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HARTFORD J.D.

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DUR-A-FLEX, INC. : :
: : JUDICIAL DISTRICT OF
: : HARTFORD
v. : :
: :
SAMET DY : MARCH 28, 2019

Memorandum of Decision

1. Trade Secrets: the merely obvious versus the marginally magic.

If someone steals your trade secret you can sue them under General Statutes §§ 35-50 to 35-58.

But first you have to have a trade secret. So this half of this case is about whether the plaintiff Dur-a-flex has proved it owned trade secrets it can sue about.

Dur-a-flex's trade secret claim is mostly about a commercial floor coating called Poly-Crete. Poly-Crete is a cementitious urethane. It combines the hardness of cement with the imperviousness of a polyurethane. These floor coatings are used in places ranging from the slaughter house to the commercial kitchen to the county morgue. Cementitious urethane floors are used in places where you plan to make a mess but don't want the floor to absorb it.

Everybody in the industry knows how to make a basic cementitious urethane. Indeed, by weight and volume, people in this industry know almost everything in Poly-Crete. And this matters. General Statutes § 35-51 (d) says information can't be a trade

secret if it is “generally known” or “readily ascertainable.” So people outside of Dur-a-flex knowing exactly how to make Poly-Crete would be a problem. That’s why it’s significant to note here that participants in the industry know *almost* everything about making Poly-Crete, but not everything.

Knowing almost everything isn’t enough. Those same floor-coating people most likely know *most* of a lot of things. They probably know *most* of how cheese is made; how birdhouses are built, and where babies come from too. But that doesn’t mean they would be right to think all cheese is the same; all birdhouses are alike or that all babies are interchangeable. People knowing most of what’s in something doesn’t mean that it can’t be a trade secret. After all, we are *mostly* water and yet somehow we can keep secrets.

So it is no blow to Dur-a-flex that many can say that Poly-Crete has three main components. They come in three separate containers and are combined by the end user. The components are sold together to contractors in a kit. There is an aggregate that includes the makings of the cement, a resin or polyol that makes the urethane a polyurethane, and a hardener. It would be no surprise to anyone in the industry that Dur-a-flex also uses castor oil as its polyol, nor that it uses sand as part of its aggregate. Indeed, the aggregate—other than one part of it to be discussed later—isn’t itself claimed to be a trade secret.

But that's where most of the agreement stops. The real question here is whether the less abundant ingredients added to the basic mixtures are enough to build a trade secret on. And these smaller things matter more than they once did because the evidence shows the cementitious urethane business has become more competitive over the years.

2. “Foo foosity” and the art of cementitious urethane manufacturing.

a. The widely known versus the genuinely grown.

Significantly, there is a name for these smaller things. And while the people at Dur-a-flex are very serious about this claim and perceive that they have millions of dollars at stake, their hopes actually turn on a matter that doesn't sound serious at all: “foo foo dust.”

Foo foo dust is a term of art. And what's worse, the relative foo foosity of Dur-a-flex's product will mean for it a win or loss at this stage of the trial. That's because foo foo dust describes the less bulky bits added to a formula that distinguish one product from another in this industry—and perhaps in others as well. The foo foo dust influences things like how well and how easily the product spreads, how it survives temperature differences, and how it avoids bubbling, blistering, molding, and the like. Anybody in this field can make a cementitious urethane, but Dur-a-flex says the foo foo dust in its resin and hardener is its money-making magic.

Still, even some things about the foo foo dust itself are generally known in cementitious urethane circles. They are the common topic of conversation among industry insiders at the annual World of Concrete convention in Las Vegas. They can be found in supplier literature, patents, product safety data sheets, and even in general internet searches. You can even identify some things about the foo foo dust by sending a sample of a product to a lab for chemical analysis—but, importantly, you can't find enough to duplicate the Poly-Crete product. There are a lot of things known about cementitious urethane foo foo dust. But a cementitious urethane still isn't a tossed salad. You can't figure out what's in it merely by taking a look.

The “a lot” that's known about the resin foo dust includes that it typically includes defoamers that are added to the resin to keep bubbling down. Plasticizers and superplasticizers are used to improve workability and keep the resin components in a consistent suspended state rather than having them separate like oil and water. Surfactants reduce the liquid's surface tension and reduce beading. Rounded grains of sand are generally known to roll and affect the pouring and spreading of the product.

And the suppliers of this foo foo dust are legion. If you call them up they will talk up their products and propose ingredients. There are dozens of different defoamers, surfactants, and plasticizers to choose from. Industry leaders will tell you they have short lists of their favorite foo foos. But there are over a dozen ingredients in the Poly-Crete resin alone, so with the choice of suppliers taken into account there are many

thousands of permutations that would explain the different choices a cementitious urethane manufacturer might make to create a unique formula.

And the experts in this case agree that this large number of small choices really matter. The experts for defendant Samet Dy—the Dur-a-flex ex-chemist— and the companies that hired him emphasized that you can find the precise foo foo dust ingredients Dur-a-flex uses on the web. Sure you can—if you know what they are. But no one disputes that Dur-a-flex’s precise combination and the amount of each ingredient and its supplier can’t be found anywhere except at Dur-a-flex.

The defense experts insist that a chemist skilled in this field can, within a few months, make a product that is the “functional equivalent” or “substantially similar” to Poly-Crete. But by “functional equivalent” or “substantially similar” product, they don’t mean they can create Poly-Crete. Whether the Poly-Crete formula is a trade secret doesn’t turn on how easy it is to make a cementitious urethane. It’s about Poly-Crete’s foo foosity. It is about how small differences in the small ingredients can be a kind of magic here, and –a topic for later—whether this magic has an independent value.

If you ask the experts on both sides of the case, they all agree that any small chemical change in the brand of the foo foo dust or its ingredients changes everything. In other words, there is a magic in every combination—a precise set of reactions that is virtually never the same once any one thing is changed. In particular, all of the experts say testing of performance has to be done all over again after anything about a single

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