

2014 WL 7039662 (C.A.9)
United States Court of Appeals, Ninth Circuit.

INTEGRAL DEVELOPMENT CORPORATION, Plaintiff-Appellant,
v.
Viral TOLAT, Defendant-Respondent.

No. 14-16629.

December 1, 2014.

On Appeal from the United States District Court for the Northern District of California, No. 3:12-CV-06575 (Honorable Jeffrey White, District Judge)

Redacted Brief for Plaintiff-Appellant

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CORPORATE DISCLOSURE STATEMENT

The following entities have a ten percent or greater interest in petitioner Progressive Choice Insurance Company: Progressive Direct Holdings, Inc. and Progressive Corporation, which is a publicly-traded company.

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STATEMENT OF RELATED CASES

The undersigned certifies that, as of this date, there are no related cases to report.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over the subject matter of this action under [28 U.S.C. §1332](#) because the action involves a federal question and because the parties are diverse and the matter in controversy exceeds \$75,000.

The District Court issued final judgment disposing of all the parties' claims on July 25, 2014. On August 22, 2014, Integral timely filed a Notice of Appeal from the Final Judgment. ER 1. (Integral also timely filed a Notice of Appeal from the trial court's denial of Integral's motion for preliminary injunction, but Integral later voluntarily dismissed that appeal.)

STATEMENT OF ISSUES

Where the District Court granted summary judgment against four of Plaintiff Integral's claims, was the disputed evidence sufficient to allow a reasonable jury to find:

1. That Defendant Viral Tolat violated California's Uniform Trade Secret Act by *misappropriating Integral's trade secrets*?
2. That Tolat *breached his agreement* with Integral to keep secrets confidential?
3. That Tolat *breached his fiduciary duty* to Integral? and
4. That Tolat infringed on Integral's registered *copyright*?

PRIMARY AUTHORITY

California Uniform Trade Secrets Act (“CUTSA”)

California Civil Code sections:

[§ 3426](#). Short title

This title may be cited as the Uniform Trade Secrets Act.

[§ 3426.1](#). Definitions

As used in this title, unless the context requires otherwise:

- (a) “Improper means” includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through

electronic or other means. Reverse engineering or independent derivation alone shall not be considered improper means.

(b) “Misappropriation” means:

(1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(2) Disclosure or use of a trade secret of another without express or implied consent by a person who:

(A) Used improper means to acquire knowledge of the trade secret; or

(B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:

(i) Derived from or through a person who had utilized improper means to acquire it;

(ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

. . . (d) “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.

§ 3426.3. Damages; royalties; exemplary damages

(a) 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.

(b) If neither damages nor unjust enrichment caused by misappropriation are provable, the court may order payment of a reasonable royalty for no longer than the period of time the use could have been prohibited.

(c) If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subdivision (a) or (b).

§ 3426.7. Construction with other statutes; other remedies; disclosure of public records

(a) Except as otherwise expressly provided, this title does not supersede any statute relating to misappropriation of a trade secret, or any statute otherwise regulating trade secrets.

(b) This title does not affect (1) contractual remedies, whether or not based upon misappropriation of a trade secret, (2) other civil remedies that are not based upon misappropriation of a trade secret, or (3) criminal remedies, whether or not based upon misappropriation of a trade secret.

INTRODUCTION

A customer asks a bank to exchange U.S. dollars for a foreign currency, say Japanese yen. The yen are available from various suppliers at various costs. The bank then seeks from the suppliers the least expensive exchange rate, and passes these savings (less its commission) along to its customer. Each day, over \$4 trillion changes hands in this foreign exchange (“*FX*”) market. The ICAP Group in London (which includes its subsidiary EBS) and a few similar firms have long dominated this market. Appellant Integral Development Corporation--a newer Silicon Valley company--innovated by bringing network-based technology into this industry and created a software that enables banks and other financial institutions to digitally connect and conduct business with each other on the internet. The software allows banks to compare available exchange rates instantly, helping clients obtain the best deal quickly and inexpensively. Integral holds multiple copyrights on this software--and now threatens dominance by the incumbents, including EBS and ICAP.

In 2012, EBS began negotiating with Integral to acquire this technology, through either a licensing agreement or acquisition of Integral itself. Either way, Integral and its shareholders stood to reap a nice profit as a result of its skills and hard work, all from its copyright and trade secret rights.

Until Respondent Viral Tolat found a way to appropriate this profit for himself.

For nearly twenty years, Tolat was Integral's Chief Technology Officer (CTO). Tolat had every right to leave Integral and work for another company, but Tolat had no right to bargain secretly for a high-paying job with a direct competitor by offering to give it confidential information he obtained from Integral. And that's what he did--with EBS.

As CTO and a member of Integral's Executive Committee, Tolat had access to confidential information about Integral's business operations. While still working for Integral, Tolat secretly gave that information (via his resume) to EBS. And during his last week at Integral, Tolat downloaded Integral's most important technological secret--its source code--despite having no use for it in his work. He downloaded over 270,000 of Integral's files, many of them containing unpublished copyright and trade secret materials.

Tolat then went to work for EBS, and received a signing bonus far beyond what the market warranted and far more than he ever made at Integral.

The result? EBS soon came out with a new product ("*EBS Direct*") that was and is directly competitive with Integral's product. EBS's sales rose, and Integral's sales fell. EBS no longer needed a license from Integral and lost interest in acquiring Integral.

The District Court, on controverted evidence, granted summary judgment for Tolat, ruling that evidence of the above facts failed to raise a triable issue of fact on Integral's claims that Tolat had misappropriated Integral's trade secrets; had breached his confidentiality agreement with Integral; had breached his fiduciary duty to Integral; and had infringed on Integral's copyrights. We contend that these rulings were erroneous and reversible.

STATEMENT OF THE CASE

The Original Complaint

On December 28, 2012, Appellant Integral Development Corporation ("*Integral*") filed a complaint against Respondent Viral Tolat ("*Tolat*") in the Superior Court for the State of California, County of Santa Clara. Tolat then had the case removed to federal district court. [Docket #1].

The Amended Complaint

On July 26, 2013, Integral filed a First Amended Complaint (“*FAC*”) in the court below. ER 72, CER¹ 738.

The *FAC* alleged the following facts--supported by evidence contained in several exhibits attached to the *FAC*:

1. Integral is a highly successful, nonpublic company that develops software for trading in foreign currency exchange. ER 73, CER 739 at 2:14--18. It was formed in 1993 and is based in Palo Alto. *Ibid.*
2. Viral Tolat was Integral's co-founder and Chief Technology Officer. ER 73, CER 739 at 2:26--3:2. He reported directly to Integral's CEO, Harpal Sandhu. ER 75, CER 741 at 4:10--13. Tolat actively participated in Integral's weekly executive staff meetings and major company decisions. ER 75, CER 741 at 4:13-16. Tolat signed a comprehensive Confidentiality and Inventions Agreement, in which Tolat promised not to disclose or use any of Integral's confidential information. ER 75, CER 741 at 4:20--24.
3. As part of Integral's senior executive staff, Tolat had detailed access to virtually all of Integral's trade secret information and confidential and proprietary intellectual property. This included Integral's source code and system architecture for multiple Integral products and services; customer lists and information; operating procedures; business strategies' research and development plans; and financial information and goals. ER 76, CER 742 at 5:20--26.
4. The 2008 financial crisis diminished the foreign exchange market, but Integral's innovations allowed it to weather the storm better than its competitors. ER 77, CER 743 at 6:17--21. As a result, Integral was courted by several companies for licensing or acquisition. ER 77, CER 743 at 6:22--23. Tolat knew in detail of these negotiations and of the importance of keeping Integral's financial information secret, so that Integral could negotiate the best terms. ER 77, CER 743 at 6:26--7:3.
5. In December of 2011, Integral CEO Harpal Sandhu began negotiating with EBS CEO Gil Mandelzis about EBS's potential acquisition of Integral or a licensing agreement. ER 78, CER 744 at 7:12--16. “[G]iven the strategic and sensitive nature of the conversations, Integral's CEO instructed every

executive on his staff [which included Tolat] not to engage directly in any conversations with anyone from EBS.” *Ibid.*

6. However, in mid-2012--without telling Integral--Tolat began negotiating with EBS for a job with EBS. ER 79, CER 745 at 8:1--6. In December of 2012, Tolat disclosed to EBS CEO Gil Mandelzis Integral's secret information regarding how to value Integral's stock. ER 81, CER 747 at 10:14--26.

7. On November 5--6, 2012--shortly before Tolat resigned from Integral in order to take a job with EBS--Tolat downloaded Integral's source code (comprising over 270,000 files) and copied over 1,000 proprietary Integral documents. ER 90, CER 756 at 19:1--23. Tolat told no one at Integral that he was doing this--though he had no Integral-related business reason to download these files, and he knew he was violating Integral's security rules by doing so. ER 90--91, CER 756--757 at 19:11--20:9.

8. In late December of 2012, Tolat told Integral's CFO that another company had offered Tolat a signing bonus “far larger than any signing bonus in the current market for similarly credentialed and situated candidates. . . .” ER 87--88, CER 753--754 at 16:26--17:3.

9. The FAC alleged that by these acts, Tolat had secretly misappropriated trade secrets in violation of California's Uniform Trade Secret Act (“*CUSTA*”) (2nd Claim for Relief), breached his employment agreement with Integral (3rd Claim for Relief), breached his fiduciary duty to Integral (4th Claim for Relief), breached his duty to loyalty to Integral under [California Labor Code §§ 2860 et seq.](#) (5th Claim for Relief), interfered with Integral's prospective business advantage (6th Claim for Relief), violated [California Penal Code § 502](#) by taking Integral's computer data without permission (9th Claim for Relief), violated the federal Computer Fraud and Abuse Act (10th Claim for Relief), and violated federal copyright statutes by downloading Integral's copyrighted source code without permission or even notice to Integral (11th Claim for Relief).

10. The FAC's prayer asked for an injunction barring Tolat from further use or disclosure of Integral's trade secrets, and for their return. ER 109, CER 775 at 38:23--28. The FAC also prayed for compensatory and punitive damages. ER 110, CER 776.

11. Integral requested a jury trial. ER 113, CER 779 at 42:6--8.

***17** 12. The FAC also alleged (with supporting exhibits) that Tolat colluded with EBS to cheat Integral in a stock fraud scheme. Tolat held many shares of Integral stock. If Tolat decided to sell them, Integral had a “right of first refusal”--the right to purchase the shares at the price a buyer offered to pay. Soon after Tolat began working for EBS, Tolat informed Integral that EBS had offered to buy his shares for \$ * * * --although the actual value of the shares was only \$ * * *. ER 80, CER 746 at 9:10--24.

Tolat knew that Integral did not want its shares to fall into the hands of its major rival, and that Integral would reluctantly match this artificially high price. But Tolat failed to inform Integral that Tolat had secretly agreed with EBS to reduce Tolat's salary at EBS by about the same amount that the shares were overpriced: \$. By this device, Tolat hoped to have Integral, in effect, pay a major part of his salary at EBS. ER 80--81, 89, CER 746--747, 749 at 9:1--10:8; 11:18--12:2. The 1st, 7th, and 8th Claims for Relief were based on the above allegations. (After the District Court issued its summary judgment ruling, these Claims for Relief were settled by the parties and dismissed by Integral.)

Tolat's Response To The First Amended Complaint

Tolat filed a motion to dismiss the FAC. [Docket #134]. Integral responded. [Docket #143], and Tolat replied. [Docket #149]. The trial court denied the motion. [Docket #185].

***18** Tolat then filed an answer to the FAC. [Docket #187].

The Cross-Motions For Summary Judgment

On July 26, 2013, Integral filed a motion for preliminary injunction. [Docket #115], along with supporting declarations. [Docket #114].

On November 15, 2013, Tolat filed a motion for summary judgment on Integral's claims 1, 2, 3, 4, 5, 6, and 11, and on Counterclaims 1 and 2. [Docket #192]. This was supported by several declarations. [Docket #193, 195, 204]. Integral filed a response [Docket #226]), supported by several declarations. ER 277, 206, 339, CER 1075, 1144, 1214. Tolat filed a reply. [Docket #242].

Integral also filed its own motion for summary judgment and for a preliminary injunction. [Docket #232]. This was supported by declarations. [Docket #197, 199, 206].

The District Court's Order

The District Court held no hearing on the cross-motions for summary judgment.

On February 24, 2014, the Court granted Tolat's motion for summary judgment. ER 14. And, in the same Order: “For all of the reasons the Court grants Tolat's motion for summary judgment,” the Court denied Integral's motions for summary judgment and for a preliminary injunction. ER 26.

On July 25, 2014, on stipulation of the parties, the District Court dismissed the remaining claims in the Amended Complaint and dismissed the counterclaims. ER 9--10. On that same day, the Court issued its Final Judgment against Integral. ER 7.

Integral's Notices Of Appeal

On March 26, 2014, Integral filed notice of appeal to the Order denying Integral's motion for preliminary injunction. ER 11. Because this ruling was reviewed on appeal for abuse of discretion, and because of the passage of substantial time since this order was issued, Integral voluntarily dismissed that appeal.

On August 22, 2014, Integral filed notice of appeal from the final judgment. ER 2.

THE STANDARD OF REVIEW

An appeal from a summary judgment is reviewed *de novo*. *Travelers Cas. & Sur. Co. of Am. v. Brenneke*, [551 F.3d 1132, 1137 \(9th Cir. 2009\)](#). The reviewing court must determine whether, “viewing the evidence in the light most favorable to the non-moving party, [] there are any genuine issues of material fact and whether the district court correctly applied the relevant [substantive] law.” *Ventura Packers, Inc. v. F/V Jeanine Kathleen*, [305 F.3d 913, 916 \(9th Cir. 2002\)](#). The district court's interpretation of the underlying

legal principles is subject to *de novo* review. *Southwest Voter Registration Ed. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003).

The following Statement of Facts is based on this standard of review. This Statement of Facts is supported by the evidence and reasonable inferences from that evidence, viewed in a light most favorable to the non-moving party: Integral.

STATEMENT OF FACTS

Tolat's Role At Integral

In 1993, Defendant Viral Tolat co-founded Integral with CEO Harpal Sandhu. ER 167, CER 970 at 1:18-19. In 2010, Tolat became Vice President of Trading Solutions, as well as Chief Technology Officer (CTO) at Integral. ER 167, CER 970 at 1:22-24. Tolat himself described his authority as follows:

In this role, I took over management of the client services team and worked to align it more closely with product development. Specifically, in my last two years at Integral, I ran the Product team and the Services team and acted as the Chief Architect of Integral's core products. *The Product team is responsible for specification of product features including trading user interfaces, APIs, business workflows, and administrative functions.* The Services team works directly with customers, sales, and account managers to implement customer specific solutions. Finally, as Chief Architect, I worked with product managers, engineers, and QA *to design and specify the overall design of the products and specifically how the system fit together as a coherent system.*

ER 167, CER 970 at 1:24-2:4. (Emphasis added).

Tolat Signs Integral's Confidentiality Agreement.

On April 20, 1998, Tolat signed Integral's Confidentiality and Inventions Agreement. Tolat promised, in exchange for employment:

- “I will devote my best efforts to the interests of the Company and will not engage in other employment *or in any activities detrimental to the best interests of the Company without the prior written consent of the Company.*”

***22** • “ ‘Confidential Information’ means any information pertaining to any aspects of the Company’s business which is either information not known by the public or by actual or potential competitors of the Company . . . , whether of a technical or financial nature or otherwise.”

• “I agree to hold in confidence and not directly or indirectly to use or to disclose, either during or after termination of my employment . . . , any Confidential Information I obtain or create during the period of my employment. . . .”

• “I agree not to make copies of such Confidential Information *except as authorized by the Company.*”

• “I agree to abide faithfully by all Company rules, regulations and policies.”

• “Any breach of this Agreement likely will cause irreparable harm to the Company for which money damages could not reasonably or adequately compensate the Company.”

ER 49-50. (Emphasis added).

EBS Seeks To Acquire Integral And/Or Integral's Technology

From March through December of 2012, Integral CEO Harpal Sandhu and EBS CEO Mandelzis “* * *.” ***23** ER 495, CER 1528 at 4:5--9.

However, Sandhu was wary about EBS's intentions. Sandhu concluded “* * *” CER 1296. (Emphasis added).

In July of 2012, Gil told Sandhu that Integral was “* * *” while EBS was “* * *” ***2** *Ibid.* Gil suggested that they “* * *” *Ibid.* Sandhu responded that “* * *” CER 129. Sandhu was, however. * * * *Ibid.*

When Sandhu met with Gil again in August of 2012, Gil complained about EBS's “* * *” and admitted that “* * *.” CER 1297.

***24**

Tolat Seeks Employment At EBS.

Integral had special procedures for protecting the secrecy of its “customer lists and information; business plans, operating procedures, and strategies.” CER 1230 at 94:3-14.

Ignoring these procedures, and despite CEO Sandhu's explicit instruction to Tolat not to communicate with Gil, on September 4, 2012, Tolat sent Gil his resume. Tolat's resume disclosed what Integral Chief Financial Officer Albert

Yau described as “highly confidential and valuable information” about Integral, including:

- “Number of employees overall;
- Number of employees managed by Viral on his Products and Services Team;
- The Company's efforts to hire a * * *;
- Details of the of Integral's * * *;
- The volume of retail trades handled by * * *;
- The development of * * *;
- The number of active deployments of * * *;
- *25** • The time to develop * * *;
- The number of major banking institutions * * *;
- The number of years and organization, including location and number of employees, of * * *;
- The use of * * *;
- The indentification of the * * *;
- The disclosure that * * *; and
- * * *.”

ER 495-496, CER 1528-1529 at 4:11-5:10. *See also* CER 1597-1599.

Only two days later, Tolat began final negotiations of his employment offer.

ER 493, CER 1526 at 2:14-22. EBS wanted to hire Tolat, “specifically to develop ***26** the EBS Direct service that EBS has released as an FX platform *directly competitive to Integral's*.” ER 494, CER 1527 at 3:1-6. (Emphasis added.)

Tolat arranged for more meetings with EBS officials. ER 494, CER 1527 at 3:10-19. He frequently communicated with EBS CEO Gil Mandelzis. ER 494, CER 1527 at 3:7-9.

On September 6, 2012, Tolat disclosed to Mandelzis more information that Integral wanted to keep secret: “* * *” ER 496-497. CER 1529-1530 at 5:20-6:9.

On October 25, 2012, Tolat asked to meet with Iain Torres, EBS's Chief Financial Officer, to show him “a hard copy of the [Integral's] last financials.” CER 1881. Tolat noted that “I haven't received the final doc yet but will reach

out to Steve [Eckhaus, Tolat's attorney] this morning to ensure he passes it on once he has it.” *Ibid.*

And on November 10, 2012, Tolat sent to EBS (again without Integral's permission or even notice to Integral) a * * * It that Integral had sent to Tolat. ER 495, CER 1528 at 4:1-7. That letter disclosed to EBS the confidential price of Integral's privately-held stock: \$ * * * per share. From this, Integral's chief rival could easily calculate Integral's total enterprise value: \$ * * * ER *27 495, CER 1528 at 4:6--10. There was no evidence that Integral had ever given Tolat permission to reveal this or any other confidential information to its competitor. In fact, the letter explicitly stated that it was “Confidential” and “neither it nor its substance shall be disclosed publicly or privately to any third person.” CER 1572.

During Tolat's efforts to obtain employment with EBS, Tolat learned that EBS was planning to introduce “EBS Direct”: an FX trading platform that was competitive with Integral's platform. But Tolat never disclosed this fact to anyone at Integral. ER 498, CER 1531 at 7:6--9. EBS told Tolat that EBS wanted to hire Tolat specifically to develop its “EBS Direct” product. ER 500, CER 1533 at 9:4--8.

On August 12, 2012, Tolat wrote to Gil, “no one knows I'm talking to you so any conversation you have [with Integral about acquisition or licensing] would have to be veiled in potential interest in Integral or questions about Integral's technology.” ER 500, CER 1533 at 9:21--24.

*28

Tolat Joins EBS

On October 16, 2012, Tolat received a written agreement from EBS to become its Chief Technology Officer. ER 168, CER 971 at 2:14--15. On November 7, 2012, Tolat told CEO Sandhu that he was resigning from Integral. ER 168, CER 971 at 2:16--17. On December 19, 2012, Tolat resigned from Integral. ER 169, CER 972 at 3:1--3. On December 20, 2012, Tolat signed EBS's offer to employ him. ER 169, CER 972 at 3:24.

On December 21, 2012, Integral asked Tolat *where* he was going to work, and Tolat told Integral for the first time that he was going to work for EBS. ER 169, CER 972 at 3:25--26. Tolat continued on Integral's payroll through

December 21 which was Tolat's last day at work for Integral. ER 169--170, CER 972--973 at 3:25--4:2.

Several times Integral asked Tolat to participate in an exit interview. ER 497, 465, 567. Tolat did not respond to the requests. ER 462--463.

Integral's Policies Regarding Security Of Trade Secrets

Integral's Policy Manual expressly forbids employees from “unauthorized possession or removal of company property;” “giving confidential or proprietary Integral information to competitors;” and “working for a competing business while an Integral employee.” CER 1227 at 90:1--18. Integral's Policy Manual expressly *29 states that “Due to the nature of Integral's products and technology, access to product source codes is strictly limited to company premises.” CER 1253.

Guests to Integral's premises must be registered and escorted at all times. Employee workstations are angled to prevent easy visibility of screens. Engineers are not allowed to interface with visitors without permission. CER 1229 at 92:12-22.

Integral's Source Code

Integral employs over * * * people in the United States as well as overseas to develop and support its source code. ER 504, CER 1537 at 13:21-23].

Integral's Chief Financial Officer, Albert Yau, stated that Integral's source code “is the company's life blood, and its value is inestimable, since Integral licenses its technology on a spectrum. ... In any agreements with its licensing, the rights to the source code is a key deliverable, and may range from rights to run the source code, to rights to develop and run customized versions of the source code. If prospective licensees were able to obtain copies of Integral's source code outside of the nondisclosure agreements which Integral requires of its licensees, they would have no need to pay royalties to Integral.” ER 504, CER 1537 at 13:8-20.

One key component of the source code, the * * * program, “is a highly technical computer program which provides the key to implementing relationship-based trading on forex aggregation services by ‘bridging,’ as the name *30 indicates, a third party's market-leading retail foreign exchange

trading front-end (where the user interfaces with the market) with Integral's back-end platform (where the transactions are actually consummated) of FX OTC transactions. This specific program has contributed significantly to Integral's growth in the retail FX broker customer segment, which was Integral's fastest growing customer segment in 2012." ER 504--505, CER 1537--1538 at 13:24--14:5. It took Integral at least * * * of work time (* * * person-years) to develop this program. ER 505, CER 1538 at 14:6--9. Integral guards its source code with a control system * * * CER 1227 at 90:27--91:3. The control system is backed up by secure servers in a room * * *. *Ibid.*

Tolat knew about these security protections. CER 1228 at 91:4--5. As CTO, Tolat knew that Integral ensures that its source code is secure. CER 1231 at 95:21--22. Tolat admitted that Integral's source code, "* * *." ER 170, CER 973 at 4:9--11.

***31**

Tolat Denies That He Disclosed Any Of Integral's Trade Secrets To EBS

Tolat swore that he never disclosed any of Integral's confidential information to EBS. ER 169, CER 972 at 3:22--23. "I never disclosed any confidential information to EBS during the time I was interviewing or since then or since I've started with EBS. . . ." CER 1306.

However, Tolat did *not* deny that he sent to EBS his resume, which included the confidential business information described earlier.

Tolat also asserted that "I did not take any of my local copies of source code with me when I resigned from Integral," and that he erased his copy of the source code at that time. ER 171, CER 974 at 5:15--19. He also claimed that he did not take with him any e-mails he received while working at Integral. ER 172, CER 975 at 6:8--21. He said that he deleted all Integral confidential documents from his Dropbox account when he left Integral. ER 173, CER 976 at 7:6--10. Tolat admitted that his Blackberry contained some Integral documents and that he took these when he left Integral to join EBS, but claimed that this was inadvertent and that he deleted them on January 14, 2013, without showing them to EBS. ER 176, CER 979 at 10:8--17.

But the circumstantial evidence described below belies Tolat's claim of innocence.

***32**

Tolat Downloads Integral's Source Code

On November 5-6, 2012, weeks after secret meetings with EBS and with his engagement agreement with EBS in hand, while the Integral New York office was closed by Hurricane Sandy, Tolat went to the Integral's New York office and downloaded Integral's entire source code. ER 168, CER 1077 at 2:8-17. This occurred just two days before Tolat told CEO Sandhu that he was resigning from Integral. ER 168, CER 971 at 2:16-17.

Tolat's download consisted of over 270,000 files in a folder structure of more than 11,000 directories, totaling nearly 23 gigabytes of data. CER 1226 at 89:1-6. "It amounts to an up-to-date copy of all our source code," which was more than * * * of all of Integral's software. ER 280, CER 1078 at 3:12-14. At his deposition, Tolat denied that he had made any copies of the source code. ER 279-280, CER 1077-1078 at 2:24-3:2. Later, however, Tolat admitted that he did in fact download the source code to "local copies" on his Western Digital hard drive. ER 278, CER 1076 at 1:12-15. *See also* ER 599. This violated Integral's Source Code Control System ("SCCS"), and "[m]arking a copy of source code on an external device is never justified and defeats the protection Integral put in place." ER 278, CER 1076 at 1:18-24. It also constituted a breach of the Confidentiality and Inventions Agreement that Tolat signed, which provided ***33** that, "I agree not to make copies of such Confidential Information except as authorized by the Company." ER 49--50. Tolat asserted that his November 5--6, 2012 download of the source code was merely an "update". ER 279, CER 1077 at 2:8--17. Tolat was not performing an, "update," but was in fact, copying 260 megabytes of source code, which took some 31 minutes. *Ibid.*

Integral's Chief Research Officer (Patrick Barkhordarian) testified that "copying from the SCCS repository to an external device is not what any developer would do as part of his work with the source code." ER 279, CER 1077 at 2:22--24. The streamlined use of Integral's SCCS, "obviates the need to have source code copied to an external device which would put that code at risk of being misplaced or lost somewhere. *Making a copy of source code on an*

external device is never justified and defeats the protection Integral put in place.” ER 278, CER 1076 at 1:21--24. (Emphasis added).

After he secretly copied Integral's source code, “Tolat never again logged onto his Outlook email account from this laptop, which he would have needed to read his emails, let alone perform his normal duties. Thus, the source code copying was not in furtherance of evaluating the company's source code as he would like the Court to believe.” ER 283, CER 1081 at 6:4--8.

***34**

Tolat Uploads More Secret Integral Files

Shortly before leaving his employment, Tolat also transferred information by uploading numerous unauthorized copies of additional trade secret and highly confidential Integral files to his personal online Dropbox account. CER 1226 at 89:7--10; ER 280, CER 1078 at 3:18--20. This “trade secret information” ER 286, CER 1084 at 9:3--7 was described by Patrick Barkhordarian, Integral's Chief Research Officer:

* * *

***35** ER 286-287, CER 1084-1085 at 9:3-10:4.

***36** “It is a standard and understood practice at Integral that employees cannot copy, transfer, or remove Integral information onto external storage devices.” CER 1226 at 89:19--21. This violation was so serious that, had Integral known of it, Integral might have fired Tolat. ER 278--279, CER 1076-- 1077 at 1:25--2:2.

Tolat had no legitimate reason to make these copies just two days before he resigned from Integral. CER 1228 at 91:26--92:2. As Tolat knew, there was no need to back up these files because Integral already had a system for backing up its files. CER 1227 at 90:27--91:3.

On December 25 and 27, 2012, Tolat linked Integral's office computer to Dropbox, and then on January 25, 2013, to his new EBS computer. ER 284, CER 1082 at 7:17--25.

Tolat Erases The Source Code And Then Erases The Eraser

A forensic examination showed that after Tolat copied Integral's source code, he installed an Eraser program and used the Eraser program “to overwrite deleted space with ‘carefully selected patterns’ to insure complete destruction

of those Integral data and files from the desktop computer hard drive.” ER 282, CER 1080 at 5:6--9. And “[h]e finished this flurry of activity by trying to uninstall the Eraser tool.” ER 280; 282, CER 1078; 1080 at 3:21--22; 5:10--11.

***37**

Tolat Fails To Return Integral's Property

“It is a standard and understood practice at Integral that after an [Integral] employee leaves the company, the departing employee must turn over any Integral information, documents, and accounts.” CER 1226 at 89:21--23.

Tolat averred that when he left Integral when he returned to Integral all of Integral's property. ER 284, CER 1082 at 7:26--8:2.

However, he failed to return the Fantom External Hard Drive he used while at Integral. ER 285, CER 1083 at 8:3--16. He did not return the memory card from his Integral Blackberry until months after joining EBS. CER 1229 at 92:27--28. Tolat also took a Motorola Xoom tablet computer owned by Integral and refused to return it or even to produce the contents of that computer. ER 361, CER 1262 at 6:16--21. That tablet contained information that is confidential and valuable to Integral. ER 362, CER 1263 at 7:18--20. It still has never been returned to Integral nor has its contents been accounted for by Tolat.

***38**

EBS's Negotiations To Acquire Integral's Technology Collapses

Although EBS had expressed considerable interest in acquiring Integral's technology or Integral itself, there was no evidence that EBS consummated (or ever explained its refusal to consummate) any deal with Integral after Tolat expressed to EBS his interest in moving to that company.

The Consequences

Integral CFO Albert Yau declared: “Integral's investigation into economic damages continues, and will be submitted to an expert to determine the amount for trial, but as CFO, I have seen direct losses in a number of areas.” ER 501, CER 1534 at 10:8--10. Here are the “direct losses” that CFO Yau had already seen:

Effect On Integral Financing

* * *. ER 502, CER 1535 at 11:8--12. “* * *.” *39 ER 502, CER 1535 at 11:12--17.

Loss Of Revenue

Tolat's wrongdoing enabled EBS to launch its EBS Direct much earlier than it otherwise would have been able to do. ER 505--506, CER 1538--1539 at 14:12-- 15:12. As this product competed with Integral's product, inevitably it cut into Integral's sales. ER 356, CER 1257 at 1:14--16.

EBS CEO Mandelzis admitted that before EBS hired Tolat, EBS had little to no experience in aggregation. ER 493, CER 1526 at 2:6--26. However, on November 27, 2012--soon after EBS had agreed to hire Tolat--EBS announced that it intended to launch EBS Direct, a product that would directly compete with Integral's product. ER 356, CER 1257 at 1:14--16. Less than six months later, EBS began signing up 300 banks for the product (ER 356, CER 1257 at 1:18--21), and EBS brought the product to market less than one year after its initial announcement (ER 356, CER 1257 at 1:21--22). Integral CEO Harpal Sandu testified that, in his experience, this time frame is “extremely short”. CER 356, CER 1257 at 1:23--27. * * *” ER 357, CER 1258 at 2:1--4.

*40 This allowed EBS to poach Integral's customers. * * *, Integral had * * * of revenue growth. ER 503, CER 1536 at 12:5-7. Soon after Tolat began working at EBS, however, Integral's revenue began diminishing. * * *.” ER 503, CER 1536 at 12:7-9.

* * *

ER 503, CER 1536 at 12:15-22. This translated into a loss of * * *. ER 1536, CER 1536 at 12:5-22.

Loss Of Valuation

This loss in revenue caused Integral's equity value to decrease by at least * * * causing a loss of * * * to Integral. ER 503, CER 1536 at 12:23-13:7.

*41

The District Court's Opinion

The District Court granted summary judgment against Integral's claim that Tolat had misappropriated its trade secrets, for three reasons:

(1) “the Court *finds* that” the above evidence did not constitute “specific information that it claims to be trade secret” (ER 18 at 5:8--11),

(2) “the Court *finds* that Integral has not revealed any evidence to demonstrate that Tolat used or disclosed any potential trade secret information to his current employer or to any other third party” (ER 19 at 6:1--4), and

(3) the Court then *finds* that the evidence fails to show “that Tolat caused Integral to suffer damages as a result of any misappropriation” (ER 21 at 8:11--14). (Emphasis added).

The District Court ruled that Integral's common law tort claims for breach of fiduciary duty, breach of contract, breach of loyalty, and intentional interference with prospective economic advantage were preempted by California's Uniform Trade Secrets Act. ER 21--22 at 8:17--9:13. In addition, “the Court *finds* that each of Integral's breach of contract and common law tort claims lack merit.” ER 22 at 9:14--15. (Emphasis added).

The District Court also rejected Integral's claim that Tolat had infringed on Integral's copyrights. Although the evidence was *undisputed* that Tolat, “did in *42 fact download copyrightable materials,” the District Court “*found*” there was “no evidence” that he did so “without Integral's authorization.” ER 25 at 12:23--26.

*43

SUMMARY OF ARGUMENT

The District Court's “finding” that Tolat did not misappropriate Integral's trade secrets is erroneous because the evidence raised a triable issue of fact on this issue. “[T]he determination of whether a claim is based on trade secret misappropriation is largely factual.” *K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations, Inc.*, 171 Cal. App. 4th 939, 954 (2009).

The District Court “found” that Integral failed to identify with sufficient specificity which parts of Integral's source code *constituted trade secrets*. This was error, because Mr. Barkhordarian's descriptions are quite detailed and specific. In addition, the Court overlooked the confidential information Tolat transmitted to EBS in his “super-sized” resume, which Integral's evidence also described in detail.

The District Court found that Tolat did not *misappropriate* the information he took. This too was error because it is undisputed that Tolat sent to Integral's chief rival (EBS) confidential information about Integral's business,

at a time when it was essential to keep that information secret. And circumstantial evidence would permit a reasonable jury to find that Tolat asked EBS to assist in his deceit to enable Tolat to share Integral's source code with EBS.

***44** The District Court found that Integral suffered no *damages* from this misappropriation. But the Court overlooked the California statute that provides for recovery of a reasonable royalty payment when damages are difficult to ascertain.

The District Court “found” that Integral's *breach of contract* claim was preempted by CUTSA, overlooking a statute that explicitly states that contract claims are not preempted by CUTSA.

The District Court also “found” that Integral's claim for *breach of fiduciary duty* was preempted by CUTSA, overlooking California cases that have allowed such claims to proceed where, for example, the evidence showed misappropriation of confidential information that was *not* a trade secret. The District Court rejected Integral's claim for *copyright infringement* because the Court had found no misappropriation. This, too, was error, because--as explained above--Integral's evidence of misappropriation raised a triable issue of fact.

***45**

ARGUMENT

I. The Evidence Raised A Triable Issue of Fact on Integral's Claim that Tolat Had Misappropriated Trade Secrets.

The District Court granted summary judgment against Integral's claim that Tolat had misappropriated its trade secrets, for three reasons: (1) “the Court finds that the above evidence did not constitute specific information that it claims to be trade secret” (ER 18 at 5:8-11), (2) “the Court finds that Integral has not revealed any evidence to demonstrate that Tolat used or disclosed any potential trade secret information to his current employer or to any other third party” (ER 19 at 6:1--4), (3) the above evidence fails to show “that Tolat caused Integral to suffer damages as a result of any misappropriation” (ER 21 at 8:11--14).

Each of these “findings” were erroneous. The District Court was presented evidence that raised a triable issue of fact on each of these three issues.

A. The Evidence Would Permit a Jury To Find That The Information Constituted Trade Secrets.

California's Uniform Trade Secrets Act provides for the recovery of actual loss or other injury caused by the misappropriation of trade secrets. [Cal.Civ. Code § 3426.3. Section 3426.1, subsection \(d\)](#) defines “trade secret” as:

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

***46** (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Put more simply, “[t]he test for trade secrets is whether the matter sought to be protected is information (1) which is valuable because it is unknown to others and (2) which the owner has attempted to keep secret.” *Whyte v. Schlage Lock Co.*, [101 Cal. App. 4th 1443, 1454 \(2002\)](#). See also *Dealertrack Inc. v. Huber*, [460 F. Supp. 2d 1177, 1183--1184 \(C.D. Cal. 2006\)](#).

Normally, this issue must go to a jury. “The issue of whether information constitutes a trade secret is a question of fact.” *Thompson v. Impaxx, Inc.* [113 Cal. App. 4th 1425, 1430 \(2003\)](#); see also *San Jose Construction, Inc. v. S.B.C.C., Inc.*, [155 Cal. App. 4th 1528, 1537 \(2007\)](#) (“Whether information is a trade secret is ordinarily a question of fact”); *In re Providian Credit Card Cases*, [96 Cal. App. 4th 292, 300 \(2002\)](#).

Where the plaintiff identifies even a single item as a trade secret, the case should not be dismissed. *Lizalde v. Advanced Planning Servs., Inc.*, [875 F. Supp.2d 1150, 1166 \(S.D. Cal. 2012\)](#).

The District Court found that the various forms of information Tolat misappropriated were not trade secrets, because Integral “has not identified specific information that it claims to be trade secret, but rather identified broad categories of documents that it contends contain ‘highly sensitive information essential to Integral's competitive advantage.’” ER 18.

***47** The Court erred. Integral's evidence was quite specific. A jury could reasonably find that the following forms of information each constituted trade secrets.

1. Integral's Evidence Specifically Described Trade Secrets That Tolat Disclosed To EBS On His Resume.

Integral CEO Harpal Sandhu had concluded * * *.” CER 1256. (Emphasis added.)

There was good reason for Integral's CEO to maintain control over all information that Integral disclosed to EBS. Negotiating a possible merger or acquisition by a competitor raises serious risks. The competitor will seek information about the company in order to decide whether to go through with the deal. But if the deal is *not* consummated, the company risks having revealed important confidential information to its rival:

- “When you put your company up for sale, you risk giving strangers--potentially your competitors--access to confidential information. * * * * If there is something truly proprietary in the way you make what you sell, leave it out of the book or online data room.” John Warrillow, *How to Protect Company Secrets During Merger Talks*, Inc. (Nov. 26, 2014), ***48** <http://www.inc.com/guides/2010/07/protecting-confidential-information-during-merger-talks.html>.

- “For most companies, their intangible assets--trade secrets and corporate know-how--are what give them an edge over their competitors. In an acquisition, they are often among the most coveted assets. So, any firm that enters into deal discussions with a potential suitor--particularly a rival--faces a dilemma: Reveal too little to your suitor, and the likelihood of reaching an agreement diminishes; divulge too much, and you open yourself to loss of competitive information if the deal talks cease.” James B. Wright, *Pitfalls of Poaching Employees After A Deal Craters*, Buchalter Nemer PLC (Apr. 1, 2007), <http://www.buchalter.com/publication/pitfalls-of-poaching-employees-after-a-deal-craters/>.

And, as CEO Sandhu explained, there were reasons why this particular suitor (EBS and Gil) were especially not to be trusted.

Thus, CEO Sandhu established (and CTO Tolat knew) that important information related to Integral's business strategy were "trade secrets" as defined in [California Civil Code § 3426.1, subsection \(d\)](#): "information . . . that [d]erives independent economic value, actual or potential, from not being generally known to the public or other persons [EBS] who can obtain economic value from its disclosure."

***49** Despite this knowledge, on September 4, 2012, while still CTO of Integral, Tolat sent to EBS his super-sized resume, and he included in that resume the following information about Integral's business, all without telling anyone at Integral he was doing so:

- "Number of employees overall;
- Number of employees managed by Viral on his Products and Services Team;
- The Company's efforts to hire a * * *;
- Details of the creation of Integral's * * *;
- The volume of retail trades handled by * * *;
- The development of * * *;
- The number of active deployments of * * *;
- The to develop * * *;
- The number of major banking institutions * * *;
- The number of years and organization, including location and number of employees, * * *;

***50** • The use of * * *;

- The identification of * * *);
- The disclosure that * * *; and
- The disclosure of * * *."

ER 495, CER 1528-1529 at 4:11-5:10. *See also* ER 1597-1599.

Much of the above information relates to Integral's confidential plans to market its product. "[Marketing strategy and plans . . . constitute trade secrets under California law." *Whyte v. Schlage Lock Co., supra*, [101 Cal. App. 4th at 1456](#); *see also Duncan v. Stuetzle*, [76 F.3d 1480, 1488, n.11 \(9th Cir. 1996\)](#)).

Integral CFO Albert Yau described the above information as "highly confidential and valuable information" about Integral. *Ibid*.

CEO Sandhu was negotiating with EBS about a possible acquisition or investment. In this situation, information about the assets of the company must be revealed strategically--in time and amount--in order to maximize Integral's bargaining position. Cf. [*51 Competitive Tech. v. Fujitsu Ltd., 286 F. Supp. 2d 1118, 1147](#) (under California law, information about existence of confidential business negotiations can constitute a trade secret). For example, the “volume of retail trades;” “[t]he number of active deployments * * *,” and “[t]he number of major banking institutions using * * *” are key pieces of highly secret information that EBS could use in establishing its negotiating position and any offer.

Revealing this sort of information to the CEO of EBS was like an assistant coach of the San Francisco 49'ers slipping the team's playbook to the Oakland Raiders' coach right before a game against the Raiders. During the game, the Raiders might learn most of the 49'ers plays anyway, but having that information *before the end of the game* could enable the Raiders to take unfair advantage of the 49'ers. Same with EBS--as Tolat well knew.

Disclosure of each of these items gave EBS important information that it could use either in acquiring Integral at a bargain price or, if negotiations failed, in directly competing with Integral:

- “Number of employees overall.”

An experienced rival could use this information to extrapolate the size of Integral's market and revenue.

[*52](#) • “Number of employees managed by Viral on his Product and Services Team” and “The Company's efforts to hire * * *.”

This was Integral's research and development department. EBS could use this information to estimate Integral's ability to innovate products in the future.

- “Details of the creation of * * *.”

These details were key to Integral's success and would be highly valued by any competitor.

- “The volume of retail trades handled by * * *.”

From this, EBS could extrapolate Integral's market share, and use this in negotiations with Integral.

- “The development of * * *.”

* * * was critical to Integral's * * *

- “The number of active deployments of * * *.”

This too was and is very sensitive information about market share.

***53** • “The time to develop * * *.”

From this, EBS could estimate how long it would take them to develop their own platform, and decide how much to offer to acquire Integral's technology instead.

- “The number of major banking institutions * * *.”

More very sensitive information about market share.

- “The number of years and organization, including location and number of employees, * * *.”

A competitor seeking to poach Integral's employees could use this information to find them.

- “The use of * * *.”
- The identification of * * *
- “The disclosure that * * *.”

***54** • “The disclosure of * * *.”

These multiple items provided EBS with knowledge of Integral's languages, open source components, core services and products, and operational details. This would enable EBS to develop a viable substitute and persuade potential customers that its product would be better than Integral's, and how they could easily switch over to EBS's product.

2. Integral's Evidence Specifically Described Trade Secrets That Tolat Disclosed To EBS About Integral's Source Code.

“[S]ource code’ describes the text in which computer programs are originally written by their human authors using a high-level programming language.” [Silvaco Data Sys. v. Intel Corp., 184 Cal. App. 4th 210, 217 \(2010\)](#) (disapproved on other grounds in [Kwikset v. Superior Court, 51 Cal. 4th 310, 337 \(2011\)](#)).

“[T]he source code for many if not most commercial software products is a secret.” [Silvaco](#) at 218; see also [Agency Solutions.Com. LLC v. TriZetto Group, Inc., 819 F. Supp. 2d 1001, 1028 \(E.D. Cal. 2011\)](#) (“while computer source code is a trade secret, the way it operates is not”).

***55** Integral's source code "is the company's life blood, and its value is inestimable, since Integral licenses its technology on a spectrum. . . ." ER 504, CER 1532 at 13:8--15.

Keeping Integral's source code secret is crucial, because "[i]f prospective licensees were able to obtain copies of Integral's source code outside of the nondisclosure agreements which Integral requires of its licensees, they would have no need to pay royalties to Integral." ER 504, CER 1532 at 13:16--20. Even Tolat admitted that Integral's source code included "code developed internally at Integral". ER 170, CER 973 at 4:9--11.

But the District Court "found" that Integral failed "to identify the specific source code files and the information contained within them," and this failure "is fatal to its claim. Listing hundreds of file names without identifying the trade secret information contained within the files, [sic] is insufficient." ER 18 at 5:14--17.

This statement is baffling because CFO Yau, specifically described the key component of the source code, the * * *, in detail: "a highly technical computer program which provides the key to implementing relationship-based trading on forex aggregation services by 'bridging,' as the name indicates, a third party's market-leading retain foreign exchange trading front-end (where the user interfaces with the market) with Integral's back-end platform ***56** (where the transactions are actually consummated) of FX OTC transactions. This specific program has contributed significantly to Integral's growth in the retail broker customer segment, which was Integral's fastest growing customer segment in 2012." ER 504--505, CER 1537--1538 at 13:24--14:5. It took Integral * * * work time to develop this program. ER 505, CER 1538 at 14:6--9.

What more could Integral have done to describe the source code--other than presenting it *in full* to the District Court, a task that would have overwhelmed the Court with paper? Indeed, the thousands of pages would have been incomprehensible to any person not an FX engineer or FX software expert with extensive experience with software creation in the foreign exchange industry. *Compare Silvaco, supra*, 101 Cal. App. 4th at 220 ("The designation did not set forth the code itself, which presumably was voluminous, but referred to files that were contemporaneously produced on

optical disks”). Integral's source code was written by and for technical experts, not for lay people. It would not be understood by lay persons on a jury, who would have found both Barkhordarian's and Yau's description much more intelligible. At trial, the jury would have been guided by Barkhordarian's and Yau's expert testimony, not by the raw source code itself.

On summary judgment, the issue is simply whether there is an issue of fact *triable to a jury*. If so, the Court must view the evidence as an ordinary juror would, not as a specialist in the field might. Compare [*57 Brocade Commc'ns Sys., Inc. v. A10 Networks, Inc., 873 F. Supp. 2d 1192, 1213 \(N. D. Cal. 2012\)](#), where the court denied a motion for summary judgment, *rejecting* defendant's argument that the description was not sufficiently particular because plaintiff “only offer conclusory expert testimony and 30(b)(6) witness testimony.”

The above descriptions are nothing like those that courts have held to be too vague. In *FormFactor, Inc. v. Micro-Probe, Inc.*, [2012 WL 2061529 \(N.D. Cal. Nov. 1, 2012\)](#), vacated by stipulation of the parties, [2012 WL 6554220](#), the Court held that the plaintiff failed to describe the information with sufficient particularity because there was *no* evidence describing the subject matter of the information. And in *Whyte v. Schlage Lock Co.*, *supra*, the Court held that “[i]nformation about Schlage's new products' is too broad to enforce because it does not differentiate between truly secret information (such as formulas and product design) and new product information which has been publicly disclosed.” [101 Cal. App. 4th at 1454](#). Yau's description is much more detailed than mere “information about . . . new products.” Neither case involves facts similar to the facts of the present case.

3. Integral's Evidence Specifically Described Other Trade Secrets That Tolat Transferred.

Patrick Barkhordarian, Integral's Chief Research Officer, described in detail the additional files that Tolat uploaded:

[*58](#) * * *

[*59](#) CER 1084 at 9:3-10:4.

Integral treated all these documents as “trade secret information.” CER 1084 at 9:3-7. “[S]uch technical “know-how” is the quintessential trade secret.” *Whyte v. Schlage Lock Co., supra, 101 Cal. App. 4th at 1456*. And a “seller's roadmap of how to market and implement its products” has also been held to be a trade secret. *Lizalde v. Advanced Planning Servs., supra, 875 F. Supp. 2d 1150*.

60** **4. *Integral Used Reasonable Efforts To Protect This Information As Trade Secret.

It is undisputed that Integral also satisfied the statutory requirement that it make reasonable efforts to keep the information secret. “[R]easonable efforts to maintain secrecy have been held to include advising employees of the existence of a trade secret, limiting access to a trade secret on ‘need to know basis,’ and controlling plant access,” and “Requiring employees to sign confidentiality agreements is a reasonable step to ensure secrecy.” *Whyte v. Schlage Lock Co., supra, 101 Cal. App. 4th at 1454*. Integral did all of these things.

Indeed, Integral went much further. Integral guards its source code with a control system that requires credentials for logging on, and for checking in and out code modules. CER 1227--1228 at 90:27--91:3. It is backed up by secure servers in a room accessible by electronic key pad, to which only certain employees have access. *Ibid.*

61** **B. *The Evidence Would Permit A Jury To Find That Tolat Misappropriated Integral's Trade Secrets.

1. *Tolat Misappropriated Integral's Business Secrets.*

“Misappropriation” is, generally speaking, improper acquisition of a trade secret or its nonconsensual use or disclosure.” *Whyte v. Schlage Lock Co., supra, 101 Cal. App. 4th at 1457*. California Civil Code § 3426.1, subsection (b), defines “misappropriation” as:

- (1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
- (2) Disclosure or use of a trade secret of another without express or implied consent by a person who:

- (A) Used improper means to acquire knowledge of the trade secret; or
- (B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:
 - (i) Derived from or through a person who had utilized improper means to acquire it;
 - (ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
 - (iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
- (C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

While still CTO of Integral--indeed, *several months* before he left Integral--Tolat sent to EBS his resume containing the trade secret information described above. Tolat knew that EBS was one of Integral's chief rivals and that *62 EBS was dying to learn more about EBS, so that EBS could acquire Integral and/or Integral's technology at the lowest possible price. The evidence of Tolat's conduct would permit a reasonable jury to find that Tolat had disclosed these trade secrets "without express or implied consent by a person who (B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was (ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use. . . ."

2. Tolat Misappropriated Integral's Technological Secrets.

As CTO, Tolat knew that Integral keeps its source code secure. CER 1231 at 95:21--22. Integral's policy manual expressly states that, "Due to the nature of Integral's products and technology, access to product source codes is strictly limited to company premises." CER 1253. Tolat knew about these security protections. CER 1228 at 91:4--5.

Nevertheless, as recently as November 5--only two days before he announced his "first" resignation--Tolat secretly downloaded Integral's source code without notice to anyone at Integral. Tolat told no one at Integral that he was doing this, he had no Integral-related business reason to download all these

files, and he knew he was violating Integral's security rules by doing so. ER 90 at 19:11--20:9.

***63** Did Total pass this information on to EBS? While the evidence shows that Tolat sent his *resume* to EBS, we were not able to uncover a smoking gun showing that he gave Integral's *source code* to EBS. We found no memo, e-mail, or recording of Tolat effectively saying to Gil: "Here it is, Gil, Integral's crown jewel."

But such *direct* evidence is not required. *Circumstantial* evidence is just as good as direct evidence to prove a fact. As this Court has held, "circumstantial evidence is not inherently less probative than direct evidence. Under some conditions it may even be more reliable. . . ." *U.S. v. Nelson*, 419 F.2d 1237, 1239 (9th Cir. 1969); see also *U.S. v. Brady*, 579 F.2d 1121, 1127 (9th Cir. 1978), *cert. denied* 439 U.S. 1074), where this Court held that "circumstantial evidence is intrinsically no different from direct evidence." Here, the following circumstances--viewed together--would permit a jury to infer that Total did in fact share Integral's source code with EBS:

- Tolat--not EBS--had initiated his effort to work for EBS.
- Tolat then sought to ingratiate himself with EBS by supplying EBS with confidential information about Integral, multiple times. In September of 2012, Tolat included confidential information in the resume he sent to EBS. In October, Tolat asked to show EBS's Chief Financial Officer "a hard copy ***64** of the [Integral's] last financials." CER 1881. And in November, Tolat told Mandelzis the confidential price of Integral's stock.
- EBS told Tolat that EBS wanted to hire Tolat to develop a platform ("EBS Direct") that would compete with Integral's platform. ER 500, CER 1533 at 9:4-8. But Tolat failed to share that information with Integral, even though he then worked for Integral and had a duty to further Integral's interests. ER 498, CER 1531 at 7:6-9.
- Just two days before he told Integral that he was resigning--when Tolat should have been *returning* Integral's property--Tolat instead downloaded Integral's entire source code: over 270,000 files in a folder structure of more than 11,000 directories, totaling nearly 23 gigabytes of data. ER 1226 at 89:1-6. Tolat knew that this massive downloading violated Integral's security policies.

- At that time, Tolat had no need to use the source code to perform his duties at Integral--while he knew that EBS had expressed a strong need to acquire Integral's technology. "Gil and EBS were eager to license Integral's technology" ER 495, CER 1528 at 4:5-9.

- Tolat also uploaded numerous unauthorized copies of trade secret and highly confidential files on to a personal online Dropbox account shortly before leaving Integral. ER 1226 at 89:7-10.

***65** Intent to misappropriate may be shown by defendant's "lack of forthrightness both in his activities before accepting his job . . . and in his testimony." *Whyte v. Schlage Lock Co., supra, 101 Cal. App. 4th at 1459*. See also *Proudfoot Consulting Co. v. Gordon, 576 Fed. 3d 1223, 1236, n.13 (11th Cir. 2009)*; *PepsiCo, Inc. v. Redmond, 54 Fed. 3d 1262, 1270 (7th Cir. 1995)*.

Tolat was less than forthright in the following respects:

- While working for Integral, he learned that EBS was planning to develop a competing product, but withheld this crucial information from Integral.

- He told Gil that "no one knows I'm talking to you so any conversation you have [with Integral about acquisition or licensing] would have to be veiled in potential interest in Integral or questions about Integral's technology." ER 500, CER 1553 at 9:21-24.

- He refused to engage in an exit interview.

- At his deposition, he denied that he had made any copies of the source code. ER 280-281, CER 1077-1078 at 2:24-3:2. Later, however, he admitted that he downloaded the source code to "local copies" on his hard drive. ER 279, CER 1076 at 1:12-15; see also ER 343.

- He tried to conceal from Integral his downloading of the source code--in fact he later tried to *erase* his digital tracks from his two computers and his ***66** uploading of confidential documents to his Google account--and then to cover up the erasure.

- After Tolat joined EBS, EBS became able to bring a competing product to market within a short time. EBS CEO Mandelzis admitted that before EBS hired Tolat, EBS had little to no experience in aggregation. ER 493, CER 1526 at 2:6-26. However, on November 27, 2012--soon after EBS had agreed to hire Tolat--EBS announced that it intended to launch EBS Direct, a product that would directly compete with Integral's product. ER 536, CER

1257 at 1:14-16. Less than six months later, EBS began signing up 300 banks for the product (ER 536, CER 1257 at 1:18-21), and EBS brought the product to market less than one year after its initial announcement (ER 536, CER 1257 at 1:21-22). Integral CEO Harpal Sandu testified that, in his experience, this time frame is “extremely short.” ER 537, CER 1258 at 1:23-27]. “* * *” ER 538, CER 1259 at 2:1-4. See [Anaconda Co. v. Metric Tool & Die Co.](#), 485 F. Supp. 410, 418-419 (E.D. Pa. 1980) (bringing product to market in unusually short time is circumstantial evidence of misappropriation).

***67** The District Court's Order discusses *only this last point*, stating that “[t]his Court does not find persuasive Integral's conclusion that Tolat must have shared its trade secret information with EBS because the company was able to get a competitive product to market more quickly than Integral.” ER 20 at 7:15--18. There are two problems with this “finding”:

First, this statement of what the Court “does not find”--like several other statements in the District Court's order--reads like a statement of decision after a bench trial, rather than a ruling on whether there is a triable issue of fact for a jury. “Does not find” is a far cry from “there is no triable issue of fact.”

Second, this statement ignores *all the other* items of evidence listed above. Viewed in isolation, there might be some innocent explanations for each of these events, but a jury could put them *together* to infer reasonably a guilty explanation: in exchange for the value Tolat received, Tolat disclosed Integral's source code to EBS.

C. The Evidence Would Permit A Jury To Find That Tolat's Wrongdoing Caused Integral to Suffer Substantial Damages.

[California Civil Code § 3426.3](#) sets out the damages allowed by California's trade secret misappropriation law:

(a) 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.

***68** (b) If neither damages nor unjust enrichment caused by misappropriation are provable, the court may order payment of a reasonable

royalty for no longer than the period of time the use could have been prohibited.

(c) If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subdivision (a) or (b).

Applying only the first sentence of subsection (a), the District Court held that Integral's evidence “does not demonstrate resulting damage, because Integral's claim for \$10 million in damages was not supported “with actual evidence in the record that a drop in its revenue stream was caused by any alleged misappropriation by Tolat.” ER 21 at 8:3--11. This finding is incorrect. See [Restatement \(Second\) of Contracts § 351 \(1981\)](#): “It is enough, however, that the loss was foreseeable as a probable, as distinguished from a necessary, result of his breach.” The circumstantial evidence described above raises a triable issue that it is “probable” that Tolat's misappropriation caused Integral to suffer actual damages due to the effects on profits of (1) lost financing, (2) lost sales and profits, and (3) reduced valuation. No expert or other testimony of Tolat proved otherwise.

Second, unjust enrichment exists in the savings EBS achieved from Tolat from Tolat's wrongdoing.

Third, the District Court overlooked [subsection \(b\) of § 3426.3](#), which specifically addresses cases in which it is unusually difficult to prove damages or where unjust enrichment cannot be readily proved. At a minimum, the Court *69 should have held that there is a triable issue of fact regarding the amount of a “reasonable royalty” for the trade secrets that Tolat misappropriated, but failed to do so.

II. The Evidence Raised A Triable Issue Of Fact On Integral's Claim for Breach of Fiduciary Duty.

The District Court ruled that Integral's common law tort claims for breach of fiduciary duty, breach of contract, breach of loyalty, and intentional interference with prospective economic advantage are preempted by California's Uniform Trade Secrets Act. ER 21 at 8:17--9:13.

In addition, “the Court finds that each of Integral's breach of contract and common law tort claims lack merit.” ER 22 at 9:14--15.

To the extent that the Integral information Tolat stole were in fact trade secrets, we do not challenge the District Court's ruling that Integral's non-contract claims are statutorily preempted. *Silvaco Data Sys. v. Intel Corp.*, *supra*, held that CUTSA preempts *non-contract* claims based on misappropriation of trade secrets. [¶184 Cal. App. 4th at 236](#).

If, however, this Court holds that the information were *not* trade secrets, the information was nevertheless confidential, and Integral may proceed on its claim for breach of fiduciary duty. See *Imax Corp. v. Cinema Tech., Inc.*, [152 F.3d 1161, 1169 \(9th Cir. 1998\)](#) (“a plaintiff can maintain a common law unfair competition claim regardless of whether it demonstrates a legally protectable trade secret.”); [*70 City Solutions, Inc. v. Clear Channel Commc'ns, 365 F.3d 835, 842 \(9th Cir. 2004\)](#) (upholding jury verdict on plaintiff's unfair competition claim based on jury finding that defendant's misappropriated plaintiff's “confidential and proprietary business strategy”, despite a jury finding that defendant had not violated the CUTSA).

In addition, the evidence shows that Tolat breached his fiduciary duty to Integral in other ways, including failing to tell Integral about EBS's plans to develop a product that would compete with Integral's.

[*71](#) **III. *The Evidence Raised A Triable Issue Of Fact On Integral's Claim for Breach of Contract.***

The District Court erred in holding that Integral's claim for breach of contract was preempted--even if the information were in fact trade secrets.

A. *This Claim Is Not Preempted By California's Uniform Trade Secrets Act.*

California's trade secrets law, in Civil Code [§ 3426.7 \(b\)](#), expressly provides that it does *not* preempt actions for breach of contract: “This title does not affect (1) contractual remedies, whether or not based upon misappropriation of a trade secret”

In *Silvaco Data Systems v. Intel Corp.*, *supra*, the court held that CUTSA preempts most remedies, but not contractual remedies. Speaking of plaintiff's claims, the court held: “*Since none of them sounds in contract, they are all*

superseded by CUTSA, and none of them states a cause of action independent of that act.” [F3184 Cal. App. 4th at 236](#) (Emphasis added.)

More recently, in [Angelica Textile Services, Inc. v. Jaye Park, 220 Cal. App. 4th 495, 507 \(2013\)](#), the court held: “Angelica's breach of contract cause of action against Park was not displaced by CUTSA. As Angelica points out, breach of contract claims, even when they are based on misappropriation or misuse of a trade secret, are not displaced by UTSA. ([Cal. Civ. Code § 3426.7, subd. \(b\)\(1\)](#)).”

***72** The District Court cited a single case--a federal district court opinion--to support its ruling that CUTSA preempts breach of contract claims that are based on misappropriation of trade secrets: [First Advantage Background Servs. Corp. v. Private Eyes, Inc., 569 F. Supp. 2d 929, 936--937 \(N.D.Cal. 2008\)](#). In *First Advantage*, the court did hold that CUTSA preempted plaintiff's claim for common law “breach of confidence,” even though plaintiff alleged that the breach stemmed from the breach of an agreement. The court said that “The only difference alleged is the existence of a contract, which is inadequate to avoid preemption.” *Id.* The court was mistaken, having overlooked CUTSA's non-preemption of contract claims. See [Cal. Civ. Code § 3426.7\(b\)](#). At that time--before *Silvaco* and *Angelica* were decided--there was apparently no reported California case that had addressed this issue. In the present case, the District Court did acknowledge *Angelica's* holding, preceding it with “*cf.*” But “*contra*” would seem more fitting. And why the Court would prefer a single federal district court case that predated two California appellate decisions applying California's own statute is puzzling.

B. The Evidence Would Permit a Jury to Find That Tolat Breached His Contract With Integral.

The above-described evidence shows that Tolat breached his contract with Integral by supplying Integral's confidential information to EBS--*whether or not* that information constituted Integral “trade secrets.”

***73** Tolat signed a Confidentiality and Inventions Agreement, in which Tolat promised:

- “I will devote my best efforts to the interests of the Company and will not engage in other employment or in any activities detrimental to the best interests of the Company without the prior written consent of the Company.”
- “Confidential Information' means any information pertaining to any aspects of the Company's business which is either information not known by the public or by actual or potential competitors of the Company . . . , whether of a technical or financial nature or otherwise.”
- “I agree to hold in confidence and not directly or indirectly to use or to disclose, either during or after termination of my employment . . . , any Confidential Information I obtain or created during the period of my employment. . . .”
- “I agree not to make copies of such Confidential Information except as authorized by the Company”
- “I agree to abide faithfully by all Company rules, regulations and policies.”
- “Any breach of this Agreement likely will cause irreparable harm to the Company for which money damages could not reasonably or adequately compensate the Company.”

ER 49-50.

***74** The *direct* evidence described above shows that Tolat breached this agreement by sending his resume containing Integral's trade secret and confidential information to EBS. No authorization existed for this. And the *circumstantial* evidence described above shows that Tolat *again* breached the confidentiality agreement by delivering Integral's source code to EBS. Indeed, Tolat was *expressly* directed *not* to engage with EBS at this time. The above evidence also shows that these breaches caused Integral to suffer actual damages, due to the breach's effects on lost financing, lost sales and profits, and lost enterprise valuation. In California, a plaintiff may recover damages where defendant's breach was a “substantial factor” in causing the damages, even if other factors also contributed to the loss. *Haley v. Casa Del Rey Homeowners Ass'n*, 153 Cal. App. 4th 863, 871 (2007); *Bruckman v. Parliament Escrow Corp.*, 190 Cal. App. 3d 1051, 1063 (1987). And in *Meister v. Mensinger*, 230 Cal. App. 4th 381 (2014), the court summarized California's general approach to what constitutes sufficient evidence of damages:

“Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty.’ (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 873.) “The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. [Citation.] This is especially true where . . . it is the wrongful acts of the defendant . . . that have caused the other party to not realize a profit to which that party is entitled.” [*Id.* at 396--397.]

***75** *IV. The Evidence Raised A Triable Issue Of Fact On Integral's Claim For Copyright Infringement.*

The District Court noted that “there is no dispute that Tolat had the authority to and *did in fact download copyrightable materials.*” ER 25 at 12:22--23. (Emphasis added). Those materials were included in Integral's source code. The District Court concluded, however, that “Integral's conclusion that the copied source code was used for illegitimate purpose [*sic*] is not supported by the evidence, as addressed in the Court's analysis on the claim for misappropriation.” ER 25 at 12:26--28.

As shown above, however, Integral presented circumstantial evidence sufficient to raise a triable issue of fact that that Tolat did in fact misappropriate the source code, by improperly taking it with him to EBS. As the source code included copyrighted materials that were downloaded without permission, the District Court erred in ruling that there was no triable issue of fact on this claim.

***76** *CONCLUSION*

What Tolat did threatens the integrity of every company in Silicon Valley. Many people in the high-tech community are waiting to see if our courts will provide a forum for holding Tolat accountable. If he avoids accountability, other less-than-ethical executives are bound to follow his path. The summary judgment should be reversed, so this case can proceed to trial.

Footnotes

Confidential Excerpts of Record.”

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In December 2012, EBS reported trading volume at a six-year low. Stephen L. Bernard, *Foreign-Exchange Trading Volume Jumped on EBS Platform in February*, Wall St. J., Mar. 6, 2013.