

Federal Appellate Court Vacates Order Denying Injunction in Biotechnology Trade Secret Dispute

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The United States Court of Appeals for the Fifth Circuit in New Orleans recently vacated an order from a Texas-based district court denying a preliminary injunction to Direct Biologics, LLC (“Direct Biologics”). The court ruled that Direct Biologics had presented sufficient evidence that its trade secret information in the hands of its former employee and business competitor, Vivex Biologics, Inc. (“Vivex”), could constitute irreparable harm if Direct Biologics could present evidence Vivex and the former employee would likely use that information during the pendency of the lawsuit. The court’s opinion offers guidance for employers facing confidential data breaches and hiring employees from competing firms.

Direct Biologics sues former employee, his new employer

Direct Biologics is a biotechnology company in the regenerative medicine field, which manufactures biologically derived pharmaceutical products, including stem cell therapies and tissue regeneration grafts. In 2018, Direct Biologics hired Adam McQueen as one of its first employees. At the time of his resignation in March of last year, McQueen served as one of Direct Biologics’ executive vice presidents. As a senior employee, McQueen participated in product development, sales, operations, and regulatory and compliance work.

Along with these responsibilities, McQueen had access to large amounts of Direct Biologics’ confidential and trade secret information. After his resignation from Direct Biologics, McQueen accepted a position as vice president of product strategy for Vivex, a direct competitor of Direct Biologics that develops and markets similar products. Direct Biologics filed suit against McQueen and Vivex, alleging that, prior to his resignation, McQueen misappropriated Direct Biologics’ confidential and trade secret information by linking his personal Dropbox account to the company’s online accounts in violation of company policy.

McQueen and Vivex, on the other hand, alleged that McQueen had not used or disclosed any of Direct Biologics’ information to Vivex and that he only linked the Dropbox accounts because he did not have a company computer or remote access to company-controlled platforms.

In April of last year, Direct Biologics moved for a preliminary injunction, asking the court to order McQueen to stop working for Vivex and to immediately return all of Direct Biologics’ confidential and

trade secret information. The district court denied the motion, finding that Direct Biologics failed to present sufficient evidence that it was irreparably harmed by McQueen's alleged actions. Direct Biologics appealed this ruling to the Fifth Circuit.

Fifth Circuit vacates district court ruling, orders further proceedings

To obtain a preliminary injunction, an order preventing a defendant from engaging in certain behavior pending the outcome of trial and the final resolution of a case, a plaintiff must establish four elements. Relevant here, a plaintiff must establish that he is likely to suffer irreparable harm without an injunction.

Irreparable harm, simply put, is harm for which it is not easy to calculate a monetary remedy. When a plaintiff's injury can easily be calculated monetarily, courts will likely decline to issue preliminary injunctive relief. In many states, including Texas, a presumption of irreparable harm can arise when a defendant discloses trade secret information to a business competitor.

In this case, the district court ruled that Direct Biologics failed to establish irreparable harm because it offered no evidence to show that a monetary remedy would be inadequate to redress McQueen's alleged misconduct. The district court based its ruling, in part, on its conclusion that there was no evidence McQueen had already used or disclosed Direct Biologics' trade secrets.

The Fifth Circuit took issue with this holding, noting that the district court needed to analyze not only whether McQueen had already used Direct Biologics' information but also whether he or Vivex were likely to use that information during the litigation if not returned. The district court also failed to consider how difficult it can be to quantify damages related to "lost opportunity to create or gain control of a new market."

Because of these issues, the Fifth Circuit vacated the district court's order denying the injunction and sent the case back to the district court to make additional factual findings about whether McQueen and Vivex were likely to use Direct Biologics' information and whether any harm that would result from that use could be calculated with monetary damages. See *Direct Biologics, L.L.C. v. Adam McQueen et al.*, No. 22-50442, United States Court of Appeals for the Fifth Circuit, April 3, 2023.

The takeaways

Departures of senior employees can often lead to thorny legal issues. When an employee with access to a company's proprietary information leaves, especially under suspicious circumstances, it is important for an employer to take stock of the situation immediately. It is prudent to examine such an employee's predeparture computer activity to determine if the employee retained any confidential data belonging to the employer and to take steps to ensure that the employee is complying with his or her post-employment obligations. Time is of the essence for any legal action arising from an employee's departure, and a company should seek legal advice immediately if it is concerned that a former employee may have taken company information or is in breach of a restrictive covenant.

On the other hand, employers hiring new employees who previously worked for a competitor should be aware of the state and federal laws prohibiting trade secret misappropriation. The federal Defend Trade Secret Act can subject a new employer to liability for its new employee's misappropriation of trade secret information belonging to a former employer. Before hiring an employee who previously worked for a competitor, a prospective employer should always ask that prospective employee if there are any restrictive covenants in place and remind the prospective employee not to take any

information from his or her previous employer. Failure to do so could result in costly and time-consuming litigation.

In either case, seeking legal advice as early as possible about a departing or incoming employee can save a company significant time and money and is always a good idea.

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