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Stealing the System: Trade Secret Battles After Franchise Termination

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Introduction

Proprietary information underpins almost all modern businesses. Operational methods, customer and vendor data, training systems, marketing strategies, and financial analytics drive the playbook for how a company creates value and differentiates itself. In a traditional corporate structure, that information remains tightly held within a single company because the business's competitive advantage depends on it remaining exclusive. But franchise systems are built on the paradox that the same information that must remain proprietary must also be shared among numerous franchisees. After all, the whole point of franchising is replicating a successful business model, which requires turning over the model itself.

That paradox creates a tension that is unique to franchising. A traditional company will selectively share its secrets with employees, who might later work for competitors. But a franchisor depends on widespread dissemination of its secrets to *independent businesses*—each incentivized to maximize its own profits—who are already set up to act as direct competitors. As such, franchisors are faced with an ever-present risk that former franchisees will walk away with the system's proprietary information to use as a playbook against that system.

The first and most straightforward line of defense against this threat is, often, the franchisee's post-termination covenant not to compete at all within a limited time and space (coupled, of course, with contractual confidentiality obligations, as well as trademark protection from the Lanham Act to the extent the franchisee continues to use the same or confusingly similar marks). But there are circumstances that put the efficacy of a noncompete in question, such as, for example, its applicability to the competition at issue, its enforceability in the applicable forum, or the relief available. Other contract tools, such as confidentiality or non-solicitation clauses, can be similarly limited. In those circumstances, how can a franchisor defend its proprietary information?

Enter "trade secrets" protection. In addition to contract remedies, state law—beginning with a patchwork of common law and later culminating in the Uniform Trade Secrets Act (UTSA), which the vast majority of states have now adopted—has long protected franchisors from franchisees wrongfully using or disclosing any of the franchisor's information that (i) the franchisor has taken reasonable steps to keep secret, and (ii) is valuable because it is not generally known or replicable by others who could use it.[1] And in 2016, the Defend Trade Secrets Act (DTSA) was enacted to provide federal

[1] *See generally*, Laura Sixkiller & Susan Tegt, *Two Can Keep a Secret? Protecting Confidential and Proprietary Information*, American Bar Association, ABA 48TH ANNUAL FORUM ON FRANCHISING W-6 (2025), Section II.C (explaining the UTSA and its history); Mark S. VanderBroek & Christian B. Turner, *Protecting and Enforcing Franchise Trade Secrets*, 25 FRANCHISE L.J. 191 (2006) (describing the state of trade secrets litigation prior to the DTSA).

matter jurisdiction for a non-exclusive but uniform cause of action to protect business owners' trade secrets.[2]

On the one hand, trade secrets cases are less commonly litigated in the franchise space than more traditional noncompete claims, perhaps because they carry their own unique challenges, risks, and limitations. First, while it's typically obvious whether a franchisor has the facts to support a viable noncompete claim, the same isn't always true for trade secret misappropriation. After all, a former franchisee's competing business probably can't avoid advertising its products and services, but it won't advertise whether it relies on proprietary information. And even if the franchisor suspects that it does, it is rare to have "smoking gun" evidence that will inform whether litigation is likely to uncover actionable misappropriation. Trade secret litigation can also be expensive: not only must the franchisor seek evidence of misappropriation, but it must also respond to discovery regarding its confidentiality procedures (and lapses) and the value of its claimed trade secrets. Further, the risk of *losing* a trade secrets claim can create additional exposure through fee-shifting, not to mention the damage caused by a ruling that the relevant information is not sufficiently valuable or protected to merit trade secret protection. Finally, even a successful trade secrets claim may only result in a targeted injunction rather that the "slam dunk" victory of completely shutting down the competitive business.

But even with these limitations, a trade secret claim can be a valuable supplement or substitute to a more traditional state contract claim because (i) a DTSA claim provides access to federal court where it might not otherwise exist; (ii) trade secret claims can couple with and strengthen noncompete claims in jurisdictions that only enforce noncompetes that protect trade secrets; (iii) trade secret claims can provide a basis for liability against former franchisees and third parties under circumstances where a noncompete claim may be vulnerable; and (iv) trade secret claims provide access to the DTSA, UTSA, or other state's own unique remedies, such as a statutory basis for alternative damage theories that could be easier to prove than traditional expectation damages, exemplary damages, and even ex-parte seizure orders in extraordinary circumstances for DTSA claims.

This paper proceeds in three parts. Section I begins with the underlying principles of trade secret protection, including the DTSA's and UTSA's core elements and features, along with an examination of how those principles have been tested throughout the various litigation stages in the franchise space. Sections II and III then extrapolate from these principles, with Section II analyzing trade secrets claims' litigation strengths—including application to nonsignatories, universal application, unbound duration, punitive damages, attorneys' fees, seizure remedies, synergies with other claims, and access to federal court for DTSA claims—and Section III focusing on its limitations—including the risk of damaging precedent, exposure to attorneys' fees, the risk of losing subject matter jurisdiction in federal court, and the inherent uncertainty and expense of litigating a trade secret claim compared to a more traditional noncompete or Lanham Act claim. Finally,

[2] *See generally* Natalma McKnew & Emily Bridges, *I've Got a Secret . . . and I'm Willing to Use It! Franchisors, Franchisees, and Trade Secrets*, 36 Franchise L.J. 561 (2017) (describing the context and enactment of the DTSA); Sixkiller and Tegt, supra note 1, Section II.D.

Section IV translates that doctrine and precedent into practice, offering concrete insights and steps both prior to and during litigation.

I. The Principles and Elements of Trade Secret Claims

To be successful, a plaintiff in any trade secret action must plead and ultimately prove (i) that they own a trade secret, which (ii) the defendant has misappropriated (or threatened to misappropriate), and (iii) that misappropriation has harmed (or imminently threatens harm to) the plaintiff. In a DTSA claim, the plaintiff must also show (iv) that the trade secret is related to a product or service used in interstate or foreign commerce.

A. The Existence of a Trade Secret

A wide range of business information can, in principle, be protected under the DTSA, which includes within its scope "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."[3] But for any such information to qualify as a "trade secret," two key conditions must be met: (i) the holder must have taken reasonable measures to keep the information secret, and (ii) the value of the information must be enhanced by virtue of its secrecy, i.e. not being generally known or readily ascertainable.

1. Reasonable Measures to Keep the Information Secret

First, the "owner" of the information—defined as "the person or entity in whom or in which rightful legal or equitable title to, or license in, the trade secret is reposed"—must have "taken reasonable measures to keep such information secret."[4] In other words, to claim a secret a franchisor must first treat it like one, implementing contractual (i.e. NDAs; non-competes; enforcement) and practical safeguards (e.g. password protecting data; securely disposing of physical manifestations) to ensure the information isn't easily accessible or misused by others.

a) Contractual Protections

By far the most common protection cited by franchisors is the fact that they provide confidential information to their franchisees pursuant to the franchise agreement, which defines confidential information—often broadly—and requires that franchisees keep that

[3] 18 U.S.C. § 1839(3). The UTSA's definition is similar. UNIF. TRADE SECRETS ACT § 1(4) (1985). Going forward, where the statutes are similar, we will quote to the DTSA and include the UTSA citation and also call out where the statutes differ.

[4] *Id.* §§ 1839(3)(A), (4); UNIF. TRADE SECRETS ACT § 1(4).

information strictly confidential, which courts universally find to be a relevant factor.[5] Also important is whether those confidentiality obligations extend to franchisees' employees.[6]

b) Password Protected Database

Another common measure cited by franchisors is that confidential information, whether it be in the confidential manual, client data, or other proprietary sources is all housed in a password-protected database, with access restricted to those—such as franchisees or employees of the franchisor or franchisee—who have undertaken similar confidentiality obligations. This is another measure that courts find relevant, and, in many cases, sufficient when coupled with the contractual obligations in the franchise agreement.[7]

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[5] Willett v. Window Gang, LLC, 2026 WL 575903, at *7 (W.D. Va. Mar. 2, 2026) (the franchisor had taken adequate measures to protect pricing formula and lead-generating system by providing the information only to franchisees who signed franchise agreements that bound them to keep the information confidential); JTH Tax LLC v. Anderson, 2023 WL 3499645, at *2–5 (D. Ariz. Apr. 18, 2023) (finding that the franchisor had adequately alleged that its confidential information had independent value due to its secrecy, which the franchisor took reasonable measures to protect, by claiming that they were only disclosed to franchisees in the operation of a franchised business while the franchise agreement was in effect, and that the franchisor took legal recourse against former franchisees who breached their confidentiality obligations under the franchise agreements); Hydration Station USA Franchise Sys., LLC v. Seaverns, 2021 WL 12104571, at *7–9 (N.D. Ga. Jan. 8, 2021) (the contractual protection of the information in the Franchise Agreement, which defined intellectual property broadly (thus potentially covering the trade secrets), and stated that the franchisee's right to use it was "derived solely from" the franchise agreement, was "a reasonable measure to keep the information secret"); JTH Tax LLC v. Gause, 2023 WL 3081300, at *6–7 (W.D.N.C. Apr. 25, 2023), vacated after stipulated injunction, 2023 WL 4440292 (W.D.N.C. July 10, 2023) (the franchisor had taken "reasonable measures" to keep the information secret "by only disclosing this information to franchisees following the execution of a franchise agreement, prescribing the permissible use of this information, prohibiting the disclosure or use of its Confidential Information beyond the scope of the franchise agreement, and providing for specific procedures for returning the Confidential Information following the termination of a franchise agreement").

[6] JTH Tax, Inc. v. Freedom Tax, Inc., 2019 WL 2062519, at *11–12 (W.D. Ky. May 9, 2019) (officer's nonsignatory status was irrelevant, because as an officer of the franchisee she had a duty to maintain the franchisor's trade secrets).

[7] Allstate Ins. Co. v. Fougere, 79 F.4th 172, 187–96 (1st Cir. 2023) (Allstate took reasonable precautions to protect proprietary information by only granting access to agents with contractual confidentiality obligations, password protecting access to the data, and revoking access to agents that had been terminated); MNM & MAK Enters., LLC v. HIIT Fit Club, LLC, 2019-Ohio-4017, ¶¶ 18-31, 134 N.E.3d 242, 248–51 (franchisee testified that member list was kept secret and was password protected, with escalating tiers of access so that only high level employees had access to all of the information contained in it. The court concluded that this was competent, credible evidence to support that the franchisee took reasonable measures to protect the member list's secrecy); Waxing the City Franchisor LLC v. Katularu, 2024 WL 3887109, at *7–8 (D. Minn. Aug. 20, 2024) (franchisor was likely to prevail on its trade secrets claims, alleging that franchisee had targeted the formerly franchised business's client base through accessing the franchisor's "client database" portal, containing "contact information, service and product preferences, and appointment history and frequency," which had been provided to the franchisee on a need to know, password-protected basis); Crumbl LLC v. Dirty Dough LLC, 2023 WL 5180370, at *5–10 (D. Utah Aug. 11, 2023) (plaintiff took reasonable efforts to protect its recipes and methods, which were disclosed to franchisees only on password-protected servers in connection with confidentiality obligations); BakeMark USA LLC v. Negron, 2024 WL 1075280, at *18–20 (S.D.N.Y. Jan. 12, 2024), report and recommendation adopted, 2024 WL

2. Independent Economic Value From Not Being Known or Readily Ascertainable

To be considered a trade secret, the information must derive "independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information."[8] In other words, even if information is kept strictly confidential, it's only a "trade secret" if it has independent value—not just because it's useful—but because it's the type of knowledge that is not easily replicated or pieced together by others in the industry.

As noted above, a core feature of franchising is that the franchisor offers its franchisees access to a full suite of proprietary operational methods, training practices, recipes, software, data, vendor networks, supply chain models, and other information that empowers them to differentiate themselves from competitors and grow the success of the entire brand. But in trade secret litigation, the independent value requirement forces the franchisor to decide which of those components to defend as its "special sauce" and explain what, exactly, makes the sauce so special. Of note, this does not mean that each individual ingredient must itself be a secret: sometimes the sum can be greater than the parts. As such, even if individual components are public knowledge, the packaging of them together can be a trade secret so long as the franchisor can prove that it was done in a unique and useful way that would be difficult for others in the industry to replicate.[9]

3. Defining Franchise Trade Secrets.

This all raises the practical and strategic question of how broadly a franchisor's trade secrets should be framed. A broader definition covers more conduct and expands the scope of potential remedies, but it also invites and is vulnerable to challenge. For example, if the franchisor claims its entire operating system is protectible, then it can plausibly seek to shut down a former franchisee's entire competitive operation on the grounds that using the business model itself constitutes misappropriation. But to succeed, the franchisor must establish that the know-how identified in the operations manual is an

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3385641 (S.D.N.Y. July 12, 2024) (finding pricing and customer information to be a trade secret where it was housed within a "confidential, password protected database, limiting which employees can access it, and requiring employees with access to sign confidentiality agreements); SpeeDee Worldwide, LLC v. Toppa, 729 F. Supp. 3d 125, 131-32 (D. Mass. 2024) (franchisor took reasonable steps to protect its proprietary information because "it password-protected relevant training material, maintained confidential customer lists and required outside parties who attended regional franchise meetings to sign non-disclosure agreements").

[8] *Id*. § 1839(3)(B); UNIF. TRADE SECRETS ACT § 1(4).

[9] Allstate Ins. Co. v. Fougere, 79 F.4th 172, 187–96 (1st Cir. 2023) (noting, in the context of a customer database that contained a wealth of useful data, some of it publicly available, that "the inclusion of some information in compilations which could have been obtained from public sources does not mean the compilations were not trade secrets, and that trade secrets may be found, even as to that information, when it would have been immensely difficult to collect and compile it in the form in which it appeared in the compilation.").

irreplicable differentiator rather than—as the franchisee will argue—mere operational competence and common knowledge within the industry.

a) Broad Aspects of the Overall System

Franchisors, particularly in industries that emphasize proprietary operational methods, may sue former franchisees turned competitors for competing in such a way that misappropriates the franchisor's entire franchise system, operational standards, training methods, marketing strategies, customer and vendor networks, and know-how, such that the franchisor alleges that the same behavior is effectively both a breach of both the noncompete and also a violation of the trade secrets statutes.[10] Claims that a franchisee "stole the system" are rarely encountered apart from a concurrent noncompete claim, but are often used to fill gaps in the noncompete claim using trade secrets' unique benefits, discussed in further detail below, such as using the DTSA claim as a jurisdictional anchor, as a means to sue nonsignatories as liable for trade secret misappropriation, and to add further evidence of irreparable harm when seeking injunctive relief.[11]

Although these broadly defined trade secret claims can be powerful if proved—as they can help to shut down the entire competitive business—they are vulnerable to attack as to whether (and to what extent) the franchisor's entire system is a trade secret. Courts have cautioned that trade secrets cannot be alleged solely through listing general categories of proprietary information: rather, plaintiffs must describe each specific trade secret in sufficient detail and explain why each of them provide independent value by virtue of not being generally known or readily ascertainable in the industry.[12]

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[10] JTH Tax, LLC v. Merit, No. 24-CV-00683-GPG-STV, 2025 WL 1151477, at *6 (D. Colo. Jan. 28, 2025), report and recommendation adopted, No. 24-CV-00683-GPG-STV, 2025 WL 1151454 (D. Colo. Feb. 21, 2025) (granting franchisor's motion for default judgment and agreeing with "those courts across the country that have concluded that" the franchisor of the Liberty Tax System's "Operations Manual, methods of operation of its franchise, customer information and records, and marketing information," all "used by Plaintiff's network of 21,000 tax preparers across the national economy," constituted protectible trade secrets).

[11] *Id*. at *9 (irreparable harm established, in part, because trade secrets were at issue); JTH Tax LLC v. Gause, No. 321CV00543FDWDCK, 2023 WL 3081300, at *6–7 (W.D.N.C. Apr. 25, 2023) (granting franchisor's motion for preliminary injunction against franchisee), Dkt. No. 1 at ¶ 9 (DTSA providing basis for plaintiff in non-diversity case).

[12] JTH Tax LLC v. Cortorreal, 2024 WL 897605, at *4–6 (E.D. Va. Mar. 1, 2024) (finding, unlike the *Merit* court, that "client lists and files, methods of operation, private customer information, and marketing strategies as well as their confidential Operations Manuals" were inadequately pleaded as trade secrets by Liberty, because "[p]laintiff merely states that this list of materials are trade secrets but never describes or explains the materials and how Liberty derives economic value from them . . . provid[ing] the Court with naked conclusory assertions without any support"; franchisor later corrected its pleading defects, as described later in this paper); Cisco Sys., Inc. v. Chung, 462 F. Supp. 3d 1024, 1048 (N.D. Cal. 2020) (internal citation omitted) (noting that broad trade secret allegations "that are merely descriptive of the types of information that generally *may* qualify as protectable trade secrets are insufficient to state a claim"); Hydration Station USA Franchise Sys., LLC v. Seaverns, 2021 WL 12104571, at *7–9 (N.D. Ga. Jan. 8, 2021) (franchisor's "medical supply sourcing strategies and processes, membership programs and models,

In *Stockade Companies, LLC v. Kelly Rest. Grp., LLC*, for example, the franchisor of a restaurant system sued its former franchisee for misappropriating its entire "buffet system," which the franchisor defined broadly as a trade secret that was comprised of all relevant "recipes, the training system, trade dress, trademarks, the resource library, the marketing program, the purchasing system, the point-of-sale system, the gift-card system, and research and development," as well as "all of our vice president[s], directors that help operate the franchises and develop systems and process[es] to help us operate our restaurants."[13] When pressed to more precisely define what comprised the buffet system, the witness for the franchisor insisted, "it's everything."[14] Faced with a purported trade secret that it characterized as an "indeterminate laundry list of elements," the court denied the franchisor's motion for a preliminary injunction, noting that even the franchisor admitted that the franchisee was not using the buffet system "in its entirety."[15] It is possible that the outcome would have been different if the franchisor had targeted discrete aspects of its system for protection rather than lump them all in as a single overarching trade secret "system."

b) Client (or Vendor) Information

Customer data is among the most commonly asserted trade secrets in a franchise system, likely because of its almost universal importance to any franchise system or business model and the closest thing to a recipe that some franchisees can realistically abscond with and use. Client lists, in particular, are singled out as proprietary to the franchisor in many franchise agreements. Proving misappropriation of client information can be more straightforward than other methods, and a substantial client overlap shortly after a franchisee's transition to a competitive business can be powerful circumstantial evidence in its own right.

Courts have counseled that a mere list of customer or vendor names may not constitute a trade secret if it is readily ascertainable by legitimate means.[16] On the other

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package names and contents, pricing structures, revenue and profitability models, and vendor relationships including pricing negotiated by [Plaintiffs]" were sufficiently specific and plausibly valuable to constitute trade secrets, at least at the pleadings stage).

[13] No. 1:17-CV-143-RP, 2017 WL 4640443, at *5 (W.D. Tex. Oct. 16, 2017).

[14] *Id*.

[15] *Id*. The Court also noted that the franchisee no longer had access to certain components of the buffet system, including the resource manuals and the operations manuals, which it had returned. Further, the franchisee persuasively argued that the franchisor did not adequately protect the information it insisted was a trade secret, noting that the franchisor disposed of the allegedly secret information by throwing the contents, including recipes, "into a public, unlocked dumpster." *Id*. Further, while the franchise agreement permitted the franchisor to require its franchisees to require their employees to sign confidentiality and noncompete agreements, in practice the franchisor did not do so, which meant that any of those employees could have left their positions and "put their knowledge of the 'buffet system' to work for a competitor." *Id*. n.4.

[16] Pool Scouts Franchising, LLC v. Stuart Rd. Corp., 2025 WL 961675, at *11 (E.D. Va. Mar. 31, 2025) (because a client list must be comprised of "more than publicly available information, even if it takes considerable effort to compile" to constitute a trade secret, to plead a viable trade secret claim a franchisor

hand, trade secret protection often extends to databases comprised of additional proprietary data, such as detailed and difficult-to-compile contact information, customer preferences, billing history, plan details, member expiration dates, pricing data, vendor reviews, or the terms on which vendors may be enticed to deal.[17] Pricing information, in particular, has been recognized as a powerful tool for competitors to use to undercut the franchisor.[18]

c) Proprietary Software, Recipes, Formulae or Tools

In addition to business methods and customer data, which show commonality across industries, franchisors in specific industries will be more likely to rely on particularized trade secrets that are crucial to their specific business models. For example, restaurants' competitive advantage may be supported by proprietary recipes,[19] For example, a franchisor's proprietary software can qualify as a trade secrets.[20] Further, service industries may benefit from tailored lead generation and pricing estimation tools.[21] Because the independent value of these discrete formulae is often more straightforward to establish, it may be easier to plead and prove the existence of these formulae as trade secrets. On the other hand, proving misappropriation may be more difficult because the

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must plead "how they were developed and why the underlying customer information is not otherwise readily ascertainable by [the franchisor's] competitors in the relevant market").

[17] JTH Tax LLC v. Cortorreal, No. 2:23-CV-0355, 2024 WL 3928884, at **1, 6 (E.D. Va. Aug. 23, 2024) (customer lists that included not just names, but "phone numbers, social security numbers and other tax return and financial information" could constitute trade secrets); BakeMark USA LLC v. Negron, 2024 WL 1075280, at *18–20 (S.D.N.Y. Jan. 12, 2024), report and recommendation adopted, 2024 WL 3385641 (S.D.N.Y. July 12, 2024) ("pricing and customer information" that "lists all of [a facility's] customers, the items and quantities those customers ordered, [plaintiff's] costs, and what it charged each customer" were trade secrets).

[18] BakeMark, 2024 WL 1075280, at *18–20 (acknowledging plaintiff's explanation that "if a competitor were to access the information," the competitor "could then use that information to undercut [the plaintiff's] market share by offering [its] customers lower prices on the baking goods that [the plaintiff] sells").

[19] Crumbl LLC v. Dirty Dough LLC, 2023 WL 5180370, at *5–10 (D. Utah Aug. 11, 2023) (court found that franchisor was likely to prove that at least some part of its detailed recipes for specific ingredients and portions, photographs and instructional videos, and detailed steps for mixing and baking cookies could have independent value by virtue of not being generally known or readily ascertainable).

[20] Willett v. Window Gang, LLC, No. 3:25-CV-00044, 2026 WL 575903, at *5–8 (W.D. Va. Mar. 2, 2026) (franchisor adequately alleged that its "flat-rate job pricing formula and bidding software" was developed and refined by analyzing over a decade of commercial data, is not known or readily ascertainable by competitors without that data, and "allows franchisees to perform flat-price bids, which generally provide larger profit margins than jobs done on a T&M (time and materials) basis," all of which—along with the franchisor's measures to restrict access to active franchisees with confidentiality obligations—could entitle the software to trade secret protections).

[21] *Id*. (franchisor adequately pleaded a trade secret claim by explaining how its call center and lead-generating system—which "gathers leads, job information, and preferences for potential customers requesting services that could be provided by a Window Gang franchisee within a particular service area"—provided a "material advantage" because the "call center is catered to the franchisee service areas and provided only to Window Gang's franchisees.").

mere fact of competition may be insufficient without evidence tying that competition to the use of the particularized trade secret. Along the same lines, because the DTSA and UTSA protect trade secrets, not competition per se, a plaintiff's remedies may be limited to an injunction preventing the defendant from using the particular formulae or product at issue.[22] While a targeted injunction may be useful or even crucial depending on the context, it is inherently more challenging to monitor and police than a broad injunction that shuts down the competition entirely for a time certain.

B. Misappropriation

To be successful in a trade secret action, the plaintiff must prove that notwithstanding its reasonable measures to protect the secrecy of its information, the defendant misappropriated it anyway. Misappropriation of a trade secret generally occurs by a person who (i) acquires it improperly; or (ii) acquires it under a duty to keep it secret and/or limit its use, but discloses and/or uses it anyway; or (iii) acquires / discloses / or uses it with reason to know it was acquired improperly or in connection with a duty to keep it secret and/or limit its use.[23] Through this last prong, franchisors can tie liability not

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[22] JTH Tax, LLC v. Morrell, No. 8:24-CV-237-SDM-CPT, 2025 WL 3900733, at *5–7 (M.D. Fla. Aug. 11, 2025) (defendants were permanently enjoined from the misappropriation and ordered to deliver all proprietary information to the franchisor).

[23] The relevant test of the DTSA, states:

> **(5)** the term "misappropriation" means--
>
> **(A)** acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
>
> **(B)** disclosure or use of a trade secret of another without express or implied consent by a person who--
>
> **(i)** used improper means to acquire knowledge of the trade secret;
>
> **(ii)** at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was--
>
> **(I)** derived from or through a person who had used improper means to acquire the trade secret;
>
> **(II)** acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the use of the trade secret; or
>
> **(III)** derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret or limit the use of the trade secret; or
>
> **(iii)** before a material change of the position of the person, knew or had reason to know that--
>
> **(I)** the trade secret was a trade secret; and

only to former franchises and their guarantors, but also to nonsignatories such as a former franchisee's new competitive entity or business partners. While those nonsignatories may not themselves have stolen the trade secrets or signed on to the confidentiality obligations under the franchise agreement, that is no excuse if the franchisor can establish that they knew or should have known that their access to the trade secrets was derived through the former franchisee, who *was* bound.[24]

Proving misappropriation is often easier said than done. It is the rare case where the defendant is caught red-handed leaving the factory with the secret recipe to Coca-Cola. More often, a franchisor will be attempting to prove that a former franchisee or the guarantor's new entity improperly used components of its proprietary system—perhaps including entirely intangible aspects like operational methods, marketing strategies, and training tools—to set up a competing business. Even where that information is protectible, it may be difficult to find direct proof that a former franchisee used it when they contend that their business is distinct and was founded using only their own business experience, know-how, and independent research.

In part for this reason, courts have acknowledged that direct evidence of misappropriation is rare and most cases will be proved through circumstantial evidence.[25] Some examples of circumstantial evidence that have met with success are below.

1. Speed of Competition

When a franchisee is terminated (or abandons) one day, and begins running a fully competitive business with an established client base the following day, even without direct

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> **(II)** knowledge of the trade secret had been acquired by accident or mistake;
>
> **(6)** the term "improper means"--
>
> **(A)** includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means; and
>
> **(B)** does not include reverse engineering, independent derivation, or any other lawful means of acquisition[.]

18 U.S.C. § 1839(5), (6); UNIF. TRADE SECRETS ACT § 1(2).

[24] Hydration Station USA Franchise Sys., LLC v. Seaverns, 2021 WL 12104571, at *7–9 (N.D. Ga. Jan. 8, 2021) (DTSA protections extended to franchisee's non-signatory entities, to which his knowledge was imputed, as well as his business partner, who likely knew of the franchisee's duty to maintain secrecy under the franchise agreement); JTH Tax, Inc. v. Freedom Tax, Inc., 2019 WL 2062519, at *11–12 (W.D. Ky. May 9, 2019) (franchisee officer's nonsignatory status was irrelevant, because as an officer of the franchised business she had a duty to maintain the franchisor's trade secrets).

[25] JTH Tax LLC v. Grabowski, 2021 WL 3857794, at *6–8 (N.D. Ill. Aug. 30, 2021) ("Courts have recognized that circumstantial evidence is acceptable, indeed even expected, in trade secret misappropriation cases," and, in fact, "because direct evidence of theft and use of trade secrets is often not available, courts routinely allow a plaintiff to rely on circumstantial evidence to *prove* misappropriation by drawing inferences from perhaps ambiguous circumstantial evidence.").

proof of misappropriation several courts have determined that the speed of the transition could only realistically have been achieved by using the franchisor's proprietary operational and customer data to jumpstart the competitive business.[26]

2. Overlap in Customers, Products, Strategies, or Services

When a franchisee is accused of misappropriating proprietary customer lists, recipes, marketing strategies, or training and operational standards, evidence that the franchisee's output closely mirrors that of the formerly franchised business—whether in the marketing methods, the products sold, or the customers serviced—is a powerful indicator that the franchisee was using the same trade secret inputs to generate those results.[27]

3. Culpable Behavior

Occasionally the franchisor will have access to information that suggests the franchisee has been acting with a culpable state of mind. Examples could include emailing proprietary information from one's branded email to one's personal email account, soliciting former customers to discuss "new" opportunities, or warning business partners to stop talking about the competitive business through trackable channels.[28] Further, the franchisor's information technology department or vendors may be able to access a digital forensic trail to determine whether the franchisee accessed and downloaded certain proprietary information prior to termination.[29] While such evidence might not in itself be a "smoking gun" of misappropriation in the face of a franchisee's contention that nothing untoward occurred, it could, coupled with other evidence such as

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[26] SpeeDee Worldwide, LLC v. Toppa, 729 F. Supp. 3d 125, 132 (D. Mass. 2024) (the fact that the franchisee opened a competing business so soon after termination of the franchise agreement was evidence that they had used the franchisor's trade secrets: "[e]ven if defendants returned all confidential materials before they terminated their franchise, they could not have commenced the operation of an independent business so quickly without the benefit of plaintiffs' trade secrets.").

[27] Waxing the City Franchisor LLC v. Katularu, 2024 WL 3887109, at *7–8 (D. Minn. Aug. 20, 2024) (the franchisee did not dispute that its clients overlapped with the franchised business; and in a social media post for the new business, before it opened, the franchisee thanked its "wonderful clients" at a time that it should not yet have had any clients); Bambu Franchising, LLC v. Nguyen, 537 F. Supp. 3d 1066, 1073–76 (N.D. Cal. 2021) (franchisor's recipes nearly identical).

[28] *See, e.g.* BakeMark USA LLC v. Negron, No. 23-CV-2360 (AT) (BCM), 2024 WL 1075280, at *19 (S.D.N.Y. Jan. 12, 2024), report and recommendation adopted, No. 23 CIV. 2360 (AT), 2024 WL 3385641 (S.D.N.Y. July 12, 2024) (while a plaintiff must often "construct a web of perhaps ambiguous circumstantial evidence" to prove misappropriation, where plaintiff's former employees had "furtively emailed" proprietary information to their personal email accounts while working for defendant, "the web is not particularly ambiguous"); JTH Tax LLC v. Cortorreal, No. 2:23-CV-0355, 2024 WL 3928884, at *3 (E.D. Va. Aug. 23, 2024) (texting former tax customers that "[w]e are the same preparers with the same great customer service as always, with a new name and address" was evidence of misappropriation).

[29] Crumbl LLC v. Dirty Dough LLC, 2023 WL 5180370, at *5–10 (D. Utah Aug. 11, 2023) (evidence that employee downloaded to his personal computer 66 recipes from plaintiff's password-protected server); Brightview Grp., LP v. Teeters, 441 F. Supp. 3d 115, 129–44 (D. Md. 2020) (evidence that employee surreptitiously downloaded proprietary information to a folder on his computer called "new business").

the speed of transition or similarity of customers or products, be sufficient to create a material issue of fact that misappropriation has occurred. [30]

C. Harm to the Plaintiff from the Misappropriation

Both the DTSA and UTSA require that the plaintiff prove harm that can be remedied, but the statutes allow for a broader suite of remedies that provide greater flexibility to plaintiffs seeking monetary damages. A plaintiff seeking preliminary or permanent injunctive relief in addition to, or in lieu of, damages will also have to show the traditional factors of irreparable harm, namely that the balance of harms weighs in their favor, and that the public interest would not be disserved by an injunction.

1. Actual Damages, Unjust Enrichment, or a Reasonable Royalty Rate

Unlike traditional common law claims, which often require plaintiffs to prove actual expectation damages, the trade secrets statutes provide franchisors with a variety of options to choose from when seeking a monetary remedy. For example, the DTSA provides for the following monetary remedies:

> **(b)(3) Remedies**.--In a civil action brought under this subsection with respect to the misappropriation of a trade secret, a court may—
>
> **(B)** award--
>
> **(i)**
>
> **(I)** damages for actual loss caused by the misappropriation of the trade secret; and
>
> **(II)** damages for any unjust enrichment caused by the misappropriation of the trade secret that is not addressed in computing damages for actual loss; or
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> **(ii)** in lieu of damages measured by any other methods, the damages caused by the misappropriation measured by imposition of liability for a reasonable royalty for the misappropriator's unauthorized disclosure or use of the trade secret[.][31]

[30] Bambu Franchising, LLC v. Nguyen, 537 F.Supp.3d 1066 (2021) (compelling circumstantial evidence included a $100,000 deposit arrangement in which the franchisee granted a non-signatory the right to engage in the daily operation of the business for a period of time—without the franchisor's knowledge or consent—shortly before the business was transformed into a competitive business run by the non-signatory).

[31] 18 U.S.C. § 1836(b)(3)(B). The UTSA's remedy is similar. UNIF. TRADE SECRETS ACT § 3(a).

Courts have held that the structure of these statutes means that plaintiffs are empowered to choose whichever of the monetary options is higher.[32] The statutes also provide for exemplary damages and attorneys' fees in certain circumstances, discussed in further detail below.

2. Injunctive Relief Factors

Rather than, or in addition to, seeking monetary damages, many franchisor plaintiffs in trade secret cases seek preliminary and permanent injunctive relief to enjoin a defendant franchisee's future misappropriation of the franchisor's trade secrets. In those cases, in addition to providing the underlying merits (or likelihood of success), the plaintiff must also prove that enjoining the misappropriation is necessary to prevent irreparable harm, will not create a disproportionate and inequitable balance of harms, and will not prejudice the public interest.

a) Irreparable Harm

Both the DTSA and UTSA permit injunctive relief as part of their remedies, with a reasonable royalty in "exceptional circumstances that render an injunction inequitable."[33] Because of this authorization and the inherent nature of trade secrets, some jurisdictions, particularly in the First Circuit, have concluded that the trade secrets statues carry a presumption of irreparable harm so long as a plaintiff is likely to succeed on the merits.[34] On the other hand, the Tenth Circuit and recently the Seventh Circuit appear to clearly reject a presumption under the DTSA because it permits but does not mandate injunctive relief.[35] Courts in the Second and Third Circuits, too, appear to reject a presumption, particularly where there is no risk of future dissemination of the trade secret.[36] Lower

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[32] MNM & MAK Enters., LLC v. HIIT Fit Club, LLC, 2019-Ohio-4017, ¶¶ 18-31, 134 N.E.3d 242, 248–51 (noting that a "plaintiff would be entitled to the higher amount of either plaintiff's lost profits or defendant's gain" (quoting Miller Med. Sales, Inc. v. Worstell, No. 93-AP-23, 1993 WL 538300, at *2 (Ohio Ct. App. Dec. 21, 1993)).

[33] 18 U.S.C. § 1836(b)(3)(A); UNIF. TRADE SECRETS ACT § 2(a), (b).

[34] Benchmark Techs., Inc. v. Tu, No. CV 22-10227-LTS, 2023 WL 8371973, at *3 (D. Mass. May 30, 2023), judgment entered, No. CV 22-10227-LTS, 2023 WL 8371933 (D. Mass. July 12, 2023) (collecting cases).

[35] First W. Cap. Mgmt. Co. v. Malamed, 874 F.3d 1136, 1143 (10th Cir. 2017); Life Spine, Inc. v. Aegis Spine, Inc., 8 F.4th 531, 545 (7th Cir. 2021).

[36] Faiveley Transp. Malmo AB v. Wabtec Corp., 559 F.3d 110, 118–19 (2d Cir. 2009) ("A rebuttable presumption of irreparable harm might be warranted in cases where there is a danger that, unless enjoined, a misappropriator of trade secrets will disseminate those secrets to a wider audience or otherwise irreparably impair the value of those secrets. Where a misappropriator seeks only to use those secrets—without further dissemination or irreparable impairment of value—in pursuit of profit, no such presumption is warranted because an award of damages will often provide a complete remedy for such an injury. Indeed, once a trade secret is misappropriated, the misappropriator will often have the same incentive as the originator to maintain the confidentiality of the secret in order to profit from the proprietary knowledge."); Campbell Soup Co. v. ConAgra, Inc., 977 F.2d 86, 92 (3d Cir. 1992) (rejecting plaintiff's contention that irreparable harm must be presumed where the elements of a trade secret claim have been satisfied, and finding no irreparable harm where the defendant had discontinued its use of the plaintiffs' trade secrets).

courts in other jurisdictions are mixed, but the majority rule appears to be against a presumption.[37] Those who counsel against a presumption point to the Supreme Court's decision in *eBay Inc. v. MercExchange, L.L.C.*, which discouraged the use of presumptions for statutes that merely permit injunctive relief.[38] However, certain state statutes mandate that there "shall" be an injunction upon a finding of trade secret misappropriation, which can flip this analysis.[39]

Regardless of whether a presumption is appropriate, however, many courts find that the threat of ongoing misappropriation is typically sufficient to establish irreparable harm.[40] On the other hand, some find that irreparable harm is lacking where it appears the plaintiff will be in a strong position to prove damages,[41] or where the only further harm is continued use by the same misappropriator rather than further dissemination.[42]

b) Balance of Equities and Public Interest

Typically, where courts find that misappropriation has occurred—or is likely to be proven in the preliminary injunction context—they are more likely to find that the defendants' harms are self-inflicted and that the public interest will be served by upholding the law and trade secret protections.[43]

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[37] Brightview Grp., LP v. Teeters, 441 F. Supp. 3d 115, 138 (D. Md. 2020) (collecting cases and predicting that the Fourth Circuit would "require an individualized analysis of irreparable harm on a case-by-case basis").

[38] 547 U.S. 388, 392, 126 S. Ct. 1837, 1840, 164 L. Ed. 2d 641 (2006).

[39] N.C. Gen. Stat. Ann. § 66-154 ("Except as provided herein, actual or threatened misappropriation of a trade secret may be preliminarily enjoined during the pendency of the action and shall be permanently enjoined upon judgment finding misappropriation for the period that the trade secret exists plus an additional period as the court may deem necessary under the circumstances to eliminate any inequitable or unjust advantage arising from the misappropriation."); Qorvo, Inc. v. Akoustis Techs., Inc., No. 1:21-CV-01417-JPM, 2024 WL 5336415, at *3 (D. Del. Oct. 11, 2024) (explaining that "courts interpreting North Carolina law note that this statutory language 'creat[es] a presumption of irreparable injury and irreparable harm absent an injunction'" and collecting cases).

[40] Brightview Grp., LP v. Teeters, 441 F. Supp. 3d 115, 129–44 (D. Md. 2020) (finding irreparable harm satisfied, even without a presumption).

[41] BakeMark USA LLC v. Negron, 2024 WL 1075280, at *18–20 (S.D.N.Y. Jan. 12, 2024), report and recommendation adopted, 2024 WL 3385641 (S.D.N.Y. July 12, 2024) (unexplained delays, coupled with a strong likelihood that the plaintiff would be in a good position to quantify its damages as to lost customer revenue and goodwill, precluded a finding of irreparable injury).

[42] *See* Faiveley, 559 F.3d at 118–19.

[43] JTH Tax, LLC v. Morell, No. 8:24-CV-237-SDM-CPT, 2024 WL 4905422, at *13–16 (M.D. Fla. Sept. 18, 2024) (defendants' harms were due to their violation of the DTSA and court need not weigh hardship from stopping behavior that is "unlawful").

D. DTSA -- Nexus to Interstate or Foreign Commerce.

To qualify for DTSA jurisdiction, a trade secret must "be related to a product or service used in, or intended for use in, interstate or foreign commerce."[44] While this requirement must be adequately pled and proved for a DTSA claim to survive,[45] it is often straightforward to satisfy because "it is not necessary that the alleged trade secret itself was used in interstate commerce," just that "the product or service related to the trade secret is used, or intended for use, in interstate commerce," a standard that many franchisors are readily prepared to meet.[46] The franchisor should be prepared to plead and ultimately prove, however, that the related product or service not only affects, but is itself "within the flow," of interstate commerce.[47]

Regarding foreign commerce, it is worth noting that the DTSA, unlike the Lanham Act, extends to conduct that occurs outside the United States so long as the alleged offender is a citizen or resident of the United States, or if an act in furtherance of the offense was committed in the United States.[48]

II. Unique Benefits of Bringing a Trade Secret Claim

While not always the first line of defense, trade secret claims remain a potentially powerful tool in the toolkit of a franchisor (or franchisee) who wants to protect their system and proprietary information, with unique benefits beyond those that could be obtained

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[44] 18 U.S.C. § 1836(b)(1).

[45] JTH Tax LLC v. Pierce, No. 1:22-CV-1237-SEG, 2022 WL 4122215, at *1 (N.D. Ga. Sept. 8, 2022) (noting that the plaintiff initially failed to adequately allege the interstate commerce connection, which deficiency would, if not rectified, have resulted in total dismissal of the action if the court's jurisdiction were based solely on the federal question presented by the plaintiff's DTSA claim).

[46] Ultimate Fitness Grp., LLC v. Anderson, No. 18-CV-60981, 2019 WL 8810367, at *3–4 (S.D. Fla. Mar. 13, 2019) (interstate commerce satisfied where "the trade secrets were related to Orangetheory's fitness services which are offered at more than 900 Orangetheory franchises located throughout the United States and around the world"). This requisite "nexus" to interstate commerce has been found for most alleged trade secrets in the franchise context, which by its nature involves interstate commerce. ReBath LLC v. HD Sols. LLC, No. CV-19-04873-PHX-JJT, 2020 WL 7000071, at *2–3 (D. Ariz. Sept. 18, 2020) (DTSA's jurisdictional component was satisfied for franchisee's alleged misappropriation of a customer database, even though the franchisee's customers were required to be in Texas, because the database "inferentially touched upon interstate commerce" since the franchise system generally sold and installed products in interstate commerce; also collecting cases in which interstate commerce was found even where products were shipped at one point from state to state or where the defendant had at one point attended a business meeting in another state); JTH Tax LLC v. Cortorreal, No. 2:23-CV-0355, 2024 WL 3928884, at *5–7 (E.D. Va. Aug. 23, 2024) (trade secrets implicated interstate commerce because they were related to tax information, which is transmitted from each state to the IRS in Washington, D.C.).

[47] Providence Title Co. v. Truly Title, Inc., 547 F. Supp. 3d 585, 596–98 (E.D. Tex. 2021), aff'd sub nom. Providence Title Co. v. Fleming, No. 21-40578, 2023 WL 316138 (5th Cir. Jan. 19, 2023).

[48] 18 U.S.C. § 1837.

solely through a breach of contract claim for breach of noncompetition, nonsolicitation, or confidential provisions.

A. Federal Jurisdiction Without Preemption

Many national franchisors choose to litigate in federal court, where possible, for the consistency and uniformity of legal application and reliability of the rules and the federal bench. But, at the same time, many franchisors are limited liability companies with a diverse membership group, which means they may be citizens of many states and thus effectively closed out of diversity jurisdiction. Enter the DTSA, which creates a federal question and provides supplemental jurisdiction for a franchisor's other state claims.[49]

Note, too, that despite creating a federal cause of action, the DTSA explicitly does not preempt any state laws or curb franchisor's rights to bring other, similar claims based on misappropriation.[50] In one of the few stark contrasts between the statutes, the UTSA expressly states that it displaces any state law, non-contractual, remedies that are based on misappropriation.[51]

B. Statutory Right to Alternative Damage Remedies

In breach of contract actions, some courts resist allowing plaintiffs to seek traditionally equitable remedies such as unjust enrichment unless they first prove that they have "no adequate remedy at law," which can effectively restrict a plaintiff to seeking actual damages.[52] On the other hand, proving actual expectation damages in a misappropriation case may be challenging, require expensive expert testimony, or yield meager results compared to alternative remedies, such as disgorging the defendants' ill-gotten profits.

In contrast, the plaintiff in a trade secret case is presented with a menu of potential remedies and may choose from the higher of actual damages or unjust enrichment,[53] and,

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[49] 18 U.S.C. § 1836.

[50] 18 U.S.C. § 1838 ("Except as provided in section 1833(b), this chapter shall not be construed to preempt or displace any other remedies, whether civil or criminal, provided by United States Federal, State, commonwealth, possession, or territory law for the misappropriation of a trade secret . . . .").

[51] UNIF. TRADE SECRETS ACT § 7; *see* Sixkiller & Tegt, supra note 1, for an in-depth discussion.

[52] *See, e.g.* Bettencourt v. Jeanne D'Arc Credit Union, 370 F. Supp. 3d 258, 265 (D. Mass. 2019) ("The availability of an adequate remedy at law, even if ultimately unviable, precludes a claim for unjust enrichment."); In re Ford Motor Co. Speed Control Deactivation Switch Prods. Liab. Litig., 664 F. Supp. 2d 752, 763 (E.D. Mich. 2009) ("The California and Texas Plaintiffs' unjust enrichment claims must be dismissed. As an equitable remedy, unjust enrichment is not available where there is an adequate remedy at law.").

[53] MNM & MAK Enters., LLC v. HIIT Fit Club, LLC, 2019-Ohio-4017, ¶¶ 18-31, 134 N.E.3d 242, 248–51 (10th Dist. 2019) ("plaintiff would be entitled to the higher amount of either plaintiff's lost profits or defendant's gain.").

if neither is workable, a reasonable royalty rate.[54] Proving a successful defendant's profits through their financials may be more straightforward than proving expectation damages, and the franchisor's already-established royalty rate may serve as an effective backstop where both actual damages and the defendant's profitability are non-existent or difficult to prove. On the other hand, franchisees may counter that the franchisor should only recover profits attributable to misappropriation (difficult to prove) and the franchisor's royalty rate covers other value—such as ongoing support and a license to use the marks—making it too high to constitute a reasonable proxy for misappropriation.

C. Double Damages and Attorneys' Fees

For willful and malicious misappropriation, both the DTSA and the UTSA permit an award of double damages, even for alternative remedies such as unjust enrichment or a reasonable royalty rate.[55] That adds a combination of flexibility and leverage that is only possible by bringing a statutory claim.[56] And it is worth mentioning that the trade secrets statutes offer potentially more flexibility than the exemplary damage provisions of the Lanham Act, which allows up to treble damages but only, in non-counterfeit cases, to "actual damages."[57] And while these statutory benefits may be practically challenging under franchise agreements that preclude punitive damages, the outcome may depend

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[54] The DTSA provides for the following monetary remedies:

> **(b)(3) Remedies**.--In a civil action brought under this subsection with respect to the misappropriation of a trade secret, a court may—
>
> > **(B)** award--
> >
> > > **(i)**
> > >
> > > > **(I)** damages for actual loss caused by the misappropriation of the trade secret; and
> > >
> > > > **(II)** damages for any unjust enrichment caused by the misappropriation of the trade secret that is not addressed in computing damages for actual loss; or
> > >
> > > **(ii)** in lieu of damages measured by any other methods, the damages caused by the misappropriation measured by imposition of liability for a reasonable royalty for the misappropriator's unauthorized disclosure or use of the trade secret;

18 U.S.C. § 1836(b)(3)(B). The UTSA's remedy is similar. UNIF. TRADE SECRETS ACT § 3(a).

[55] The DTSA provides that "if the trade secret is willfully and maliciously misappropriated, award exemplary damages in an amount not more than 2 times the amount of the damages awarded under subparagraph (B) [pertaining to actual damages, unjust enrichment, or a reasonable royalty rate]." 18 U.S.C. § 1836(b)(3)(C). The UTSA is similar. UNIF. TRADE SECRETS ACT § 3(b). Ohio's version of the UTSA allows for treble damages. Ohio Rev. Code Ann. § 1333.63(B).

[56] *See* Motorola Solutions, Inc. v. Hytera Communications Corporation Ltd., 108 F.4th 458 (2024) (awarding double damages off an unjust enrichment award).

[57] Thompson v. Haynes, 305 F.3d 1369, 1380 (Fed. Cir. 2002).

on the contract language and whether statutory remedies (including state UTSA claims) can be contractually waived at all.[58]

The statutes also provide for attorneys' fees where there is a finding of willful and malicious misappropriation. Notably, the Court in *JTH Tax, LLC v. Merit* noted that there was a "dearth of caselaw" addressing whether a defendant has "willfully and maliciously" misappropriated trade secrets.[59] The Court cited to the Fourth Circuit's opinion in *Steves & Sons, Inc. v. JELD-WEN, Inc.*,[60] which similarly noted the lack of a clear definition of those terms in the DTSA or UTSA caselaw. In *Steves*, a trade secret case that advanced to a bench trial, the district court had instructed the jury that it could only find that trade secrets were "willfully and maliciously misappropriated" if they found that the defendant acted with an "intent to cause injury or harm," a high scienter bar that the jury did not find was established.[61] In contrast, the plaintiff argued before the trial court and on appeal that the district court's instruction was in error, and the term could be satisfied anytime the defendant acted with "conscious disregard for the rights of another."[62] The court analyzed case law from various jurisdictions and found cases from different jurisdictions supporting either definition.[63] Ordinarily, the Court held, it would look to Congressional intent through legislative history, but because the plaintiff had dedicated "less than a page" to that argument, the Court ultimately determined that the plaintiff's argument was too "perfunctory and undeveloped" to reverse the district court's determination.[64]

The case law appears fairly split in other jurisdictions; while the majority trend appears to be in favor of the "intent to cause injury" definition, in several cases the court's definition of the term, even for purposes of the DTSA, has depended on whether the plaintiff was also seeking relief under a state statue in which the terms "willful and

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[58] *Contrast* Alabama Aircraft Indus., Inc. v. Boeing Co., 133 F.4th 1238, 1247 (11th Cir. 2025) (parties' contractual punitive damages waiver precluded exemplary damages under Missouri UTSA claim) *with* H1 Lincoln, Inc. v. S. Washington St., LLC, 489 Mass. 1, 26, 179 N.E.3d 545, 565 (2022) (limitation of liability could not preclude punitive damages under statute designed to punish willful misconduct); Castillo v. CleanNet USA, Inc., 358 F. Supp. 3d 912, 945 (N.D. Cal. 2018) (noting that despite franchise agreement's punitive damages waiver, statutory remedies could ordinarily not be waived); Cook v. Pub. Storage, Inc., 2008 WI App 155, ¶ 83, 314 Wis. 2d 426, 473, 761 N.W.2d 645, 668 (punitive damages could not be waived by contract).

[59] No. 24-CV-00683-GPG-STV, 2025 WL 2710698, at *4 (D. Colo. July 30, 2025), report and recommendation adopted, No. 24-CV-00683-GPG-STV, 2025 WL 2710550 (D. Colo. Aug. 20, 2025)

[60] *Id.* (citing 988 F.3d 690, 726 (4th Cir. 2021)).

[61] 988 F.3d at 726.

[62] *Id.*

[63] *Id.* at 727 (collecting cases, including New Hampshire and Texas cases, along with the leading treatise, supporting the "intent to cause injury" definition, while cases in North Dakota and Illinois supported the "conscious disregard" definition).

[64] *Id.*

malicious" were defined, in which case the court applied that same definition across both state and federal claims.[65]

D. Unique Seizure Remedy

The DTSA's seizure remedy is a potentially powerful tool to seize evidence and instrumentalities ex-parte, and much of the legislative history around the DTSA centered on the power and potential reach of the seizure remedy.[66] On the other hand, courts have recognized that it is a remedy that is even more extraordinary than preliminary injunctive relief and typically reserved for particularly egregious behavior, catastrophic potential harm, or instances where a defendant has repeated instances of noncompliance with more traditional remedies.[67] Perhaps because most trade secrets at issue in the franchise

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[65] See Silverthorne Seismic, LLC v. Sterling Seismic Servs., Ltd., No. CV H-20-2543, 2021 WL 4710813, at *7 (S.D. Tex. Oct. 7, 2021) (applying the "conscious disregard" standard for both DTSA and TUTSA claims because Texas had amended its Trade Secrets Act in 2017 to define "willful and malicious" as an "intentional misappropriation resulting from the conscious disregard of the rights of the owner of the trade secret"); Brightview Grp., LP v. Teeters, No. CV SAG-19-2774, 2021 WL 1238501, at *20 (D. Md. Mar. 29, 2021) (applying the "intent to injure" standard for both the DTSA and the Maryland Uniform Trade Secrets Act, because "[t]he Maryland Court of Special Appeals has defined malicious under the MUTSA as an act done 'for an improper motive and without legal justification' and 'to deliberately cause harm or injury,' and finding that there was a material dispute whether defendants had acted with the requisite scienter when there was evidence they knew they were misappropriating the plaintiff's trade secrets, passed them off as their own work, gave them to third parties, encouraged others to use them, and repeatedly used them to compete); *see also* Computer Scis. Corp. v. Tata Consultancy Servs. Ltd., 159 F.4th 429, 445 (5th Cir. 2025) (affirming district court's application of the "conscious disregard" standard when both parties had agreed to it in the lower court, and finding that that relatively lower standard was met); KPM Analytics N. Am. Corp. v. Blue Sun Sci., LLC, 729 F. Supp. 3d 84, 105-110 (D. Mass. 2024) (collecting cases and determining to follow the "intent to injure" standard as the well-reasoned majority approach, in part because a subjective intent to harm was necessary in order for the extra "malicious" requirement to impart a meaningful difference from the elements required to prove any violation for damages; the court found that even that higher standard was met, in part because the defendant had constructed "false or contrived" attacks against the plaintiff in an attempt to divert customers who were trying to do business with the plaintiff, exploited trade secret customer data to undercut the plaintiff's prices and poach its business, used the plaintiff's trade secret software to compete with it, and misappropriated on such a large scale that their "actions cannot be written off as a mere accident or one-off lapse in judgment"); Qorvo, Inc. v. Akoustis Techs., Inc., No. 1:21-CV-01417-JPM, 2024 WL 5336415, at *1 (D. Del. Oct. 11, 2024) (noting that a jury had found the defendants' trade secret misappropriation under the DTSA and North Carolina Trade Secrets Protection Act to be willful and malicious, and thus awarding $31,315,214 in unjust enrichment damages, $7,000,000 in punitive damages); No. 1:21-CV-01417-JPM, Dkt. No. 690 (awarding $11,743,745.54 in attorneys' fees under the DTSA and NCTSPA because the misappropriation was willful and malicious); Dkt. No. 596 (jury instructions providing that "'Willful and malicious' means such intentional acts or gross neglect of duty as to exhibit a reckless indifference of the rights of others on the part of the wrongdoer, and an entire want of care so as to raise the presumption that the entity at fault is conscious of the consequences of its carelessness."); Dkt. No. 731 (noting that the defendants' appeal had been dismissed after the matter settled); N.C. Gen. Stat. Ann. § 66-154(c), (d) (permitting punitive damages).

[66] 18 U.S.C. § 1836(b)(2); *see also* McKnew & Bridges, supra note 2, for an in-depth breakdown of the seizure provisions of the DTSA and the relevant legislative history.

[67] JTH Tax, LLC v. Merit, No. 24-CV-00683-GPG-STV, 2025 WL 3241665, at *7 (D. Colo. Oct. 9, 2025), report and recommendation adopted, No. 24-CV-00683-GPG-STV, 2025 WL 3241651 (D. Colo. Oct. 29, 2025) (seizure request mooted by defendants' voluntary compliance).

context are less prone to require (or permit) immediate identification and seizure, as opposed to more traditional equitable remedies, franchisors have rarely invoked the seizure remedy and to date the authors are not aware of any published cases evaluating it in any significant depth in the franchise context.

E. Universal Application, Without Temporal or Geographic Restrictions

Many jurisdictions have grown increasingly hostile to post-termination noncomplete claims. Some jurisdictions disfavor them, others, such as California, refuse to enforce them in many business contexts,[68] and, as of July 1, 2026, Virginia will explicitly forbid franchisors from including them in future retail franchise agreements.[69] In recent years, the FTC invoked its rulemaking authority to attempt to ban noncompetes in the employment context and invited public comment on whether that ban should extend to the franchise context.[70] Those efforts failed,[71] but they reflect a growing skepticism of noncompete agreements in many states. Therefore, in certain jurisdictions a trade secret claim may represent the best chance at a meaningful injunctive remedy against a former franchisee who de-identifies but nonetheless competes with the franchisor using its proprietary system, customer data, and other trade secrets.

Even in the majority of states that permit post-termination noncompetes for legitimate business justifications, those justifications may be easier to establish by proving the need to protect the franchisor's trade secrets.[72] As discussed above, proving irreparable harm and the entitlement to equitable relief may be easier when statutory

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[68] Cal. Bus. & Prof. Code § 16600 ("Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."). *But see* Bambu Franchising, LLC v. Nguyen, 537 F.Supp.3d 1066 (2021) (enforcing the post-termination noncompete in a franchise agreement because it was designed to protect the franchisor's goodwill and was thus permitted under an exception, Cal. Bus. & Prof. Code § 16601, "which provides, in pertinent part, that '[a]ny person who sells the goodwill of a business, . . . may agree with the buyer to refrain from carrying on a similar business within a specified geographic area in which the business so sold, or that of the business entity, division, or subsidiary has been carried on, so long as the buyer, or any person deriving title to the goodwill or ownership interest from the buyer, carries on a like business therein").

[69] VA LEGIS 553 (2026), 2026 Virginia Laws Ch. 553 (H.B. 69) (amending Va. Code Ann. § 13.1-563 to provide that, effective July 1, 2026, it shall be "unlawful for any person, in connection with the sale or offer to sell a franchise," to "offer or enter into a franchise agreement that restricts the right of a franchisee to engage in the business of offering, selling, or distributing goods or services at retail after termination or expiration of the franchise agreement").

[70] *See* Final Rule: Non-Compete Clause Rule, Federal Trade Commission (16 CFR Part 910), available at https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete-rule.pdf.

[71] *See* Ryan, LLC v. Fed. Trade Comm'n, 746 F. Supp. 3d 369, 390 (N.D. Tex. 2024) (nationwide injunction against Non-Compete Clause Rule).

[72] SpeeDee Worldwide, LLC v. Toppa, 729 F. Supp. 3d 125, 132 (D. Mass. 2024) (distinguishing a prior Massachusetts case that had declined to enforce a noncompete provision which was merely "designed to curtail ordinary competition in part because there were no trade secrets involved," and enforcing franchisor's noncompete provision, in part, because it was designed to protect the trade secrets that the franchisor had disclosed to the franchisee).

trade secret claims are at issue, particularly, though not exclusively, in jurisdictions that continue to recognize a presumption of irreparable harm for trade secret misappropriation.

Further, all jurisdictions place limitations on the scope, time, and geographic region in which a noncompete can be enforced. Because the DTSA and UTSA are not bound by those same restrictions—trade secret laws apply to everyone, everywhere, at all times—a trade secret claim can be a substitute or alternative claim against competitive behavior that falls outside or is weak on any of those parameters.[73]

And again, as noted above, because the definition of misappropriation includes those who knowingly or recklessly use trade secrets derived from individuals with a duty to keep them secret, trade secret claims can be a means (along with tortious interference claims) of suing a franchisee's nonsignatory affiliates, who may be the real parties in interest, particularly in an injunction context.[74]

III. Unique Risks of Bringing a Trade Secret Claim

The inverse of trade secrets claims' unique benefits are the risks they can add to litigation, which collectively may illuminate why they are pursued selectively rather than routinely when more traditional noncompetition claims are available.

A. Risking the Loss of Subject Matter Jurisdiction

Although the benefits of federal court may be tempting, it is risky to plead a DTSA claim merely as a "tagalong" claim in a non-diversity case to anchor supplemental federal jurisdiction over a plaintiff's primary state law claims. If the DTSA claim is the complaint's weakest link and the plaintiff has done little to support or prosecute it, a defendant may move to dismiss it and thereby put the entire action at risk of being dismissed for lack of subject matter jurisdiction, restarting the entire process in state court.

While this risk is potentially costly and time consuming, it is typically not fatal. Because the time limit to assert state law claims is tolled during the pendency of any federal court action,[75] at least franchisors need not face the Hobson's choice of asserting all claims in state court in the first instance to avoid the downside risk of missing the statute of limitations after losing subject matter jurisdiction in federal court.[76]

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[73] Of course, both the DTSA and UTSA bar claims more than three years after the misappropriation was, or should reasonably have been, discovered. 18 U.S.C. § 1836(d); UNIF. TRADE SECRETS ACT § 6.

[74] 18 U.S.C. § 1839(5)(A) (emphasis added); UNIF. TRADE SECRETS ACT § 1(2); Hydration Station USA Franchise Sys., LLC v. Seaverns, 2021 WL 12104571, at *7–9 (N.D. Ga. Jan. 8, 2021) (nonsignatories liable for trade secret misappropriation).

[75] 28 U.S.C. § 1367(d).

[76] Jinks v. Richland County, S.C., 538 U.S. 456, 459 (2003) (under most circumstances, states must apply federal tolling under § 1367(d)).

B. Exposure to Defensive Attorneys' Fees

Additionally, under both the DTSA and UTSA, a trade secret defendant can seek statutorily-imposed attorneys' fees if they can show that the plaintiff brought the misappropriation claim in "bad faith."[77] That standard—requiring both objective speciousness and subjective bad faith,[78] is high and typically involves a showing that there was a complete lack of evidence to support the claim and it was commenced or continued for an improper purpose, such as harassment, delay, or to thwart lawful competition.[79] That said, despite the high standards,[80] few litigants would be comfortable defending against a motion in which the defendant persuasively argued that the plaintiff simply treated the claim as a jurisdictional hook and took no serious efforts to prove it.

C. Damaging Precedent

As with losing a noncompete enforcement case, losing a trade secret case can be damaging to the entire system, particularly if the Court rules that the franchisor's purported trade secrets are not worthy of protection. Bad precedent may circulate and reduce the franchisor's leverage with franchisees in future disputes.[81] For those reasons, a franchisor should be cautious before asserting any trade secret claim under circumstances where its protectible status is a close question.

D. Risk of Disclosure to the Public or to Litigation Adversaries

Additionally, any franchisor considering bringing a trade secret claim should be aware of the risk of disclosing its proprietary information while seeking to protect it. The risk of disclosure may arise through the litigation process, either from inadvertence by

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[77] 18 U.S.C. § 1836(b)(3)(D); UNIF. TRADE SECRETS ACT § 1(4)(i).

[78] Workplace Technologies Research, Inc. v. Project Management Institute, Inc., 664 F.Supp.3d 1142, 1159 (S.D. Cal. 2023).

[79] FLIR Systems, Inc. v. Parrish, 174 Cal.App.4th 1270, 1278 (2009); SASCO v. Rosendin Electric, Inc., 207 Cal.App.4th 837, 847 (2012).

[80] Dunster Live, LLC v. LoneStar Logos Management Company, LLC, 908 F.3d 948, 952-53 (5th Cir. 2018) (voluntary dismissals without prejudice ordinarily will not trigger bad faith awards because they do not establish the winner of the dispute); Physician's Surrogacy, Inc. v. German, 311 F.Supp.3d 1190, 1196-97 (S.D. Cal. 2018) (same).

[81] Pie Dev., L.L.C. v. Pie Carrier Holdings, Inc., 128 F.4th 657, 665 (5th Cir. 2025) (finding of no trade secrets was preclusive in subsequent action, including against nonparties who could not have been put on notice that a trade secret had been misappropriated where the alleged trade secret was found not to be a trade secret at all). *But see* Lawson Prods., Inc. v. Chromate Indus. Corp., 158 F. Supp. 2d 860, 863 (N.D. Ill. 2001) (even though a prior court had found that the plaintiff failed to allege a trade secret, the defendant was not entitled to estop new trade secret claims against a new defendant because the prior court "did not hold that the MRO industry as a whole does not, as a matter of law, have any trade secrets" but rather "simply applied the Illinois trade secret law to the specific information allegedly misappropriated, and found it unprotected"; the trade secrets at issue in the new case had some distinguishing features, and although those differences "may or may not prove outcome determinative," the plaintiff was nonetheless "free to argue that this information is protected, even if the information in [the prior matter] was not").

counsel or by a court's refusal to protect information used in court proceedings. This has consequences beyond the specific litigation, as public disclosure of a trade secret destroys its value and usually prevents the holder from protecting the disclosed information against users who obtain the information through the public source. Even with a solid confidentiality or protective order, a trade secret plaintiff will have to disclose its alleged trade secrets to the opposing party, which could result in that competitor gaining new or additional knowledge of information the plaintiff is seeking to protect. And finally, a trade secret holder must take steps to protect its confidential information once the case gets into the courtroom.

At least one plaintiff has lost trade secrets protections in part by filing proprietary customer data on a public docket rather than under seal.[82] And because courts have discretion whether to seal records, litigants must be diligent to ensure that their grounds for confidentiality are well supported. Further, franchisors will need to ensure that there are appropriate protective orders and safeguards in place, including Attorneys' Eyes Only designations, ex parte submissions, or in camera review where appropriate, to avoid damaging disclosures to other litigants.

Helpful guidance regarding protection of trade secrets during litigation is found in *The Sedona Conference Commentary on Protecting Trade Secrets in Litigation About Them*.[83] Fairness dictates that, absent unusual circumstances, a defendant that is accused of misappropriating trade secrets must be given access to the plaintiff's trade secrets that the defendant allegedly misappropriated.[84] When the defendant is a company, access to discovery materials can include the defendant's employees who are necessary to assist counsel in defending the case, as well as in-house lawyers and expert witnesses who also might be in or work with competitors in the same industry.[85] Thus, a franchisor bringing a trade secret claim might have to disclose its secrets to its competitors.

Further, once the litigation gets into court, such as for a preliminary injunction hearing or trial, there is a presumption of public access to the proceedings, and some courts may be reluctant to impose the kinds of restrictions the parties might want on access to the courtroom or to exhibits filed in the case. As the Sedona Commentary notes, "The right of public access is firmly entrenched in the law throughout the United States."[86]

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[82] Gov't Emps. Ins. Co. v. Nealey, 262 F. Supp. 3d 153, 168 (E.D. Pa. 2017) (company may have taken reasonable steps to keep purported customer data secret, until it destroyed that secrecy by filing the information on a public docket, not under seal; this allowed a subsequent court to find—even that the motion to dismiss phase—that the information was not a trade secret for purposes of the DTSA because the plaintiff had not taken reasonable steps to keep it secret).

[83] *The Sedona Conference, Commentary on Protecting Trade Secrets in Litigation About Them*, 23 SEDONA CONF. J. 741 (2022).

[84] *See id*. at 770-73

[85] *Id*. at 756-70, 773-75.

[86] *Id.* at 781.

Both the DTSA and the UTSA, however, direct courts to implement procedures to protect litigants' trade secrets, and courts usually implement some protections for trade secret information.[87] Counsel should address this issue early in the case, preferably during the initial Rule 26(f) conference, and educate the court about the need to impose protections for the parties' confidential information both during discovery and in court proceedings.

E. Can be Speculative and Costly

To mitigate the above risks, franchisors should invest the appropriate resources into any trade secret case prior to and during litigation, which exposes a plaintiff to substantial defensive discovery obligations to prove the existence and maintenance of secrecy of the trade secret and produce and explain away any examples of deviations in security (i.e. the obligation to "air one's own dirty laundry"), as well as affirmative discovery requirements to search for documents and other information that would support a finding of misappropriation, often not visible with a surface level search.

The time and resources to prosecute trade secrets claims can be largely additive of, not duplicative with, the work required to support noncompete and trademark claims. Further, most potential trade secrets claims come with some inherent uncertainty, particularly when misappropriation is suspected but strong evidence is not yet available. In the noncompete context, the defendant's competitive business is likely to be advertised, making it relatively easy to determine prior to suit whether the franchisor will be able to prove, at minimum, the fact of competition through direct evidence. This leaves only the potential of non-enforceability as a significant risk. But because a former franchisee is unlikely to advertise that they use "back of the house" trade secrets that are proprietary to their former franchisor, the franchisor will often have to actively seek new evidence of misappropriation, which may not be forthcoming. And evidence that is found will likely be circumstantial, requiring yet more resources to "put the pieces together."

F. Relief is Tailored to Misappropriation, Not Competition

As discussed above, although not a "risk" per se, one of the most significant limitations of a trade secret claim versus a noncompete claim is that even a successful trade secret claim is unlikely to result in an injunction that entirely shuts down a former franchisee's competitive business. Instead, trade secret injunctions are often drafted to ensure that the defendant must no longer use, and in some cases must return tangible or electronic copies of, the information that has been proved to be a trade secret.[88] Again, while potentially useful, this is typically more difficult to police and less immediately impactful than a noncompete that shuts the competitor down in their tracks. For this

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[87] *Id.* at 783 & n.59 (collecting cases).

[88] JTH Tax, LLC v. Merit, No. 24-CV-00683-GPG-STV, 2025 WL 1151477, at **12–13 (D. Colo. Jan. 28, 2025), *report and recommendation adopted*, No. 24-CV-00683-GPG-STV, 2025 WL 1151454 (D. Colo. Feb. 21, 2025) (enjoining defendants from using or disclosing franchisor's proprietary information, including "methods of operations, customer information, and marketing information," and ordering that defendants return the information to franchisor).

reason, in many franchise cases trade secrets claims are approached as ancillary and supplemental to noncompete claims.

IV. Practical Considerations

Taking into account the above principles and the most salient benefits and drawbacks of trade secret claims, several practical considerations come to the fore.

A. Drafting Considerations – Describing and Protecting the Secrets in Franchise Documents

As the case law makes clear, it is important for a franchisor to draft its franchise agreements so that they are broad enough to capture the franchisor's trade secrets as they will change over time. And the franchisor's operations manual should—under the cover of confidentiality—describe the trade secrets and their value with particularity. Finally, in Item 14 of the FDD, franchisors are required to describe the proprietary information that is communicated to franchisees "in general terms"—including whether particular information, such as a formula or recipe, "is considered to be a trade secret,"—and the terms for their use by franchisees.[89] Franchisors should continuously monitor and revise their franchise agreements, operations manuals, and FDDs to ensure that their most important and valuable proprietary information is captured under the franchisor's contractual protections.

Equally important, the franchise agreement must (i) ensure that the franchisor owns the information that it claims is proprietary (or, at minimum, jointly owns information that it does not want the franchisee to claim is proprietary to it);[90] and (ii) place ironclad obligations on the franchisee to keep the named proprietary information secret and limit their use to authorized purposes and only while the franchisee remains an active franchisee. Also included should be the franchisee's obligation to extend these confidentiality obligations to any employees that they give access to, including employee restrictive covenants.

B. "Reasonable Measures" – Extra Protections Against Disclosure

Even a perfectly crafted franchise agreement may be insufficient in and of itself to establish that the franchisor has taken reasonable measures to protect the secrecy of its proprietary data. One way to bolster protections is to ensure that trade secret information is housed in a secure location, such as, for electronically stored data, a password-

[89] 16 C.F.R. § 436.5(n)(7) ("If the franchisor claims proprietary rights in other confidential information or trade secrets, describe in general terms the proprietary information communicated to the franchisee and the terms for use by the franchisee. The franchisor need only describe the general nature of the proprietary information, such as whether a formula or recipe is considered to be a trade secret.").

[90] T&T Mgmt., Inc. v. Choice Hotels Int'l, Inc., 2025 WL 643033, at *5–7 (D. Minn. Feb. 27, 2025) (dismissing franchisee's trade secret claims against franchisor for using the franchisee's customer data to divert businesses to competitive hotels, finding that although the customer data was a trade secret, the franchisor had the right to acquire it, had equal rights to it, and had no requirement to keep it confidential).

protected database that is only accessible to those who have already undertaken a duty to keep the information secret and limit its use. As one example, franchisors should consider extending this control to sensitive and valuable information that franchisees help collect, such as customer information, particularly where the franchise agreement provides that the franchisor owns customer data. Rather than permit franchisees to maintain their own customer database, customer information can be input and housed in a CRM platform that franchisees have access to and can input data in, but which is centrally controlled and protected by the franchisor.

Further, for contractual obligations to have teeth, they must be enforced. A franchisor is more likely to be found to have acted reasonably if it actively enforces its franchisees' obligations to secure confidentiality agreements with employees who are given confidential information. Likewise, a franchisor is more likely to be seen as vigilant if it actively polices the system to enforce the secrecy of its proprietary information, ensuring that the admonitions in the franchise agreement are not merely words but an actual safety feature of the franchisor's system.

C. Pleading with Sufficient Particularity

While the franchise agreement's protections will be broad, once a dispute has moved to the pleading stage of litigation, to survive a motion to dismiss the franchisor should describe its trade secrets with sufficient particularity so that their proprietary value is apparent to the Court.[91]

In *JTH Tax LLC v. Cortorreal*, for example, the court granted a former franchisee's motion to dismiss the franchisor's DTSA claims, holding that the franchisor had not adequately alleged that its "client lists and files, methods of operation, private customer information, and marketing strategies as well as [its] confidential Operations Manuals" were trade secrets, because even though the franchisor "stresses the measures it has taken to protect and preserve" the information, it "never describes or explains the materials and how [it] derives economic value from them."[92] While the court acknowledged that client lists and marketing strategies could be considered trade secrets under the DTSA, "a plaintiff seeking statutory protection must allege specific factual detail about the nature of these materials, including their development and why competitors cannot readily ascertain the client lists."[93] The court concluded that the franchisor had simply "provided the Court with naked conclusory assertions without any support," and

[91] Pool Scouts Franchising, LLC v. Stuart Rd. Corp., 2025 WL 961675, at *11 (E.D. Va. Mar. 31, 2025) (dismissing franchisor's trade secret claims because it had not plausibly alleged that its client lists had independent value by virtue of their secrecy, thus entitling them to trade secret protections, because the franchisor did not explain beyond "conclusory statements" as to "how they were developed and why the underlying customer information is not otherwise readily ascertainable by [its] competitors in the relevant market").

[92] 2024 WL 897605, at *4–6 (E.D. Va. Mar. 1, 2024).

[93] *Id*. at *6.

thus dismissed its trade secret claims without prejudice.[94] Following dismissal, the franchisor re-pleaded its trade secret claims to add additional details that "it has spent twenty-seven years compiling its customer lists, from which it derives independent economic value, including its operational methods and Confidential Information," and provided additional factual details about the information and its "relation to facilitating the tax business."[95] This time, the court denied the franchisee's renewed motion to dismiss, finding that the franchisor's amended complaint adequately described the information and, rather than nakedly assert its value, explained how it "derived independent economic value from the documents being kept secret because they contained information to generate business, which if disclosed, would create an unfair competition advantage."[96]

Courts apply the requirement to identify trade secrets even more strictly at proof stages of summary judgment or trial. For example, in *Applied Predictive Technologies, Inc. v. MarketDial, Inc.*,[97] the Federal Circuit affirmed summary judgment for the defendant because the plaintiff failed to sufficiently identify and define its alleged trade secrets. The court noted that the plaintiff's interrogatory responses provided only "cursory, high-level descriptions of different categories or sources of information without more," and also failed to show how the alleged compilation of trade secrets derived independent economic value from not being generally known or readily ascertainable."[98]

Courts also have reversed substantial trade secrets verdicts because the plaintiff did not define its trade secrets with sufficient specificity. In *Coda Development s.r.o v. Goodyear Tire & Rubber Co.*,[99] another recent Federal Circuit decision, the appellate court affirmed the trial court's post-trial judgment as a matter of law reversing a $64 million verdict because none of the five alleged trade secrets at issue were defined with sufficient specificity. Among other reasons, the court held that merely describing the functions or output of the final product incorporating the alleged secret does not meet the statutory definition.[100]

Franchisors should also ensure they have performed sufficient pre-litigation discovery to be able to plead the defendants' misappropriation beyond mere "information

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[94] *Id*.

[95] JTH Tax LLC v. Cortorreal, No. 2:23-CV-0355, 2024 WL 3928884, at *6 (E.D. Va. Aug. 23, 2024).

[96] *Id*.

[97] No. 2024-1751, 2026 WL 218291 (Fed. Cir. Jan. 28, 2026).

[98] *Id*. at *2.

[99] 160 F.4th 1350 (Fed. Cir 2025).

[100] *Id*. at 1357. Cf. Zunum Aero, Inc. v. Boeing Co., No. 24-5212 & 24-5751, 2025 WL 2364602 (9th Cir. Aug. 14, 2025) (reversing trial court's grant of JMOL overturning $72 million jury verdict because it found plaintiff's trade secrets were "vague and amorphous," holding instead that plaintiff had sufficiently identified its trade secrets using specific exhibits and expert witness testimony).

and belief," which several federal courts have held may be insufficient to plausibly allege a trade secret claim.[101]

D. Preparing for Effective Discovery – Tailoring Requests to the "Day-to-Day" of How Confidential Information is Used

Trade secret litigation is both fact intensive and tailored to the specifics of the particular industry and franchise system, and most courts require fairly developed factual allegations from the outset of the case. It is therefore important that outside counsel work with the franchisor's team early in litigation to understand (i) what the franchisor's trade secrets are and how preserving their confidentiality connects to the value proposition for a franchisee's business model, so counsel can adequately explain that value to a factfinder; (ii) the franchisor's reasonable measures to preserve the confidentiality of its trade secrets, including not just legal obligations but also practical measures and practices; (iii) how franchisees actually use and interface with the tools provided by the franchisor or preferred vendors on a day-to-day basis, including those that contain trade secrets, partially to understand how it works, to understand how proprietary data may have been extracted and misappropriated, to determine whether a trail of that misappropriation may exist through audit trails of downloads or access to password-protected portals, and to appreciate how a franchisee who chose to misappropriate data would use it in their competitive business. An efficient combination of software audits, targeted internal email searches, and consultation with franchisees' business and/or marketing coaches, can (i) bolster a complaint with sufficient particularly to withstand early dispositive motions, and, just as important, (ii) guide and target discovery requests toward those most likely to yield the most candid communications and the most useful other data from the defendant, third party vendors, or employees.

E. Pre-Litigation Investigation

Along with acquainting outside counsel with a knowledge of what a rogue franchisee might want to take, how they might get it, and what digital tracks that might leave, additional early investigative actions can yield significant dividends throughout a case. A non-exhaustive list of potential early areas of inquiry include:

- Whether the franchisor's POS, CRM, or other proprietary software tracks access, report extraction, and logins / logouts by user;

[101] Flexpand, LLC v. CREAM, Inc., 2020 WL 13504975, at *5–7 (N.D. Cal. Sept. 9, 2020) (franchisor's allegations that the defendants accessed its computer system without authorization was conclusory where it was plead only "on information and belief" and was "devoid of further factual enhancement"); Direct Components, Inc. v. Microchip USA, LLC, 2024 WL 1929522, at *4–6 (M.D. Fla. May 2, 2024) (granting franchisee's motion to dismiss where court could not determine whether franchisor's allegations of misappropriation of the franchisor's customer data were plausible, particularly where many of the foundational allegations, such as whether the former franchisee was a competitor and used the franchisor's data to solicit customers and data, were all pleaded on "information and belief").

- Whether the digital versions of the operations manual show when they have been accessed by specific authorized users;

- Whether the franchisor owns and has access to franchisees' branded emails—which could show proprietary data being emailed—and whether franchisees have been warned that they do not have a reasonable expectation of privacy in branded emails;

- How and where customers' and vendors' information is maintained, what details and specific information about customers, vendors, and transactions it contains, and the ways in which it might be extracted;

- Whether CRM software or tools can be captured to determine a franchisee's customer base and how those customers can be differentiated by time, volume of business, etc. so that the list can be compared with the competitive business's customer base;

- Whether similar software or tools exist to determine a franchisee's employees and vendors;

- What information the franchisee's business and/or marketing coach or partners convey to franchisees on behalf of the franchisor, such as regional sales trends, lead reports, marketing plans and strategies, etc., how that information is conveyed, and how it could be misused if not kept confidential;

- What LMS, library assets, and training tools the franchisor maintains for its franchisees, how those assets are protected, how they could be pulled, and whether doing so would create an audit trail;

- What types of manuals are provided to the franchisees from the franchisor, so outside counsel can request copies of the competitive businesses' records and determine how closely they match;

- Whether data is collected and systematized through the franchise network, and whether insights from that systemization are shared with franchisees through proprietary tools, software, or reports.

Conclusion

Protecting a franchisor's proprietary information is crucial for the health of the entire franchise network and to protect the competitive advantage of the system's franchisees. The DTSA's and UTSA's statutory protections, alone or in conjunction with other traditional claims like breach of contract noncompetition, nonsolicitation, and confidentiality provisions, play a critical role in the franchisor's ability to preserve the value of its system and franchised businesses.