

## FEARS ABOUT DTSA EX PARTE SEIZURE NOT REALIZED

- 18 USC 1836(b)(2), patterned after Lanham Act
- Received the most critical attention in Congress
- Order issued in only three cases, one public
- They are difficult to get and to implement
- Key takeaway: Rule 65 orders may be easier
  - See *Earthbound Corp. v. Mitek USA*, 2016 WL 4418013 at \*11 (W.D. Wash.): TRO requiring immediate delivery of devices to independent expert

## DTSA: THE DEATH OF “INEVITABLE DISCLOSURE”?

Based on dictum *Pepsico v Redmond*, 54 F.3d 1262 (7<sup>th</sup> Cir. 1995)

- In fact, injunctions without evidence of bad behavior are rare

Touchstone is UTSA §2: “threatened misappropriation”

- Widely accepted that threats can be circumstantial

California concern that federal court could impose “inevitability”

- B&P Code 16600: strong public policy favoring employee mobility
- *Whyte v. Schlage*, 101 CA4th 1443 (2002): no “alternative claim”

§1836(b)(3)(A): respect state policy, no bans, require real evidence

- “conditions . . . shall be based on evidence of threatened misappropriation and not merely on the information the person knows”
- Facts of *Pepsico* could result in “threatened misappropriation” injunction in CA

## IDENTIFICATION OF SECRETS AS CASE MANAGEMENT

### Trade secrets: the only IP not defined until litigation

- Can't just point to a stack of data; but it's not like patent claims

### California: "reasonable particularity" before plaintiff discovery

- Based on *Diodes v. Franzen*, a pleading case

### Level of specificity can vary

- Nature of the secret: algorithm vs. R&D, "negative" information
- Whether information is exclusively in the hands of defendant
- Stage of the litigation (more specific as moving toward trial)
- As part of an injunction (very specific)
- How to handle amendment of the TS description

## EXTRATERRITORIAL SCOPE NOT CLEAR YET

### Statutes don't apply outside the U.S. unless Congress intends it

#### DTSA added (uncodified) §5 "Sense of Congress" that

- "Trade secret theft occurs in the U.S. and around the world, and, wherever it occurs, harms the companies that own the trade secrets and the employees of the companies"

#### DTSA added (uncodified) §4 requiring regular reports on

- "The scope and breadth of the theft of trade secrets of U.S. companies occurring outside of the U.S., and the threat" posed, together with recommendations to "reduce the threat of and economic impact caused by" such foreign theft

#### EEA expressly provided (18 USC §1837) limited extraterritoriality

- If an "act in furtherance of the **offense**" was committed in the U.S.; or
- If the "**offender**" was a U.S. citizen or permanent resident

#### Personal jurisdiction on the facts in *TianRui*, 661 F.3d 1322?