

For Certain Not Secret Now: Court Declines to Seal Alleged Trade Secret in Amended Complaint

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The US Court of Appeals for the Federal Circuit affirmed a decision declining to seal information in an amended complaint where the defendant failed to prove that the information was a trade secret. *DePuy Synthes Products, Inc. v. Veterinary Orthopedic Implants, Inc.*, Case No. 20-1514 (Fed. Cir. Mar. 12, 2021) (Dyk, J.)

After DePuy sued Veterinary Orthopedic Implants (VOI) for patent infringement, the district court issued a protective order providing that “supplier . . . names and identifying information” would be treated as “Highly Confidential Material—Attorney Eyes Only.” DePuy later filed an amended complaint containing such information when it joined VOI’s manufacturer as a defendant. The amended complaint disclosed the manufacturer as such and alleged additional facts about the defendants’ relationship. VOI argued that the manufacturer’s identity and additional facts about the VOI-manufacturer relationship should be sealed as trade secrets. DePuy argued that the manufacturer’s identity was already public, but took no position regarding the additional facts. After the district court declined to seal the amended complaint, VOI appealed.

The Federal Circuit first considered whether it had jurisdiction under the collateral order doctrine and whether the district court abused its discretion in denying the motion to seal.

The Federal Circuit found that it had jurisdiction under the collateral order doctrine because:

- The district court’s order conclusively determined the sealing issue.
- The sealing issue was important although unrelated to the merits of the infringement claim.
- Meaningful review after final judgment would be impossible because disclosed information can never be secret again.

On the merits, the Federal Circuit found no abuse of discretion, reasoning that there was no clear error in the district court’s finding that the manufacturer’s identity was not a trade secret where (1) the manufacturer openly advertised itself as an orthopedic manufacturer, (2) the manufacturer and VOI did not have a confidentiality agreement or a confidential relationship giving rise to an implied

obligation of confidentiality, and (3) a third-party email suggested that VOI's relationship with the manufacturer was "known within the relevant community." The Court further found no abuse of discretion in the district court's declining to seal the additional allegations despite DePuy's non-opposition because the district court was required to independently weigh the parties' interest in confidentiality against the public right of access.

Practice Note: Parties routinely seek sealing of information that may not qualify as formal trade secrets. The district court's duty to independently evaluate sealing means that parties must be prepared to articulate the particularized harm they will suffer absent sealing or risk the public disclosure of the information, even where the parties agree to treat information confidentially.

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