need for a confidentiality agreement” and DT sent a proposed NDA “before the misappropriation occurred.”).)

Further, none of the communications show DT asking Lithomania or EA to treat the prototypes as confidential. The first communication presented is an August 25, 2008 voicemail where *Lithomania*’s Gina Long tells DT’s Erik Jones that “there will also be a nondisclosure agreement that I need to sign and . . . I need to have you guys sign.” (Jones Decl., Exhibit 14.) This voicemail does not reveal any effort by *DT* to keep the prototypes confidential, and it further comes a month and a half after DT sold Lithomania the prototypes.

The second communication presented is an August 26, 2008 email from Lithomania’s Gina Long to a DT employee saying that she “ha[s] attached EA Confidentiality

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agreement.” (PSUF ¶ 1; Jones Decl., Exhibit 78 at DT00290.) Again, this does not show any effort by DT to keep the prototypes confidential. Though as DT says this may have created an “expectation” that “the parties would be signing an EA-authored confidentiality agreement,” (PSUF ¶ 1 (page 2)), it does not show an effort by DT to keep the prototypes secret, especially before DT sold the prototypes to Lithomania. Similarly, the fourth communication, where Jones tells Long on August 28, 2008 that the confidentiality agreement was actually not attached, fails to raise a genuine dispute of material fact. (PSUF ¶ 1; Jones Decl., Exhibit 78 at DT00289.)

The third communication presented, where on August 27, 2008, Erik Jones tells a DT employee to tell Lithomania’s Gina Long that DT wants to have a mutual non-disclosure agreement (“NDA”) and non-circumvent agreement in place so that DT could share additional information, isn’t much help either. (PSUF ¶ 1 (page 2); Jones Decl. Exhibit 77 (under seal).) Any NDA “so DT could share additional information” (PSUF ¶ 1 (page 2)) doesn’t raise a genuine dispute of material fact as to whether DT took reasonable efforts to protect the prototypes long before disclosed.

Finally, the fourth communication presented is an August 29, 2008 email where Jones emailed Lithomania’s Gina Long a non-circumvent, NDA agreement to be signed by DT, Lithomania, and EA. (SUF ¶ 1 (page 2); Jones Decl. ¶ 14; Exhibit 78 at DT00289, 91-94.) But “[t]his agreement was primarily designed to cover the disclosure of DT’s factory information.” (Jones Decl. ¶ 14.) And the agreement’s terms don’t reflect efforts by DT to keep the prototypes secret. The agreement says “the commerce contemplated between the Signatories hereto is absolutely CONFIDENTIAL! The Specific Terms and Conditions of this document shall be held as private and privileged and strictly confidential by all Signatories named herein.” (*Id.*; Exhibit 78 at DT00293.) Reading those provisions together, especially where the email comes a month and a half after DT sold Lithomania the prototypes, doesn’t raise a genuine dispute of material fact as to whether DT undertook reasonable efforts to keep the prototypes secret.

Having decided that the “substantial communications” don’t rebut EA’s showing and raise a genuine dispute of material fact, the Court moves to DT’s next argument.

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1.2 Lithomania Knew It'd Be Wrong

DT next argues that a genuine dispute of material fact as to whether DT's efforts were reasonable exists because "Lithomania conceded that it knew it would be inappropriate to send a designer's ideas to a competitor," (Opposition at 8:13-16.) The testimony DT cites supporting this purported concession comes from the deposition of Gina Long from another case, which goes like this:

Q. But did you show Unitime's 3D drawing to DT?

A. No. . . .

Q. Why not?

A. . . . for the same reason I wouldn't show a printer that I'm quoting with the fact . . . that I'm quoting with someone else.

Q. What's that reason?

A. Well, I guess it's none of their business . . .

Q. . . . Would it be inappropriate, in your mind, to have shown DT the 3D drawing from Unitime?

A. Maybe.

(Declaration of Christopher Arledge ("Arledge Decl."), Dkt. No. 100, Exhibit A, at 69:22-70:14.) DT further argues that "[w]e also know Lithomania knew its conduct was wrong, because why else would Lithomania have lied about what it had done?" (Opposition at 10:13-14.)

First, the Court is not persuaded that Ms. Long's testimony and Lithomania's lies show that Lithomania knew it would be wrong to send DT's prototypes to TREK. But even if it were so persuaded, this evidence doesn't reflect reasonable efforts made by DT, or otherwise make the prototypes a trade secret. DT says it does because "under California law, *the defendant's* perceptions of the information as being secret are substantively relevant to the alleged secret's status as a trade secret in fact." (Opposition at 11:5-11 (citing *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1454 (2002) (emphasis

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added).) But the testimony cited is from a representative of Lithomania, and Lithomania is not a defendant here. And the cited case notes the defendant's perceptions only after stating that the trade secrets were "not publicly disseminated and [were] subject to a confidentiality agreement." *Whyte*, 101 Cal. App. 4th at 1454.

DT next argues that EA "has also made [the] admission" that what it did was wrong because it is a "core EA policy" that "all its business partners' information is indeed to be treated confidential." (Opposition at 11:14-19 (citing EA's website).) But even if that type of statement on EA's website could show that EA knew DT's prototypes were confidential, which the Court doubts, it doesn't show that *DT* took reasonable efforts.

In short, the argument that EA knew it would be inappropriate to send a designer's ideas to a competitor misses the point. Even if EA and Lithomania believed that it would be inappropriate to send DT's prototypes to TREK, that doesn't mean the prototypes were a trade secret. DT misses this point in other similar arguments, including its argument that "[f]or Lithomania and EA to betray DT the way it did, to cast DT aside surreptitiously while stealing its designs so the project could go forward, was a blatant breach of trust" that "was morally and legally reprehensible." (Opposition at 10:27-11:3.) EA's conduct may have been morally and legally reprehensible, but DT's argument that EA and Lithomania knew it'd be wrong to send DT's prototypes to TREK doesn't raise a genuine dispute of material fact as to whether the prototypes were trade secrets.

DT's theory here appears to be that it built a relationship of trust with Lithomania and EA, and that this supported a "reasonable belief" that DT could share its prototypes and have their features be kept secret. (*See generally* Opposition at 10-12.) DT relies on a case from another circuit to argue that this relationship of trust is alone sufficient to raise a genuine dispute of material fact as to whether the prototypes were trade secrets. In that case, the alleged trade secrets were kept in a vault. *Rockwell Graphic Systems, Inc. v. DEV Indus., Inc.*, 925 F.2d 174, 177 (7th Cir. 1991). Access to the vault was limited to authorized employees, who had to sign agreements not to disseminate the alleged trade secrets, and the trade secrets had to be signed out and then returned. *Id.* Vendors allowed to see the trade secrets had to sign confidentiality agreements, and the trade secrets were

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also labeled confidential. *Id.* The Court stated that “[t]he mere fact that [the plaintiff] gave [the alleged trade secrets] to vendors—that is, disclosed its trade secrets to ‘a limited number of outsiders for a particular purpose’—did not forfeit trade secret protection.” *Id.*

This case does not persuade the Court that, under the circumstances presented here, a working relationship producing trust is sufficient standing alone to raise a genuine dispute of material fact as to whether the prototypes were trade secrets. *See also Pachmayr Gun Works, Inc. v. Olin Mathieson Chem. Corp., Winchester W. Div.*, 502 F.2d 802, 808 (9th Cir. 1974) (“[C]ourts will consider the factual circumstances of each case on an individual basis, to determine whether a confidential relationship may reasonably be implied.”)

1.3 DT Told Its Employees to Keep Things Confidential

DT next argues that “DT made clear to employees that its designs should be protected, it took steps to protect them internally and from hackers, it demanded that its suppliers sign an NDA before manufacturing the product, etc.” (Opposition at 8:19-22.) As support, DT cites the declaration of Erik Jones. But the cited paragraph doesn’t concern the prototypes, it concerns design work. (Jones Decl. ¶ 18.) And it’s clear that the design work doesn’t include the prototypes because of phrases like these: “DT provided the design work . . . for purposes of creating the prototypes,” and “I kept all of the design work on my own personal laptop computer.” (*Id.*) Thus this doesn’t create a disputed issue of fact as to DT’s efforts.

1.4 EA Asked Lithomania to Have DT Sign a Confidentiality Agreement

Finally, DT argues that a genuine dispute of material fact exists because in October 2008, EA asked Lithomania to have DT sign a confidentiality and anti-piracy agreement. (Opposition at 8:25-26.) “The agreement purports to require DT to keep secret all confidential information,” including “manufacturing or other services [DT did] for Lithomania” relating to the PlumbBob USBs. (*Id.* at 8:25-9:5.) DT argues this shows that

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“EA believed DT’s designs were in fact trade secrets” and that “EA is wrong when it asserts that DT never asked for a confidentiality agreement.” (*Id.* at 9:3-6.) But EA asking Lithomania to have DT sign a confidentiality agreement doesn’t raise a genuine dispute of material fact as to whether DT undertook reasonable efforts to protect its trade secrets. That the agreement was never signed further cuts against DT.

1.5 Summary and Conclusion

EA met its initial burden to show that there is no reasonable dispute of material fact that DT did not take reasonable efforts to maintain the secrecy of its prototypes. DT’s arguments in response fail to raise a genuine dispute of material fact because they do not reflect any efforts by DT in any way related to selling the prototypes to Lithomania. There is no genuine dispute of material fact concerning whether DT took reasonable efforts to protect the secrecy of its prototypes. DT did not.

DISPOSITION

The Motion is GRANTED. The Court will enter judgment.

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