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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

OPENWAVE MESSAGING, INC.,
Plaintiff,
v.
OPEN-XCHANGE, INC.,
Defendant.

Case No. [16-cv-00253-WHO](#)

**AMENDED ORDER GRANTING
MOTION FOR SUMMARY JUDGMENT**

This lawsuit arises from the now dissolved business relationship between plaintiff Openwave Messaging, Inc. (“Openwave”) and defendant Open-Xchange, Inc. (“OX”). Openwave asserts a myriad of claims against OX for conduct related to OX’s successful acquisitions of former Openwave employees and former Openwave clients, and OX has filed a counterclaim. This Order concerns OX’s motion for summary judgment on Openwave’s claims for misappropriation of trade secrets under federal and California law in their entirety and on Openwave’s breach of the implied covenant of good faith and fair dealing claim and its common law unfair competition claim to the extent these claims are based on an act of misappropriation of trade secret. Because Openwave has neither proffered any material evidence showing disputed facts nor established that it is entitled to further discovery, I GRANT OX’s motion for summary judgment.

BACKGROUND

I. BACKGROUND FACTS

To understand the background of this case, both substantive and procedural, I start with the somewhat complicated corporate structure of the Open-Xchange companies. OX, a Delaware corporation, was the original Open-Xchange entity, founded in January 2005 to attract US venture capital. Decl. of Monika Schroeder ISO OX’s Response to Interim Order Regarding Rule 56(d)

1 (“Schroeder Decl. III”) ¶ 5 (Dkt. No. 151-1). Eight months later, GmbH was founded as a
2 subsidiary of OX in Germany. *Id.* European investors were more interested in the business than
3 US investors, so OX AG was formed in Germany in 2008 and became the parent company. *Id.*
4 There are a variety other OX-related companies in different countries around the world, including
5 Open-Xchange S.r.l., which operates in Italy. *See id.* ¶ 3. OX has no employees outside the
6 United States. *See* Decl. of Monika Schroeder ISO OX’s Mot. to Dismiss or Stay Duplicative
7 Trade Secret Claims (“Schroeder Decl. II”) ¶ 2 (Dkt. No. 90); *see also* Decl. of Monika Schroeder
8 ISO Mot. to Dismiss (“Schroeder Decl. I”) ¶¶ 2, 5 (Dkt. 18-2) (explaining that Open-Xchange,
9 Inc. has no employees outside the United States).

10 The general background allegations of the parties are discussed in my Orders concerning
11 the parties’ motions to dismiss. (Dkt. Nos. 28, 56). Relevant to this Order, Openwave, a
12 Delaware corporation with its principal place of business in San Mateo, California, accuses OX of
13 “target[ing] and hir[ing] numerous people from Openwave’s Italy operations” to staff its Italy
14 operations that have opened up in the exact same city.” Second Amended Complaint (“SAC”) ¶¶
15 13, 99, 126-129 (Dkt. No. 42). Openwave believes that in the process of hiring former Openwave
16 employees, OX received Openwave’s trade secrets in an improper manner and subsequently used
17 them to the detriment of Openwave. *Id.* ¶¶ 1-3. Among OX’s defenses to Openwave’s claims is
18 that it is the American subsidiary of OX AG and is a different legal entity than OX AG, OX
19 GmbH (a German subsidiary of OX AG), and OX S.r.l., the Italian subsidiary that apparently
20 hired the former Openwave employees.

21 The trade secrets at the core of this case, customer and technological information, are also
22 at issue an Italian proceeding brought in Turin, Italy by Openwave Messaging S.p.A against Open-
23 Xchange, S.r.l and 4 former Openwave Messaging S.p.A employees. *See* Schroeder Decl. II ¶ 3.
24 Following a forensic investigation, Openwave Messaging S.p.A moved for injunctive relief as
25 well as seizure of the purportedly misappropriated information. *See* Schroeder Decl. II, Ex. B
26 ¶¶ 1-2, 60-61. In its motion, Openwave Messaging S.p.A accused Open-Xchange, S.r.l of
27 soliciting its employees and subsequently using improperly attained trade secrets and confidential
28 information from those employees.

1 On December 19, 2016, the Turin court granted Openwave's request for an injunction but
2 denied its seizure request. *See* Schroeder Decl. II, Exh. D at 3. The Turin court found that, based
3 on the results of the forensic investigation, two former Openwave employees likely had
4 maintained information from Openwave following their employment. *Id.* at 9-10. Open-Xchange
5 S.r.l. subsequently appealed the order. *Id.* at 3-4. On February 3, 2017, the Turin court issued an
6 opinion upholding the December 19 Order granting injunctive relief. *See id.* ¶ 6, Ex. D.

7 **II. PROCEDURAL BACKGROUND**

8 The resolution of this motion has been tortured. On June 30, 2017, OX filed a motion to
9 dismiss or stay Openwave's misappropriation and unfair competition claims because Openwave
10 opened litigation in Italy over the exact same claims against a different entity and has failed to
11 identify its asserted trade secrets adequately. Openwave's response barely addressed the merits,
12 but asserted that OX had liability through an alter ego or agency theory for the acts allegedly done
13 by S.r.l.¹ OX denied that any discovery violation had occurred and properly pointed out that
14 Openwave's substantive response to the motion was weak at best.

15 At a hearing on the motion on August 23, 2017, I converted the motion to dismiss to a
16 motion for summary judgment, asked for more briefing and evidence, and indicated that
17 Openwave could respond with a Rule 56(d) motion if it lacked evidence to oppose on the merits
18 because of improper conduct by OX. I also denied Openwave's broad discovery request, filed
19 after the close of discovery, because of its delay in seeking discovery regarding the separate legal
20 entities controlled by OX's parent company and OX's showing that it had produced all of the
21 documents either within its control or jointly controlled with some other OX entity.

22 Briefing on the motions for summary judgment mimicked the briefing on the motion to
23 dismiss. Openwave identified scant evidence to support misappropriation of any trade secret, and
24 failed to identify its trade secrets. Instead, its lead argument was that it lacked sufficient discovery
25 under Rule 56(d). At the hearing, I indicated that I would grant OX's motion on the merits unless
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28 ¹ The same day, just a week before the discovery cut off, it filed a one-sided discovery dispute
letter in violation of my Civil Case Standing Order, complaining about serious discovery
violations by OX.

1 Openwave’s 56(d) motion had merit. I noted that Openwave’s argument was undercut by its delay
2 in seeking the discovery it now claimed was vital. But, to satisfy the question of whether OX sold
3 its wholly owned subsidiary to its parent for the purpose of hiding incriminating documents from
4 Openwave, I ordered OX to produce documents regarding the transfers about which Openwave
5 had raised suspicions and gave each party the opportunity to file briefs of five pages or less
6 explaining the meaning of that evidence. Those documents were filed on November 7 and 17,
7 respectively.

8 **LEGAL STANDARD**

9 **I. SUMMARY JUDGMENT**

10 Summary judgment on a claim or defense is appropriate “if the movant shows that there is
11 no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of
12 law.” Fed. R. Civ. P. 56(a). In order to prevail, a party moving for summary judgment must show
13 the absence of a genuine issue of material fact with respect to an essential element of the non-
14 moving party’s claim, or to a defense on which the non-moving party will bear the burden of
15 persuasion at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has
16 made this showing, the burden then shifts to the party opposing summary judgment to identify
17 “specific facts showing there is a genuine issue for trial.” *Id.* The party opposing summary
18 judgment must then present affirmative evidence from which a jury could return a verdict in that
19 party’s favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 257 (1986).

20 On summary judgment, the Court draws all reasonable factual inferences in favor of the
21 non-movant. *Id.* at 255. In deciding a motion for summary judgment, “[c]redibility
22 determinations, the weighing of the evidence, and the drawing of legitimate inferences from the
23 facts are jury functions, not those of a judge.” *Id.* However, conclusory and speculative testimony
24 does not raise genuine issues of fact and is insufficient to defeat summary judgment. *See Thornhill*
25 *Publ’g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

26 **II. RULE 56 (D)**

27 “If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot
28 present facts essential to justify its opposition [to a motion for summary judgment], the court may

1 (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to
2 take discovery; or (3) issue any other appropriate order.” Fed. R. Civ. P. 56(d). Rule 56(d)
3 “provides a device for litigants to avoid summary judgment when they have not had sufficient
4 time to develop affirmative evidence.” *United States v. Kitsap Physicians Serv.*, 314 F.3d 995,
5 1000 (9th Cir. 2002).

6 A court “should continue a summary judgment motion upon a good faith showing by
7 affidavit that the continuance is needed to obtain facts essential to preclude summary
8 judgment.” *California v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998). Rule 56(d) requests
9 should be granted freely where a party has not had a “realistic opportunity” to pursue discovery
10 relating to its theory of the case. *Burlington N. Santa Fe R. Co. v. Assiniboine & Sioux Tribes of*
11 *Fort Peck Reservation*, 323 F.3d 767, 773 (9th Cir. 2003) (citations omitted). “[T]he denial of
12 a Rule 56[(d)] application is generally disfavored where the party opposing summary judgment
13 makes (a) a timely application which (b) specifically identifies (c) relevant information, (d) where
14 there is some basis for believing that the information sought actually exists.” *VISA Int’l Serv.*
15 *Ass’n v. Bankcard Holders of Am.*, 784 F.2d 1472, 1475 (9th Cir. 1986). The party making a Rule
16 56(d) request must be able to show that it diligently pursued its previous discovery opportunities
17 and show “how allowing additional discovery would have precluded summary judgment.” *Qualls*
18 *v. Blue Cross of Cal., Inc.*, 22 F.3d 839, 844 (9th Cir. 1994).

19 **DISCUSSION**

20 **I. SUMMARY JUDGMENT**

21 Openwave claims that OX misappropriated nine trade secrets: (1) customer lists, (2)
22 product pricing information and a pricing tool, (3) customer demand information, (4) customer
23 satisfaction surveys, (5) customer mapping information, (6) customer contract terms, (7) the
24 Openwave email platform stack, (8) the Virgin Media email system stack, and (9) Openwave’s
25 technical data and documentation. *Oppo.* at 17 (Dkt. No. 125). To prove misappropriation under
26 both California’s Uniform Trade Act, Cal. Civ. Code § 3426, and the Defend Trade Secrets Act,
27 18 U.S.C. § 1836, *et seq.*, Openwave must demonstrate that (1) it owned a trade secret; (2) OX
28 “acquired, disclosed, or used” its trade secret through improper means; and (3) OX’s actions

1 damaged it. *Sargent Fletcher, Inc. v. Able Corp.*, 110 Cal. App. 4th 1658, 1665 (2003). OX
2 moves for summary judgment, arguing that: (1) Openwave cannot prove ownership of a
3 misappropriated trade secret; (2) there is no evidence that OX engaged in any act of trade secret
4 misappropriation; and (3) Openwave has not provided evidence that it suffered damage.

5 **A. Ownership of Trade Secrets**

6 A trade secret is information that: “(1) [d]erives independent economic value, actual or
7 potential, from not being generally known to the public or to other persons who can obtain
8 economic value from its disclosure or use”; and “(2) [i]s the subject of efforts that are reasonable
9 under the circumstances to maintain its secrecy.” Cal. Civ. Code § 3426.1(d). OX contends that
10 Openwave has not made a reasonable disclosure of the trade secrets in dispute, proven that its
11 purported trade secrets were subject to efforts that are reasonable under the circumstances to
12 maintain their secrecy, or shown that its purported trade secrets are not generally known or readily
13 ascertainable.

14 **1. Whether Openwave Properly Disclosed Its Trade Secrets**

15 A plaintiff seeking relief for misappropriation of trade secrets “must identify the trade
16 secrets and carry the burden of showing that they exist.” *MAI Sys. Corp. v. Peak Computer, Inc.*,
17 991 F.2d 511, 522 (9th Cir. 1993). While the Ninth Circuit has yet to decide whether Section
18 2019.210 of the California Code of Civil Procedure applies to actions in federal court, courts in
19 this district have routinely applied the trade secret disclosure provisions in Section 2019.210. *See*
20 *Jobscience, Inc. v. CVPartners, Inc.*, 2014 WL 852477, at *5 (N.D. Cal. Feb. 28, 2014) (WHA);
21 *Soc. Apps, LLC v. Zynga, Inc.*, 2012 WL 2203063, at *2 (N.D. Cal. June 24, 2012) (YGR).
22 Accordingly, I apply Section 2019.210 in this case.

23 In order to protect its trade secrets, Openwave must first “describe the subject matter of the
24 trade secret with sufficient particularity to separate it from matters of general knowledge in the
25 trade or of special knowledge of those persons who are skilled in the trade, and to permit
26 defendant to ascertain at least the boundaries within which the secret lies.” Cal. Code Civ. Proc.
27 2019.210; *see also Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1453 (2002) (quoting
28 *Diodes, Inc. v. Franzen*, 260 Cal. App. 2d 244, 253 (1968)). Though it need not “spell out the

1 details of the trade secret,” Openwave must minimally provide “reasonable notice of the issues
2 which must be met at the time of trial and [] provide reasonable guidance in ascertaining the
3 scope of appropriate discovery.” *Diodes*, 260 Cal. App. 2d at 252–53.

4 To satisfy the Section 2019.210 disclosure requirement, Openwave’s trade secret
5 disclosure needs to include: “(1) a summary of the specific trade secret; (2) the background of the
6 trade secret and a description of how each secret has derived independent, actual or potential
7 economic value by virtue of not being generally known to the public; (3) a description of how
8 each secret has been the subject of reasonable efforts to maintain its secrecy; and finally (4) each
9 of the precise claimed trade secrets, numbered, with a list of the specific elements for each, as
10 claims would appear at the end of a patent.” *Jobscience, Inc.*, 2014 WL 852477, at *5.
11 Openwave’s trade secret disclosure satisfies each of these requirements. *See generally* Openwave
12 Third Amended Trade Secret Disclosure (Trade Secret Disclosure) (Dkt. No. 89-2). Accordingly,
13 Openwave’s trade secret disclosure satisfies the dictates of Section 2019.210’s disclosure
14 requirement.

15 **2. Whether Openwave’s Purported Trade Secrets Are Legally Protectable**

16 Even though Openwave adequately disclosed its purported trade secrets, it still carries the
17 burden of establishing that the particular information constitutes a protectable trade secret. *See*
18 *MAI Sys. Corp.*, 991 F.2d at 522. A “trade secret” consists of three elements: (a) information; (b)
19 which is valuable because it is unknown to others; and (c) which the owner has attempted to keep
20 secret. *Abba Rubber Co. v. Seaquist*, 235 Cal. App. 3d 1, 18 (1991). OX argues that Openwave
21 fails to carry this burden because it has not (1) proven that its purported trade secrets were subject
22 to efforts that are reasonable under the circumstances to maintain their secrecy, or (2) shown that
23 its purported trade secrets are not generally known or readily ascertainable. Openwave’s
24 purported trade secrets can be broken down into two general categories: (1) customer information
25 (trade secrets 1-6 above) and (2) technological information (trade secrets 7-9 above). I address
26 each category in turn.

27 **a. Customer Information**

28 Openwave relies on cases that have found similar information to be trade secrets to

1 secrets, Openwave needs evidence that the information (1) is not generally known or easily
2 ascertainable and (2) is subject to actions by Openwave to keep it secret.

3 Openwave’s claim that its technical data and documentation is a trade secret suffers from
4 the same deficient support as its customer information. Openwave points to no evidence but
5 rather attempts to merely provide cases that support a finding that such information is a trade
6 secret. As discussed above, this is insufficient for the purposes of summary judgment. Given its
7 failure to rely on any evidence, Openwave cannot create a genuine dispute as to a material fact
8 related to technical data and documentation. Accordingly, OX is entitled to summary judgment
9 for Openwave’s technical data and documentation.

10 To demonstrate that its technology stacks are trade secrets, Openwave uses the deposition
11 of Chief Technology Officer Farooq Ali. Deposition of Farooq Ali at 184:3-16 (Dkt. No. 128-1,
12 Ex. B). Ali testifies that Openwave treat the technological stacks’ contents as confidential and that
13 such information would be valuable to OX because of the stacks’ resiliency. *Id.* Further,
14 Openwave submits evidence regarding the measures that it undergoes to maintain secrecy of this
15 information. *See* Decl. of Kevin Hunsaker ¶¶ 3-10 (Dkt. No. 129). From these facts, a reasonable
16 jury could infer that the technological stacks derive potential economic value from not being
17 generally known to the public and Openwave takes reasonable measures to safeguard their
18 secrecy. Accordingly, Openwave meets its burden to identify legally protectable trade secrets as
19 to the Openwave email platform stack and the Virgin Media email system stack.

20 **B. Misappropriation of Trade Secrets**

21 Given that Openwave has only carried its burden of identifying legally protectable trade
22 secrets concerning the technological stacks, I only address the alleged misappropriation of these
23 trade secrets. To show misappropriation, Openwave must show that “the defendant acquired,
24 disclosed, or used the plaintiff’s trade secret through improper means.” *Sargent Fletcher v. Able*
25 *Corp.*, 110 Cal. App. 4th 1658, 1665 (2003). It may prove such misappropriation by circumstantial
26 as well as direct evidence. *UniRAM Tech., Inc. v. Taiwan Semiconductor Mfg. Co.*, 617 F.Supp.2d
27 938, 944 (N.D. Cal. Sept. 5, 2007) (VRW). Openwave points to several pieces of evidence: (1) an
28 email from former Openwave employee, Alberto Carmelo; (2) interactions between OX and

1 former Openwave employees that have subsequently worked for OX; (3) OX's success with
2 former Openwave customers; (4) a findings in the Italian proceeding regarding a USB device
3 containing Openwave information; and (5) OX's work for Virgin Media. Only the USB device
4 and OX's work for Virgin Media arguably relate to Openwave's properly identified trade secrets.
5 All other evidence relates to Openwave's customer information, which Openwave failed to
6 demonstrate is legally protectable.

7 Openwave points to a ruling in the Turin court in which the court found that the USB
8 device of a former Openwave employee who went on to work for Open X-change S.r.l was
9 probably used to make copies of information related to Openwave Messaging S.p.A. *See*
10 Schroeder Decl. II, Ex. D at 9 (Dkt. No. 90-4). This is the only document that Openwave uses to
11 support its allegation that OX misappropriated its trade secrets. Merely pointing to the findings of
12 another court is insufficient for the purposes of summary judgment. *See Fed. R. Civ. Pro. 56.*
13 They also fail to provide any evidence of what data the USB device contained and if the contents
14 relate to the Openwave email platform stack or the Virgin Media email system stack.
15 Accordingly, the findings of the Turin court do not create a genuine issue of material fact whether
16 OX misappropriated Openwave's trade secrets relevant to this action.

17 As to OX's relationship with Virgin Media, Openwave submits a copy of the agreement
18 between OX and Openwave in which OX agreed to allow Openwave to sell OX's technology to
19 Virgin Media as a part of the Openwave email platform. *See Decl. of Ryan Selness ISO Oppo. to*
20 *Mot., Ex. I (Dkt. No 128-1).* Openwave also points to the deposition of its 30(b)(6) witness Marie
21 Weston Smith. Smith testifies that the speed in which OX was able to get its platform up for
22 Virgin Media was impossible. *Decl. of Monica Hernandez ISO Oppo. to Mot., Ex. 40 at 83:24-*
23 *84:2 (Dkt. No. 126-1).* With this evidence, Openwave insists on an inference that OX was able to
24 "take Virgin as a customer by pledging to save it time and money by recycling the work
25 Openwave had already performed for Virgin." *Oppo. at 23.* This is not merely a request for a
26 reasonable inference. Instead, Openwave seeks a reading of the evidence that the record does not
27 support. Openwave points to no evidence beyond its own allegations that, as a part of its deal with
28 OX, it provided Openwave with its technological stacks and information. And Smith's testimony

1 does not provide evidence that Openwave’s technological stacks were the foundation for OX’s
2 work with Virgin Media. In fact, Openwave provides no evidence that OX’s interactions with
3 Virgin Media involved any mention of Openwave at all. Openwave cannot satisfy its summary
4 judgment burden on either of the trade secrets that it demonstrated were legally protectable with
5 the information related to Virgin Media. Accordingly, OX is entitled to summary judgment as to
6 all of Openwave’s purported trade secrets.

7 **C. OX Is Not S.r.l.**

8 Starkly, Openwave identifies no improper conduct by OX. From the evidence of record,
9 S.r.l. is the Italian subsidiary of GmbH, which is the German subsidiary of OX AG. OX is the
10 American subsidiary of OX AG. It does not have employees outside the United States. Schroeder
11 Decl. I ¶ 2. OX is not liable for the conduct of its parent, its parent’s German subsidiary, or that
12 subsidiary’s Italian subsidiary. There has been a total failure of proof by Openwave that OX has
13 or had anything to do with OX S.r.l.’s hiring of Openwave’s former Italian employees. This is a
14 separate reason to grant OX’s motion for summary judgment.

15 **II. OPENWAVE’S 56(D) MOTION**

16 Federal Rule of Civil Procedure 56(d) is a device for litigants to avoid summary judgment
17 when the non-movant needs to discover affirmative evidence necessary to oppose the motion. *See*
18 *Garrett v. San Francisco*, 818 F.2d 1515, 1518 (9th Cir.1987). In making a Rule 56(d) motion, a
19 party opposing summary judgment must make clear “what information is sought and how it would
20 preclude summary judgment.” *Margolis v. Ryan*, 140 F.3d 850, 853-54 (9th Cir. 1998); *see, e.g.,*
21 *id.* at 853–54 (district court correctly denied motion for continuance to engage in further discovery
22 under Rule 56(d) where plaintiff did not provide any basis or factual support for his assertions and
23 his assertions appeared based on nothing more than “wild speculation”). Rule 56(d) requires that
24 the requesting party show (1) it has set forth in affidavit form the specific facts it hopes to elicit
25 from further discovery, (2) the facts sought exist, and (3) the sought-after facts are essential to
26 oppose summary judgment. *Family Home & Finance Center, Inc. v. Federal Home Loan*
27 *Mortgage Corp.*, 525 F.3d 822, 827 (9th Cir. 2008).

28 Typically, Rule 56(d) is relied on when an opponent files an early motion for summary

1 judgment. Openwave's comes at the end of discovery, after I have found that it was not diligent in
2 seeking the information it now calls critical. It could have sought records from the foreign OX
3 entities through the Hague Convention. It could have sought relief from me during the discovery
4 process. It did neither. And the affidavit of Monica Hernandez, offered to support the motion,
5 fails to identify specific facts that it tried to but could not obtain during discovery.

6 Given the evident sincerity of counsel's belief that OX entered into a complex corporate
7 restructuring scheme to thwart Openwave's ability to obtain documents, I required OX to offer
8 proof to support its representations that Openwave was not a factor, let alone a motivating one, for
9 the restructuring that occurred before this litigation was filed. It did so. OX provided evidence
10 that the Open-Xchange companies conceived of the restructuring plans in 2008, and executed
11 them once the German Parliament passed the Tax Amendment Act of 2015, modifying the
12 German group reorganization rule so the OX could transfer ownership to OX AG (the parent)
13 without forfeiting the parent's loss carryovers. *See* Schroeder Decl. III ¶ 11. OX also showed
14 how the transfers benefited OX, which was able to use its loss carryovers from prior tax years to
15 offset all of the income of the sales of IP to OS Software GmbH and of OX GmbH to OX AG
16 (more than \$12 million) in 2015 and owe no federal tax. *Id.* ¶ 11, Ex. B. Moreover, it noted that
17 Openwave is barely mentioned in contemporaneous notes, minutes or emails. OX's Response to
18 the Interim Order Regarding Rule 56(d) Mot. at 3-4 (Dkt. No 150-4).

19 In response, Openwave again offered suppositions but no proof. While it continues to cry
20 foul and raise questions about OX's assertions, it filed no substantial evidence to dispute them. Its
21 Rule 56(d) motion for additional discovery is DENIED.

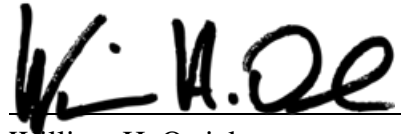
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1 **CONCLUSION**

2 For the reasons discussed above, I GRANT OX's motion for summary judgment of no
3 trade secret misappropriation, and with respect to Counts III, IV, VI and XI.

4 **IT IS SO ORDERED.**

5 Dated: May 4, 2018

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8 William H. Orrick
United States District Judge