Recent Federal Decisions and Emerging Trends in U.S. Defend Trade Secrets Act Litigation

I. Introduction

The enactment of the Defend Trade Secrets Act of 2016[1] (the "DTSA") marks a milestone in the recent development of trade secret law in the United States ("U.S.").[2] Recent federal decisions and emerging trends in DTSA litigation regarding the following issues deserve the attention of Taiwanese companies who might be involved in DTSA litigation in U.S. federal courts ("federal courts"): (1) whether the DTSA displaces any other civil remedies provided by the existing trade secret laws; (2) whether a plaintiff should pay attention to any pleading standard when bringing a DTSA claim in federal court; (3) whether a federal court will easily grant an ex parte application for seizure order under the DTSA (an "ex parte seizure order"); and (4) whether the DTSA applies to trade secret misappropriations that occurred before the DTSA came into effect. This article provides insights into these developments and trends, and concludes with their implications at the end.

II. The DTSA does not displace any other civil remedies provided by the existing trade secret laws, and federal courts may nonetheless turn to pre-DTSA laws and decisions for guidance

The DTSA states that it does not "preempt" or "displace" any other civil remedies provided by other federal and state laws for trade secret misappropriation.[3] Prior to the enactment of the DTSA, the civil protection and remedies of trade secrets in the U.S. have traditionally been provided under state laws.[4] The DTSA provides federal courts with original jurisdiction[5] over civil actions brought under the DTSA, giving trade secret owners an option to litigate trade secret claims in federal courts.[6] As a result, the DTSA adds a layer of protection for trade secrets and creates a federal path for plaintiffs to pursue civil remedies.[7]

Some commentators point out that federal courts, when hearing DTSA claims, construing DTSA provisions or analyzing DTSA claims, oftentimes turn to state laws and decisions existing prior to the enactment of the DTSA for guidance.[8] Various decisions show that federal courts tend to look to local state laws and pre-DTSA decisions when hearing DTSA claims or making decisions.[9] This suggests that pre-DTSA trade secret laws and prior decisions remain an indispensable reference for federal courts.

III. A plaintiff should pay careful attention to the plausibility pleading standard when bringing a DTSA claim in federal court

A plaintiff's pleading in his complaint must satisfy the plausibility pleading standard when the plaintiff brings a DTSA claim in federal court.[10] Otherwise, the plaintiff's complaint may be dismissed by the federal court.[11] Filing a motion requesting dismissal of the plaintiff's complaint[12] on the grounds of the plaintiff's failure of stating plausible claims for relief is thus a defense that a defendant may employ to defeat the plaintiff's claim in the early stage.[13]

The DTSA opens the door of federal courts to trade secret plaintiffs to pursue civil remedies,[14] but the DTSA does not "guarantee unfettered access to the federal courts."[15] When filing a DTSA lawsuit in federal court, a plaintiff must state "the grounds for the court's jurisdiction," the plaintiff's claims (entitlement to relief), and the plaintiff's "demand for the relief sought" in his complaint.[16] The claim and statement pled by the plaintiff in his complaint must meet the "plausibility" threshold.[17] In other words, at the pleading stage, a plaintiff should plead facts sufficiently demonstrating that all prerequisites of his claim (e.g., jurisdiction and venue,[18] elements of a claim required by the DTSA,[19] etc.) are satisfied when bringing a DTSA claim in federal court.[20] For instance, in addition to claiming the existence of his trade secret, a plaintiff should state how his trade secret was misappropriated through improper means.[21] However, in the context of trade secrets, the plausibility pleading standard can be challenging to a plaintiff because it is never easy to balance between "satisfying the required pleading standard" and "avoiding disclosing too much information about the trade secret in a pleading."[22]

Let's take pleading the existence of a trade secret as an example. Under the plausibility pleading regime, a plaintiff is required to plead all relevant facts of trade secret (elements)[23] defined by the DTSA to affirmatively prove the existence of his trade secret.[24] In other words, a plaintiff needs to state sufficient facts indicating that the information in dispute has economic value while not being known to the public, and reasonable steps have been taken to maintain the secrecy of that information,[25] all of which plausibly suggest that the information in dispute qualifies as a trade secret.[26] Federal courts do not require a plaintiff to disclose his trade secret in detail in his complaint.[27] Nevertheless, a plaintiff should be able to provide the "general contour" of the alleged trade secret that he seeks to protect.[28] Federal courts would be reluctant to see that a plaintiff, merely "identify[ing] a kind of technology" or "point[ing] to broad areas of technology," or barely asserting that the misappropriated information is confidential, then "invit[ing] the court to hunt through the details in search of items meeting the statutory definition."[29] Instead of simply alleging that the subject matter at issue involves a trade secret, a plaintiff's complaint should contain descriptions identifying the plaintiff's trade secret.[30] For instance, in his pleading, a plaintiff has to tell what information is involved and what efforts have been made to maintain the confidentiality of such information.[31] For further example, a plaintiff should provide documents or information constituting the alleged trade secret rather than merely listing general topics or categories of information.[32]

IV. Obtaining a DTSA ex parte seizure order is challenging as federal courts tend to take a conservative approach to prevent abuse of this ex parte seizure remedy

Since the DTSA came into effect, federal courts rarely grant an ex parte application for seizure order under the DTSA.[33] The provision for ex parte seizure orders is a controversial part of the DTSA[34] as it allows a court, upon ex parte application and if all DTSA

requirements are met, to issue a civil order "for the seizure of property necessary to prevent the propagation or dissemination of the trade secret."[35] So far federal courts have been hesitant to order DTSA ex parte seizures and are giving great deference to the statutory text of the DTSA seizure order provision.[36] Only when a federal court finds it "clearly appears from specific facts" that certain requirements are met[37] and only in "extraordinary circumstances"[38] may a federal court issue an ex parte seizure order.[39] When being confronted with an ex parte application for seizure order under the DTSA, federal courts tend to favor a conservative approach to prevent the abuse of this ex parte seizure remedy.[40] If any alternative equitable relief is available to achieve the same purpose, federal courts will likely find it unnecessary to issue an ex parte seizure order.[41] In addition, a plaintiff's mere assertion that the defendant, if given notice, would destroy evidence or evade a court order, but without showing that the defendant "had concealed evidence or disregarded court orders in the past," will likely be insufficient to persuade the court to issue an ex parte seizure order.[42] Furthermore, federal courts will decline to order an ex parte seizure if a plaintiff fails to meet his burden demonstrating that the information in dispute constitutes a trade secret.[43] All of the foregoing suggests that one will likely face an uphill struggle in federal court when seeking to obtain an ex parte seizure order under the DTSA.[44]

Though federal courts sparingly order DTSA ex parte seizures, to date at least one federal court did issue a published DTSA ex parte seizure order, which appeared in Mission Capital Advisors, LLC v. Romaka.[45] In Romaka, the defendant allegedly downloaded the plaintiff's client and contact lists to the defendant's personal computer without the plaintiff's authorization; the plaintiff filed an ex parte motion seeking to seize some properties containing the plaintiff's trade secrets or enjoin the defendant from disclosing that information.[46] During the trial, the defendant neither acknowledged receipt of the court's prior orders[47] nor appeared before the court as ordered,[48] all of which together with other facts in Romaka convinced the court that other forms of equitable relief would be inadequate and the defendant would likely evade or otherwise disobey the court order.[49] After reviewing the facts of this case along with DTSA requirements item by item, the Romaka court found it clearly appears from specific facts that all requirements for an ex parte seizure order under the DTSA are met,[50] and thus, issued a said seizure order as requested by the plaintiff.[51] Romaka gives us some hints about what circumstances would cause a federal court to order a DTSA ex parte seizure.[52] This case tells us that evading or disregarding court-mandated actions is likely demonstrating to the court a propensity to disobey a future court order and may probably increase the likelihood of meriting a DTSA ex parte seizure order.[53] Moreover, echoing other decisions rendered by federal courts, Romaka reveals that federal courts tend to approach ex parte seizure order applications in a gingerly way.[54]

Federal courts take a conservative approach toward ex parte seizure order to curtail abuse of such order[55] does not mean that no injunctive relief is available to victims of trade secret misappropriation. Injunctive relief provided by other federal laws or state laws[56] is nonetheless available to those victims.[57] As long as the facts of the case before the court meet all elements required for injunctive relief, it is not rare for federal courts to grant injunctive relief other than an ex parte seizure order.[58]

V. The DTSA might apply to a pre-DTSA trade secret misappropriation that continues after the DTSA became effective

The DTSA expressly states that it applies to any trade secret misappropriation that "occurs on or after the date of the enactment" of the DTSA.[59] Therefore, the DTSA does not apply to trade secret misappropriations that began and ended before the effective date of DTSA.[60] In practice, it is possible that a federal court will dismiss a plaintiff's DTSA claim if the plaintiff fails to state that the alleged trade secret misappropriations (either in whole or in part) took place after the DTSA came into effect.[61]

Federal courts have begun addressing or recognizing that the DTSA might apply to trade secret misappropriations that occurred prior to and continued after the enactment date of the DTSA.[62] However, a plaintiff should "plausibly" and "sufficiently" plead in his claim that some parts of the alleged continuing misappropriation of trade secrets occurred after the DTSA became effective.[63] Some critics opine that, in the case of a continuing trade secret misappropriation that took place before and continued after the DTSA was enacted, the available recovery shall be limited to "post-DTSA misappropriation."[64]

By being mindful of the foregoing, maybe someday a plaintiff will bring a DTSA claim for a pre-DTSA misappropriation of trade secrets that continues after the DTSA is in effect.[65] In this kind of litigation, one should pay attention to whether the plaintiff has plausibly and sufficiently alleged the part of misappropriation that occurred after the enactment date of the DTSA.[66] When a plaintiff fails to plausibly and sufficiently alleges the post-DTSA misappropriation part, the defendant stands a chance to convince the court to dismiss the plaintiff's claim.[67]

VI. Conclusion

To sum up, recent federal decisions and emerging trends in DTSA litigation provide the following implications to Taiwanese companies who might be involved in DTSA litigation in federal court:

1. The DTSA does not preempt or displace any other civil remedies provided by other federal laws and state laws.[68] Rather, the DTSA adds a layer of protection for trade secrets and creates a federal path for plaintiffs to pursue civil remedies.[69] Federal courts tend to turn to local state laws and pre-DTSA decisions for guidance when hearing DTSA claims or making decisions.[70] Do not ignore pre-DTSA trade secret laws or prior decisions as they remain an indispensable reference for federal court.
2. A plaintiff's pleading must satisfy the plausibility pleading standard when the plaintiff brings a DTSA claim in federal court.[71] Whether the plaintiff's pleading satisfies the plausibility pleading standard is likely one of the hard-fought battles between the parties in the early stage of the litigation. The plausibility pleading regime does not require a plaintiff to disclose his trade secrets in detail in his complaint.[72] However, a plaintiff should be able to describe and identify his trade secrets.[73]
3. Seeking to secure a DTSA ex parte seizure order in federal court will likely face an uphill battle.[74] Obtaining alternative injunctive relief would be easier than obtaining a DTSA ex parte seizure. When being confronted with an ex parte application for seizure order under the DTSA, federal courts tend to favor a conservative approach to prevent the abuse of this ex parte seizure remedy.[75] Notwithstanding the foregoing, as long as the facts of the case before the court meet all elements required for injunctive

relief, it is not rare for federal courts to grant injunctive relief other than an ex parte seizure order.[76]

4. The DTSA might apply to trade secret misappropriations that occurred prior to and continued after the enactment date of the DTSA.[77] When a DTSA litigation involves this kind of continuing misappropriation, one of those hard-fought battles between the parties during litigation will likely be whether the plaintiff has plausibly and sufficiently stated the part of misappropriation that occurred after the DTSA came into effect.[78] When a plaintiff fails to plausibly and sufficiently alleges the post-DTSA misappropriation part, the defendant stands a chance to convince the court to dismiss the plaintiff's claim.[79]

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[1] The Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (May 11, 2016) (mostly codified in scattered sections of 18 U.S.C. §§1836-1839 [hereinafter the "DTSA"].

[2] Mark L. Krotoski, Greta L. Burkholder, Jenny Harrison & Corey R. Houmand, The Landmark Defend Trade Secrets Act of 2016, at 3 (May 2016); Bradford K. Newman, Jessica Mendelson & MiRi Song, The Defend Trade Secret Act: One Year Later, 2017-Apr Bus. L. Today 1, 1 (2017).

[3] 18 U.S.C. §1838.

[4] S. Rep. No. 114-220, at 2 (2016) [hereinafter "S. Rep."]; Kaylee Beauchamp, The Failures of Federalizing Trade Secrets: Why the Defend Trade Secrets Act of 2016 Should Preempt State Law, 86 Miss. L.J. 1031, 1033, 1045 (2017); Zoe Argento, Killing the Golden Goose: The Dangers of Strengthening Domestic Trade Secret Rights in Response to Cyber-Misappropriation, 16 Yale J. L. & Tech. 172, 177 (2014); James Pooley, The Myth of the Trade Secret Troll: Why the Defend Trade Secrets Act Improves the Protection of Commercial Information, 23 Geo. Mason L. Rev. 1045, 1045 (2016); John Conley, New Federal Trade Secret Act and Its Impact on Life Sciences, Genomics L. Rep. (Aug. 12, 2016), https://www.genomicslawreport.com/index.php/2016/08/12/new-federal-trade-secret-act-and-its-impact-on-life-sciences/; Newman, Mendelson & Song, supra note 2, at 1.

[5] 18 U.S.C. §1836(c).

[6] Krotoski, Burkholder, Harrison & Houmand, supra note 2, at 7; Beauchamp, supra note 4, at 1033, 1045, 1072; Lily Li & Andrea W. Paris, Help! What Are My (Immediate) Defenses to a Federal Trade Secret Claim?, 58-Sep Orange County Law. 52, 52 (2016); Newman, Mendelson & Song, supra note 2, at 1.

[7] Conley, supra note 4.

[8] William M. Hensley, Post-Enactment Case Law Developments under the Defend Trade Secrets Act, 59-Jul Orange County Law. 42, 44 (2017); Robert B. Milligan & Daniel Joshua Salinas, Emerging Issues In the Defend Trade Secrets Act's Second Year, Seyfarth Shaw LLP: Trading Secrets (June 14, 2017), https://www.tradesecretslaw.com/2017/06/articles/dtsa/emerging-issues-in-the-defend-trade-secrets-acts-second-year/; Jeffrey S. Boxer, John M. Griem, Jr., Alexander G. Malyshev & Dylan L. Ruffi, The Defend Trade Secrets Act – 2016 In Review, Carter Ledyard & Milburn LLP (Jan. 19, 2017), http://www.clm.com/publication.cfm?ID=5579; Rajiv Dharnidharka, Andrew D. Day & Deborah E. McCrimmon, The Defend Trade Secrets Act One Year In – Four Things We've Learned, DLA Piper (May 30, 2017), https://www.dlapiper.com/en/us/insights/publications/2017/05/defend-trade-secrets-act-four-things-learned/; Joshua R. Rich, The DTSA After One Year: Has the Federal Trade Secrets Law Met Expectations?, McDonnell Boehnen Hulbert & Berghoff LLP, Vol. 15 Issue 3 Snippets 6, 7 (Summer 2017).

[9] HealthBanc International, LLC v. Synergy Worldwide, 208 F.Supp.3d 1193, 1201 (D.Utah 2016); Phyllis Schlafly Revocable Trust v. Cori, No. 4:16CV01631 JAR, 2016 WL 6611133, at *2-5 (E.D. Mo. Nov. 9, 2016); Panera, LLC v. Nettles, No. 4:16-cv-1181-JAR, 2016 WL 4124114, at *4 fn.2 (E.D. Mo. Aug. 3, 2016); Henry Schein, Inc. v. Cook, 191 F.Supp.3d 1072, 1077, 1079-1080 (N.D.Cal. 2016); Engility Corp. v. Daniels, No. 16-cv-2473-WJM-MEH, 2016 WL 7034976, at *8-10 (D. Colo. Dec. 2, 2016); M.C. Dean, Inc. v. City of Miami Beach, Florida, 199 F. Supp. 3d 1349, 1353-1357 (S.D. Fla. 2016); GTO Access Systems, LLC v. Ghost Controls, LLC, No. 4:16cv355-WS/CAS, 2016 WL 4059706, at *1 fn.1, *2-4 (N.D. Fla. June 20, 2016); Earthbound Corp. v. MiTek USA, Inc., No. C16-1150 RSM, 2016 WL 4418013, at *9-10 (W.D. Wash. Aug. 19, 2016); Kuryakyn Holdings, LLC v. Ciro, LLC, 242 F.Supp.3d 789, 797-800 (W.D. Wisc. 2017).

[10] Michelle Evans, Plausibility under the Defend Trade Secrets Act, 16 J. Marshall Rev. Intell. Prop. L. 188, 190 (2017); Eric J. Fues, Maximilienne Giannelli & Jon T. Self, Practice Tips for the Trade Secret Holder: Preparing a Complaint Under the Defend Trade Secrets Act, Inside Counsel (June 14, 2017), https://www.finnegan.com/en/insights/practice-tips-for-the-trade-secret-holder-preparing-a-complaint.html; David R. Fertig & Michael A. Betts, The Defend Trade Secrets Act: Jurisdictional Considerations—Part I, 29 No. 7 Intell. Prop. & Tech. L.J. 3, 3-5 (2017) [hereinafter "Considerations—Part I"].

[11] M.C. Dean, 199 F. Supp. 3d at 1357; Chatterplug, Inc. v. Digital Intent, LLC, No. 1:16-cv-4056, 2016 WL 6395409, at *3 (N.D. Ill. Oct. 28, 2016); Raben Tire Co. v. McFarland, No. 5:16-CV-00141-TBR, 2017 WL 741569, at *2-3 (W.D. Ky. Feb. 24, 2017).

[12] Fed. R. Civ. P. 12(b).

[13] Jessica Engler, The Defend Trade Secrets Act at Year One, 12 No. 4 In-House Def. Q. 20, 22 (2017).

[14] Conley, supra note 4.

[15] Fertig & Betts, Considerations—Part I, supra note 10, at 3.

[16] Pleading the grounds for the court's jurisdiction, the plaintiff's claim (entitlement to relief), and the plaintiff's demand for the relief sought are requirements for the pleading under Article 8 of the Federal Rules of Civil Procedure (the "FRCP"). Fed. R. Civ. P. 8(a). The FRCP applies to "all civil actions and proceedings in the United States district courts." Fed. R. Civ. P. 1. Thus, the FRCP requirements also apply to DTSA civil actions brought in federal courts. Evans, supra note 10, at 190; Fues, Giannelli & Self, supra note 10; Fertig & Betts, Considerations—Part I, supra note 10, at 3-4.

[17] In Bell Atlantic Corporation v. Twombly, the U.S. Supreme Court interpreted Article 8(a) of the FRCP, introduced the concept of "plausibility pleading," and established the plausibility pleading standard. Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 547, 570

(2007). Under the plausibility pleading standard, a plaintiff is not required to provide “detailed factual allegations” in his complaint, but he needs to state the grounds of his claim (entitlement to relief), which should be “more than labels and conclusions.” Id. at 555, 570. At least, the plaintiff's complaint should contain enough facts showing that the plaintiff's claim is “plausible on its face.” Id. Two years after Twombly, in Ashcroft v. Iqbal the U.S. Supreme Court expressly affirmed that the plausibility pleading standard established in Twombly applies to “all civil actions.” Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009). Accordingly, the plausibility pleading standard applies to all DTSA claims brought in federal courts. Evans, supra note 10, at 190; Fues, Giannelli & Self, supra note 10; Fertig & Betts, Considerations—Part I, supra note 10, at 3-5. It is worth mentioning that some commentators are of the opinion that federal pleading stands are often higher than those required under state laws. Boxer, Griem, Jr., Malyshev & Ruffi, supra note 8.

[18] Gold Medal Prods. Co. v. Bell Flavors & Fragrances, Inc., No. 1:16-CV-00365, 2017 WL 1365798, at *5-8 (S.D. Ohio, Apr. 14, 2017). See also Fertig & Betts, Considerations—Part I, supra note 10, at 4; David R. Fertig & Michael A. Betts, The Defend Trade Secrets Act: Jurisdictional Considerations—Part II, 29 No. 8 Intell. Prop. & Tech. L.J. 12, 12 (2017) [hereinafter “Considerations—Part II”].

[19] McFarland, 2017 WL 741569, at *2-3; M.C. Dean, 199 F. Supp. 3d at 1357; Digital Intent, 2016 WL 6395409, at *3. See also Fertig & Betts, Considerations—Part I, supra note 10, at 3-5.

[20] Fues, Giannelli & Self, supra note 10; Fertig & Betts, Considerations—Part I, supra note 10, at 5; Fertig & Betts, Considerations—Part II, supra note 18, at 13-14.

[21] Boxer, Griem, Jr., Malyshev & Ruffi, supra note 8.

[22] Id.

[23] 18 U.S.C. §1839(3).

[24] McFarland, 2017 WL 741569, at *2.

[25] Fues, Giannelli & Self, supra note 10.

[26] Engler, supra note 13, at 21-22. Providing help in identifying the trade secret in question by requesting as much detail as possible is a common point shared by the plausibility pleading standard in the U.S., and the “Case Detail Explanation Form” (to be filled out by the complainant or the victim) attached to Article 6 of the “Guideline for Handling Major Trade Secret Cases in the Prosecuting Authority” in Taiwan. However, they apply to different circumstances:

1. The plausibility pleading standard in the U.S. sets forth the threshold requirements to be met by a plaintiff in his pleading when the plaintiff brings a civil claim in federal court and applies to all federal civil actions. On the other hand, the aforementioned Case Detail Explanation Form in Taiwan is a form to be filled out by the complainant or the complainant's agent. This Form provides a reference to prosecutors for the investigation of major trade secret cases (criminal cases), but it does not serve as the basis for a prosecutor to determine whether to prosecute a case.
2. The plausibility pleading standard is not only followed by those bringing a federal civil action but also adopted by federal courts when hearing civil cases. Contrarily, the aforementioned Case Detail Explanation Form in Taiwan is provided to prosecutors as a reference for investigation. A prosecutor is not bound to prosecute a case simply based on the information provided in this Form. Likewise, this Form and the information provided therein are not binding on any court in Taiwan.

A commentator noted that the Ministry of Justice in Taiwan referred to the “Prosecuting Intellectual Property Crimes (Manual)” of the U.S. Department of Justice when adopting the “Guideline for Handling Major Trade Secret Cases in the Prosecuting Authority” on April 19, 2016. “Article 6 indicates that the complainant or the victim should first fill out the Case Detail Explanation Form, which would help the prosecution authority not only figures out whether the allegedly misappropriated trade secret meets the elements of secrecy, economic value, and secrecy measures under law, but also evaluates whether it is necessary to resort to compulsive measures”. Ti-Chu Chen (陳砥柱), Guideline for Handling Major Trade Secret Cases in the Prosecuting Authority, Louis & Charles Attorneys at Law (遠東萬佳法律事務所) (July 14, 2016), http://www.louisilf.com/zh-tw/posts/2016-07-14 (last visited Dec. 31, 2017). See also Prosecuting Intellectual Property Crimes (Manual) (4th ed. 2013), available at: https://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/03/26/prosecuting_ip_crimes_manual_2013.pdf. However, the cover of the “Prosecuting Intellectual Property Crimes (Manual)” expressly states that its contents are provided as “internal suggestion to Department of Justice attorneys.” Id. Therefore, the contents of this manual theoretically are not binding on any federal court.

[27] Mission Measurement Corp. v. Blackbaud, Inc, 216 F.Supp.3d 915, 921 (N.D.Ill. 2016).

[28] Digital Intent, 2016 WL 6395409, at *3.

[29] McFarland, 2017 WL 741569, at *2; Blackbaud, 216 F.Supp.3d at 921; Ciro, 242 F.Supp.3d at 798.

[30] Evans, supra note 10, at 191. Some federal court decisions show that requesting the plaintiff to provide sufficient facts describing the trade secret in question is not something newly developed following the enactment of the DTSA. Rather, it has been the position held by federal courts before the DTSA came into effect. AWP, Inc. v. Commonwealth Excavating, Inc., Civil Action No. 5:13cv031., 2013 WL 3830500, at *5 (W.D. Va. July 24, 2013); Events Media Network, Inc. v. Weather Channel Interactive, Inc., Civil No. 1:13–03 (RBK/AMD), 2013 WL 3658823, at *3 (D. N.J. July 12, 2013); Council for Educational Travel, USA v. Czopek, Civil No. 1:11–CV–00672, 2011 WL 3882474, at *4 (M.D. Pa. Sept. 2, 2011); DLC DermaCare LLC v. Castillo, No. CV–10–333–PHX–DGC, 2010 WL 5148073, at *4 (D. Ariz. Dec. 14, 2010).

[31] Blackbaud, 216 F.Supp.3d at 921.

[32] Ciro, 242 F.Supp.3d at 800.

[33] Engler, supra note 13, at 21; Hensley, supra note 8, at 44.

[34] Hensley, supra note 8, at 44; Newman, Mendelson & Song, supra note 2, at 2-3; Rich, supra note 8, at 6; Engler, supra note 13, at 20.

[35] 18 U.S.C. §1836(b)(2)(A).
[36] Newman, Mendelson & Song, supra note 2, at 3.
[37] Under the DTSA, a court may, only in "extraordinary circumstances," issue an ex parte seizure order when "find[ing] that it clearly appears from specific facts that": (1) "an order issued pursuant to Rule 65 of the Federal Rules of Civil Procedure or another form of equitable relief would be inadequate to achieve the purpose of this paragraph because the party to which the order would be issued would evade, avoid, or otherwise not comply with such an order;" (2) "an immediate and irreparable injury will occur if such seizure order is not issued;" (3) "the harm to the applicant of denying the application outweighs the harm to the legitimate interests of the person against whom seizure would be ordered of granting the application and substantially outweighs the harm to any third parties who may be harmed by such seizure;" (4) "the applicant is likely to succeed in showing that the information is a trade secret and the person against whom seizure would be ordered misappropriated the trade secret of the applicant by improper means or conspired to use improper means to misappropriate the trade secret of the applicant;" (5) "the person against whom seizure would be ordered has actual possession of the trade secret and any property to be seized;" (6) "the application describes with reasonably particularity the matter to be seized and, to the extent reasonable under the circumstances, identifies the location where the matter is to be seized;" (7) "the person against whom seizure would be ordered, or persons acting in concert with such person would destroy, move, hide, or otherwise make such matter inaccessible to the court, if the applicant were to proceed on notice to such person;" and (8) "the applicant has not publicized the requested seizure". 18 U.S.C. §1836(b)(2)(A)(ii).
[38] 18 U.S.C. §1836(b)(2)(A)(i).
[39] Engler, supra note 13, at 21; Michael T. Renaud & Nick Armington, DTSA and Ex Parte Seizure – Lessons from the First Ex Parte Seizure Under The DTSA, Mintz Levin Cohn Ferris Glovsky and Popeo PC (Aug. 21, 2017), https://www.globalipmatters.com/2017/08/21/dtsa-and-ex-parte-seizure-lessons-from-the-first-ex-parte-seizure-under-the-dtsa; Matthew Werdegar & Warren Braunig, One Year On: the Federal Defend Trade Secrets Act, Daily J. (Apr. 26, 2017), available at: https://www.keker.com/Templates/media/files/Articles/Keker%20(DJ-4_26_17).pdf.
[40] Newman, Mendelson & Song, supra note 2, at 3; Dharnidharka, Day & McCrimmon, supra note 8; Werdegar & Braunig, supra note 39.
[41] OOO Brunswick Rail Mgmt. v. Sultanov, No. 5:17-cv-00017, 2017 WL 67119, *2 (N.D. Cal., Jan. 6, 2017); Magnesita Refractories Company v. Mishra, CAUSE NO. 2:16-CV-524-PPS-JEM, 2017 WL 365619, at *2 (N.D. Ind. Jan. 25, 2017).
[42] Baleriz Carribean Ltd. Corp. v. Calvo, Case 1:16-cv-23300-KMW, at 7 (S.D.Fla. Aug. 5, 2016). See also Renaud & Armington, supra note 39. A commentator opines that federal courts are reluctant to issue an ex parte seizure order against someone who has never concealed evidence or disregarded court orders before. Engler, supra note 13, at 21.
[43] Digital Assurance Certification, LLC v. Pendolino, Case No: 6:17-cv-72-Orl-31TBS, at *1-2 (M.D.Fla. Jan. 23, 2017).
[44] Engler, supra note 13, at 21; Dharnidharka, Day & McCrimmon, supra note 8.
[45] Mission Capital Advisors, LLC v. Romaka, No. 16-cv-05878-LLS (S.D.N.Y. July 29, 2016). Some commentators consider Romaka the very first case in which a federal court ordered a DTSA ex parte seizure after the DTSA became effective. Renaud & Armington, supra note 39.
[46] Romaka, No. 16-cv-05878-LLS, at 1-3.
[47] Id. at 2.
[48] Id.
[49] Id.
[50] In Romaka, the federal district court found the followings after reviewing the facts of this case along with the requirements under the DTSA: (1) "[a]n order issued pursuant to Rule 65 of the Federal Rules of Civil Procedure or another form of equitable relief would be inadequate because [the defendant] would evade, avoid, or otherwise not comply with such an order;" (2) "[a]n immediate and irreparable injury to [the plaintiff] would occur if such seizure is not ordered;" (3) "[t]he harm to [the plaintiff] of denying the application outweighs the harm to the legitimate interests of [the defendant];" (4) "[the plaintiff] is likely to succeed in showing that the information at issue is a trade secret based on [the plaintiff's] averments;" (5) "[the plaintiff] is likely to succeed in showing that [the defendant] has misappropriated [the plaintiff's trade secret] by improper means;" (6) "[the plaintiff] is likely to succeed in showing that the [defendant] has actual possession of the [plaintiff's trade secrets]; (7) "[d]espit the risk that [the defendant] would make the [plaintiff's trade secret] inaccessible to the court, or retain unauthorized copies, [the plaintiff] is proceeding on notice;" and (8) "[the plaintiff] is likely to succeed in showing, and has represented, that it has not publicized the requested seizure." Id. at 2-4.
[51] Id. at 4. In Romaka, the plaintiff also applied for the seizure of its proprietary information other than its client and contact lists. However, the Romaka court denied the plaintiff's request for the seizure of other proprietary information because the plaintiff failed to describe "with sufficient particularity" such information and related facts, such as "confidentiality and irreparable harm." Id.
[52] Renaud & Armington, supra note 39.
[53] Id.
[54] Newman, Mendelson & Song, supra note 2, at 3; Engler, supra note 13, at 21; Renaud & Armington, supra note 39.
[55] Newman, Mendelson & Song, supra note 2, at 3.
[56] For instance, the injunctive remedies available under the DTSA. 18 U.S.C. §1836(b)(3). For further example, a preliminary injunction or a temporary restraining order available under the FRCP. Fed. R. Civ. P. 65(a), (b).
[57] As stated above, the DTSA does not preempt or displace any other remedies provided by other federal laws and state laws for trade secret misappropriation. 18 U.S.C. §1838.

[58] Cook, 191 F.Supp.3d at 1077, 1076-1077, 1079; Daniels, 2016 WL 7034976, at *10-11, 14; Nettles, 2016 WL 4124114, at *4. See also Newman, Mendelson & Song, supra note 2, at 2-3; Rich, supra note 8, at 6; Boxer, Griem, Jr., Malyshev & Ruffi, supra note 8.
[59] DTSA §2(e), Pub. L. No. 114-153, 130 Stat. 376, 381-382.
[60] Werdegar & Braunig, supra note 39; Krotoski, Burkholder, Harrison & Houmand, supra note 2, at 14; Engler, supra note 13, at 21.
[61] Avago Technologies U.S. Inc. v. Nanoprecision Products, Inc., Case No. 16-cv-03737-JCS, 2017 WL 412524, at *9 (N.D.Cal. Jan. 31, 2017); Cave Consulting Group, Inc. v. Truven Health Analytics Inc., Case No. 15-cv-02177-SI, 2017 WL 1436044, at *5 (N.D. Cal. Apr. 24, 2017); Physician's Surrogacy, Inc. v. German, Case No.: 17CV0718-MMA (WVG), 2017 WL 3622329, at *8-9 (S.D. Cal. Aug. 23, 2017). See also Tara C. Clancy, April Boyer & Michael R. Creta, Emerging Trends in Defend Trade Secrets Act Litigation, National Law Review (Sept. 26, 2017), https://www.natlawreview.com/article/emerging-trends-defend-trade-secrets-act-litigation; Milligan & Salinas, supra note 8.
[62] Cook, 191 F.Supp.3d at 1076-1079; Allstate Insurance Company v. Rote, No. 3:16-cv-01432-HZ, 2016 WL 4191015, at *1-5 (D. Or. Aug. 7, 2016); Syntel Sterling Best Shores Mauritius Limited v. Trizetto Group, Inc., 15-CV-211 (LGS) (RLE), 2016 WL 5338550, at *6 (S.D.N.Y. Sept. 23, 2016); Adams Arms, LLC v. Unified Weapon Systems, Inc., Case No. 8:16-cv-1503-T-33AEP, 2016 WL 5391394, at *6 (M.D. Fla. Sept. 27, 2016); Brand Energy & Infrastructure Services, Inc. v. Irex Contracting Group, CIVIL ACTION NO. 16-2499, 2017 WL 1105648, at *3-8 (E.D. Pa. Mar. 24, 2017); Sleekez, LLC v. Horton, CV 16–09–BLG–SPW–TJC, 2017 WL 1906957, at *5-6 (D. Mont. Apr. 21, 2017). See also Rich, supra note 8, at 8.
[63] Unified Weapon Systems, 2016 WL 5391394, at *6; Horton, 2017 WL 1906957, at *5-6. See also Milligan & Salinas, supra note 8; Werdegar & Braunig, supra note 39. A recent federal court decision reveals that federal courts will likely dismiss a DTSA claim if a plaintiff makes no specific allegations other than a “conclusory allegation” of the continuing trade secret misappropriation. Hydrogen Master Rights, Ltd. v. Weston, 228 F.Supp.3d 320, 338 (D.Del. 2017). See also Engler, supra note 13, at 23.
[64] Unified Weapon Systems, 2016 WL 5391394, at *6. See also Rich, supra note 8, at 8.
[65] Engler, supra note 13, at 23.
[66] Milligan & Salinas, supra note 8.
[67] Engler, supra note 13, at 23.
[68] 18 U.S.C. § 1838.
[69] Conley, supra note 4.
[70] Synergy Worldwide, 208 F.Supp.3d at 1201; Cori, 2016 WL 6611133, at *2-5; Nettles, 2016 WL 4124114, at *4 fn.2; Cook, 191 F.Supp.3d at 1077, 1079-1080; Daniels, 2016 WL 7034976, at *8-10; M.C. Dean, 199 F. Supp. 3d at 1353-1357; Ghost Controls, 2016 WL 4059706, at *1 fn.1, *2-4; MiTek USA, 2016 WL 4418013, at *9-10; Ciro, 242 F.Supp.3d at 797-800.
[71] Evans, supra note 10, at 190; Fues, Giannelli & Self, supra note 10; Fertig & Betts, Considerations—Part I, supra note 10, at 3-5.
[72] Blackbaud, 216 F.Supp.3d at 921.
[73] Digital Intent, 2016 WL 6395409, at *3. See also Evans, supra note 10, at 191.
[74] Engler, supra note 13, at 21; Dharnidharka, Day & McCrimmon, supra note 8.
[75] Sultanov, 2017 WL 67119, at *2; Mishra, 2017 WL 365619, at *2; Calvo, Case 1:16-cv-23300-KMW, at 7; Pendolino, 2017 WL 320830, at *1-2. See also Newman, Mendelson & Song, supra note 2, at 3; Engler, supra note 13, at 21; Renaud & Armington, supra note 39; Werdegar & Braunig, supra note 39.
[76] Newman, Mendelson & Song, supra note 2, at 2-3; Rich, supra note 8, at 6; Boxer, Griem, Jr., Malyshev & Ruffi, supra note 8.
[77] Cook, 191 F.Supp.3d at 1076-1079; Rote, 2016 WL 4191015, at *1-5; Trizetto Group, 2016 WL 5338550, at *6; Unified Weapon Systems, 2016 WL 5391394, at *6; Irex Contracting Group, 2017 WL 1105648, at *3-8; Horton, 2017 WL 1906957, at *5-6. See also Rich, supra note 8, at 8.
[78] Milligan & Salinas, supra note 8.
[79] Engler, supra note 13, at 23.

Links

- New Federal Trade Secret Act and Its Impact on Life Sciences, Genomics L. Rep. (Aug. 12, 2016),
- Emerging Issues In the Defend Trade Secrets Act
- Carter Ledyard & Milburn LLP (Jan. 19, 2017)
- The Defend Trade Secrets Act One Year In – Four Things We
- Preparing a Complaint Under the Defend Trade Secrets Act, Inside Counsel (June 14, 2017)
- Guideline for Handling Major Trade Secret Cases in the Prosecuting Authority, Louis & Charles Attorneys at Law (遠東萬佳法律事務所) (July 14, 2016)
- DTSA and Ex Parte Seizure – Lessons from the First Ex Parte Seizure Under The DTSA, Mintz Levin Cohn Ferris Glovsky and Popeo PC (Aug. 21, 2017)
- Emerging Trends in Defend Trade Secrets Act Litigation, National Law Review (Sept. 26, 2017)
- See also Prosecuting Intellectual Property Crimes (Manual) (4th ed. 2013)
- One Year On: the Federal Defend Trade Secrets Act, Daily J. (Apr. 26, 2017)

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