

I've got a \$233 Million Secret On Bartko Zankel Bunzel & Miller

By Scott Graham

I've been hearing for years that patents are growing obsolete in today's legal landscape and that trade secrets are where the action is going to be.

This week I'm feeling it.

Exhibit A was **U.S. District Judge Jon Tigar's** order clearing the way for a trade secrets trial involving artificial intelligence, which I wrote about in Tuesday's briefing.

Exhibit B landed Wednesday in the Santa Clara County courtroom of **Judge Sunil Kulkarni**: a \$223 million trade secret verdict between rival Silicon Valley chip designers.

"This case is about complicated software and hardware. But it's more about lies, theft, and betrayal," is how **Bartko, Zankel, Bunzel & Miller partner Patrick Ryan** kicked off his opening statement for ASML US.

That might be standard fare for a trade secret trial, but you can imagine how it would hold more thrall than **breaking down each limitation of asserted patent claims**.

Ryan spun a narrative in which the CEO of **Xtal Inc.** hired away six executives, engineers and other employees from ASML's **Brion Technologies division** in San Jose. That unit has spent more than 15 years developing computational lithography that helps companies like Intel, Samsung and Toshiba fit billions of transistors on a silicon chip. Some of the employees began quietly working for Xtal while still employed at ASML. Others downloaded parts of ASML's Tachyon optimal proxim-

ity correction software to hard drives. One even uploaded ASML source code directly into Xtal's source code repository.

"When they left, they all said, 'We've given everything back. We have nothing,'" Ryan said. Next thing you know, Xtal won a \$27 million contract from Samsung "using ASML Brion's technology. That's what they did."

This proved to be difficult to defend against. Unlike a patent case, there wasn't any validity to attack. Xtal's attorney, **Donald Putterman of Putterman Landry + Yu**, tried the next best thing, arguing to the jury that **ASML didn't act as if its secrets were valuable**—failing to erect an email firewall or monitor employees' computers. "We're talking about products that are alleged to be incredibly valuable, incredibly time-consuming to have been built, incredibly burdensome to replicate," Putterman said during closing argument. "What does it tell you, though, if there is essentially no effort to protect them?"

Most of the employees had inadvertently copied random "odds and ends" from ASML while trying to collect personal information from their workplace computers, Putterman argued. When business information was discovered, it was returned. That behavior was inconsistent with a conspiracy to steal multiple trade secrets. "Given the total lack of security at ASML, any of these engineers could have copied everything, e-mailed it out of the office,



Bartko Zankel partner Patrick Ryan

walked out of the door with it, with ASML being none the wiser," Putterman said.

These defenses didn't appear to sway jurors, who found that all 10 alleged trade secrets had value, that Xtal used six of them, and that Xtal induced the ASML employees to breach their contracts and their duties of loyalty. Jurors also found Xtal acted with malice, fraud or oppression, opening the door to attorneys fees and a possible punitive award.

And there won't be an opportunity to invalidate the trade secrets at the PTAB or apportion the damages down to the smallest salable secret.

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