

9th Circ. Comet Ruling Spotlights Trade Secret Proof Burdens

By **Amanda Main, Bobby Ghajar and Mark Lambert** (September 11, 2026)

A single jury instruction cost a trade secret plaintiff its \$40 million verdict.

On July 14, the U.S. Court of Appeals for the Ninth Circuit reversed a \$40 million trade secret verdict in *Comet Technologies USA Inc. v. XP Power LLC*, vacating the judgment in its entirety and remanding for a new trial.[1]

The court held that the U.S. District Court for the Northern District of California's jury instructions erroneously placed the burden of proof on the defendant, rather than the plaintiff, to establish that the trade secrets at issue were "readily ascertainable by proper means" — an essential element of plaintiff's claim under the federal Defend Trade Secrets Act.

The error originated in the plaintiff's decision to voluntarily dismiss its claims under California's Uniform Trade Secrets Act during trial. Unlike the DTSA, CUTSA treats ready ascertainability as an affirmative defense that the defendant must prove.

When the plaintiff dropped its CUTSA claims, the corresponding jury instruction was no longer appropriate, but it was never corrected. In the Ninth Circuit's own words: "That was a significant change that led to the reversible instructional error."

Background

The case arose from a familiar trade secret scenario: when employees leave one company to work for a competitor and they are accused of taking their former employer's confidential and trade secret information with them.

In this case, Comet Technologies alleged that several of its engineers went to work for XP Power in the radio frequency power generator and impedance matching market, bringing with them thousands of confidential documents detailing Comet's products, research and development strategy, and underlying technologies. According to Comet, after just nine days, its former employees delivered complete designs and a development plan for competing product lines to XP Power.

Comet sued, alleging misappropriation of trade secrets under both the DTSA and CUTSA.

During trial, Comet made a strategic decision to dismiss its CUTSA claims, leaving only the federal DTSA claims. Over XP Power's objection, the district court instructed the jury that XP Power bore the burden of proving the trade secrets were readily ascertainable — an instruction appropriate under CUTSA, but not under the DTSA.

The jury awarded \$20 million in compensatory damages and \$20 million in punitive damages; the court also granted a permanent injunction and over \$17 million in attorney



Amanda Main



Bobby Ghajar



Mark Lambert

fees. XP Power appealed.

The Jury Instruction Error

The heart of the appeal was the allocation of the burden of proof on ready ascertainability. Under the DTSA, a plaintiff must prove that its trade secrets were not readily ascertainable through proper means — that is, that the information could not have been readily obtained, discovered, developed, reverse-engineered or compiled by others without significant difficulty, effort or expense.[2]

Some states, including California, take the opposite approach: Under CUTSA, ready ascertainability is an affirmative defense the defendant must prove. Once the plaintiff dropped its CUTSA claims, the jury instruction placing that burden on the defendant was erroneous.[3]

The Ninth Circuit concluded the error was not harmless. The court explained that prejudice is likely where an erroneous instruction shifts an element of a party's burden of proof and nothing about the verdict indicates the result would have been the same.

Comet argued the instructions were accurate "as a whole" because a separate instruction required it to prove independent economic value, which it contended necessarily encompassed ready ascertainability. The court disagreed, holding that independent economic value and ready ascertainability are distinct statutory elements addressing different concepts — usefulness versus secrecy — and that information can have one without the other.

Comet also argued that its evidence was so strong the jury would have reached the same result under a correct instruction. The court rejected this as well, noting that the trial record included substantial conflicting expert testimony on whether significant aspects of the trade secrets were disclosed in public patents, product bulletins or otherwise discoverable through routine methods.

Because the jury's compensatory damages award bundled together costs that may have included both protectable and readily ascertainable information, the court could not isolate the impact of the error. Finding the dispute was one that a correctly instructed jury — not an appellate court — must resolve, the Ninth Circuit remanded for a new trial.

The Dissent: A Warning the Result May Not Change

U.S. Circuit Judge Patrick J. Bumatay agreed that the jury instruction was erroneous, but dissented on harmlessness. In his view, the trial record contained overwhelming and largely uncontested evidence that the stolen materials were not readily ascertainable, and the defendant offered no direct evidence to the contrary.

He also read the jury's own findings — that each trade secret had independent economic value, and the award of compensatory and punitive damages — as strong circumstantial evidence that a properly instructed jury would have reached the same result.

The dissent is a useful reminder for clients on both sides of a case: Winning the instructional-error argument on appeal is necessary but not sufficient. Where the evidence on ready ascertainability is genuinely one-sided, a defendant may still lose on remand, and a plaintiff facing a similar instructional flaw should not assume automatic reversal.

The Concurrence: Avoidance Damages and Injunction Are Not Double Recovery

In a concurrence, U.S. Circuit Judge David F. Hamilton addressed an issue that may resurface on remand: whether awarding both unjust-enrichment damages for avoided research and development costs and a permanent injunction constitutes an impermissible double recovery. XP Power had argued that once it paid damages reflecting the costs it avoided by stealing rather than developing the trade secrets, an injunction barring further use would effectively let Comet collect twice for the same harm.

Judge Hamilton rejected that argument, reasoning that avoided-cost damages are retrospective (they undo a benefit the defendant already obtained) while an injunction is prospective (it prevents future harm to the plaintiff's business), so the two remedies address different harms over different time periods. He joined the U.S. Courts of Appeals for the Third and Seventh Circuits in so holding, and distinguished a line of cases from the U.S. Court of Appeals for the Second Circuit suggesting that unjust-enrichment awards for avoided costs may be punitive in nature.

He also cautioned that treating payment of damages as effectively purchasing a license to keep using stolen trade secrets would invite exactly the kind of "efficient breach" calculus that trade secret law is designed to deter.

Strategic Takeaways: Choosing Between the DTSA and State Law

For companies and counsel weighing whether to plead a federal DTSA claim, a state trade secret claim or both, this case offers several concrete lessons.

Know which side the burden favors before deciding which claim to lead with.

Under the DTSA, the plaintiff must affirmatively prove the trade secret was not readily ascertainable by proper means. Under CUTSA, ready ascertainability is instead an affirmative defense the defendant must prove. Plaintiffs with strong secrecy evidence and a weak record on public availability may prefer to lead with, or preserve, a state law claim where the burden favors them. Defendants, conversely, may prefer the case be tried purely under the DTSA.

Revisit jury instructions every time the claim mix changes.

The Sedona Conference's new model instructions (discussed below) and this decision both emphasize that instructions calibrated for a mixed federal/state case can misstate the law the moment a claim is dismissed, added or narrowed. Any voluntary dismissal, partial judgment or claim narrowing close to or during trial should trigger an immediate review of every instruction and verdict form question.

Consider whether to build a granular expert damages model tied to specific categories of information.

A significant part of the Ninth Circuit's harmless-error analysis turned on the fact that Comet's damages expert used a bottom-line, cost-code-based figure that bundled potentially readily ascertainable information (dimensions, configuration, published concepts) together with genuinely protected information (manufacturing variation, material properties, design strategy).

The parties should consider whether to build a more granular damages model to apportion

damages by category of information, and whether such presentation makes strategic sense for their cases.

Sedona Conference's New DTSA Model Jury Instructions

This decision arrives against the backdrop of an effort to bring uniformity to DTSA jury instructions.

In May, the Sedona Conference's Working Group 12, which focuses on trade secret law, published its DTSA model jury instructions, the first comprehensive set of consensus model instructions for a DTSA claim. The Sedona model instructions confirm the allocation of the burden of proof that the Ninth Circuit enforced in *Comet* when it comes to showing whether the trade secrets are readily ascertainable by proper means.

The Sedona Conference also cautions that DTSA instructions must be tailored to the claims actually tried and updated as claims are added or dropped, since instructions appropriate for one mix of claims may misstate the law if the claims in the case change.

Conclusion

The Ninth Circuit decision underscores that in DTSA cases, the burden of disproving ready ascertainability rests with the plaintiff, not the defendant, and this allocation differs from state misappropriation laws, including CUTSA.

The case is also notable for Judge Hamilton's concurrence confirming that a DTSA plaintiff may recover both unjust-enrichment damages and a permanent injunction without triggering an impermissible double recovery, and for Judge Bumatay's dissent, which would have found the same instructional error harmless.

Taken together, the majority, concurrence and dissent give litigants on both sides fresh ammunition for the next trade secret trial, whether the issue is which statute to plead, how a jury should be instructed or what relief a plaintiff can stack at judgment.

Amanda A. Main, Bobby Ghajar and Mark Lambert are partners at Cooley LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] *Comet Technologies USA Inc. v. XP Power LLC*, 181 F.4th 988 (9th Cir. 2026).

[2] See 18 U.S.C. §1839(3)(B).

[3] Cal. Civ. Jury Instruction No. 4420 (2025).