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Trade Secret Litigation: A Comprehensive Guide to Strategy and Best Practices (2026 Update)

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How to Protect Your Client's Most Valuable Secret Asset: A Comprehensive Guide to Strategy and Best Practices for Bringing a Trade Secrets Lawsuit

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2026 Update

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Trade Secrets Litigation: A Comprehensive Guide to Strategy and Best Practices Under the Defend Trade Secrets Act

- DTSA at Ten: What Changed Since 2025
- Defining trade secrets and misappropriation
- Pre-litigation action items
- Bringing a trade secrets suit
- Discovery strategy
- Expert strategy
- Relief in trade secrets suits
- Protecting trade secrets during litigation

DTSA at Ten: What Changed Since 2025

- **The clock beat the verdict.** *Insulet v. EOFlow*, 176 F.4th 1347 (Fed. Cir. 2026) (reh'g en banc denied Oct. 19, 2026); $452M D. Mass. verdict reversed as time-barred; clock ran from when plaintiff saw a look-alike product and knew its own ex-employees were there — its own internal emails proved it trade secrets and misappropriation
- **Apportion per secret or lose the award.** *Trinseo Europe v. KBR*, 165 F.4th 399 (5th Cir. 2026): damages vacated where plaintiff proved 1 number for 10 secrets and the jury found
- **Identify by what it is, not what it does.** *NEXT Payment Solutions v. CLEAResult*, 168 F.4th 1091 (7th Cir. 2026); circuits now split on when particularity is tested. *Glysco* (4th Cir.: pleading) vs. *Quintara* (9th Cir.: fact question through discovery)
- **Do the forensics before you file.** *Allstate v. Freeman* (W.D. Wis. Jan. 7, 2026): Rule 11 sanctions for suing a departing agent without examining her devices

The Story: *Nick's Neat Time Travel Inc. v. Benson Sydney and Chris's Cool Time Travel Co.*

This is a trade-secrets and unfair-competition case. Desperate to appease their restless, IPO-dreaming investors after a year of failed products, time-travel startup Chris's Cool Time Travel Co. (“CCT”) turned to its new Chief Technology Officer, Benson Sydney (“Sydney”), to save them. CCT poached Sydney from time-travel innovator and leader Nick's Neat Time Travel Inc. (“NNT”) — where he spent 8 years as its VP of R&D, IP strategist, shareholder, and top engineer. Facing mounting pressure to justify his first Suite title, Sydney fell back on his deep knowledge of and experience with NNT's decade-ahead time-travel innovations using flux capacitor technology. After a rebrand, CCT now hypes itself as the new unrivaled leader in time travel after only 18 months in the space — a timeline impossible without standing on NNT's shoulders.

Defining Trade Secrets and Misappropriation

- Defend Trade Secrets Act (Federal Level)
- Examples of Trade Secrets
- What Is Misappropriation?
- Inevitable Disclosure

What Are Trade Secrets?

- The most common question in trade secret litigation is whether the information at issue is a "trade secret"
  - Some states factual question for the jury; some states mixed question of law/fac
    (**may implicate whether summary judgment is available/appropriate; more likely available for defendant than for plaintiff*)
- Sometimes easy (*e.g.* Coca-Cola's recipe); sometimes not (*e.g.* customer lists)
- Trade secret protection lasts forever (as long as it stays secret)

What Are Trade Secrets?

- **Governing Law**: Federal and State
  - Defend Trade Secrets Act (18 U.S.C. § 1831, *et seq.*)
  - Uniform Trade Secrets Act (ex. G.L. ch. 93 § 42, *et seq.*)
    - Every state (except New York) has adopted a version of the Uniform Trade Secrets Act
- DTSA supplements but does not preempt state law
- Note that confidential ≠ trade secret

Defend Trade Secrets Act (Federal Level)

- **DTSA (18 U.S.C.A. § 1839(3)(A)–(B))** defines trade secrets as information that:
  - (1) the owner thereof has taken reasonable measures to keep such information secret; AND
  - (2) the information derives independent economic value, actual or potential, fro not being generally known to, and not being readily ascertainable through prope means by, another person who can obtain economic value from the disclosure c use of the information

Defining Information

- Intangible (distinct from physical embodiment) (doesn't have to be fixed in tangible form)
  - *E.g., can of Coke is distinct from its underlying formula*
- Can be positive information (*e.g.* Coca-Cola's recipe)
- Can be negative information (*e.g.* failed designs or compounds for an Alzheimer drug)
  - *I.e.*, trade-secrets law protects the whole journey to a successful product/ system
- Can be single-event information (*e.g.* information in a confidential bid for a one-time project)
- Can be information *not* used in business (*e.g.* an idea for a future product/ project or information used by a charity (as long as it has economic value))
- Doesn't have to be novel
- **but does not include employee's general skill and knowledge acquired through experience*

Defining Information

- **DTSA (18 U.S.C.A. § 1839(3)):**
  - All forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing
- **note thaDTSA lists only 6 categories vs. UTSA is unlimited*

Reasonable Measures/Efforts to Protect

- "Reasonable" measures/efforts to protect is fact dependent
  - **And varies per jurisdiction (more steps than other corporate information?)*
- **Examples**
  - Using and enforcing computer passwords
  - Releasing information on a "need to know" basis to a limited set of employees
  - Confidentiality/ nondisclosure agreements
  - Providing training to employees on handling confidential information
  - Confidentiality policies/ procedures (*e.g., Employee handbook*)
  - Conducting exit interviews/ shutting off access to departing employees

Independent Economic Value Derived from Secrecy

- No bright-line rule/fact-driven
- Three sub-elements:
  - (1) Independent economic value
  - (2) Secrecy
  - (3) A link between value and secrecy
- Prepare to demonstrate on a "per trade secret" basis (*Synopsys, Inc. v. Risk Based Security, Inc.*, 70 F.4th 759, 771 (4th Cir. 2023))

Independent Economic Value Derived from Secrecy

- **Independent economic value**
  - "Independent" means not only value to trade secret owner but also *others*
  - In many cases – *e.g.*, formula for Coca-Cola – economic value is readily provable
  - But in most cases, don't assume or rely on conclusory assertions: be specific and present objective information
  - Economic value may also be component of damages too, so the effort to establish is a worthwhile investment
  - How much? Must provide some advantage more than trivial (*see* Restate. Unfair Comp)
  - Potential value may suffice (where actual value hard to prove)
    - *E.g.*, others have expressed only interest in buying/ licensing; patent applications

Economic Value Derived from Secrecy

- **Independent economic value**
  - Examples of facts/information that can prove value:
    - **Development costs/effort**: time and material costs of developing trade secret
    - **License price**: amounts others have paid to use the trade secret
    - **Disclosure to competitor**: ex-employee sharing trade secret with competitors who then successfully used in their businesses
    - **Demonstrated performance**: provided company ability to win customers and maintain a competitive advantage over competitors
    - **Increased efficiency**: trade secret tangibly improved business and decreased costs for running the business
    - **Defendants' effort to obtain**: what lengths defendants went to obtain the trade secret

Economic Value Derived from Secrecy

- **Secrecy**: "not being generally known to, and not being readily ascertainable through proper means"
  - **Not *generally* known** (in industry/ public):
    - Absolute secrecy/ exclusivity not required; only *relative* secrecy
    - *I.e.*, more than one person/ company can have a trade secret
    - Facts: time it takes to develop, others paying for it, novelty of information, etc.

Economic Value Derived from Secrecy

- **Secrecy** "not being generally known to, and not being readily ascertainable through proper means"
  - **Not *readily* ascertainable**
    - Impossibility not required; but must be some degree of difficulty, expense, time-consuming
    - That some or all the components of a trade secret are well known does not automatically prevent protection for a secret combination, compilation, or integration of the individual components
    - But information, individually or in combination, is not protectable as a trade secret where the information is readily ascertainable or common knowledge (*e.g.* employee general knowledge)
    - *I.e.*, even if only one person knows it, if others could readily ascertain it, no trade secret
    - Unless the party compiling the information, while using the common knowledge as a source, expends a great deal of time, effort and expense in developing the material and treats the material as confidential in its business

Economic Value Derived from Secrecy

- **Secrecy**: "not being generally known to, and not being readily ascertainable through proper means"
  - **By proper means**
    - *Proper*: independent invention, reverse engineering, obtained by a license, taken from public use/ display, taken from published literature, etc.
    - *Improper*: theft, bribery, misrepresentation, breach of confidentiality duty, espionage, etc.

Economic Value Derived from Secrecy

- **Link**:
  - There must be a causal connection between the secrecy and economic value
  - For example, value from demonstrated performance provided company ability to win customer business:
    - Because only the company had the trade secret, it was able to retain busines win the bidding on contract, etc.
    - After trade secret was disclosed, company lost the business, customer, contract, etc. to the competitor it was disclosed to
  - *But* obsolete information (with no value to competitors), even though provides value to owner does not derive value from being secret

Examples of Trade Secrets

- Coca-Cola's soda formula is perhaps the most famous/classic trade secret:
  - The formula is information
  - The formula provides economic value (billions of dollars a year)
  - The formula is not known by anyone outside the company
  - The formula cannot (apparently) be reversed engineered
  - The formula is reasonably kept secret (in a safe)

What Is Misappropriation?

- Trade-secrets law provides limited protection: it prevents only the "misappropriation" of the trade secret
  - In other words, the focus for trade-secrets protection (in addition to whether the information is a trade secret) is how it came to be acquired and used
    - If lawfully, then no protection regardless if the information fits the categorical definition of a trade secret
  - "Reverse engineering" ≠ trade-secret misappropriation
    - *E.g.*, using same publicly available info to create same product/ service
      - For example, two companies may end up with the same detailed customer list, but the process for creation of each may have been wholly independent

What Is Misappropriation?

- Sometimes direct evidence of misappropriation is available
  - *E.g*, Sydney (ex-employee) downloaded to a thumb drive and emailed himself critical designs, drawings, and schematics of NNT's time-machine technology
  - **This is why doing a comprehensive investigation is critical (see infra)*
- But often must rely on circumstantial evidence
  - *E.g*, showing that Sydney (ex-employee) had access to NNT's time-travel technology, that CCT (his new employer) is developing the same technology, comparisons of the two technology to show similarities, that NNT and CCT are competitors (*i.e*, serve the same customers in the same market segment)
  - **This is why getting an expert involved early is also critical (see infra)*

What Is Misappropriation?

- **DTSA (18 U.S.C.A. § 1839(5))** provides two+ different ways one can be liable for misappropriation: (1) acquisition; and (2) disclosure/use
  - (1) acquisition of a trade secret of another by a person who knows or has reaso know that the trade secret was acquired by improper means
    - "improper means" = theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means AND does not include reverse engineering, independent derivation, or any other lawful means of acquisition

What Is Misappropriation?

- **DTSA (18 U.S.C.A. § 1839(5))** provides two+ different ways one can be liable for misappropriation: (1) acquisition; and (2) disclosure/use
  - (2) disclosure or use of a trade secret of another without express or implied consent by a person who:
    - used improper means to acquire knowledge of the trade secret;
    - at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was derived through improper means, etc.
    - before a material change of the position of the person, knew or had reason to know that the trade secret was a trade secret and knowledge of the trade secret had been acquired by accident or mistake

Inevitable Disclosure

- If, after thorough investigation (*see infra*), little evidence exists of actual or intended misappropriation, use, or disclosure of trade secrets, consider inevitable disclosure
- Inevitable disclosure claim applies where it is impossible for the former employee to perform the new job without relying on the employee's knowledge of the former employer's trade secrets, disclosing them to the employee's new employer, or both

Inevitable Disclosure

- DTSA appears to allow for inevitable disclosure claims (18 U.S.C.A. § 1836(b)(3)(allowing for claims based on "threatened misappropriation"))
  - But some courts have read DTSA to not embrace inevitable disclosure doctrine
- On state level, not every state recognizes the doctrine
- Courts may be reluctant because:
  - The claims may, in effect, block an employee from accepting a new job even where the employee is not in breach of any contractual obligation or law; and
  - No evidence exists that the employee did anything wrong (like misappropriation)

Pre-Litigation Action Items

- NNT internal investigation
- Cease-and-desist letters to Sydney and CCT

NNT Internal Investigation

- Prompt and thorough investigation is critical:
  - Demonstrates that NNT has a legitimate business interest and takes any suspected violation seriously
    - Delay weakens your case, especially if you're seeking injunctive relief
  - Minimizes damage to NNT's business resulting from Sydney's and CCT's competitive activity (*i.e.*, mitigating damages)
  - Ensures that evidence of Sydney's and CCT's conduct will not be lost (*e.g.*, litigation hold/ preserving ESI)
  - Informs litigation strategy (*e.g.*, strength of injunction motion, who to sue, etc.)

NNT Internal Investigation

- Three-stage investigation:
  - (1) Investigate NNT's trade secrets and governing documents
  - (2) Investigate Sydney's (ex-employee) actions
  - (3) Investigate CCT (new employer)

Investigating NNT's Trade Secrets

- The first step is to determine what information of NNT is suspected to have been misappropriated is truly secret and valuable because it is a secret
  - *I.e*, conduct audit of company's information that Sydney (ex-employee) had access to and determine whether it is legally protectible as a trade secret
    - **Often most important legal issue in trade secret litigation, so analysis at the outset is critical to determine strength of case and set/manage client expectations*
- And what documents may govern the relationship: employment agreements, shareholder agreements, noncompetes, nondisclosures, nonsolications, etc.
  - **This will determine what "extra" law governs and what "extra" rights/obligations parties may have (e.g., venue/choice of law, arbitration, jury waiver, right to fees*

Investigating Sydney's (Ex-Employee) Actions

- After determining that NNT has protectible trade secrets (*e.g.*, its time-travel technology), the next step is to investigate and determine whether Sydney (ex-employee) actually misappropriated the trade secrets
  - **Remember that common knowledge/experience/independent discovery doesn't*
- Conduct detailed forensic analysis of Sydney's email account (especially emails sent to a personal email account), work devices (desktop, laptop, tablets, phone, etc.), office files, calendar, expense records, etc.
  - Forensic analysis should be done by a professional – someone who can at some point authenticate (by affidavit/ testimony) the collection and retention process
  - **This evidence found can often make or break an injunction motion*

Investigating Sydney's (Ex-Employee) Actions

- Consider interviewing potential witnesses (*e.g.* co-workers, clients, customers, etc.) to obtain affidavits or preview testimony for injunction hearing
- Shut off Sydney's (ex-employee) access to NNT's computer system/ network
- Review building security footage and log-in records for suspicious activity (*e.g.* did Sydney (ex-employee) access the building at late/ off hours to remove boxes or did he print a large volume of documents?)
- Send a litigation hold notice internally to relevant NNT employees about their obligation to preserve and not destroy relevant ESI and documents (*see infra*)

Investigating CCT (New Employer)

- Also investigate CCT (new employer)
  - Are they competitors/competing?
    - Who are their customers? What markets are they?
  - What are their goals/motivations (*e.g.*, set on fast track IPO?)
  - Evidence of using trade secrets?
  - Where are they located (for jurisdiction)?
  - Who are the principals (for individual liability)?
- Sources: CCT's (new employer) website, LinkedIn, Lexis business reports, etc.
  - **Utilize firm resources (e.g., we have a tool to pull screenshots of websites*

Cease-and-Desist Letter(s)

- Typically includes:
  - Reminder to ex-employee of contractual and other obligations
  - Demands that ex-employee cease and desist from conduct violating their obligations
  - Demands return of trade secrets
  - Provides litigation hold notice (*see supra*)
  - **May also be sent to new employer (although consider if ex-employee is litigating may be more effective)*

Cease-and-Desist Letter(s)

- Advantages:
  - Opportunity to resolve without litigation
  - Learn value information (*e.g.*, ex-employee's defenses, whether new employer is representing, litigation appetite)
  - Demonstrates the employer's interest and seriousness in protecting its business from unfair competition
  - May help set the clock on statute of limitations "discovery rule" (*see infra*)

Cease-and-Desist Letter(s)

- Disadvantages:
  - May not be practicable (*e.g.*, risk of disclosure too great, requiring immediate legal action)
  - May be seen as an empty threat, diminishing creditability if the employer isn't prepare to take legal action
  - May prompt ex-employee/ new employer to sue first
  - May give rise to tortious interference/ defamation counterclaim if allegations are not well substantiated
  - May foreclose ability to obtain ex-parte seizure order (*see infra*)

Bringing a Trade-Secrets Suit Against Sydney and CCT

- **Why**: Risk losing trade secret forever
- **When**: Urgency; statute of limitations (discovery rule)
- **Where**: Personal jurisdiction/forum selection/venue/choice of law
- **Who**: Ex-employee, new employer, third parties
- **What**: Complaint allegations/causes of action/defenses/counterclaims

Why Bring a Trade-Secrets Suit?

- Unlike other intellectual-property protection devices, once the trade secret is disclosed it may be lost forever
  - *Compare patents, copyrights, trademarks*
    - While laches-type arguments may exist under other intellectual-property protection devices, you can literally lose your trade secret IP without litigating
- Litigation is, of course, not without risks:
  - Risk of further disclosure (including inadvertent disclosure)
  - Disruption to client/ business
  - Emotional impact of litigation (requires accusing a former colleague/ business partner/ friend of theft, likely irreparably destroying the relationship)

When to Bring a TradeSecrets Suit?

- As soon as possible
  - Time is of the essence (disclosure risks losing the trade secret)
  - *But see* other timing considerations: impact negotiations? impact how public perceives the suit? timing to other events (*e.g.*, meeting, conference, IPO, etc.)
- Critical to also impress upon the judge that swift action was taken to safeguard the trade secret, particularly if seeking injunctive relief
- Urgency inherent in trade-secret litigation distinguishes it from other litigation and colors the whole litigation process

When - Statute of Limitations

- **DTSA (18 U.S.C.A. § 1836(d)):** codifies the "discovery rule"
  - "A civil action under subsection (b) may not be commenced later than 3 years after the date on which the misappropriation with respect to which the action would relate is discovered or by the **exercise of reasonable diligence should have been discovered**. For purposes of this subsection, a continuing misappropriation constitutes a single claim of misappropriation."
- Court may look to state substantive law concerning the "discovery rule" (*see Group 14 Technologies, Inc., v. Nexeon Limited*, 2024 WL 4227762, at *3 (W.D. Wash. 2024) (applying Washington state law).
- **Often not an issue though if suit is brought soon after employee leaves for competitor*

Where - Personal Jurisdiction

- General (home) + specific (minimum contacts) + state's long-arm statute
- Requires careful thought and research/analysis of law and record/facts
- Essentially two options:
  - Sue where plaintiff (client) is
    - Home-field advantage
    - But risks Fed. R. Civ. P. 12(b)(2) (time/expense/distraction/discovery/hearing)
  - Sue where defendants are
    - Safest option
    - But not home-turf, law where defendants are likely then applies (*infra* case)

Where - Forum Selection

- Check governing documents (*i.e.*, employee agreement, shareholder agreement, etc.)
  - **Another reason internal investigation is critical*
- Federal vs. State Court
  - DTSA gives path to federal court regardless of diversity (*i.e.*, fed question)
  - But we may want state court in certain circumstances if favorable
    - *E.g.*, Massachusetts state courts have a specialized business session which may have specialized experience with trade secrets cases that favor plaintiffs
    - *E.g.*, state trade-secret common law/ UTSA interpretation/ application different or more predictable than Circuit's development under DTSA
  - Can litigate DTSA claims in state court (but most states have UTSA analog)
    - And defendant ex-employee may then try to remove to federal court

Where - Venue

- Check governing documents (*i.e.*, employee agreement, shareholder agreement, etc.)
  - **Another reason internal investigation is critical*
- Venue typically proper under 28 U.S.C.A. § 1391 in the district where NNT's (company) is because that is where the trade secrets (*i.e.*, the property that is the subject of this action) are situated and where substantial part of the events giving rise to the claims (the misappropriation of the trade secrets) occurred

Where - Choice of Law

- Check governing documents (i.e., employee agreement, shareholder agreement, etc.)
  - **Another reason internal investigation is critical*
- Check forum's substantive law: did the state adopt UTSA? special preemption or displacement of common law issues? procedural quirks (like forced disclosure)? discovery requirements (like having to describe with particularity before *(see California)*?
  - **Consider pleading standards and required elements under different law (see infra)*
- Absent choice-of-law, court will do a choice-of-law analysis, and consider where:
  - NNT (company) electronically stored its trade secrets
  - Sydney (ex-employee) accessed NNT's trade secrets to misappropriate them
  - Sydney and CCT have/ are using NNT's trade secrets to harm NNT

Who to Bring Claims Against

- Principally will bring claims against Sydney (ex-employee)
- Should we also sue CCT (new employer)?
  - Typically yes, if facts show that:
    - Sydney (ex-employee) was acting under CCT's (new employer) direction when misappropriating NNT's trade secret information
    - CCT (new employer) has agreed to indemnify Sydney (ex-employee) for any liability arising out of his move to CCT or breach of contract with NNT
    - CCT (new employer) gained a competitive benefit by Sydney's (ex-employee) trade secret misappropriation

Who to Bring Claims Against

- Parent/affiliated companies?
  - Yes, if facts show intertwined (piercing corporate veil) or direct liability (direct participation theory)
- Should we sue any other third parties?
  - Yes, if facts show that anyone else:
    - Procured or assisted in the misappropriation of the trade secrets.
    - Received those trade secrets.

What – Complaint Allegations

- Drafting complaint must balance urgency required with the reality that the complaint may be the only opportunity to lay out (and effectively win) the case
  - **Given that disclosure of the trade secret risks losing it forever, trade secret cases can largely be won or lost on an injunction motion (which the complaint supports)*
  - Obtaining early injunctive relief has higher burden on plaintiff (likelihood of success) than just surviving Fed. R. Civ. P. 12(b)(6) motion to dismiss (plausibility)
- Description of the trade secret
  - Must balance client's likely desire to disclose nothing and avoiding over-disclosure with need to provide the court with plausible basis for claims
    - **semi-heightened particularity requirement – must describe with sufficient particularity to distinguish from general knowledge in the industry; broad descriptions of areas of technology/concepts*
  - Can mitigate disclosure risks by considering filing complaint under seal

What - Causes of Action Against Sydney and CCT*

** facts will determine what causes of action are available and against whom*

- Violation of 18 U.S.C. § 1836, *et seq.* (Defend Trade Secrets Act)
- Violation of G.L. ch. 93 § 42, *et seq.* (Massachusetts Uniform Trade Secrets Act)
- Breach of Contract (Noncompete/ Nondisclosure)
- Breach of Implied Covenant of Good Faith and Fair Dealing
- Breach of Fiduciary Duty (Duty of Loyalty)
- Tortious Interference with Existing Contractual Relations

What - Causes of Action Against Sydney and CCT

- Tortious Interference with Prospective Contractual Relations
- Conversion
- Civil Conspiracy
- Commercial Disparagement/Defamation
- Violation of G.L. ch. 93A § 11 (Unfair Competition)
- Unjust Enrichment
- **consider other intellectual property claims (patent, trademark, copyright) if related*

Sydney and CCT's Defenses

- Typically, defenses in trade secret actions are not affirmative defenses but rather the flip side of the prima facie elements must prove:
  - (1) “The information is not a trade secret”
  - (2) “The information was not misappropriated”
- **See also procedural/equitable defenses*
  - *Subject-matter jurisdiction (i.e., no relation to interstate commerce)*
  - *Personal jurisdiction*
  - *Statute of limitations (3 years from date of discovery)*
  - *Laches/acquiescence*

"The Information Is Not a Trade Secret"

- How to anticipate this defense:
  - Don't overreach on what NNT's trade secrets are
    - *I.e*, NNT should only claim as a trade secret that which we have evidence for
  - Consider if any facets of NNT's trade secrets are commonly known in the industry or are public knowledge or were publicly disclosed without confidentiality
    - Note though that unique compilations of commonly/ publicly known info may be protectible as a trade secret
  - Explain how NNT protects its trade secrets
    - *E.g*, policy defining/ protecting trade secrets, requiring employees to sign NDAs, training employees on trade secrets, restricting access, etc.

"The Information Was Not Misappropriated"

- How to anticipate this defense:
  - Absent direct evidence of theft (*e.g.*, security camera footage carrying boxes out of the office during off hours, emailing confidential files to oneself, downloading confidential files, etc.), generally must prove by circumstantial evidence
    - **This is why a thorough internal investigation is critical*
    - *Particularly Sydney's (ex-employee) computer and email files*
      - *Did he download documents or delete them?*

Sydney and CCT's Counterclaims

- Consider that filing may provoke counterclaims from Sydney and CCT:
  - Unpaid wages or commissions
  - Discrimination
  - Retaliation
  - Damage caused by wrongful seizure under the DTSA
    - *See* 18 U.S.C. § 1836(b)(2)(G)
  - Tortious interference with contracts or prospective business relations

Discovery Strategy

- **When**: order/timing (expedited)
- **Who**: employee, employer, third-party discovery (like former customers)
- **What**: requests for documents, interrogatories, depositions

Discovery Order/Timing

- Consider seeking expedited discovery
  - Especially if seeking injunctive relief, considering requesting the court to permit expedited (narrow/targeted if necessary) in advance of an evidentiary hearing
- Consider who to serve discovery on first
  - *E.g.*, maybe it's advantageous to obtain discovery from some third parties (*e.g.*, recruiters/ headhunters/ former customers) to better arm yourself with the facts before deposing (*i.e.*, Fed. R. Civ. P. 30(b)(6)) defendants
- Be conscious of tracking order deadlines – build in time for protective orders, discovery fights (*e.g.*, despite pleading disgorgement damages, defendants may not voluntarily produce their financial records or trade-secret related information)

Who to Request Discovery From

- Potential people/entities to request discovery from:
  - Sydney (~~ex~~employee)
  - CCT (new employer)
  - Third parties
    - Employees/~~ex~~employees of CCT (new employer)
    - Recruiters/headhunters
    - Clients/customers of NNT and/or CCT
    - Investors/consultants of CCT
  - Experts

What Discovery to Request

- General topics to explore in written discovery and depositions:
  - Sydney's (~~ex~~employee) skill set, knowledge, experience, and duties at NNT and then now at CCT
  - Sydney's (~~ex~~employee) access to NNT's confidential and trade secret information, including the nature and extent of the his access to confidential computer databases and files
  - Any agreements between NNT and Sydney and between CCT and Sydney, including any with restrictive covenants or nondisclosure language
  - Sydney's (~~ex~~employee) acknowledgment of NNT's employer's policies

What Discovery to Request

- General topics to explore in written discovery and depositions:
  - Sydney's wrongful acts of appropriation, including the specific information and materials misappropriated and how obtained
  - Collaborative or conspiratorial conduct by Sydney and another third parties (e.g., CCT, other employees, etc.)
  - Sydney's contact and communications with CCT
  - Sydney's contact and communications with recruiters/ headhunters
  - The policies and practices and any relevant acts of CCT (new employer)

What Discovery to Request

- General topics to explore in written discovery and depositions:
  - Records of CCT's (new employer) knowledge or use of NNT's trade secrets, including existing, downloaded, transferred, deleted computer files
  - Social media posts and other electronic communications (e.g., LinkedIn)
  - Indemnity obligations between Sydney (ex-employee) and CCT (new employer) (*i.e.*, who is going to be paying the litigation bills)
  - Potential insurance coverage applying to claims against CCT

Expert Strategy

- Hiring early on (to beat defendant to hiring + help craft litigation strategy)
- Help crafting discovery (attend depositions)
- Help translate and educate
- Type of experts: damages, technical

Relief in Trade-Secrets Suits

- Complaints should seek the following relief:
  - Injunctive relief (TRO/PI/Permanent injunction)
  - Money damages (+ pre- and post-judgment interest)
  - Attorney's fees + costs
  - Multiple/punitive damages
  - Ex-parte pretrial seizure order

Injunctive Relief

- Why seek early TRO/injunctive relief?
  - First goal in trade secrets litigation is to stop the bleeding and prevent further disclosure/damage (which if wide enough might destroy the trade secret forever)
    - *E.g.*, if misappropriator posts trade secret widely on the internet (*e.g.*, Reddit thread), could destroy trade secret as now trade secret is publicly known and available)
  - Communicates seriousness to the court and public about protecting trade secrets
  - Requires briefing on an expedited schedule
    - Potential to catch defendant off guard and force them to show their hand about their theory of defense without much notice (especially if they don't anticipate the suit)
  - Typically readily appealable (at least in federal court; *see* 28 U.S.C. § 1292(a))

Injunctive Relief

- Seek a TRO/injunction to:
  - Direct the return of purported trade secret information
  - Prohibit the use or disclosure of trade secret information
  - Prohibit Sydney (ex-employee) from accessing, modifying, or destroying devices
  - Prohibit Sydney (ex-employee) from violating a restrictive covenant such as a non-compete or non-solicitation agreement
    - *But see 18 U.S.C. § 1836(b)(3) (injunctions cannot "prevent a person from entering into an employment relationship" or "conflict with applicable State law prohibiting restraints on the p of a lawful profession, trade, or business")*
  - Royalty injunction (*i.e.*, conditioning future use on payment of reasonable royalty)
  - Assign any patents/ copyrights obtained/ developed using trade secret

Injunctive Relief

- Injunction standard typically requires NNT to prove:
  - Likelihood of success on the merits;
  - Likelihood that it will suffer irreparable harm absent preliminary injunctive relief;
    - **typically presumed as a matter of law that disclosure of trade secret causes irrepara*
    - *otherwise shown that damages are difficult/impossible to prove*
  - The balance of harms between it and Sydney/ CCT favor NNT
    - **typically favors plaintiffs, unless defendants can show specific harm (e.g., lost contr*
  - Some public interest served by injunctive relief
    - **typically favors plaintiffs as public as an interest in protecting trade secrets*
- The federal circuits vary in how they weigh these factors: balancing vs. sequential

Protecting Trade Secrets During Litigation

- In normal litigation, pleadings and filings are public (*courts prefer public)
- Trade-secret litigation requires diligence in maintaining secrecy of trade secret
- Protective orders:
  - DTSA requires courts to take measures to protect
  - Regulates how discovery is conducted
  - Levels: Attorneys' Eyes Only; Outside Counsel's Eyes Only
  - Provides process for redactions (*in filings, sharing with client, others, be careful*)
  - In-camera hearings
  - Sealing records (*the DTSA codifies the obligation to seal trade secrets in court proceedings, a be which may not be as readily available in state court (18 U.S.C. § 1835).*)
  - Must vigilantly monitor parties/ non-parties' compliance with protective orders

Thank You

- *Question/comments: nschneider@eckertseamans.com*