

# Texas Appellate Court Requires Strict Proof of Trade Secret Elements For Every Defendant in Evaluating TCPA Defense

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A recent Texas appellate court decision provides additional guidance for those parties litigating trade secrets in the new era of the Texas Citizens Participation Act (“TCPA”). The holding in *Morgan v. Clements Fluids S. Tex, Ltd.*, 2018 Tex. App. LEXIS 9061 (Tex. App. – Tyler, 2018) will inform both Plaintiffs and Defendants in future trade secret actions in this state.

In an opinion issued by a three-judge panel of the Twelfth Court of Appeals in Tyler, the Court determined that Clements Fluids South Texas Ltd. (“Clements”) had not presented enough evidence to defeat a former employee’s motion to dismiss the claims against him under the TCPA. The panel did allow trade secret misappropriation claims to proceed against two other former employees based on the quality of the evidence provided to support the claims against them.

Clements filed the lawsuit against three former employees, alleging they misappropriated confidential and proprietary information concerning its “salt system,” which is described as a system it developed for “addressing the loss of circulation during well completion and production.” In response, all three defendants filed a Motion to Dismiss under the TCPA. The Court held that Clements presented enough evidence at this phase of the lawsuit to proceed with claims against Morgan and McAnally, who now work for direct competitor Greenwell Energy Solutions, but had failed to show enough evidence that Douglas Laney, who works for another direct competitor, Chemco, had used the information inappropriately.

In the Court’s analysis of the Defendants’ Motion to Dismiss under the TCPA, it considered whether the trade secret claim is “based on, related to, or in response to a communication made by defendants in exercising their right of free speech association with their current employers.” In keeping with the current trend of holdings on TCPA/Trade Secret cases, the Court held that the trade secret claims did, at least in part, relate to the Defendants communications with their current employers.

The burden then shifted to Clements, who was required to present evidence sufficient to show a prima facie case as required by the TCPA. To meet this burden, Clements relied primarily on a lengthy affidavit by its vice president, Chase Tarrant. The affidavit spelled out the nature of the proprietary information, the non-disclosure agreements signed by every employee, the closing of worksites where the technology is in use, and the limited disclosure of the technology to its employees, among other factors. The Court held that the evidence was sufficient to prove trade secret status.

Importantly, to show misappropriation, the affidavit also provided details about the post-employment activities of Morgan and McAnally, who were alleged to have used the Clements trade secrets to compete with Clements after they left the company. The company they joined had no history in the “salt system” business, but after the Clements employees joined, they started to compete in the industry. In affirming the holding that Clements met its burden with respect to Morgan and McAnally, the Court held that the “totality of the circumstantial evidence” that the duo used the technology to compete. In other words, direct evidence is not required to meet a nonmovant’s burden under the TCPA.

However, as to Laney, who joined a different competitor (ChemCo) after leaving Clements, the Court found “no evidence, circumstantial or otherwise, that Laney disclosed or used Clements’ trade secrets.” Specifically, the Court found no evidence in the record to establish whether Chemco performed salt systems jobs prior to Laney’s employment with ChemCo, nor is there any evidence that establishes Laney performed any salt systems jobs with ChemCo.”

As it related to the temporary injunction barring the three defendants from having anything to do with salt system work, the ex-Clements employees argued it actually prohibited them from “using information generally known in the industry and from engaging in legal business competition with Clements.” The appellate court agreed, noting even Clements’ own witnesses have admitted there are methods of performing salt system jobs without using Clements’ trade secrets, and struck that portion of the injunction.

The *Morgan* opinion provides a helpful roadmap not only for parties that are intending to bring a trade secret case against former employees, but for defendants who wish to pursue their free-speech and association rights under the TCPA.

