

2015 WL 1407076 (C.A.9) (Appellate Brief)
United States Court of Appeals, Ninth Circuit.

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

No. 14-16629.

March 16, 2015.

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 Reply Brief for Plaintiff-Appellant

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I. Tolat Ignores This Court's Standard of Review.

At Brief of Appellee (“BA”) 6--16, Tolat presents an excellent “Factual Background” “excellent as Tolat's closing argument to a jury. It consists solely of *Tolat's* evidence, mentioning none of Integral's evidence. Indeed, the citations in Tolat's “Factual Background” consist of his own declarations (which appear at ER 166--178, ER 405--415, and CER 969--981).

“Believe us, not them” is an acceptable argument to a jury. But this Court does not sit as a jury, nor did the District Court. On *de novo* review of summary judgment, this Court decides whether the *non*-moving party's evidence would allow a jury to find for that party. This Court views conflicting evidence “in the light most favorable to the non-moving party.” *Ventura Packers, Inc. v. F/V Jeanine Kathleen*, [305 F.3d 913, 916 \(9th Cir. 2002\)](#).

The remainder of Tolat's brief continues in this vein, frequently relying only on his own evidence.

Tolat does criticize some of Integral's evidence, but fails to acknowledge the rule that the Court should also draw all *reasonable inferences* from the non-moving party's evidence. *See, e.g., American Civil Liberties Union of Nev. v. City of Las Vegas*, [333 F.3d 1092, 1097 \(9th Cir. 2003\)](#) (the reviewing court will give “the nonmoving party in each instance the benefit of all reasonable inferences”); *6 *Hopper v. City of Pasco*, [241 F.3d 1067, 1078 \(9th Cir. 2001\)](#) (“the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . . The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his [or her] favor”).

A summary judgment must be reversed if the non-moving party's evidence raises a triable issue of fact on *any one* of its causes of action. Integral's evidence, along with inferences reasonably drawn from that evidence, raises a triable issue on *each* of its causes of action.

II. The Evidence Raises A Reasonable Inference That Tolat Misappropriated Integral's Trade Secrets.

A. The Evidence Raises A Reasonable Inference That The Information Included Trade Secrets.

1. Tolat's Resume Contained Trade Secrets.

At AOB 47--54, Plaintiff presented evidence showing that the “super-sized” resume that Tolat sent to EBS included Integral's trade secrets. At BA 24, Tolat disagrees.

Under CUTSA, “[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 \(2002\)](#). Even a single trade secret will defeat an effort to keep a case from a jury. *Lizalde v. Advanced Planning Servs., Inc.*, [875 F. Supp.2d 1150, 1166 \(S.D. Cal. 2012\)](#).

a. Integral did not waive this issue on appeal.

At BA 24--25, Tolat argues that Integral failed to “argue” the resume in the trial court. A party may, however, raise a new argument on appeal; he is barred only from making a new *claim* on appeal. *Yee v. City of Escondido*, [503 U.S. 519, 534 \(1992\)](#). In any event, the resume is evidence, not argument. And Integral did in fact specifically cite the resume to the trial court. Integral's memo of points and authorities directed the trial court to “documented *8 evidence of . . . [Tolat's] active assistance of a direct competitor while still on Integral's payroll and his direct disclosures and other misappropriations in violation of Integral's rights.” The memo then directed the court to “Tolat's resume, sent to EBS on September 4, 2012.” The memo then cited specific paragraphs of the Declaration of Albert Yau. CSER 289:1--11. Mr. Yau's Declaration appears at CER 1524, where he discusses the resume (at CER 1528:11--1529:12). The resume itself appears at CER 1597--1599.

At BA 24, Tolat notes that Integral presented this evidence with its own motion for summary judgment. But the trial court ruled on *both* motions at the same time. In its single ruling on both cross-motions, the trial court stated that it considered the resume and Integral's argument about it when granting Tolat's motion, as well as while denying Integral's motion. In its Order, the trial court stated: "For all the reasons the Court grants Tolat's motion for summary judgment, it denies Integral's motion." ER 26:13--14.

b. Tolat's resume included Integral's trade secrets.

At BA 25, Tolat argues that his resume "contains only generic and publicly-available information concerning the company, its products and Tolat's role in developing them."

***9** But Tolat's resume included at least fourteen trade secrets, listed at AOB 51-54. Plaintiff explained there why each of these involved information that satisfies the two elements defining a trade secret: (1) it is "valuable because it is unknown to others", and (2) Integral attempted to keep it secret.

Tolat's brief addresses only 2 of these 14 items, apparently conceding that the other 12 did indeed constitute trade secrets. Integral CFO Albert Yau testified that all 14 items were "highly confidential and valuable information about Integral" (CER 1528). Tolat calls this a mere "unsupported conclusion." But Tolat overlooks Integral's *further* evidence that when Tolat sent this information to EBS, Tolat knew that CEO Sandhu was then negotiating with EBS about a possible acquisition or investment. Sandhu had concluded "* * * CER 1296. (Emphasis added). From this evidence, a reasonable juror could infer that Tolat knew that, in this delicate setting, the details that he gave to EBS-- especially Integral's "volume of retail trades," "[t]he number of active deployments * * * and "[t]he number of major banking institutions using * * *"--were key pieces of highly ***10** secret economically valuable information that EBS might use in establishing its negotiating position and in compiling any offer.

The only two items Tolat challenges are (1) details of Integral's MT4 Bridge, and (2) the time it took * * * to develop aggregation functionalities on Integral's FX Grid and FX Inside software platforms. At BA 26--27, Tolat

claims that the details of MT4 Bridge were insufficient to constitute a trade secret, and that the five-year time period was no trade secret. Tolat is mistaken as to both.

Tolat's resume included substantial non-public information regarding the MT4 Bridge program. For example, Tolat disclosed that Integral did * * *. CER 1598. Dr. Barkhordarian explained that Integral's Board * * *," and noted that * * *" CER 1084.

The fact that it took Integral * * * to develop the information also was economically valuable and secret. It was not disclosed outside of Integral, and knowing this fact would make it far easier for a rival to plan its own business and development schedule. CER 1532. Knowing this fact allowed EBS to infer the *11 costs in time and money for a build-or-buy decision on a similar project, and factor that into its ongoing negotiations with Integral. CER 1260. Tolat's resume further disclosed to EBS that FX Grid and FX Inside * * *, and that * * *. CER 1598. Thus, Tolat disclosed * * *. in addition to the key features that make it useful and valuable for customers. CER 1528. Indeed, the fact that Tolat never sought approval for disclosure of any of this information to anyone is itself telling: a jury could reasonably infer that Tolat sought to hide from Integral the fact that he was communicating trade secrets to a direct competitor and his refusal to disclose at all what he was doing proves that. Tolat is free to argue otherwise to a jury, but there is a material dispute of fact.

***12 2. Integral's Source Code Includes Integral Trade Secrets.**

At AOB 54--57, Plaintiff presented evidence that Integral's source code includes trade secrets. At BA 28, Tolat disagrees, claiming that more specificity was required for any computer software to comprise a trade secret under California law.

Tolat relies on *Social Apps, LLC. v. Zynga, Inc.*, [2012 U.S. Dist. LEXIS 75900, 2012 WL 2203063 \(N.D. Cal. Jun. 14, 2012\)](#), an unpublished district court case involving a discovery dispute, not a motion for summary judgment. There, the defendant needed to know exactly what plaintiff was claiming in

order to prepare for trial. The case did not involve the question of how much specificity is required to permit a jury to rule for the non-moving party. Tolat also relies on *Silvaco Data Sys. v. Intel Corp.*, [184 Cal. App. 4th 210 \(2010\)](#). There, however, the court began its analysis by stating: “The chief question presented is whether Intel could be liable for such use if, *as was effectively undisputed, it never possessed or had access to the source code* but only had executable, machine-readable code compiled by its supplier from source code.” [Id. at 215](#); emphasis added. In the present case, however, whether EBS “possessed or had access to” Integral's source code--by getting it from Tolat--is disputed.


***13** Tolat further relies on [FormFactor, Inc. v. Micro-Probe, Inc., 2012 U.S. Dist. LEXIS 79359, 2012 WL 2061520 \(N.D. Cal. Jun. 7, 2012\)](#).¹ There, however, evidence of trade secrets in the source code was insufficiently specific because plaintiff furnished only lists of files, and “None of these lists sufficiently identifies the trade secrets with particularity, in part because of the very size of the lists, and in part because many of the entries consist of a mere listing of names of computer files.” *Id.* at *16. The present case involved no “mere listing of names”. CFO Yau specifically described the key component of the source code, the MT4 Bridge program, 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 (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.]

At BA 30, Tolat contends that Integral waived this “argument”, because this evidence was discussed in Integral's motion, not in its opposition to Tolat's motion. But as noted above, the trial court considered all evidence submitted on both cross-motions when ruling on the motions. “For all the reasons the Court ***14** grants Tolat's motion for summary judgment, it denies Integral's motion.” ER 26:13--14.

At BA 30, Tolat also contends that the MT4Bridge program is not source code, but only “an executable software program” that Integral provided to its own customers. While * * * is indeed the executable version of the program, Integral *also* identified the *source code itself* separately as a trade secret - both as to the code itself and as to multiple related documents that further detail why that source code is valuable and what it contains. *See, e.g.*, SCER 389 (direct reference to the source code, stating, “MetaTrader 4 Bridge (also known as ‘IDC MT4 Bridge’ ”), SCER 395 (“51. MT4.pdf”), SCER 396 (“88. MT4.pdf”), and SCER 401 (“13. MT4 model Aug 2012-vvt.xlsx”).

Tolat contends (at BA 31--32) that Mr. Yau's description is too vague, because it does not include “the specific methods and algorithms used by the developer to create unique characteristics of the program.” Disclosure of specific algorithms is a requirement of patent law, but no California case requires this under the California Uniform Trade Secret Act. Source code is valuable for both what it implements and potentially how it is implemented. A new feature for software that is not distributed to the public can be a trade secret, even if the specific methodology or implementation algorithm within the source code itself is more generally known. These are separate concepts in computer program coding *15 that can and often do create mutually reinforcing trade secrets, but do not necessarily have to go together.

Integral's algorithms implementing this program may well be trade secrets, but that analysis is unnecessary and overly complicated where *all* of the code was taken--as happened here--and therefore the more fundamental secrets of Integral were misappropriated.

To use the language adopted in copyright law comparisons for source code in this Circuit, the level of abstraction for the analysis and comparison here is at a higher level of features and functionalities than the more granular analysis of comparing algorithms or methods. *Cf.*  *Brown Bag Software v. Symantec Corp.*, [960 F.2d 1465, 1475 \(9th Cir. 1992\)](#). No part of the California Uniform Trade Secret Act (or any cases under it) disqualifies as trade secrets the specific computer software that Integral set forth and which Tolat admitted was Integral's trade secrets.

Nor is a new or unique algorithm required for the finding of a trade secret. Features and integrations such as those described by Mr. Yau, not generally

known, are trade secrets. Integral provided evidence that the fact that MT4 Bridge program implements “relationship based training” by connecting its trading front end with the FX OTC back-end is not generally known and is valuable, *i.e.* it has “* * * ***16**.” ER 504--505, CER 1537--1538 at 13:24-- 14:5. CUTSA does not require disclosure of algorithms or methods, and such concepts should not be imported from patent law. [Cal. Civ. Code § 3426.1\(d\)](#) requires that information (1) have independent economic value from not being generally known, and (2) be subject to reasonable efforts to maintain secrecy. Mr. Yau and Dr. Barkhordarian's testimony and other evidence in the record specifically identify Integral's source code and its economic value. Integral made reasonable efforts to maintain the secrecy of its source code, requiring nondisclosure, confidentiality and non-use agreements from its employees, contractors, consultants, customers, and business partners. CER 1230.

In addition, the entirety of Integral's source code qualifies as a trade secret because it is a *compilation*--even if every element of it separately were otherwise public knowledge (which is not the case here). “Trade secret’ means information, including a formula, pattern, *compilation*, program, device, method, technique, or process. . . .” [Cal. Civ. Code § 3426.1\(d\)](#) (emphasis added).

***17** 3. Other Documents.

At AOB 57--59, we presented evidence that Tolat disclosed to EBS five additional documents that contain Integral's trade secrets. At BA 33, Tolat disagrees.

Tolat again claims waiver of *argument*, but concedes that Integral cited in its opposition Mr. Barkhordarian's Declaration. The Declaration showed that this *evidence* raised a triable issue of fact.

Tolat argues that this Declaration is inadmissible. For several reasons, this argument has no merit. First, Tolat's objection to Barkhordarian's Declaration in the trial court appears only in a footnote (CSER 264, fn. 2). It does not appear that the trial court ever ruled on Tolat's objection, or that Tolat ever asked the court to rule on it. Tolat's failure to request a ruling

constitutes abandonment of the objection. *Ramirez v. City of Buena Park*, 530 F.3d 1012, 1026 (9th Cir. 2009). Second, Tolat waived his present claim that the Declaration was hearsay, because Tolat's footnote included no hearsay objection. Third, the hearsay claim is based on the fact that the Declaration mentions the contents of Tolat's Xoom tablet. However, those contents were introduced not for their truth, but only to show that Tolat misappropriated them.

Tolat also argues that the Barkhordarian Declaration lacks foundation, as Dr. Barkhordarian “cannot establish that he ever reviewed any of the documents” *18 found on Tolat's Xoom tablet, which were uncovered by a forensic analyst whose report Barkhordarian cited. BA 34. As an expert, however, Barkhordarian may rely on the reports of other experts. (Dr. Barkhordarian holds a Ph.D. in Electrical Engineering and Computer Systems from Stanford and was Chief Technology Officer at two companies before he joined Integral, where he became Chief Research Officer. CER 1076.)

Tolat also argues that the Xoom documents were not trade secrets. He accuses Dr. Barkhordarian of providing only “cursory descriptions” of the misappropriated documents. BA 35.

Those descriptions appear at AOB 58--59 and at ER 286--287, CER 1084--1085 at 9:3--10:4. The descriptions are lengthy and detailed, but still understandable to jurors who might well lack the technical expertise needed to comprehend computer code and the like. They can hardly be fairly described as “cursory” or inadequate under the cases Tolat relies on.

B. The Evidence Raises A Reasonable Inference That Tolat *Misappropriated* Integral Trade Secrets While He Was Still An Integral Officer and Fiduciary.

At AOB 61--67, we presented evidence that Tolat misappropriated Integral's trade secrets at least twice: by sharing both *business* secrets and *technological* secrets with Integral's competitor, EBS--all while Tolat was still on Integral's payroll, still an executive officer and still a corporate fiduciary of Integral. CER 1083--1085, 1525--1524.

Tolat sent Integral's *business* secrets to EBS when he sent his resume to EBS. Tolat repeats his argument that his resume did not contain business secrets, but he makes no argument that--assuming the resume did include business secrets--deliberately sending them to Integral's rival would not constitute misappropriation.

At AOB 63--67, we listed the many facts that add up to circumstantial evidence that Tolat also shared Integral's *technological* secrets with EBS. At BA 37. Tolat characterizes this evidence as “speculative inferences”. Once again, he relies on his own declarations (at BA 38--40)--even though an appeal of a summary judgment requires review of the non-moving party's evidence.

He does attack several items in our list, leaving others untouched. At BA 40-41, he argues that evidence that he downloaded Integral's entire source code just two days before he announced his resignation is irrelevant, because Integral *20 had generally authorized him to use the source code. Tolat overlooks, however, Integral's evidence 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. And 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.

At AOB 65--66, we noted that an intent to misappropriate might be inferred from *lack of candor*, and cited many instances in which Tolat was less than forthright with Integral. At BA 42, Tolat argues that his failure to tell Integral that EBS planned to develop a competing product is irrelevant, because Integral already knew this. But Tolat cites no evidence that Tolat *knew* that Integral knew this. At BA 42, Tolat also argues that he did

not refuse an exit interview, because he testified that he offered to meet with Integral's human resources department. [*21](#) But--as Tolat knew--human resources deals with payroll retirement, health benefits and the like, not the confidentiality issues that Integral's officers wanted to address in an exit interview.

At AOB 26 and 64, we noted evidence that Tolat gave EBS the confidential price of Integral's stock, from which EBS could calculate the value of Integral and use that secret information in its negotiations to acquire Integral. At BA 40, Tolat argues that “Tolat merely advised EBS of the price Integral had *offered* to pay him for his shares, which he was free to tell anyone he chose” A jury might reasonably infer, however, that an arms-length offer indicates the market price of the shares--and that Tolat was not “free to tell” that information to Integral's rival, when he had been expressly directed by Integral's CEO “* * *” CER 1296 (It appears that EBS in fact did use Tolat's information to estimate the total value of Integral's stock, at * * * CER 1994.) At BA 42-43, Tolat argues that the short time it took EBS to bring its competing product to market is rebutted by Tolat's evidence. Once again Tolat ignores the rule that on review of summary judgment, the appellate court accepts [*22](#) the non-moving party's evidence (which we described at AOB 662) and all inferences reasonably drawn from it.

Integral provided more than sufficient circumstantial evidence to permit a jury to reasonably infer that Tolat shared these secrets with EBS. Compare this Court's recent decision in [Cruz v. City of Anaheim, 765 F.3d 1076 \(9th Cir. 2014\)](#) (summary judgment reversed where circumstantial evidence would permit reasonable jury to find that decedent did not reach for a gun).[3](#)

C. The Evidence Raises A Reasonable Inference That The Misappropriation by Tolat *Damaged and Continues to Damage* Integral.

At AOB 67--69, we presented evidence that Tolat's misappropriation caused actual and continuing damage to Integral. At BA 44--45, Tolat disagrees. [California Civil Code § 3426.3](#) allows three separate methods of computing damages for misappropriation of trade secrets. We discussed all three.

At minimum, the third method allows a reasonable royalty where it is too difficult to ascertain actual damages with sufficient certainty. Tolat fails even to acknowledge this method, let alone provide any reason why it should not apply here. A reasonable jury can apply any (and all) of the three measures, but at a minimum, a reasonable jury can determine a reasonable royalty that must be paid as a result of the misappropriation.

III. The Evidence Raises A Triable Issue of Fact On Integral's Claim for Breach of Fiduciary Duty.

A. CUTSA Does Not Preempt This Claim.

At AOB 69, we claimed that Integral's evidence, discussed above, also showed that Tolat breached his fiduciary duty to Integral. We conceded that CUTSA preempts non-contract claims for misappropriation of trade secrets.

Nevertheless, if this Court holds that the information were *not trade secrets*, the information was still *confidential*, and Tolat breached his fiduciary duty by giving them to EBS.

At BA 45--48, Tolat disagrees. He relies on footnote 22 of *Silvaco*, where the court held that CUTSA preempted plaintiff's *conversion* claim even if the property taken was not a trade secret, because “Information that does not fit this definition, and is not otherwise made property by some provision of positive law, belongs to no one, and cannot be converted or stolen.” Tolat's claim of breach of fiduciary duty, however, is not a claim of conversion, and does not depend on characterizing his acts as the stealing of “property”.

Breach of fiduciary duty and misappropriation of trade secrets are not always congruent. One who has no fiduciary duty might steal trade secrets, and one might breach a fiduciary duty without stealing trade secrets. Tolat cites no case holding that CUTSA preempts a claim for breach of fiduciary duty.

***25** Thus far, this Court has held that CUTSA does *not* preempt all related claims. 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”);

and *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).

We submit that the reasoning of those cases also applies to a claim for breach of fiduciary duty and particularly as against an individual who violates that duty while purporting to remain an executive officer and corporate fiduciary of his full-time employer -- precisely what the evidence and reasonable inferences from it demonstrates Tolat did as against Integral and in favor of EBS in this case.

***26 B. Even If CUTSA Could Preempt Claims Based On Stealing Confidential Information, It Does Not Preempt Integral's Claim That Tolat Breached His Fiduciary Duty By *Failing* to Inform Integral of Key Information About EBS.**

Integral presented evidence--the Declaration of CFO Albert Yau--showing that while Tolat was negotiating with EBS for a new job, Tolat learned things about Integral's rival that he should have shared with Integral. Yau testified that although Tolat gave EBS information about Integral, "Viral was not at all forthcoming with Integral about the information he was learning from Integral's competitor", and that Tolat "never disclosed to any of us that EBS was planning to introduce a directly competitive FX trading platform." CER 1530:10--11, 1531:6--9. Yau also testified that "Viral has admitted that he never informed Harpal, me, or anyone at Integral that he was working with EBS, taking time away from business trips and his company responsibilities to help Gil 'reinvent a company'. . . ." CER 1530:10--14.

At BA 49--50, Tolat argues that he had no duty to disclose to EBS's plans to Integral or how he was helping EBS while he was working for Integral, because California law protects an employee's right to prepare to work for a competing employer. True, Tolat had every right to discuss generally with EBS when and how he might work for EBS. But he could have done that without such *active* interaction--learning information from EBS that would

have been valuable to his ***27** current employer, and actively assisting EBS while he was working for Integral. He did not share this information with Integral--a breach of his fiduciary duty.

***28** **IV. The Evidence Raises A Triable Issue of Fact On Integral's Claim for Breach of Contract.**

At AOB 71--74, we contended that the evidence supported Integral's claim for breach of contract. At BA 50--54, Tolat disagrees.

Tolat first contends that CUTSA preempts breach of contract claims - overlooking the express language of *Silvaco* (quoted at AOB 71) that indicates otherwise. Tolat dismisses a similar statement in *Angelica Textile Services, Inc. v. Jaye Park*, [220 Cal. App. 4th 495, 507 \(2013\)](#) as *dicta*, and then relies on several cases involving claims of “breach of confidence”, not breach of contract.

At BA 53--54, Tolat repeats the arguments he made regarding Integral's claim for misappropriation of trade secrets. Our response to those arguments applies here as well: nothing in CUTSA or any case law thereunder preempts Integral's contract claims.

***29** **V. The Evidence Raises A Triable Issue of Fact On Integral's Claim for Copyright Infringement.**

The District Court found that Tolat downloaded copyrightable materials, but rejected Integral's claim that he did so for an illegitimate purpose. At AOB 75, we contended that since those materials were part of the source code, our evidence that Tolat misappropriated the source code would also include those materials. At BA 54--59. Tolat disagrees.

***30** **A. Because Tolat Copied Integral's Entire Source Code, Comparing the Copy to the Original Is Unnecessary And There Is No Need for A Filtration Analysis.**

Where an *entire source code* is copied (as opposed to reverse engineered), an analysis under the intrinsic/extrinsic test is unnecessary. “Because Southeastern's service activities involved *copying entire programs*, there is no doubt that protected elements of the software were copied.” [Triad Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330, 1335 \(9th Cir. 1995\)](#) (emphasis added). “*In the wholesale copying* of a copyrighted operating system, a filtration analysis is not necessary.” [Sony Computer Entertainment, Inc. v. Connectix Corp., 48 F. Supp. 2d 1212, 1217 \(N.D. Cal. 1999\)](#) (emphasis added) (reversed on the basis of fair use in [Sony Computer Entertainment, Inc. v. Connectix Corp., 203 F.3d 596, 609 \(9th Cir. 2000\)](#)). As noted at AOB 75, the District Court found that Tolat had copied Integral's entire source code, mooting any argument made by Tolat that a comparison must occur or that he may merely have copied unprotectable elements. Additionally, on the day Tolat's counsel provided notice of Tolat's intention to quit, Tolat updated his unauthorized local copy with * * * MB of Integral's source code. ER 0281.

Because of the wholesale copying, [Airframe Sys. v. L-3 Commc'ns. Corp., 658 F.3d 100, 103 \(1st Cir. 2011\)](#) --relied upon by Tolat --is distinguishable. ***31** There, a comparison was necessary because the copyright holder's source code has been translated from the RPG programming language into the PHP programming language. Tolat also relies on [Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510 \(9th Cir. 1992\)](#), but that case involved an attempt at reverse engineering. Integral established its *prima facie* case of copyright ownership by the registration of its source code, and provided admissible, undisputed evidence of wholesale copying by Tolat.

***32 B. Tolat's Copying of Source Code Breached Integral's Control Systems and Company Policy.**

Integral submitted detailed evidence that Tolat knew that his copying of the source code was unauthorized. Integral has a source code control system that required all of its engineers to access the code only remotely specifically to stop anyone from making local copies. ER 0278--0280/CER 1076--1078.

Integral has written company policies that making local copies of its source code is not authorized: “* * *.” CER 1253.

Tolat admitted in his deposition that there was no need for local copies, because all of the code was stored on servers. Tolat had no Integral-related need for the source code, because he had not been directly modifying or creating code since 2012. Appellant's CSER 6:13--24. After his copying was discovered, Tolat deleted the source code, and he ran an “Eraser” program in an attempt to destroy all traces that the unauthorized copying had occurred. ER 281--282.

As a high-level and trusted fiduciary, Tolat should have stayed as far away from Integral's copyrighted source code as he could - once he began speaking with a competitor, and especially after he had decided to leave Integral and go to work for that competitor. Instead, on the same day he gave notice he was leaving Integral, Tolat engaged in wholesale copying in violation of company policy, *33 breaching company source control systems, and in dereliction of his fiduciary duties.

***34 CONCLUSION**

The District Court issued an Order which purports to reach “findings”. But that was not its task. This was no bench trial. On the parties' cross- motions for summary judgment, the Court's sole task was to seek to identify the triable issues of fact for a jury--not to summarily decide them in favor of or against one party or the other.

Integral's evidence raised multiple triable issues of fact on misappropriation of trade secrets, breach of fiduciary duty, breach of contract, and copyright infringement. Integral should be allowed to bring each of these claims to trial by jury, as is its constitutional right under the Seventh Amendment. The judgment of the District Court should be reversed.

Footnotes

1

This decision was later vacated. *See FormFactor, Inc. v. Micro-Probe, Inc.*, 2012 U.S. Dist. LEXIS 175773, 2012 WL 6554220 (N.D. Cal. Nov. 21, 2012).

2

See *Aspen Technology, Inc. v. M3 Technology, Inc.*, [569 Fed. Appx. 259, 267 \(5th Cir. 2014\)](#), where the court held that “[e]vidence of a similar product may give rise to an inference of actual use under certain circumstances,’ such as when the defendant’s product was quickly developed by someone who had recently resigned from the plaintiff-company.”

3

See also *Aspen Technology, supra*, [569 Fed. Appx. at 266](#), where the court held that “The record demonstrates that Aspen also presented *circumstantial evidence of use* by eliciting testimony that pricing is a highly individualized, confidential process; that Acuff was one of the primary negotiators for M3; that M3 directly competed against Aspen in almost all its projects; and that between 2009 and at least through early 2010--i.e., the time period Acuff worked at M3--M3 lost only one of its bids against Aspen. Furthermore, because Acuff defragmented his laptop hard drive, the district court permitted the jury to “infer that the content of those deleted ... documents or information would have been unfavorable to M3.” Given the *circumstantial evidence* presented and the two adverse-inference instructions, the jury had a legally sufficient basis from which to determine that M3 had *misappropriated* Aspen’s pricing calculators.” Emphasis added.