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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ALL AMERICAN SEMICONDUCTOR,
LLC,

Plaintiff and Appellant,

v.

APX TECHNOLOGY CORP.,

Defendant and Respondent.

G046605

(Consol. with G046613, G046803 &
G047643)

(Super. Ct. No. 30-2008-00101073)

O P I N I O N

Appeal from a judgment and an order of the Superior Court of Orange County, Glenda Sanders, Judge. Affirmed.

Law Offices of Chad Biggins, Chad Biggins; Fox, O'Neill & Shannon and Bruce C. O'Neill for Plaintiff and Appellant.

Brady, Vorwerck, Ryder & Caspino and Ravi Sudan for Defendant and Respondent.

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All American Semiconductor, LLC (plaintiff), appeals from a judgment and attorney fee order after the trial court granted summary adjudication in favor of APX Technology Corporation (APX) on plaintiff’s trade secret misappropriation cause of action. Plaintiff contends triable issues of fact precluded summary adjudication, and plaintiff argues the trial court erred in awarding APX attorney fees on grounds of bad faith (Civ. Code, § 3426.4) after the court concluded plaintiff’s trade secret claim was completely baseless. As we explain, despite the complexity of the technological subject matter, this appeal turns on straightforward summary adjudication and fee award review principles under which plaintiff’s claims have no merit. We therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

According to the parties’ separate statements of fact, an investment group formed plaintiff as an LLC to purchase in bankruptcy and assume the name and all assets of a corporation known as All American Semiconductor, Inc. (Inc.).¹ The bankruptcy asset bid solicitation materials that plaintiff reviewed before the purchase described Inc. as a company that “markets its products primarily to original equipment manufacturers in a diverse and growing range of industries.” Inc.’s “customer base include[d] manufacturers of computers and computer-related products; office and home office equipment; cellular and portable products; wireless products; networking, satellite and other communications products, Internet infrastructure equipment and appliances,” and other technology products.

¹ For ease of reference, the parties refer to All American Semiconductor, LLC as “plaintiff,” and they use “Inc.” as shorthand for the company that plaintiff purchased, All American Semiconductor, Inc. We will do the same.

Among Inc.'s many subsidiaries was a company called All American A.V.E.D., Inc., which included the Aved Memory Products business unit (Aved). Some of Inc.'s and Aved's many products included "Flat Panel Display Products," "Active and Passive/Electromechanical Products," and "Memory Modules." According to plaintiff, "[m]emory modules facilitate the incorporation of expanded memory in limited space" in technology applications, and "[m]emory products, which include the memory module subsegment, represent one of the larger product sectors of semiconductor revenues." For its part, APX rather unhelpfully defines a memory module as an assembly of "certain components on a P[rinted]C[ircuit]B[oard] designed for that purpose and specifications."

Plaintiff acquired Aved when it acquired Inc. Plaintiff believed when it bought Inc. out of bankruptcy that Aved's ongoing business operations included designing memory modules and that it did not simply design those modules under contract for others, but instead retained ownership of their proprietary memory module designs. Plaintiff relied on a statement in the voluminous bankruptcy bid solicitation package noting Aved "also sells memory modules under the Aved Memory Products label. These modules, which are designed by the Company, are manufactured by third party companies." (Plaintiff's underlining.) This statement apparently had its origin in Inc.'s summary statement of its operations in a 2006 quarterly Securities and Exchange Commission (SEC) regulatory filing, in which Inc. stated in identical language, "These modules, *which are designed by the Company*, are manufactured by third parties." (Italics added.)

Plaintiff bought from Inc. under the bankruptcy asset purchase agreement all of the following, "*to the extent owned*" by Inc. and its various subsidiaries: "all inventory, raw materials and work-in-process"; "all fixed assets, equipment, furnishings,

computer hardware, vehicles, fixtures and other tangible personal property”; “all rights of the Sellers under the Assumed Contracts”; and “*all Seller Intellectual Property*, including the software licensed to Sellers by Microsoft and Oracle.” (Italics added.)

According to plaintiff, Aved’s intellectual property included ownership of memory module designs because Aved designed them and, while other companies, including APX, assembled memory modules based on Aved’s designs, the designs remained Aved’s sole property. Plaintiff does not describe the due diligence it performed in conjunction with its purchase to verify Aved owned or had in its possession any particular examples of memory module design intellectual property. While plaintiff’s agreement to purchase Inc. included a right of inspection, plaintiff’s rights under the agreement to any intellectual property it acquired was not contingent upon inspection. Because plaintiff need not “have viewed each and every design for such designs to be included in the sale,” plaintiff concluded that inspection or verification of the existence of *any* designs “ma[de] no sense in this multimillion dollar transaction, within an ongoing bankruptcy, involving the sale of multiple businesses, which sold ‘all’ of Inc.’s intellectual property.”

After plaintiff completed the bankruptcy purchase, it sought to consolidate in Miami, Florida, some of Inc.’s assets from around the country, including from Aved’s Tustin operation, where Aved assembled memory modules and where plaintiff believed Aved designed them as well. Plaintiff found no memory module inventory in Tustin. To its surprise, plaintiff also did not find any memory module design plans. Indeed, plaintiff was surprised to find no paper documents of any kind among the Aved assets shipped from Tustin to Miami. This unsettled plaintiff’s president, Jamil Nizam, who expected “‘at a minimum’ the transfer of folders of bills of materials, designs, and drawings.”

Nizam believed Inc., through its subsidiary Aved, owned intellectual property including memory module designs. He based his belief on the reference in the bankruptcy bid solicitation materials to Inc.'s history of product design and the reference to intellectual property and "Sellers' design . . . of [unspecified] products" in the asset purchase agreement. Plaintiff acknowledged that while Nizam had 26 years of experience in the electronic components industry, he did not have an electrical engineering degree or other familiarity with memory modules, nor any business experience with memory modules, nor did he know what one looked like, and he did not have any knowledge of the process to design a memory module.

Plaintiff sent to Aved's Tustin location one of its business operations auditors, Laura Blaisdell, who had been employed at Inc. for 19 years and was well-versed in its operating procedures, especially its computer systems. Blaisdell confirmed the absence of paper files of any kind in the Tustin office to transfer to Inc. in Miami. Blaisdell also personally supervised the transfer of Aved's computer files to plaintiff's computer network. Familiar with "the meaning and impact of computer 'scrubbing,'" Blaisdell noted the existence of empty directories on Aved's computers labeled "Richard McCauley," "Document," "GDDR266," and "Dung." Blaisdell concluded someone had "scrubbed" Aved's computers, erasing data from them.

Plaintiff surmised the erased data related somehow to memory modules and would have shown Aved not only designed memory modules, but continued to hold a proprietary ownership interest in those designs. Plaintiff concluded, for instance, that because "[t]here is no reason to have a file directory without files," it reasonably could infer "the 'Document List' file contained designs."

McCauley, Aved's general manager and a vice president of the company, had resigned his position before the bankruptcy. According to McCauley, Aved did not design memory modules, it only assembled them according to designs created by APX and other companies. Plaintiff surmised the converse was true, reasoning as follows: APX assembled memory modules; the designs to do so had to come from somewhere; and therefore the designs APX used to assemble memory modules must have been Aved's. Plaintiff claimed McCauley formed a new company called Aved Memory Products, Inc. (AMP), even before he left Aved, and AMP produced memory modules in conjunction with APX. Plaintiff believed APX assembled the memory modules according to Aved's missing designs, pirated by McCauley.

Plaintiff sued McCauley and AMP (collectively, the McCauley defendants) for claims including trademark infringement and, as pertinent here, four causes of action against both the McCauley defendants and APX: unfair competition by using Aved's memory module designs (fifth cause of action); conversion of over \$300,000 of Aved's physical inventory to assemble memory modules (seventh cause of action); conversion of Aved's memory module designs (eighth cause of action); and misappropriation of Aved's trade secrets, namely its memory module designs (ninth cause of action).

The trial court granted APX's motion for judgment on the pleadings on Aved's fifth cause of action for unfair competition, and plaintiff does not challenge that ruling in this appeal. The seventh cause of action for conversion of inventory eventually went to trial, and plaintiff does not challenge the defense verdicts. In the meantime, APX sought summary adjudication of Aved's eighth and ninth causes of action.

APX grounded its summary adjudication motion in McCauley's deposition testimony that Aved did not and could not design memory modules. Instead, Aved

acquired memory module designs from APX and assembled modules based on those designs, according to McCauley. Lu Nguyen, an electrical engineer and APX's founder and president, explained APX provided Aved and other memory module assemblers with memory module designs on a nonexclusive basis, never selling the underlying design because that would destroy APX's business model. Patrick Patterson, an electrical engineer, testified he designed the memory modules for APX, and he and Nguyen explained that complex computer software such as OrCad, PADS, and Gerber electronic files were "absolutely required in the design process" for memory modules. McCauley confirmed Aved lacked the in-house capability to design memory modules because it employed no electrical engineers and also did not have the requisite software or machine tooling.

Plaintiff opposed APX's summary adjudication motion relying on its general belief based on the SEC and bankruptcy bid solicitation materials that Aved designed memory modules. For its part, APX highlighted that plaintiff failed to identify or provide any description of Aved's alleged trade secret memory module designs, and that no one at Inc. or Aved could describe who, how, when, and where anyone at Aved designed a specific memory module.

To rebut this claim and show a triable issue of fact, plaintiff offered the deposition testimony of a McCauley employee and former shipping clerk at Aved, Jesus Sanchez, attesting that he believed a former Aved employee, Dung Nguyen, designed memory modules at Aved. Sanchez, however, provided no foundation for his belief; he did not work with Dung in design, nor did he otherwise have any familiarity with or expertise in the design of memory modules. Additionally, Dung testified he was not an engineer and denied he designed memory modules.

Plaintiff also relied on Blaisdell's declaration that she conducted a business practices audit for Inc. at Aved 10 years before the litigation and noted then a 1996 Aved "Quality Manual" that referred to management and design process controls necessary to obtain certification from an unspecified certification agency. But Blaisdell did not claim the manual or certification process governed the design of memory modules specifically.

Blaisdell did claim to have found on Aved's computers a "trace of print" and, while neither party explained what a trace of print is, plaintiff suggested it had something to do with Orcad memory module design software, and therefore the Orcad software might once have been on Aved's computers before being scrubbed. Similarly, Blaisdell surmised from an empty directory labeled "GDDR266" that Gerber software, which could be used to design memory modules, might also have once been on Aved's computers.

David Heimann, an Inc. employee who had never worked at Aved, testified in his deposition that with the right software and tools, he and other Inc. field engineers could design a memory module. But Heimann, who held only a two-year associates degree in electrical engineering, admitted he had never observed anyone at Aved or Inc. creating or preparing any memory module designs, he did not know what specific equipment Aved or Inc. possessed to design memory modules, and he did not know of any memory module designs created by Inc. or Aved. Finally, plaintiff faulted McCauley for the lack of evidence, claiming he stole the designs and that, because "McCauley's infringing company employs the bulk of [former] Aved employees," "[p]roviding evidence adverse to McCauley would risk these 'disloyal' employees' jobs."

Without evidence of any particular memory module designs created by Aved, plaintiff submitted supplemental opposition that offered a new basis for liability.

Plaintiff now claimed it obtained an exclusive intellectual property and trade secret interest in memory module designs by purchasing designs *from* APX so it could assemble memory modules. Plaintiff relied on multiple invoices in which APX billed Inc. on behalf of Inc.'s subsidiary Aved for nonrecurring engineering (NRE) charges. Inc. paid APX a total of \$81,000 on the NRE invoices, which dated from 2000 to 2007. One invoice for \$15,000 among the two or three dozen NRE invoices stated it was for “NRE *design* 4GB 4 Rank SO-DIMM.” (Italics added.) Based on these invoices and McCauley’s testimony that APX included design costs in its price for memory module components that Aved purchased and assembled, plaintiff argued it owned memory module designs created by APX.

The trial court granted APX summary adjudication, concluding plaintiff failed to establish a triable issue of fact on either of its theories of design ownership and misappropriation. Specifically, the court concluded that “even if Aved did design [its own] memory modules, there is no evidence that Aved provided *specific designs* to” APX that APX then misappropriated. The trial court similarly found no triable issue of fact on APX’s alleged misappropriation of its own designs that it sold to Aved. Specifically, the court concluded plaintiff “did not provide any evidence to show that, when Aved/[Inc.] purchased designs from Defendant APX, it specifically conditioned the purchase on an agreement that APX would not retain anything related to the purchased designs. As such, Defendant APX’s possession of designs it sold to Aved/[Inc.] would be lawful,” whereas plaintiff’s misappropriation theory required it “to show that APX engaged in a wrongful act to somehow misuse whatever designs it sold to Aved/[Inc.]”

The matter proceeded to trial on the remaining causes of action. Plaintiff prevailed against the McCauley defendants for infringing its Aved trademark when

McCauley began operating Aved Memory Products, Inc. The jury rejected plaintiff's claim that APX and the McCauley defendants converted \$300,000 of Aved's physical inventory for manufacturing memory modules. In a special verdict, the jury also rejected plaintiff's claim that the McCauley defendants converted Aved memory module designs or misappropriated Aved memory module design trade secrets. Specifically, the jury found Aved did not own the memory module designs it claimed the McCauley defendants stole. In a posttrial motion, the trial court awarded APX more than \$200,000 from plaintiff in attorney fees because plaintiff continued to pursue its trade secret misappropriation cause of action against APX without any evidence to support the claim. (Civ. Code, § 3426.4.) Plaintiff now appeals the trial court's summary adjudication ruling on plaintiff's ninth cause of action alleging APX misappropriated trade secrets (memory module design) and the trial court's ruling awarding APX attorney fees. Success in overturning the summary adjudication ruling would, of course, also require reversal of the attorney fees order.

II

DISCUSSION

A. *Summary Adjudication Principles and Standard of Review*

“A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty.” (Code Civ. Proc., § 437c, subd. (f)(1); all further undesignated statutory references are to this code.) “A motion for summary adjudication proceeds in all procedural respects as a motion for summary judgment.” (*Westlye v. Look Sports, Inc.* (1993) 17 Cal.App.4th 1715,1727; § 437c, subd. (f)(2).) As with motions for summary judgment, the moving party on a motion for summary adjudication bears the initial

burden to show the plaintiff's claim has no merit. (§ 437c, subs. (a) & (o).) A defendant meets “his ‘burden of showing that a cause of action has no merit if’ he ‘[shows] that one or more elements of the cause of action . . . cannot be established’” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849) or disproves “at least one essential element of the plaintiff’s cause of action” (*Sanchez v. Swinerton & Walberg Co.* (1996) 47 Cal.App.4th 1461, 1465) or there is a complete defense to the claim. (§ 437c, subd. (p)(2).)

Once the defendant meets that burden, the burden shifts to the plaintiff to present evidence establishing triable issues exist on one or more material facts as to that cause of action or a defense thereto. (§ 437c, subd. (p)(2).) A triable issue of material fact exists “‘if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.’ [Citation.] Thus, a party ‘cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact. [Citation.]’ [Citation.]” (*Dollinger DeAnza Associates v. Chicago Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1144-1145 (*Dollinger*)). “Where the plaintiff fails to satisfy this burden, judgment in favor of the defendant shall be granted as a matter of law. [Citation.]” (*Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014.)

We review de novo a trial court’s summary adjudication ruling. (*Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 848.) Nevertheless, “[o]n review of a summary [adjudication], the appellant has the burden of showing error, even if he did not bear the burden in the trial court.” (*Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 230 (*Claudio*)). “[I]n practical effect, we assume the role of a trial

court and apply the same rules and standards that govern a trial court’s determination of a motion for summary [adjudication].’ [Citation.] ‘Regardless of how the trial court reached its decision, it falls to us to examine the record de novo and independently determine whether that decision is correct.’ [Citation.]” (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694; *Dollinger, supra*, 199 Cal.App.4th at p. 1144 [“the reviewing court . . . ‘reviews the trial court’s ruling, not its rationale’”].)

B. *The Law Governing Trade Secret Misappropriation Claims*

The California Uniform Trade Secrets Act (CUTSA), codified in sections 3426 through 3426.11 of the Civil Code, governs claims relating to the misappropriation of trade secrets. A “[t]rade secret” is “information, including a formula, pattern, compilation, program, device, method, technique, or process that: [¶] (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and [¶] (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” (Civ. Code, § 3426.1, subd. (d).) Stated differently, the fundamental test for a trade secret is “whether the matter sought to be protected is information (1) which is valuable because it is unknown to others and (2) which the owner has attempted to keep secret.” (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1454; *ABBA Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 18 (*Abba Rubber*).) Information that is generally known to the public or to persons in the relevant industry is not a trade secret. (*American Paper & Packaging Products, Inc. v. Kirgan* (1986) 183 Cal.App.3d 1318, 1326.)

The information cannot be vague or undefined. By statute, a plaintiff seeking trade secret protection must be able to “identify the trade secret with reasonable

particularity.” (§ 2019.210; see Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights* (2008) 61 Stan. L.Rev. 311, 344 [a plaintiff should be required to “clearly define[] what it claims to own, rather than (as happens all too often in practice) falling back on vague hand waving”].) Accordingly, plaintiffs sometimes file under seal a document or description “designating the trade secrets claimed by it.” (*Silvaco Data Systems v. Intel Corp.* (2010) 184 Cal.App.4th 210, 221 (*Silvaco*), disapproved on other grounds in *Kwikset Corp. v. Superior Court* (2011) 51 Cal. 4th 310, 337.)

The plaintiff must own the trade secret. (*CytoDyn of New Mexico Inc. v. Amerimmune Pharmaceuticals, Inc.* (2008) 160 Cal.App.4th 288, 297 (*Cytodyn*) [ownership is an essential element for trade secret protection under CUTSA]; *Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1665 [same].) Thus, “a plaintiff must be able to prove his status as an ‘owner’ of the trade secret,” or face dismissal of the claim. (*Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal App.4th 980, 999 (*Jasmine Networks*) [no standing where plaintiff does not own trade secret].)

The CUTSA protects trade secret owners against misappropriation of their proprietary information. Misappropriation is the wrongful acquisition, use, or disclosure of a trade secret. (Civ. Code, §3426.1, subd. (b).) A cause of action for misappropriation of a trade secret consists of the following elements: “(1) possession by the plaintiff of the trade secret; (2) the defendant’s misappropriation of a trade secret, meaning its wrongful acquisition, disclosure or use; and (3) resulting or threatened injury to the plaintiff.” (*Silvaco, supra*, 184 Cal.App.4th at p. 220.) Here, the trial court granted summary adjudication based on the first element: plaintiff failed to demonstrate it could prove by a preponderance of evidence that it possessed and solely owned trade secret information.

C. *Summary Adjudication of Plaintiff's Trade Secret Claim Was Proper*

The trial court properly granted APX's summary adjudication motion on plaintiff's trade secret misappropriation claim. Plaintiff advanced two alternate theories of trade secret ownership: first, that it created memory module designs it furnished to APX for assembly and second, it purchased memory module trade secret designs from APX that Aved used to develop a derivative line of Aved memory modules based on APX's trade secret design. The trial court did not err in concluding no evidence supported either theory.

A general flaw common to both theories is that plaintiff never identified *what* constituted the trade secret in any particular memory module design. The core premise of trade secret protection is that an individual or enterprise has developed a novel commercial secret worthy of legal protection precisely because it is unknown to others in the trade or the public. Plaintiff did not identify for the court in sealed filings or otherwise any particular secret manner of designing memory modules that it developed or purchased. Instead, on its development theory, plaintiff devoted its efforts to showing its *capacity* to design, i.e., that it *could have designed* memory modules, based on the inference it hoped to create from evidence that some of the scrubbed data might have been software that *could be* used to design memory modules. Plaintiff similarly attempted to prove its field engineers *could* design memory modules, assuming Heimann was correct that any field engineer and not just an experienced designer or electrical engineer could design a memory module given the right software and materials.

But conspicuously lacking in plaintiff's summary adjudication opposition was any evidence Aved *actually* designed any *particular* memory module, whether or not it had the capacity to do so. Independently fatal to plaintiff's claim, plaintiff also omitted

specifying in its opposition *what* constituted the trade secret in any particular module design, including evidence that the design was novel in the field and remained unknown to competitors and the public.

At oral argument in this court, as at the hearing below, plaintiff attempted to fill these gaps with inferences. For example, plaintiff suggested a doctrine of “confidential relationship” or “equitable estoppel” supported its design ownership claim. Plaintiff contends Aved did not expect APX as its assembly vendor to misappropriate Aved’s designs because parties in a commercial relationship are or should be estopped from doing so. But this tack is circular. Plaintiff simply presumes from its bare allegation that Aved furnished APX with designs that Aved in fact did so — without any evidence that Aved actually gave APX any particular designs *or* created *or* owned them, *nor even what constituted the trade secret, if any, in the unspecified designs.*

We find similarly spurious plaintiff’s claim at argument that a reasonable trier of fact could infer from the bare fact Aved existed before Nguyen founded APX that Aved necessarily must have created memory module designs and therefore held superior title in those designs against APX. The argument is a logical nonsequitur since the mere existence of a company before another is formed says nothing about *what* the first company has designed or created, if anything. Plaintiff’s attempt to shift the burden of proof to APX is similarly unavailing. Plaintiff claimed at argument that APX had not proved it created or owned any memory module designs, and therefore a reasonable trier of fact could infer that Aved created and owned memory module designs. Again, this reasoning is fallacious: that one entity has *not* done X, does not mean another has. In any event, plaintiff’s inability to provide evidence of any particular trade secret in any particular memory module design that it allegedly created does not warrant shifting the

burden of proof to APX to identify *Aved*'s trade secrets. That burden necessarily rests on the plaintiff. (See § 2019.210 [plaintiff must “identify the trade secret with reasonable particularity”]; see also *Silvaco, supra*, 184 Cal.App.4th at p. 220 [plaintiff must prove existence of trade secret it claims to possess].)

In sum, the record reflects plaintiff knew nothing of the designs it allegedly created. Yet inherent in the nature of a trade secret is that it is something only the plaintiff knows, and further that it is worth protecting and the plaintiff has actually protected it. Because plaintiff failed to offer proof of *what* its alleged memory module design or designs consisted of, it could not prove another essential element of its trade secret case: that whatever was unique about its memory module design was unknown to the public or to others in the industry. As noted, at best plaintiff attempted to present evidence that it *could* design memory modules with novel trade secret elements. But trade secret protection safeguards what *is*, not what could be. And the design must be new or otherwise unknown to others, which plaintiff made no effort to establish.

It is the plaintiff's burden to prove the existence of the claimed trade secret (*Silvaco, supra*, 184 Cal.App.4th at p. 220) and “to prove his status as an ‘owner’ of the trade secret,” or face dismissal of the claim (*Jasmine Networks, supra*, Cal App.4th at p. 999). (See, e.g., *IDX Systems Corp. v. Epic Systems Corp.* (7th Cir. 2002) 285 F.3d 581, 583-584 [at summary judgment, claimant must “separate the trade secrets from the other information that goes into any software package. Which aspects are known to the trade and which are not?"] Put another way, the plaintiff may not “leave[] mysterious exactly which pieces of information are the trade secrets” and “must do more than just identify a kind of technology and then invite the court to hunt through the details in search of items meeting the statutory definition.” (*Ibid.*) Consequently, the trial court

properly granted summary adjudication on grounds there was “no evidence [of] specific designs” constituting trade secrets that McCauley allegedly provided *to* APX.

The trial court similarly properly granted summary adjudication on grounds that plaintiff provided no evidence to support its alternate trade secret claim in designs Aved allegedly purchased *from* APX. As the trial court observed, even assuming the invoices for nonrecurring engineering (NRE) charges could be deemed to refer to the design of memory modules, nothing in the record indicated APX’s engineering work for Aved entitled Aved to exclusive rights in any design.

Plaintiff misplaces reliance on McCauley’s testimony that APX included the cost of design in its invoice charges for products and services APX sold to Aved and others. This does not establish an inference plaintiff gained exclusive rights to APX’s designs, just as a consumer who purchases an iPad from Apple Computer, Inc., does not gain intellectual property rights in the device’s underlying technology because the purchase price necessarily includes research and design costs. McCauley’s testimony simply does not support an inference plaintiff held an ownership right in any unspecified trade secrets that may have been included in Aved’s purchases from APX. In particular, nothing in the invoices or any other evidence suggested an *exclusive* right, such that APX would be barred from using the very trade secrets or intellectual property it developed in whatever it sold to Aved. As the trial court observed, plaintiff failed to show Aved “specifically conditioned the purchase[s]” in any manner, failed to show APX “would not retain anything related to the purchased designs,” and therefore failed to present any evidence APX’s continued use of its own designs was a wrongful misappropriation.

Additionally, just as plaintiff failed to show the particulars of *what* Aved may have designed on its own and that anything in those memory module designs was

unknown to the public or in the industry, plaintiff also failed to show *what* constituted the trade secret or secrets in any nonrecurring engineering Aved purchased from APX, or that the NRE creation was *unknown* to the public or others in the industry. Although the trial court did not expressly articulate this rationale concerning the alleged designs Aved purchased from APX, it independently supports the trial court’s summary adjudication rationale. (See *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694, fn. omitted [“The sole question properly before us on review of the summary judgment is whether the judge reached the right *result* . . . whatever path he might have taken to get there, and we decide that question independently of the trial court”].)

At oral argument, plaintiff pointed to the similarity between items APX produced for McCauley’s new company’s product catalog and memory modules that Aved formerly sold as evidence that APX misappropriated for McCauley designs that Aved created itself or purchased from APX. Plaintiff cites the 135 “identical” products as evidence that APX commandeered from Aved the trade secrets necessary to produce those items. In essence, plaintiff relies on the products’ similitude as the “what” constituting its trade secret; in other words, because the products are the same, their underlying design must be the same too, and therefore APX necessarily misappropriated Aved’s trade secret design to produce and assemble those products.

But this “evidence” of product line similarity does not state a *trade secret* claim. As discussed, plaintiff never identified the nature of any trade secret used to create any particular memory module, including how the secret manner of creating the product is unique in the industry and adds value because it is unknown by others. The fact two companies have similar or identical iterations of a product undercuts the notion a trade secret is necessary to create them. (See Civ. Code, § 3426.1, subd. (a) [independent

derivation permissible].) Additionally, *products* cannot themselves be trade secrets if they reveal their constituent parts to those in the trade or public who handle or disassemble them because reverse engineering is *not* a trade secret violation. (*Ibid.*; *Abba Rubber, supra*, 235 Cal.App.3d at pp. 21-22, fn. 9.) In sum, plaintiff did nothing to demonstrate it held by original creation or by purchase contract an exclusive trade secret right in the underlying design of any products it sold, the very basis of a trade secret claim. For all the foregoing reasons, the trial court properly granted summary adjudication on plaintiff’s trade secret misappropriation cause of action.²

D. *Attorney Fees*

Plaintiff argues the trial court abused its discretion by awarding APX \$202,291.50 in attorney fees for plaintiff’s bad faith prosecution of its trade secret claim. The CUTSA provides that “[i]f a claim of [trade secret] misappropriation is made in bad faith . . . the court may award reasonable attorney’s fees and costs to the prevailing party.” (Civ. Code, § 3426.4.) The statute does not define bad faith. “But courts have concluded that ‘bad faith’ as used in section 3426.4 consists of both ‘objective speciousness of the Plaintiff’s claim . . . and . . . subjective bad faith in bringing or maintaining the claim.’” (*SASCO v. Rosendin Electric, Inc.* (2012) 207 Cal.App.4th 837,

² Because we conclude plaintiff’s challenge to the trial court’s summary adjudication ruling fails on the merits, we need not address APX’s alternative collateral estoppel argument. Specifically, APX asserts that the jury’s special verdict conclusion on the conversion cause of action that plaintiff did not own any memory module designs that McCauley allegedly stole renders moot the trade secret misappropriation claim. The parties dispute whether the trade secret misappropriation and conversion claims were based on the same facts and theories, but we need not resolve the issue.

APX’s request for judicial notice of excerpts of Nguyen’s and McCauley’s deposition testimony is similarly denied as moot because, as discussed, the record at the time of summary adjudication shows the trial court properly granted APX’s motion.

844-845 (SASCO), italics added.) “Section 3426.4 authorizes the trial court to award attorney fees as a deterrent to specious trade secret claims. [Citation.] Because the award is a sanction, a trial court has broad discretion in awarding fees.” (SASCO, at p. 845.)

“Objective speciousness exists where the action superficially appears to have merit but there is a complete lack of evidence to support the claim.” (*FLIR Systems, Inc. v. Parrish* (2009) 174 Cal.App.4th 1270, 1276 (*FLIR Systems*)). The requirement of subjective bad faith, however, means “more” is necessary “than the simple inability to prove the necessary elements of a cause of action.” (*Weco Supply Co., Inc. v. Sherwin-Williams Co.* (E.D. Cal., Jan. 3, 2013) 2013 WL 56639, *3.) “The ‘bad faith’ contemplated by section 3426.4 means not only that the claim is objectively specious, but that the plaintiff acted with *subjective* bad faith.” (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 578 (*Yield Dynamics*)).

“A subjective state of mind will rarely be susceptible of direct proof; usually the trial court will be required to infer it from circumstantial evidence.” (*Gemini Aluminum Corp. v. California Custom Shapes, Inc.* (2002) 95 Cal.App.4th 1249, 1263.) For example, bad faith “may be inferred where the specific shortcomings of the case are identified by opposing counsel, and the decision is made to go forward despite the inability to respond to the arguments raised.” (*Id.* at p. 1264.) Subjective bad faith exists where the party intends to cause unnecessary delay, filed the action to harass the opposing party, or harbored other improper motives. (*FLIR Systems, supra*, 174 Cal.App.4th at p. 1278.) “A court may find subjective misconduct by relying on direct evidence of [the] plaintiff’s knowledge during certain points in the litigation *and may also infer it from the speciousness of [the] plaintiff’s trade secret claim and its*

conduct during litigation.” (Computer Econs., Inc. v. Gartner Group, Inc. (S.D. Cal., Dec. 14, 1999) 1999 U.S. Dist. LEXIS 22204, 18-19, italics added.)

Most critical to our analysis: A plaintiff’s failure to identify what trade secrets are at issue may support a finding of subjective bad faith. (*FLIR Systems*, 174 Cal.App.4th at p. 1281.)

Here, as discussed, plaintiff’s separate statements of fact for summary adjudication reflected a complete lack of evidence of *what* constituted plaintiff’s actual trade secret designs for memory modules and never identified any aspects of those designs that were *unknown* to the public or others in the industry. APX had moved for summary adjudication on this basis, repeatedly arguing from the outset of the litigation that plaintiff did not, and could not, identify what its own alleged trade secrets were because Aved never designed memory modules. The trial court reasonably could infer objective speciousness from plaintiff’s complete lack of evidence to support essential elements of a trade secret claim. As the court in *SASCO* observed, a bad faith finding under Civil Code section 3426.4 is not avoided simply by claiming “it appeared at the time of the filing of the action some evidence would be obtained in discovery that would support a misappropriation claim.” (*SASCO, supra*, 207 Cal.App.4th at p. 847.)

The trial court reasonably could infer subjective bad faith from plaintiff’s persistence in its claims without evidence, compounded by its supplementary opposition that reflected the same core defects. As noted, plaintiff initially opposed summary adjudication on grounds it created and furnished memory module designs to APX for assembly, but the record did not support this unfounded claim. Plaintiff nevertheless pressed forward and changed tacks in a supplemental opposition, claiming it purchased memory module designs from APX, but it still never identified *what* if anything it

purchased from APX constituted a trade secret, how any aspect of the allegedly purchased designs was *unknown* to the public or within the industry, nor how it held exclusive rights in any such design purchase. (Cf. *Zamos v. Stroud* (2004) 32 Cal.4th 958, 970 [continuing to prosecute a lawsuit lacking probable cause may reveal requisite malice].) A plaintiff's failure to identify what trade secrets are at issue supports a finding of subjective bad faith. (*FLIR Systems*, 174 Cal.App.4th at p. 1281.) We cannot say the trial court abused its discretion in finding the requisite bad faith and awarding attorney fees.

Plaintiff argues the trial court erred in sustaining APX's objections to statements in the declaration of its president, Nizam, that would have demonstrated a lack of subjective bad faith. Plaintiff relies on the court's observation in *Yield Dynamics* that "[t]he subjective element of bad faith, at least, might be proven or refuted by evidence that would have been wholly irrelevant at trial." (*Yield Dynamics, supra*, 154 Cal.App.4th at p. 579.) The court noted that while "[the plaintiff]'s subjective opinion about [the defendant]'s liability, for instance, had no place at trial and could not have been properly introduced" on the plaintiff's trade secret misappropriation claim, the evidence was relevant to "whether [the plaintiff] in fact acted for an improper motive in bringing and pursuing the action." (*Ibid.*)

But here, Nizam's bare declaration that plaintiff "filed the trade secret claim, and all of its claims in this action, in good faith and without improper motive" and similar statements did nothing to overcome plaintiff's complete lack of evidence of the particulars of any trade secret design, whether self-created or purchased. The trial court reasonably could find that by compounding, despite notice, its completely unsupported

claim of native trade secrets with a similarly unfounded claim of purchased ones, plaintiff acted in subjective bad faith.

III

DISPOSITION

The judgment is affirmed. Respondent is entitled to its costs on appeal.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.