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The District Court for the Northern District of California recently issued an order awarding partial attorneys' fees to a defendant in a trade secret misappropriation case brought pursuant to the federal Defend Trade Secrets Act ("DTSA") and California Uniform Trade Secrets Act ("CUTSA"). The decision is most notable for making clear a plaintiff's ethical obligation to immediately dismiss a trade secrets action once it knows that its misappropriation claims are objectively specious.

*Swarmify, Inc. v. Cloudflare, Inc.*, 2018 U.S. Dist. LEXIS 168317 (No. C 17-06957 WHA), concerned plaintiff Swarmify's claims of alleged misappropriation of trade secrets related to video streaming technology by defendant Cloudflare. Prior to the lawsuit, Swarmify had shared the allegedly trade secret technology with Cloudflare as the two discussed a potential business relationship. However, the negotiations fell through, and shortly thereafter, Cloudflare announced in a blog post that it was launching a new video streaming service. Upon seeing the blog post, Swarmify contacted Cloudflare and contended that it discussed Swarmify's trade secret technology. After Cloudflare failed to promptly provide any explanation, Swarmify filed suit in December 2017. Swarmify filed a motion for preliminary injunction later that same month. The Court denied the motion in February 2017. At a mediation held in early May 2018, Cloudflare for the first time raised a new defense that Swarmify conceded would disprove its claims, if true. In late May 2018, Swarmify confirmed that the defense was, in fact, true. Instead of immediately dismissing the case however, Swarmify sought to settle with Cloudflare. When the parties could not agree on the form of a dismissal (i.e., with or without prejudice), only then did Swarmify move to dismiss the action, initially without prejudice, but later with prejudice, in early June 2018.

After dismissal, Cloudflare moved for attorneys' fees, seeking approximately \$200,000, pursuant to the DTSA and CUTSA. Both statutes provide for attorneys' fees to the prevailing party where the opposing party has acted in "bad faith." Attorneys' fees may be awarded where the claim is objectively specious and the plaintiff acts with subjective bad faith in bringing or maintaining the action. Although Cloudflare asserted that Swarmify had acted in bad faith by bringing the action in first place, the Court disagreed. Rather, the Court found that prior to confirming Cloudflare's new defense first presented in May 2018, Swarmify's claims, though not particularly strong, were not objectively specious, and Swarmify had not acted in subjective bad faith. However, the Court also found that after confirming Cloudflare's new defense, Swarmify had an ethical duty to immediately dismiss the action, rather than attempt to extract some gain from Cloudflare by settling. Accordingly, the Court determined that Swarmify had acted in bad faith from late May 2018 to early June 2018, and awarded attorneys' fees to Cloudflare in the amount of approximately \$9800 for that period.

This decision serves as a reminder to both parties and counsel of the attorneys' fees exposure that may result in pushing a misappropriation claim, even modestly, once it is confirmed that the claim has no merit.