

## [Triple Tee Golf, Inc. v. Nike, Inc.](#)

United States Court of Appeals for the Fifth Circuit

April 17, 2007, Filed

Nos. 05-10934, 05-11442

### Reporter

485 F.3d 253 \*; 2007 U.S. App. LEXIS 8807 \*\*; 82 U.S.P.Q.2D (BNA) 1452 \*\*\*

TRIPLE TEE GOLF, INC., a Florida Corporation, Plaintiff-Appellant, versus NIKE, INC., an Oregon Corporation, TOM STITES & ASSOCIATES, INC., doing business as Impact Golf Technologies, Inc., JOHN THOMAS STITES, III, also known as Tom Stites, Defendants-Appellees.

**Subsequent History:** On remand at, Summary judgment granted by, Claim dismissed by [Triple Tee Golf, Inc. v. Nike, Inc., 2007 U.S. Dist. LEXIS 49026 \(N.D. Tex., July 5, 2007\)](#)

**Prior History:** [**\*\*1**] Appeals from the United States District Court for the Northern District of Texas.

[Triple Tee Golf v. Nike Inc., 2005 U.S. Dist. LEXIS 13976 \(N.D. Tex., July 13, 2005\)](#)

**Disposition:** AFFIRMED in part, REVERSED in part, and REMANDED.

### Core Terms

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trade secret, golf club, district court, patent application, weighting, summary judgment, discovery, designs, golfer, golf, Interrogatory, Irons, post-manufacture, evidentiary, proprietary information, hollow, proofs, confidential information, factory, patents, putter, sketches, secret, user, issue of material fact, confidentiality, manufacture, prototypes, misuse, remaining claim

### Case Summary

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#### Procedural Posture

Appellant, corporation one, sought review of a judgment from the United States District Court for the Northern District of Texas, which granted summary judgment to appellees, corporation two and one of its directors, in

corporation one's suit asserting misappropriation of trade secrets and other claims. Corporation one also sought review of an evidentiary order and an order denying reconsideration of the grant of summary judgment to appellees.

#### Overview

Before the director worked for corporation two, corporation one showed him golf club designs that allowed a user to adjust the club after manufacture. Corporation one alleged that its information was used by corporation two. The court held that (1) although the two clubs of corporation two that allegedly were based on corporation one's trade secrets did not use a post-manufacture adjustable design, the district court erred in granting summary judgment on this ground because there was evidence that corporation one's other trade secrets, such as concepts for implementing adjustability, were used; (2) the district court did not err in limiting corporation one's proof to the two accused clubs because corporation one failed to include in its trade secret claims allegations with regard to other clubs made by corporation two; and (3) the district court erred in denying reconsideration, which motion was premised on corporation two's failure during discovery to produce two pending patent applications, because although those applications did not involve the two accused clubs, in light of the information therein, the district court probably would not have limited proof to the accused clubs.

#### Outcome

The court reversed the district court's order denying reconsideration and the order granting summary judgment to appellees. The court affirmed the evidentiary order limiting corporation one's proofs on all its claims to evidence related to the misuse of trade secrets in the accused clubs, subject, however, to the potential need to expand that order so as not to exclude evidence relevant to other clubs comprehended by the patent applications.

## LexisNexis® Headnotes

### [HN4](#) Summary Judgment, Evidentiary Considerations

On a motion for summary judgment, all evidence must be viewed in the light most favorable to the nonmovant.

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Trade Secrets Law > Trade Secret Determination Factors > General Overview

### [HN1](#) Summary Judgment Review, Standards of Review

A circuit court reviews a grant of summary judgment de novo, applying the same standards as the district court.

### [HN5](#) Trade Secrets Law, Trade Secret Determination Factors

In Texas, a "trade secret" is defined as a formula, pattern, device or compilation of information used in a business, which gives the owner an opportunity to obtain an advantage over his competitors who do not know or use it.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > General Overview

### [HN2](#) Entitlement as Matter of Law, Appropriateness

Summary judgment is appropriate when the pleadings, affidavits, and other summary judgment evidence show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Fed. R. Civ. P. 56\(c\)](#).

### [HN6](#) Misappropriation Actions, Elements of Misappropriation

To succeed in its misappropriation of trade secrets claims, a plaintiff must show that (1) a trade secret exists; (2) the defendants acquired the trade secret by breach of a confidential relationship or other improper means; and (3) the defendants used the trade secret without authorization.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

### [HN3](#) Burdens of Proof, Movant Persuasion & Proof

A summary judgment movant bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact. The burden then shifts to the nonmovant to show the existence of a genuine fact issue for trial; however, the nonmovant may not rest upon allegations in the pleadings to make such a showing.

### [HN7](#) Summary Judgment Review, Standards of Review

In reviewing a summary judgment, a circuit court's task is to decide, inter alia, whether the district court properly considered all of the summary judgment evidence in reaching its decision.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Admissibility > Procedural

Matters > Rulings on Evidence

Civil Procedure > ... > Standards of Review > Harmless & Invited Errors > Harmless Error Rule

### [HN8](#) **Standards of Review, Abuse of Discretion**

A circuit court reviews a district court's evidentiary ruling for an abuse of discretion. If the court finds that an abuse of discretion has occurred, the court then applies the harmless error doctrine. Thus, an evidentiary ruling will be affirmed unless the district court abused its discretion and a substantial right of the complaining party was affected.

Trade Secrets Law > Trade Secret Determination Factors > General Overview

### [HN9](#) **Trade Secrets Law, Trade Secret Determination Factors**

To determine whether a trade secret exists, Texas courts apply the following six-factor test: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of the measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

Trade Secrets Law > Nonprotected Information > General Overview

### [HN10](#) **Trade Secrets & Unfair Competition, Noncompetition & Nondisclosure Agreements**

In some breach of confidentiality cases, courts may regard "confidential business information" as being distinct from "trade secrets." Such cases, however, typically involve former employees accused of misusing

their former employer's proprietary information, such as customer lists or pricing data, which arguably is not "secret" but still provides the one who possesses it with a competitive advantage.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judgments > Relief From Judgments > General Overview

### [HN11](#) **Standards of Review, Abuse of Discretion**

A circuit court reviews a district court's denial of a motion for post-judgment relief for an abuse of discretion. A trial court abuses its discretion when its ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence.

Civil Procedure > Judgments > Relief From Judgments > General Overview

### [HN12](#) **Judgments, Relief From Judgments**

A [Fed. R. Civ. P. 60\(b\)](#) motion is not an opportunity for a party to relitigate its case.

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Use

### [HN13](#) **Elements of Misappropriation, Use**

A plaintiff need not prove an actual sale or production of a product to show "use" of its trade secrets.

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**Judges:** Before JONES, Chief Judge, WIENER and BARKSDALE, Circuit Judges.

**Opinion by:** WIENER

## Opinion

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[\*256]

[\*\*\*1453] WIENER, Circuit [\*\*2] Judge.

Plaintiff-Appellant, Triple Tee Golf, Inc. ("TTG") sued Defendants-Appellees ("Defendants"), Nike, Inc. ("Nike") and Tom Stites & Associates, Inc. d/b/a Impact Golf Technologies ("IGT") for misappropriation of trade secrets, negligent misrepresentation, breach of confidentiality, breach of implied contract, and deceptive trade practices. During discovery, the district court limited TTG's proofs on all of its claims to evidence related to the use of TTG's trade secrets in two specific Nike golf clubs, the CPR Woods and the Slingshot irons (collectively, the "accused clubs"). After discovery was completed, Defendants moved for summary judgment, contending that (1) TTG's trade secrets describe a system for weighting golf clubs that is adjustable by the user of the clubs, and (2) the accused Nike clubs are not "adjustable" at all. The district court, having determined that all of TTG's claims turned on the unlawful use of [\*\*\*1454] trade secrets, granted Defendants' motion and dismissed TTG's suit in its entirety.

After the judgment was entered, TTG became aware of two patent applications previously filed by Nike, describing golf clubs that are adjustable by the user of the clubs. Based [\*\*3] on Defendants' failure to disclose these patent applications in response to TTG's discovery requests, TTG moved for relief from the earlier judgment. The district court denied this motion, stating that the patent applications were not relevant to the legal issues that it had decided. TTG now appeals the district court's limiting evidentiary order, grant of summary judgment, and denial of post-judgment relief.

## I. FACTS & PROCEEDINGS

### A. Background

TTG was founded by Jack Gillig to produce and market the golf clubs that he designed. In September 2000, Gillig contacted Tom Stites, a golf club designer and the founder of IGT, to inquire whether IGT would fabricate a prototype golf club for TTG based on one of Gillig's designs. Gillig and Stites met and discussed Gillig's ideas for club design. Gillig showed rough prototypes and sketches to Stites, who made photocopies of Gillig's written materials. After reviewing these materials, Stites agreed that IGT would fabricate a prototype club for TTG.

Shortly after this meeting, however, Stites was hired by Nike Golf ("Nike") as its Director of Product Creation. Stites informed Gillig that, because of Stites's new association [\*\*4] with Nike, IGT would not be able to make the promised prototype golf club for TTG. In 2002, TTG submitted its design concepts directly to Nike, but Nike returned TTG's submission, indicating that it was not interested in developing those concepts.

While attending a golf industry trade show in February 2003, Gillig noticed that Nike's CPR Woods bore certain similarities to one of the club designs that he had [\*\*257] shown to Stites. Gillig immediately suspected that Stites and Nike had used TTG's designs to develop the CPR Woods, and he later suspected that other of his designs had been used in Nike's Slingshot Irons and OZ T-100 putter.

TTG sued Nike and Stites in January 2004, asserting claims for (1) misappropriation of trade secrets, (2) breach of confidentiality, (3) breach of implied contract, (4) negligent misrepresentation, and (5) deceptive trade practices.<sup>1</sup>

### [\*\*5] B. Issues Narrowed During Discovery

TTG's complaint does not specify its trade secrets in detail, instead referring generally to "ideas" and "concepts" for a "novel system of golf clubs and golfing equipment." During discovery, Defendants propounded

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<sup>1</sup> TTG filed its original complaint in the Southern District of Florida, and venue was transferred to the Northern District of Texas. TTG amended its complaint three times, and its Third Amended Complaint, filed on May 19, 2005, is the operative pleading.

interrogatories to TTG seeking (1) precise descriptions of TTG's alleged "trade secrets" (Interrogatory No. 1), and (2) a list of Nike clubs that TTG believed were developed using those trade secrets (Interrogatory No. 5). TTG's initial response to Interrogatory No. 1 did not provide detailed descriptions of the alleged trade secrets, but an April 2005 supplemental response identified seven specific trade secrets:

(a) The first trade secret of the Plaintiff was for an adjustable weighting system in a "hollow back" club, so the distribution of weight in the golf club head could be changed to obtain a desired flight path and distance of a golf ball. The Plaintiff contemplated this could be accomplished through one of three methods: (1) use of an existing sole plate, with a distinct weight distribution, and fixed by Allen screws or other means, could be removed or replaced by a new sole plate with a different weight distribution, [\*\*6] (2) insertion of additional weight into the hollow of the club, or the sole, to obtain a different weight distribution, and (3) use of weighted metal bands, with a distinct weight distribution, spanning across the hollow, but inside the outside boundary of the club head, fixed by Allen screws or other means, that could be removed or replaced by a metal band with a different weight distribution.

(b) The second "trade secret" is that a peripheral band could be placed around the perimeter of the hollow to secure in place either inserted weights, as set forth in number (2) above, or the metal bands, in number (3), as set forth above.

(c) The third "trade secret" is a twenty-seven (27) point weighting system on a [\*\*\*1455] three dimensional x, y, and z coordinate system within the space of the "hollow back" golf club head, and secured with one of the methods set forth above. There would be three weight boxes along the front of the face, from left to right along the y axis, three weight boxes from the bottom of the club head to the top of the club head along the z axis, and three weight [boxes] from the front of the club head to the rear of the club head along an x axis, to create one or more [\*\*7] of twenty-seven (27) weighted coordinates in the three-dimensional space of the "hollow back" club. The adjustable weights, as set forth above, would be changed in the twenty-seven (27) point weighting system to obtain different weight distributions in the club head, to alter the flight of the golf ball when struck to the accommodate the desires and needs of the golfer. At all times, the weights and weighting system

would [\*\*258] stay within the perimeter of the club, as delineated by the peripheral bands, to comply with all rules and regulations of golfing.

(d) The fourth "trade secret" is a system to analyze the swing of a golfer to determine any defect thereof, and whether the optimal striking point ("sweet spot") on the face of the golf club should be adjusted by utilizing the twenty-seven (27) point weighting system to produce the distance and flight path of the golf ball desired by the golfer. The golfer's swing would be captured by video, and then processed through a computer program, to be written and developed by qualified programmers, to analyze the golf swing, and determine the placement of the twenty-seven (27) point weighting system to correct the swing, or to produce a desired [\*\*8] flight path or distance of the golf ball, by positioning of the optimal striking point ("sweet spot") on the face of the golf club.

(e) The fifth "trade secret" is a naming or designation system for golf clubs. Instead of designation of a "1 Wood" or a "4 Iron" or a "Pitching Wedge" or a "Putter," the golf clubs would be named or designated through lofts and description of the purpose for the club. For instance, a club may be designated as a "22 [degrees] Driver," or a "26 [degrees] Fairway Iron," etc.

(f) The sixth "trade secret" builds upon the concept described in the fifth "trade secret." The sixth "trade secret" is to move away from a standardized set of golf clubs with a set number of woods/drivers, a set number of irons, a set number of wedges, and a putter, with a uniform weight distribution throughout the set of clubs. The new set of golf clubs would be assembled using non-uniform/different weight distributions, as set forth above, to achieve different flight paths, distances, and purposes. The twenty-seven (27) point weighting system would be combined with different lofts to enable the golfer to choose specific clubs for specific needs and desires for his game. The [\*\*9] golfer could choose as many, or as little a number, clubs as he wanted to complete a set of golf clubs. All of the golf clubs would be branded the same, and designated or named using the naming system set forth above. The lofts that are available to the golfer would be in 2 [degrees] increments. This will, by its very nature, create golf clubs with non-standard loft. One example of this type of club, that was envisioned by the Plaintiff, was a 22 [degrees] Driver.

(g) The seventh "trade secret" is the way in which all of the foregoing ideas would be marketed toward the general public as one coherent system. The first target consumer would be children and junior golfers, because there were no major golf club manufacturers who directed sets of clubs toward junior golfers. The junior golfer would be provided a set of clubs with just the basic "hollow back" golf club head. Instead of a set of golf clubs with a large number of clubs to understand, the basic junior set would contain only a few clubs, for designated purposes, with different lofts, as set forth above.

The next target consumer would be the parents of the junior golfer, who are a combination of beginning, high handicap, [\*10] or low handicap golfers. This "trade secret" contemplates that the parents of the junior golfers observe their children experiencing success with the system of golf clubs and will want to use a comparable system themselves to accomplish a better game of golf.

The golf clubs would then be offered to women players, high handicap players, [\*259] and low handicap players using all of the previous [\*\*\*1456] "trade secrets" set forth above. Ultimately, the system of golf clubs, using all of the trade secrets set forth above will be tailored to very low handicap/scratch golf players, and for tour players. The system of golf clubs would be marketed to these categories of players by emphasizing that each club can be altered, prior to the start of a round of golf, to accommodate the conditions, course, hazards, and mechanics of the swing of the golfer, on any particular day.

TTG's April 2005 supplemental response also addressed Defendant's Interrogatory No. 5, which sought a definitive list of the Nike products that TTG believed incorporated its trade secrets. TTG identified Nike's CPR Woods and Slingshot Irons as the only clubs relevant to its trade secrets claims, but also indicated that "certain other [\*11] Nike golf clubs may be implemented by the use of Plaintiff's confidential information and club designs."

Unsatisfied with that response, Defendants filed a motion to compel TTG to provide a full and complete response to Interrogatory No. 5. The district court granted that motion, and TTG complied, again including, however, its contention that "certain other Nike golf clubs may be implemented by the use of Plaintiff's confidential information and club designs." Defendants

then moved the district court to enforce its earlier order by limiting TTG's trade secrets count and its proofs on that issue to Nike's CPR Woods and the Slingshot Irons. The district court granted Defendants' motion.

Nevertheless, TTG continued to assert that "confidential information" was at issue in its *non*-trade secrets claims. TTG apparently believed that the court's earlier orders addressed only the trade secrets claims. In response, Defendants asked the district court to clarify its earlier order and confirm that there was no category of proprietary information at issue in the case other than the alleged trade secrets. The district court granted this motion and ordered that TTG "not seek to offer at trial [\*\*12] any proof of misuse by any defendant of any information pertaining to any product" other than the accused clubs.

### C. Summary Judgment

Having thus succeeded in narrowing the issue for trial to whether Defendants had used TTG's trade secrets to produce Nike's accused clubs, Defendants filed a motion for summary judgment on all of TTG's claims. The district court granted Defendants' motion, ruling that (1) all trade secrets asserted by TTG related to a system of weighting that was "adjustable" by the user of the club, and (2) neither of the accused clubs are "adjustable" post-manufacture. This order applied specifically to the first, second, third, sixth and seventh trade secrets. The court granted summary judgment on the fourth trade secret because it does not involve golf clubs, and TTG had already dismissed with prejudice its claim based on the fifth trade secret. The court also stated that its dismissal of the trade secrets claims was "dispositive of [TTG's] remaining claims because all of them are predicated on a determination that . . . Nike [] used the trade secrets in its manufacture and sale of golf clubs."

### D. TTG's Motion for Relief from Judgment

[\*\*13] After the district court granted summary judgment, TTG uncovered two Nike patent applications for golf clubs that are [\*260] adjustable post-manufacture.<sup>2</sup> [\*\*14] Both patents listed Tom Stites as

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<sup>2</sup> Patent Application US 2005/0009625 describes a wood golf club head with a weight that is "independently movable," and Patent Application 2005/0137024 describes a modification of Nike's Slingshot Irons that includes a weight that is "independently movable in multiple directions."

the inventor and Nike as the assignee, and both were filed with the U.S. Patent Office in 2003, well before TTG propounded the following discovery requests to Defendants in October 2004:

*Interrogatory No. 9*

Set forth all United States patents, patent applications and other publications which NIKE deems supportive of it's [sic] contention that any of the Defendants independently created or developed the clubs at issue and *which are applicable to any golf club product or system which NIKE is now marketing or intends to market within the next three years.*<sup>3</sup>

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*Request No. 67*

All golf-related U.S. patents, U.S. *pending applications for patent*, all golf-related publications, and all industry presentations [\*\*\*1457] of the following NIKE-related individual: Tom Stites.<sup>4</sup>

In response to Interrogatory No. 9, Defendants provided only patents and patent application publications described in the first part of the request, i.e., those that "may support Defendants' contention that Defendants independently developed the clubs at issue." Defendants identified no publications "applicable to any golf club product or system which NIKE is now marketing or intends to market within the next three years."

In response to Request for Production No. 67, Defendants stated that "NIKE [] objects to the production of pending, unpublished patent applications" and "further objects to producing any documents that are public information equally available to Plaintiff or its counsel."<sup>5</sup> Defendants concede that they provided no patent applications to TTG in response to Request No. 67. TTG did not move to compel either a more complete response to Interrogatory No. 9, or production of patent applications in response to Request No. 67. The patent applications at issue were published by the Patent Office on January 13, 2005 and June 23, 2005. The [\*\*15] discovery deadline in this case was June 14,

<sup>3</sup> Emphasis added.

<sup>4</sup> Emphasis added.

<sup>5</sup> Patent applications are available through the Patent Office website, and the record makes clear that TTG and its attorneys were familiar with this process.

2005; the pre-trial conference was set for July 5, 2005; and trial was set for August 8, 2005.

When it discovered the two patent applications post-summary judgment, TTG filed a Motion for Relief from Final Judgment and for Sanctions, asserting that Defendants improperly withheld the patent applications from discovery. The district court agreed with TTG that Defendants "should have disclosed in their discovery responses . . . the existence of the two patent applications," but denied TTG's motion, conclusionally stating that those applications "[had] nothing to do with the issues presented to the court for decision." The court speculated that "the applications might form the basis for another action by plaintiff against defendants," but ultimately declared, again conclusionally, that they "were not relevant to [\*\*16] the legal issues the court resolved . . . in this case."

## [\*261] II. ANALYSIS

### A. Summary Judgment

#### 1. Standard of Review

[HN1](#)<sup>[↑]</sup> We review a grant of summary judgment *de novo*, applying the same standards as the district court. <sup>6</sup> [HN2](#)<sup>[↑]</sup> Summary judgment is appropriate when the pleadings, affidavits, and other summary judgment evidence show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. <sup>7</sup> [HN3](#)<sup>[↑]</sup> The movant bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact. <sup>8</sup> [\*\*17] The burden then shifts to the nonmovant to show the existence of a genuine fact issue for trial; however, the nonmovant may not rest upon allegations in the pleadings to make such a showing. <sup>9</sup> [HN4](#)<sup>[↑]</sup> All evidence must be viewed in the light most favorable to the nonmovant. <sup>10</sup>

<sup>6</sup> [Baker v. Am. Airlines](#), 430 F.3d 750, 753 (5th Cir. 2005).

<sup>7</sup> [Fed. R. Civ. P. 56\(c\)](#); [Celotex Corp. v. Catrett](#), 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

<sup>8</sup> [Celotex](#), 477 U.S. at 322-25.

<sup>9</sup> [Id. at 321-25](#); [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 255-57, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

<sup>10</sup> [United States v. Diebold, Inc.](#), 369 U.S. 654, 655, 82 S. Ct.

## 2. TTG's Trade Secrets Claims

### a. Generally Applicable Trade Secret Law

In this diversity action, we apply Texas substantive law. <sup>11</sup> **[\*\*18]** [HN5](#)<sup>↑</sup> In Texas, a "trade secret" is defined as a "formula, pattern, device or compilation of information used in a business, which gives the owner an opportunity to obtain an advantage over his competitors who do not know or use it." <sup>12</sup> [HN6](#)<sup>↑</sup> To succeed in its misappropriation of trade secrets claims, TTG must show that (1) a trade secret exists; (2) Defendants acquired the trade secret by breach of a confidential relationship or other **[\*\*\*1458]** improper means; and (3) Defendants used the trade secret without authorization. <sup>13</sup>

### b. The District Court's Summary Judgment Reasoning

The district court granted summary judgment, dismissing TTG's trade secrets claims based solely on the court's conclusion that TTG could not prove the third factor in the aforementioned test. Its reasoning was straightforward: (1) All of TTG's trade secrets relate to a golf club weighting system that is "adjustable by the user of the club"; (2) the accused clubs are in no way "adjustable by the user of the club" <sup>14</sup>; (3) there is, therefore, no summary judgment evidence to indicate that Defendants "used" TTG's alleged trade secrets; and consequently, (4) TTG will not be able to prove an essential element of its trade secrets claims; so (5) summary judgment **[\*262]** for Defendants on those

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[993, 8 L. Ed. 2d 176 \(1962\).](#)

<sup>11</sup> [Erie R. Co. v. Tompkins, 304 U.S. 64, 78-80, 58 S. Ct. 817, 82 L. Ed. 1188 \(1938\)](#). The parties raise no choice-of-law issues and each cites Texas law (or Fifth Circuit cases interpreting Texas law) as the controlling substantive law in this case.

<sup>12</sup> [Taco Cabana Intern. v. Two Pesos, Inc., 932 F.2d 1113, 1123 \(5th Cir. 1991\)](#) (citing [Hyde Corp. v. Huffines, 158 Tex. 566, 314 S.W.2d 763, 776, 1 Tex. Sup. Ct. J. 286 \(Tex. 1958\)](#)).

<sup>13</sup> [Guy Carpenter & Co. v. Provenzale, 334 F.3d 459, 467 \(5th Cir. 2003\)](#) (applying Texas common law).

<sup>14</sup> None dispute that the heads of the accused Nike clubs, the CPR Woods and Slingshot Irons, are cast as one piece of metal that cannot be changed post-manufacture, except through extraordinary means.

claims is appropriate. The court also concluded that dismissal **[\*\*19]** of TTG's trade secrets claims disposed of its remaining claims as well, as all of them depended on a determination that Nike used TTG's trade secrets.

### c. "Adjustability"

The district court grounded its decision primarily in its finding that all of TTG's trade secrets rely in some way on an "adjustable" weighting system. TTG does not dispute that conclusion generally, but instead argues that the district court improperly narrowed the definition of "adjustable" to "adjustable by the user of the clubs." In doing so, TTG urges, the district court ignored the deposition testimony of Gillig as the developer of TTG's alleged trade secrets, indicating that those trade secrets contemplate two kinds adjustability: (1) adjustability post-manufacture, *and* (2) adjustability "at the factory."

The district court's **[\*\*20]** reading of "adjustable," in the context of TTG's chosen definition of its trade secrets, more closely conforms with common usage. For example, TTG defined its first trade secret as an "adjustable weighting system in a 'hollow back' club, so the distribution of weight in the golf club *could be changed*." The definition goes on to specify that "the Plaintiff contemplated [that changes] could be accomplished through one of three methods," namely: (1) "use of an existing sole plate . . . [that] could be *removed or replaced* by a new sole plate," (2) "insertion of *additional* weight into the hollow of the club, or the sole," or (3) use of weighted metal bands . . . fixed by Allen screws or other means, that *could be removed or replaced*." <sup>15</sup> None disputes that this definition contemplates a club designed and constructed in such a way that its weight distribution can be altered post-manufacture.

TTG contends, however, that its concept also covers adjustability "at the factory, **[\*\*21]** " i.e., the ability of the club manufacturer to vary the weight distribution of a club permanently, *before completion*. Presumably, TTG's definition of adjustability "at the factory" might include either (1) the ability to produce made-to-order clubs built to a particular customer's specifications, or (2) the ability to adjust the weight distribution of individual variations of one kind of club (e.g., a 3-iron) to achieve particular results (e.g., higher or lower ball-flight trajectory). TTG does not contend that either of the accused Nike clubs are made-to-order. <sup>16</sup> We presume,

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<sup>15</sup> Emphasis added.

<sup>16</sup> Defendants also point to deposition testimony from TTG's



then, that TTG uses "adjustable at the factory" to mean a weight-distribution system that can be varied during the course of manufacture so that each kind of club (e.g., a 3-iron) can be produced in a variety of weight-distribution models, each variation of the same club produced to achieve a different result.

**[\*\*22]** Defendants first point out that the accused clubs are produced according to only one weight-distribution model, such that the head of each kind of club (e.g., 3-iron) is identical in every set of clubs produced.<sup>17</sup> Defendants also contend that, using TTG's definition, all golf clubs would have to be considered "adjustable at the factory," as each *kind* of club within a given set of clubs is necessarily constructed according to a weight-distribution model that (1) is designed to produce a particular **[\*\*\*1459]** **[\*263]** result, and (2) can be altered *pre-manufacture* (or "at the factory") to produce a different result. As such, Defendants contend, "adjustability at the factory" describes nothing more than any club manufacturer's capability to adjust its club-weighting design to achieve a different result before actually fabricating a particular kind of club.

Accordingly, if we were to read **[\*\*23]** "adjustable" to include "adjustable at the factory," as that phrase is characterized by TTG, we would be forced not only to disregard the common, conversational meaning of "adjustable," but also to overlook numerous references in TTG's trade secrets definitions to the ability to "change," "remove," "replace," or "insert" weighting elements. These actions simply cannot be equated with a club maker's decision -- inherent in any golf club design -- as to how permanently to distribute weight in any given club within a given set of clubs. We construe TTG's trade secrets, therefore, as did the district court, to contemplate a weighting system "adjustable by the user of the club."

Unlike the district court, however, we do not end our summary judgment analysis here, but go on to more closely examine whether the lack of "adjustability" in the accused clubs, as contemplated by TTG's description of its trade secrets, necessarily eliminates any "genuine issue of material fact" as to TTG's trade secrets claims.

TTG's "adjustable at the factory" argument, although

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marketing expert indicating that made-to-order clubs would not be considered "adjustable."

<sup>17</sup> Other specifications, such as the flexibility or the length of the clubs' shaft, are customizable in the Nike clubs, as in any clubs.

admittedly unpersuasive as made, is at least suggestive of the more basic proposition that Defendants might have misappropriated TTG's **[\*\*24]** proprietary design *even though they chose not to make the clubs adjustable post-manufacture*. In other words, even though TTG's trade secrets describe a club-weighting system that is adjustable post-manufacture, Defendants could not lawfully appropriate the proprietary design elements of that system into a permanently weighted club any more than they could copy it directly. We now consider whether a material fact issue remains in TTG's trade secrets claims based on the design elements of TTG's weighting system, as described in TTG's trade secrets definitions, despite the fact that the accused clubs are not adjustable post-manufacture.

It is undeniable that TTG's trade secret descriptions contemplated an "adjustable" weighting system. It is equally undeniable, though, that those descriptions also comprised specific concepts for *implementing* that adjustability. In TTG's final response to Defendants' Interrogatory No. 5, which asked for particular descriptions of all Nike products in which TTG's trade secrets are used, TTG detailed its allegations regarding which of those implementation concepts Defendants used and how they used them. These allegations are corroborated by the **[\*\*25]** report of TTG's expert, Douglas Winfield. This report states Mr. Winfield's unequivocal belief that Defendants would not have been able to produce the accused clubs (adjustable or not) without employing particular elements of TTG's design as specified in its trade secrets.

The Winfield report identifies several such design elements that Defendants arguably learned from TTG, none of which rely on actual post-manufacture adjustability. For example, regarding the Slingshot Irons, the Winfield report states that,

"Nike used the trade secret<sup>18</sup> and/or confidential information of Gillig/Triple Tee to solve the problem of how to move **[\*264]** the weight bar far enough from the back of the club face to achieve more of an effect on a flight path and how to keep the weight bar on the back of a cavity back iron within the 'Rules of Golf.'"

His report also states the opinion that,

While Stites had prototypes and other "iron" heads

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<sup>18</sup> Winfield's report makes clear that any reference to TTG's "trade secret" therein is based on the same trade secrets descriptions that TTG submitted to the district court.

with weight bars within a "hollow back" or "cavity back," none of them achieved as substantial of a displacement of the CG [center of gravity] away from the club face [as did TTG's prototypes]. It is my opinion, that Stites did not learn this design [\*\*26] technique until he met with Gillig in September 2000.

With respect to the CPR Wood, Winfield states that "[b]ased on my review of prototypes and golf clubs produced by Defendants, it is my opinion that Stites did not possess the design technique and geometry incorporated in the 'CPR Wood' product prior to meeting with Gillig." Winfield's report goes on to detail the reasons for his opinion, his methodology, and the state of the art of golf club design as it relates to the TTG club designs. [\*\*\*1460]

[HNZ↑](#) In reviewing a summary judgment, our task is to decide, *inter alia*, whether the district court properly considered *all* of the summary judgment evidence in reaching its decision. In this case, we conclude that, even though TTG chose to describe its trade secrets largely in terms of the "adjustability" of the weight-distribution system, [\*\*27] it nevertheless presented enough evidence, particularly Winfield's expert report, to create a material fact issue whether Defendants misappropriated other fundamental elements of those trade secrets. We reach this conclusion for several reasons.

First, even though TTG's trade secrets, as described, contemplate a weight-distribution system that is adjustable post-manufacture, this "adjustability" is but one of several design elements of that system. "Adjustability" is merely an abstract concept that must be implemented in some very real way. We must treat the particular way that TTG envisioned implementing that concept as *at least* as important to TTG's trade secret definition as the concept itself. Second, if TTG could prove that Defendants used fundamental elements of TTG's design to produce a permanently weighted club, TTG would have a viable trade secrets claim. Third, TTG did produce enough summary judgment evidence, particularly the report of its expert, to meet the "genuine issue of material fact" standard as to whether Defendants used any elements of TTG's design. Finally, given the complex and technical nature of the claims at issue, the district court should have resisted [\*\*28] basing summary judgment on but a single element of TTG's alleged trade secrets, and instead should have allowed all the evidence to be presented to a jury, which then could have weighed the

"adjustability" factor, among all others, in its final analysis. Accordingly, we reverse the district court's grant of summary judgment on TTG's trade secrets claims and remand them for further proceedings not inconsistent with this opinion.<sup>19</sup>

## 2. TTG's Remaining Claims

The district court also granted summary judgment for Defendants on TTG's claims for breach of confidentiality, breach of implied contract, negligent misrepresentation, deceptive trade practices, and accounting. [\*\*265] The entirety of its reasoning on this issue [\*\*29] is contained in the following, single paragraph.

### *Plaintiff's Other Claims*

The disposition adverse to plaintiff on his contention that defendants misappropriated his alleged trade secrets is dispositive of his remaining claims because all of them are predicated on a determination that Gillig disclosed trade secrets to Stites, that Stites transferred the trade secrets to Nike, and that Nike then used the trade secrets in its manufacture and sale of golf clubs. Therefore, summary judgment is to be granted as to the remaining claims.

The district court's ruling on these claims was predicated on its determination that "[a]ll of plaintiff's claims relate to, and grow out of, the misappropriation of trade secrets claims." This conclusion also forms the basis of the district court's earlier evidentiary order limiting TTG's proofs on all claims to (1) only the Nike clubs at issue in the trade secrets claims, and (2) only the proprietary information at issue in the trade secrets claims. TTG also appeals this evidentiary order.

As the district court based its entire summary judgment decision on its trade secrets ruling, our reversal of that ruling revives all of TTG's other [\*\*30] claims as well. We thus must consider the earlier evidentiary order to determine whether TTG may present evidence related to (1) the additional "confidential information" that it contends is at issue in its non-trade secret claims, and (2) Nike clubs other than the accused clubs.

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<sup>19</sup> As the district court found no evidence that Defendants had used TTG's alleged trade secrets, it did not address any of Defendants' other summary judgment arguments. We address only the issues presented on appeal and any other questions are to be answered, in the first instance, on remand.

## B. The June 2005 Evidentiary Order

### 1. Standard of Review

[HN8](#)<sup>19</sup> We review a district court's evidentiary ruling for an abuse of discretion.<sup>20</sup> If we find that an abuse of discretion has occurred, we then apply the harmless error doctrine.<sup>21</sup> Thus, the evidentiary ruling will be affirmed unless the district court abused its discretion and a substantial **[\*\*\*1461]** right of the complaining party was affected.<sup>22</sup>

### 2. Discussion

Again, Defendants sought throughout discovery to identify precisely what proprietary information they are alleged to have misused and which Nike products **[\*\*31]** TTG believes have incorporated that information. TTG, on the other hand, understandably appears to have been reluctant to limit its case too narrowly. Eventually, the district court compelled TTG to define all of its trade secrets with specificity and to identify which Nike clubs TTG believed were designed and manufactured using those secrets. TTG does not challenge the order requiring this limitation of its trade secrets claims.

Even as it narrowed its trade secrets claims, however, TTG continued to assert that other proprietary information not rising to the level of a trade secret had been disclosed to Defendants and used in Nike clubs. Specifically, TTG alleged that its "design elements" were used in the CPR Woods and the OZ T-100 putter. TTG also alluded generically to "certain other Nike golf club products" that it believed may yet be developed on the basis of TTG's "confidential information."

**[\*266]** Defendants objected to the inclusion of these additional allegations about TTG's non-trade secret "confidential information" and asked the district court to make clear to all that its earlier evidentiary order, limiting TTG's proofs on its trade secrets count to information related to **[\*\*32]** the accused clubs, viz., Nike's CPR Woods and Slingshot Irons, also limited TTG's proofs on

<sup>20</sup> [Green v. Adm'rs of the Tulane Educ. Fund](#), 284 F.3d 642, 660 (5th Cir. 2002) (citations omitted).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

*its remaining claims* in the same way. Defendants argued that TTG was attempting to introduce a new category of proprietary information at the last minute, even though, throughout discovery, TTG had made clear that only its trade secrets were at issue, even in its non-trade secrets claims.

In contrast, TTG insisted that it had always made clear that its non-trade secrets claims involved (1) proprietary information, such as design sketches, that did not rise to the level of trade secrets, and (2) Nike clubs other than the accused clubs. The district court granted Defendants' motion and limited TTG's proofs on all claims strictly to (1) trade secret information (2) related to the accused clubs. As any evidence related to the CPR Wood, including any "design sketches," remained admissible even under the limiting order, the practical effect of this order was to preclude TTG from offering any evidence related to the Nike OZ T-100 putter or any as yet unidentified Nike clubs.<sup>23</sup>

**[\*\*33]** We must now decide whether the district court abused its discretion in limiting TTG's proofs in this way. As noted earlier, Texas defines a "trade secret" as a "formula, pattern, device or compilation of information used in a business, which gives the owner an opportunity to obtain an advantage over his competitors who do not know or use it."<sup>24</sup> We read this definition to cover any sufficiently realized proprietary golf club design, even if only executed in "design sketches."<sup>25</sup> The record makes clear that all of TTG's claims involve allegations that Defendants misused TTG's proprietary club designs, whether by appropriating elements of its weighting system or copying its unique "design geometry." Consequently, we agree with the district court's conclusion that all of TTG's claims "relate to, and grow out of" its misappropriation of trade secrets claims.

**[\*\*34]** In defining its trade secrets in this case, TTG made no reference to a putter design. On appeal, however, TTG insists that its putter "design sketches"

<sup>23</sup> At the time the court entered this order, TTG had identified no other Nike clubs that it believed were made using TTG's proprietary information. We deal with the later-discovered Nike patent applications in the next section of this opinion.

<sup>24</sup> [Taco Cabana Intern. v. Two Pesos, Inc.](#), 932 F.2d 1113, 1123 (5th Cir. 1991) (citing [Hyde Corp. v. Huffines](#), 158 Tex. 566, 314 S.W.2d 763, 776, 1 Tex. Sup. Ct. J. 286 (Tex. 1958)).

<sup>25</sup> See *id.* (citing several cases in which drawings constituted trade secrets).

were "confidential information" that did not "rise to the level of trade secrets" but could form the basis for TTG's other tort claims, such as breach of confidentiality.

TTG seems to confuse what *constitutes* a trade secret with the evidence necessary to *prove* that trade secret. At bottom, each of TTG's claims involves an allegation that the Defendants unlawfully used TTG's proprietary club design, causing it financial injury. For TTG to succeed on any of these claims, then, it must first prove that it in fact possessed (1) proprietary information, that was (2) valuable to its business. We see no salient [\*\*\*1462] difference between this predicate and a finding that a trade secret exists.<sup>26</sup> [HN9](#) [↑] To [\*\*\*267] determine whether a trade secret exists, Texas courts apply the Restatement of Torts' six-factor test:

- (1) the extent to which the information is known outside of his business;
- (2) the extent to which it is known by employees and others involved in his business;
- (3) the extent of the measures taken by him to guard the secrecy of the [\*\*\*35] information;
- (4) the value of the information to him and to his competitors;
- (5) the amount of effort or money expended by him in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.<sup>27</sup>

We understand how TTG might conclude that its sketches do not "rise to the level of a trade secret," but the district court was correct in recognizing that all of TTG's claims were "trade secrets" claims, regardless whether TTG chose to identify them as such.

We acknowledge that TTG's pleadings and discovery responses have consistently referenced "confidential information" not included in its description of its trade secrets. We also [\*\*\*36] acknowledge that, [HN10](#) [↑] in some breach of confidentiality cases, courts may regard "confidential business information" as being distinct from "trade secrets." Such cases, however, typically involve former employees accused of misusing their former employer's proprietary information, such as customer lists or pricing data, which arguably is not "secret" but still provides the one who possesses it with a

<sup>26</sup> See *id.* at 1123 (defining a trade secret as a "formula, pattern, device or compilation of information used in a business, which gives the owner an opportunity to obtain an advantage over his competitors who do not know or use it").

<sup>27</sup> *In Re Bass*, 113 S.W.3d 735, 739, 46 Tex. Sup. Ct. J. 988 (Tex. 2003).

competitive advantage.<sup>28</sup> This case, on the other hand, involves *only* TTG's proprietary club designs, which clearly fall into the category of "trade secrets." Simply put, if TTG believed that Defendants copied its "design sketches" in producing the Nike OZ T-100 putter, TTG should have included that allegation in its trade secrets claims. Having not done so, it cannot now be heard to argue that those design sketches belong to a different category of proprietary information which, although insufficient to form the basis of a trade secrets claim, nevertheless can support its other tort claims.

[\*\*37] Accordingly, we view the district court's limitation of TTG's proofs on *all* of its claims to trade secret information related to the accused clubs as an appropriate exercise of its of discretion in evidentiary matters. On remand, that order will remain in force to prohibit TTG from offering any evidence related to the Nike OZ T-100 putter or any other Nike club that TTG could have included in its trade secrets claims.<sup>29</sup>

## C. TTG's Motion for Relief from Final Judgment

### 1. Background

The last issue in this appeal is whether the district court erred reversibly in denying TTG's Motion for Relief from Final Judgment.<sup>30</sup> After the district court [\*\*\*268] granted summary judgment for Defendants, TTG became aware of two previously published [\*\*\*38] Nike patent applications for golf clubs that are "adjustable" post-manufacture, one of which even describes an adjustable version of the Slingshot Irons. TTG had propounded both an interrogatory and a document request that undeniably contemplated patent applications such as those it later uncovered, but Defendants did not respond to the interrogatory and objected to the document request. No pending Nike patent applications were provided to TTG during discovery, and -- being aware of none -- TTG did not ask the court to compel Defendants to do so.

<sup>28</sup> See, e.g., *Mercer v. C.A. Roberts Co.*, 570 F.2d 1232, 1238 (5th Cir. 1978); *Jeter v. Assoc. Rack Corp.*, 607 S.W.2d 272, 275-76 (Tex. Civ. App.-Texarkana 1980).

<sup>29</sup> Pursuant to the holding set forth in the next section of this opinion, however, this order must be revised, or withdrawn and reissued, to allow for evidence related to the undisclosed Nike patent applications at issue in TTG's Motion for Relief from Final Judgment.

<sup>30</sup> TTG's motion also requested sanctions against Defendants.

In its post-judgment motion, TTG insisted that it was entitled to relief from the earlier judgment pursuant to [FRCP 60\(b\)](#) because (1) these recent patent applications amounted to "newly discovered evidence," or alternatively, (2) Defendants' failure to disclose these applications was a "fraud upon the court." In a short order denying TTG's motion, the district court [\*\*39] agreed with TTG that Defendants should have provided the patent applications [\*\*\*1463] during discovery, but ruled that these particular patent applications had "nothing to do with the issues presented to the court for decision in this case."

## 2. Standard of Review

[HN11](#) [↑] We review the district court's denial of TTG's motion for post-judgment relief for an abuse of discretion.<sup>31</sup> "A trial court abuses its discretion when its ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence."<sup>32</sup> Given the district court's agreement with TTG that Defendants should have provided the patent applications during discovery, its denial of TTG's motion was based entirely on its conclusion that those applications were not "relevant" to the issues that it had decided. Our review is limited to the propriety of that finding.

## [\*\*40] 3. Discussion

TTG contends that the patent applications were relevant to its case in several ways. First, TTG points to two paragraphs of its Complaint containing allegations that Defendants used TTG's proprietary information in developing and attempting to patent new golf club systems. Next, TTG identifies the discovery requests through which it expressly sought information regarding Nike golf club systems under development and, specifically, "pending applications for patent." Further, TTG asserts that the patent applications were relevant to all of the expert opinions given on both sides, especially to the extent these experts concluded whether Nike was "using" TTG's trade secrets. Finally, TTG contends that the patent applications were relevant to the district court's findings, which ultimately led to summary judgment, that there was no evidence that

<sup>31</sup> [Goldstein v. MCI WorldCom, 340 F.3d 238, 257 \(5th Cir. 2003\)](#).

<sup>32</sup> [Bocanegra v. Vicmar Servs., Inc., 320 F.3d 581, 584 \(5th Cir. 2003\)](#).

Nike used a weighting system that was adjustable by the user of the clubs.

Defendants counter that the district court did not err in holding the patent applications irrelevant, because -- in the end -- the case involved only the two accused clubs, and the patent applications "do not cover" those clubs. In Defendants' view, [\*\*41] "[w]hether the NIKE patent applications show other golf clubs that are adjustable by the golfer, or whether NIKE someday, in the future, decides to offer an adjustable golf club is irrelevant to the basis for the District Court's grant of summary judgment -- which dealt with actual [\*\*269] golf clubs."<sup>33</sup> The district court gave no reasons for its conclusion that the patent applications were irrelevant, but it presumably agreed with Defendants on this point.

We acknowledge that the patent applications were not technically relevant to the narrow grounds on which the district court decided Defendants' summary judgment motion. Once the district court decided that the only issue it needed to consider was whether Defendants had used TTG's trade secrets *in the accused clubs*, the patent application evidence presumably could not have been allowed into the case. We also agree with Defendants' general proposition that [HN12](#) [↑] a 60(b) motion is not an opportunity for a party to "relitigate its case" and with [\*\*42] the district court's conclusion that the patent applications "might form the basis of another action" by TTG.

We reverse, however, because we are convinced that the district court erroneously disregarded the relevance of the patent applications to its evidentiary orders that laid the foundation for its grant of summary judgment. Had the patent applications been disclosed during discovery, the district court should not have -- and likely would not have -- granted Defendants' motion seeking to limit TTG's proofs to only the accused clubs on *any* of its claims.<sup>34</sup> Consequently, the fact that the accused clubs were not adjustable post-manufacture would alone not have precluded the existence of any material fact issue whether Defendants had "used" TTG's trade secrets, and summary judgment would not have been

<sup>33</sup> Emphasis added.

<sup>34</sup> As noted above, the court's decision to limit TTG's trade secrets proofs to only the accused clubs was based on TTG's inability to connect its proprietary weighting system to any other Nike product. If TTG had had the patent applications at that point, it might have been able to establish connections to other Nike clubs under development.

appropriate.<sup>35</sup> As we are reversing the district court's summary judgment dismissal of every TTG claim that involves the misuse of its trade secrets in the accused clubs, the practical effect of our additional reversal [\*\*\*1464] of its denial of post-judgment relief will be to allow TTG to expand its claims beyond the accused clubs to include any misuse of its trade secrets in any Nike [\*\*43] club comprehended by the subject patent applications.

For the foregoing reasons, we (1) affirm the district court's evidentiary order limiting TTG's proofs on all of its claims to evidence related to the misuse of its trade secrets in the accused clubs, subject, however, to the potential need to expand that order so as not to exclude evidence relevant to other clubs comprehended by the aforesaid patent applications, (2) reverse the district [\*\*44] court's summary judgment dismissal of those of TTG's claims that involve the accused clubs, and (3) reverse the district court's denial of TTG's motion for post-judgment relief based on the aforesaid patent applications. We remand this matter to the district court for further proceedings consistent with this opinion.

**AFFIRMED in part, REVERSED in part, and REMANDED.**

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<sup>35</sup> [HN13](#) [↑] A plaintiff need not prove an actual sale or production of a product to show "use" of its trade secrets. See [Dresser-Rand Co. v. Virtual Automation Inc.](#), *361 F.3d 831, 840-41 (5th Cir. 2004)*(citations omitted).