

10th Circ. Clarifies Injunction Rule In Trade Secrets Row

By **Kat Greene**

Law360, Los Angeles (October 30, 2017, 9:08 PM EDT) -- First Western Financial Inc. lost a preliminary injunction it had scored in a trade secrets dispute with the former owner of an investment firm it acquired when the Tenth Circuit on Monday clarified its rule about showing irreparable harm, finding the former owner could still contact clients.

A three-judge panel reversed U.S. District Judge William J. Martinez's injunction barring former employee Kenneth Malamed from soliciting clients from First Western Capital Management after he was fired in September 2016, finding that the lower court's decision to let First Western skip proving irreparable harm was unfair to Malamed, according to the decision.

Judge Martinez had found that, ultimately, First Western hadn't shown it would face irreparable harm if Malamed stole clients, because it could be financially compensated for those losses, court records show.

But he cited an earlier decision by the Tenth Circuit that he said supported the theory that First Western was excused from showing the harm because, if its allegations that Malamed scraped its private client information before being shown the door were true, it would be a violation of the Defend Trade Secrets Act and Colorado Uniform Trade Secrets Act. As a violation of trade secrets law, the solicitation of clients could be stopped with an injunction without harm, Judge Martinez had reasoned.

On Monday, the Tenth Circuit, clarifying its own rule, said the U.S. Supreme Court has since narrowed that provision.

"DTSA and CUTSA ... merely authorize and do not mandate injunctive relief and thus do not allow a presumption of irreparable harm," the panel wrote.

The court found that, because Judge Martinez had already concluded there was no irreparable harm, remand was unnecessary and instead simply reversed the preliminary injunction ruling.

The dispute revolves around First Western's decision to can the former owner of Financial Management Advisors LLC, a firm it acquired in 2008, according to briefs in the case.

Malamed had founded FMA in 1985 and continued to work for the Denver-based company until he was fired in September 2016, court records show. Before he left First Western, he pulled reams of client records, including some clients that had come with him from FMA to First Western in 2008, according to

filings in the case.

After a meeting that hadn't gone well with First Western's brass, Malamed emailed his assistant asking her to print three copies of his client book, which included information on around 5,000 First Western clients, according to the briefs. Of those, 331 were current clients and about half of those had been FMA clients before it was acquired by First Western, court records show.

That client information, First Western contended, is the investment firm's property and doesn't belong in the hands of its former employee. It won a preliminary injunction barring Malamed from using the information to contact clients when Judge Martinez found that the use of the information would violate both state and federal trade secrets law, court records show.

Kent Goss of Crowell & Moring LLP, who represents Malamed, said he was pleased with the ruling and ready to move forward with the case in Judge Martinez's court.

The decision, he said, is especially interesting for "trade secrets geeks," because of the Tenth Circuit's clarification of its standard for preliminary injunctions.

A representative for First Western didn't immediately respond to a request for comment on Monday.

U.S. Circuit Judges Monroe G. McKay, Scott M. Matheson Jr. and Carolyn B. McHugh sat on the panel that reached Monday's decision.

Malamed is represented by Kent B. Goss and Valerie Goo of Crowell & Moring LLP and Paul H. Schwartz of Shoemaker Ghiselli & Schwartz LLC.

First Western is represented by Timothy R. Beyer and Sarah L. Hartley of Bryan Cave LLP.

The case is First Western Capital et al. v. Kenneth Malamed, case number 16-1434, in the U.S. Court of Appeals for the Tenth Circuit.

--Editing by Breda Lund.