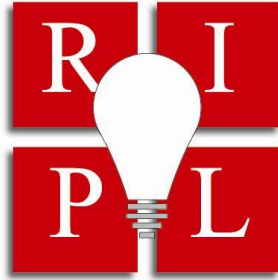


# THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



## PLAUSIBILITY UNDER THE DEFEND TRADE SECRETS ACT

MICHELLE EVANS

### ABSTRACT

With the recent passage of the Defend Trade Secrets Act (DTSA), a federal civil cause of action for trade secret misappropriation is now available. To add some familiarity to the Act, the drafters incorporated definitions similar to those of the Uniform Trade Secrets Act (UTSA). However, even though the provisions may seem familiar, there is a new requirement that is not obvious on the face of the statute- the plausibility requirement for pleading under the federal rules. To understand plausibility; however, one must understand the DTSA. Unfortunately, there is no guidance from the DTSA that can aid interpretation of the statutory definitions for this purpose. Due to the similarities with the UTSA; however, there is some persuasive guidance in the UTSA comments and in federal cases applying state UTSAs. This article reviews these options as a means of navigating the federal plausibility requirement in DTSA actions.

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MICHELLE EVANS

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## PLAUSIBILITY UNDER THE DEFEND TRADE SECRETS ACT

MICHELLE EVANS\*

### I. INTRODUCTION

On May 11, 2016, President Obama signed the Defend Trade Secrets Act (“DTSA”).<sup>1</sup> This Act amended the Economic Espionage Act to create a federal civil cause of action for trade secret misappropriation.<sup>2</sup> To add some familiarity to the text of the Act, the drafters incorporated definitions similar to those of the Uniform Trade Secrets Act (“UTSA”), an act adopted by the majority of states. However, practitioners lulled into this familiarity and not accustomed to federal practice must be cautious when pleading trade secret misappropriation under the DTSA in federal court. It is in federal court where one must be familiar with the plausibility requirement for pleading.

In order to navigate the plausibility requirement, one must first have an understanding of how the DTSA is to be applied. Unfortunately, there is no guidance from the new statute that can aid a full interpretation of the multi-component definitions found in the DTSA for purposes of satisfying the plausibility requirement. Due to the similarities with the UTSA, however, there is some persuasive guidance in the UTSA comments and in federal cases applying state UTSA. Therefore, this article reviews these options as a means of navigating the federal plausibility requirement in DTSA actions.<sup>3</sup>

### II. THE NEW DTSA

The movement to create a federal civil cause of action for trade secret misappropriation has been around a long time.<sup>4</sup> Prior to enactment of the DTSA, a litigant could bring a civil cause of action for trade secret misappropriation in federal court, but only if it was a diversity case applying a state trade secret law. This was problematic because of the lack of uniformity in state law. Although the majority of states have adopted the UTSA, more than half of the states elected to modify the statute in some form.<sup>5</sup>

While uniformity was a goal with the DTSA, a period of unpredictability is expected. However, this period of unpredictability is not expected to be too long since

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<sup>1</sup> Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376.

<sup>2</sup> *Id.*

<sup>3</sup> This article is also useful for legal studies instructors. For a case study illustrating a hypothetical company’s efforts to protect its secrets according to the Uniform Trade Secrets Act that can be used equally well to introduce students to the new DTSA, see generally Michelle Evans, *Trade Secrets in the Legal Studies Curriculum- A Case Study*, 29 J. LEGAL STUD. EDUC. 1 (2012).

<sup>4</sup> For further discussion of the movement to federalize trade secret law, see generally Marina Lao, *Federalizing Trade Secrets Law in an Information Economy*, 59 OHIO ST. L.J. 1633 (1998); Rebel J. Pace, *The Case for a Federal Trade Secrets Act*, 8 HARV. J.L. & TECH. 427 (1995).

<sup>5</sup> See UNIF. TRADE SECRETS ACT § 1 (amended 1985), 14 U.L.A. 538–39 (2005).

the DTSA is based, in part, on the UTSA. Therefore, comments to the UTSA can act as a guide for interpretation. In addition, courts may also look to other federal court interpretations of individual state UTSA's.<sup>6</sup> These cases can be used as persuasive authority while federal courts begin to apply the DTSA.<sup>7</sup> This persuasive authority will be particularly useful in determining what satisfies the plausibility requirement in federal DTSA cases. The next section looks at the plausibility requirement in more detail.

### III. RULE 8 AND THE PLAUSIBILITY REQUIREMENT

Like all federal civil causes of action, pleadings alleging trade misappropriation under the DTSA must satisfy the plausibility requirement of Rule 8(a)(2) of the Federal Rules of Civil Procedure.<sup>8</sup> According to Rule 8(a)(2), "a pleading that states a claim for relief must contain a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>9</sup> If the alleged misappropriator believes the pleadings do not satisfy Rule 8(a)(2), the alleged misappropriator can file a motion to dismiss for failure to state a claim under Rule 12(b)(6).

The leading United States Supreme Court case that set the stage for the pleading requirements was *Conley v. Gibson*.<sup>10</sup> In *Conley*, the Court concluded "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim."<sup>11</sup> Instead, "all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."<sup>12</sup> Applying this standard, the Court concluded that the complaint alleging violation of the Railway Labor Act did adequately set forth a claim and provided fair notice.<sup>13</sup>

The interpretation by the Court in *Conley*, however, was insufficient, and if applied literally, "a wholly conclusory statement of a claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later

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<sup>6</sup> For a list of statutory citations for states that have adopted the Uniform Trade Secrets Act, see UNIF. TRADE SECRETS ACT Refs & Annos, 14 U.L.A. 529 (2005).

<sup>7</sup> For further discussion of some of these state specific Uniform Trade Secrets Acts, see generally Brandon B. Cate, *Saforo & Associates, Inc. v. Porocel Corp.: The Failure of the Uniform Trade Secrets Act to Clarify the Doubtful and Confused Status of Common Law Trade Secret Principles*, 53 ARK. L. REV. 687 (2000); Michelle Evans, *The Uniform Trade Secrets Act Makes Its Way to Texas*, 23 TEX. INTELL. PROP. L.J. 25 (2014); Douglas F. Halijan, *The Past, Present, And Future Of Trade Secrets Law in Tennessee: A Practitioner's Guide Following The Enactment of The Uniform Trade Secrets Act*, 32 U. MEM. L. REV. 1 (2001); Robert W. Kiesnowski, Jr., *Trade Secrets, Duties of Confidentiality, and Misappropriation Claims under the Colorado Uniform Trade Secrets Act*, 37 COLO. LAW. 81 (2008); C. Geoffrey Weirich & Daniel P. Hart, *Protecting Trade Secrets and Confidential Information in Georgia*, 60 MERCER L. REV. 533 (2009).

<sup>8</sup> For further discussion of the federal plausibility requirement, see generally Richard J.R. Raleigh Jr. & Marcus A. Huffa, *Bell Atlantic Corp. v. Twombly: A Review of the "Plausibility" Pleading Standard*, FED. LAW., Sept. 2008, at 32.

<sup>9</sup> FED. R. CIV. P. 8(a)(2).

<sup>10</sup> 355 U.S. 41 (1957).

<sup>11</sup> *Id.* at 47.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 48.

establish some ‘set of [undisclosed] facts’ to support recovery.”<sup>14</sup> To close this loophole, Rule 8 was reinterpreted by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*.<sup>15</sup> In *Twombly*, the Court clarified that a complaint does not require detailed factual allegations, but it must contain “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action.”<sup>16</sup> Heightened fact pleading of specifics is not required, “but only enough facts to state a claim to relief that is plausible on its face.”<sup>17</sup> This requirement of plausibility does not impose a probability requirement at the pleading stage, but “simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the claim element].”<sup>18</sup>

Two years later in *Ashcroft v. Iqbal*, the United States Supreme Court confirmed that the *Twombly* plausibility requirement applied to all civil cases.<sup>19</sup> Unfortunately, neither *Twombly* nor *Iqbal* provided much guidance on what specifically satisfied the plausibility requirement and therefore interpretation for future cases had to be made on a case by case basis. However, almost a decade later, a level of predictability has emerged from federal cases applying state UTSA. This line of cases can be useful to practitioners attempting to satisfy the plausibility requirement for purposes of the DTSA. The next section looks at the plausibility requirement in relation to trade secret status.

#### IV. PLEADING TRADE SECRET STATUS UNDER THE DTSA

##### *A. In General*

When attempting to satisfy the plausibility requirement for the DTSA, one must first consider the trade secret status allegation. Under *Twombly*, plausibility requires “more than labels and conclusions.”<sup>20</sup> Thus, the plaintiff cannot simply state that a trade secret was involved, but instead must clearly identify and describe the trade secret in question.<sup>21</sup> Under the DTSA, a trade secret is defined as “all forms and types

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<sup>14</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561 (2007).

<sup>15</sup> *Id.* at 544.

<sup>16</sup> *Id.* at 555.

<sup>17</sup> *Id.* at 570.

<sup>18</sup> *Id.* at 556.

<sup>19</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009).

<sup>20</sup> *Twombly*, 550 U.S. at 555.

<sup>21</sup> *See, e.g.*, *DLC DermaCare LLC v. Castillo*, No. CV-10-333-PHX-DGC, 2010 WL 5148073, \*4 (D. Ariz. Dec. 14, 2010) (pleading information that covers “virtually every aspect to operate and manage DermaCare clinics and master regional franchises, including pre-opening items, advertising and marketing, use of Dermacare’s treatments and products, management, human resources and payroll, accounting and financial reporting, front office administration, computer and software utilization, and risk management” was sufficient under the UTSA); *Events Media Network, Inc. v. Weather Channel Interactive, Inc.*, Civil No. 1:13-03 (RBK/AMD), 2013 WL 3658823, \*3 (D. N.J. July 12, 2013) (identifying the trade secret as a database that compiles information for schedules and related information for various local and national events was sufficient for the UTSA claim); *Council for Educ. Travel, USA v. Czopek*, Civil No. 1:11-CV-00672, 2011 WL 3882474, \*4 (M.D. Pa. Sept. 2, 2011) (identifying trade secrets as strategic business and marketing plans, computer programs and codes, client lists and information regarding client accounts, employee rosters and compensation terms was sufficient to satisfy the plausibility requirement for the UTSA claim); *AWP, Inc. v.*

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 if (A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives 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.”<sup>22</sup>

This definition, however, is slightly different from that of the UTSA definition. Specifically, the UTSA preamble of potentially protectable items does not include as many types as that of the DTSA.<sup>23</sup> However, classification in the preamble is just one factor to consider for determining the trade secret status. Aside from these modifications to the preamble, the requirements under parts (A) and (B) of the DTSA definition substantively follow the language used in the UTSA.<sup>24</sup> Therefore, for purposes of satisfying the plausibility requirement for trade secret status under the DTSA, both the UTSA comments<sup>25</sup> and federal decisions determining plausibility for purposes of state UTSA claims can be useful.

Federal decisions determining plausibility of trade secret status allegations for purposes of state UTSA claims require the trade secret owner to describe “the subject matter of the trade secret with sufficient particularity to separate it from matters of general knowledge in the trade or of special knowledge of those persons . . . skilled in the trade.”<sup>26</sup> This can include identifying the trade secret in relation to a specific

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Commonwealth Excavating, Inc., Civil Action No. 5:13cv031, 2013 WL 3830500, \*5 (W.D. Va. July 24, 2013) (concluding the plaintiff sufficiently identified its trade secrets as “the identities of its customers, particular needs and issues of its customers, and protocols and methodologies for traffic control”).

<sup>22</sup> 18 U.S.C. § 1839(3) (2016).

<sup>23</sup> The UTSA preamble to the trade secret definition provides for “information, including a formula, pattern, compilation, program device, method, technique, or process.” See UNIF. TRADE SECRETS ACT § 1 (amended 1985), 14 U.L.A. 538 (2005).

<sup>24</sup> See *id.* (The UTSA trade secret definition provides that the information “(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”).

<sup>25</sup> *Id.* § 1 cmt.

<sup>26</sup> Compare *Ikon Office Solutions, Inc. v. Rezente*, No. CIV. 2:10–1704 WBS KJM, 2010 WL 5129293, \*2 (E.D. Cal. Dec. 9, 2010) (alleging the trade secrets were “the [plaintiff’s] books and records, the confidential customer list and account information contained therein, including the identity of [plaintiff’s] customers, their names and addresses, agents and account managers, business and financial dealings, the transactions in their [plaintiff] accounts, purchase requirements, purchasing history and patterns, servicing terms and conditions, lease agreement lengths, expirations, and terms, equipment configurations, customer plans, preferences, and communicated needs, interconnectivity opportunities, profitability considerations, [plaintiff’s] strengths and weaknesses with its customers, and other business and financial information concerning [plaintiff’s] products, prices, pricing schedules, profitability considerations, marketing strategies, leasing terms, vendors, costs, training techniques, distribution and delivery systems, and/or other market considerations” was sufficient) with *Am. Registry, LLC v. Hanaw*, No. 2:13–cv–352–FTM–29UAM, 2013 WL 6332971, \*3–\*4 (M.D. Fla. Dec. 5, 2013) (alleging that the defendants misappropriated “customer lists, customer identity,

product.<sup>27</sup> However, the plausibility requirement is not so broad as to require a detailed disclosure of the actual trade secret.<sup>28</sup>

In addition, *Twombly* requires “more than . . . a formulaic recitation of the elements of a cause of action.”<sup>29</sup> This applies equally to the sub-elements of a cause of action. When considering the trade secret element to the misappropriation cause of action, the plaintiff must address the specific sub-elements of the trade secret definition.<sup>30</sup> However, reciting the statutory definition alone is insufficient.<sup>31</sup> In addition, ignoring a substantial portion of the trade secret definition will not suffice.<sup>32</sup> The specific sub-elements to the DTSA trade secret definition require that the trade secret information (1) have independent economic value, actual or potential; (2) not be generally known to another person who would benefit from it; (3) not be readily ascertainable through proper means; and (4) be the subject of reasonable measures to

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customer contact information and confidential information about each customer’s business, purchase and credit information, sales and operation procedures, software, system architecture, financial data, sales and marketing strategies and data, lists, statistics, programs, research, development, employee, personnel and contractor data, information and records, and information relating to products offered” by plaintiff was so broad that it was meaningless) *and* Medafor, Inc. v. Starch Med. Inc., No. 09–CV–0441 PJS/FLN, 2009 WL 2163580, \*1 (D. Minn. July 16, 2009) (identifying trade secrets as “business methodologies, formulas, devices, and compilations of information, including suppliers and customers” was too broad).

<sup>27</sup> See, e.g., *Eastman Chem. Co. v. AlphaPet Inc.*, Civ. Action No. 09–971–LPS–CJB, 2011 WL 5402767, \*5 (D. Del. Nov. 4, 2011) (identifying the trade secret as “confidential, proprietary, and trade secret information relating to the manufacture of PET, including information related to Eastman’s IntegRex™ PET technology” was sufficient even though the trade secret owner also used the phrase “including information related to Eastman’s IntegRex™ PET technology” throughout the complaint which suggested that there could be some other unidentified trade secrets); *TE Connectivity Networks, Inc. v. All Sys. Broadband, Inc.*, Civil No. 13–1356 ADM/FLN, 2013 WL 6827348, \*4 (D. Minn. Dec. 26, 2013) (identifying the product and the specifics of each product such as “technical specifications, design parameters, performance criteria, and testing data” was sufficient); *Wilcox Indus. Corp. v. Hansen*, 870 F. Supp. 2d 296, 309 (D.N.H. 2012) (concluding the trade secret owner sufficiently identified its trade secrets where the design specifications, materials specifications, information relating to the development of parts and components, information relating to the manufacturing and assembly processes, customer information, marketing strategies, and details of contracts and communications with current and prospective customers were tied to one specific product).

<sup>28</sup> See, e.g., *Joshua David Mellberg LLC v. Will*, 96 F. Supp. 3d 953, 964 (D. Ariz. 2015) (alleging the trade secret information included training materials, confidential client and marketing lists, advertising data, call center metrics, proprietary sales processes, metrics, and scripts, sales and marketing programs, advertising copy still in development, and password protected training and educational videos was sufficient).

<sup>29</sup> *Twombly*, 550 U.S. at 555.

<sup>30</sup> See, e.g., *Ikon Office Solutions, Inc.*, 2010 WL 5129293, at \*2; *EndoSurg Med., Inc. v. EndoMaster Med., Inc.*, 71 F. Supp. 3d 525, 547 (D. Md. 2014).

<sup>31</sup> See, e.g., *Pellerin v. Honeywell Int’l, Inc.*, 877 F. Supp. 2d 983, 988–989 (S.D. Cal. 2012).

<sup>32</sup> See, e.g., *Hot Stuff Foods, LLC v. Dornbach*, 726 F. Supp. 2d 1038, 1044 (D. Minn. 2010) (concluding the plaintiff failed to adequately establish trade secret status in the complaint where there were no facts to support several sub-elements, even though the plaintiff alleged that when the former employee resigned, he allegedly copied company’s confidential business plans, pricing, margins, and sales strategies).

maintain secrecy.<sup>33</sup> The trade secret owner should be prepared to plead each of these sub-elements for plausibility purposes.<sup>34</sup>

### *B. Pleading Independent Economic Value, Actual or Potential*

The definition of a trade secret under the DTSA includes a requirement that the information “derives independent economic value, actual or potential.”<sup>35</sup> This sub-element is the same in the UTSA definition. Under either application, in order to establish trade secret status, the trade secret owner must have some idea of the information’s value.<sup>36</sup> Looking to federal cases applying state UTSA, it can be important to show that the information is valuable to competitors<sup>37</sup> or that others, including the alleged misappropriator, would pay money for the information.<sup>38</sup> In

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<sup>33</sup> See Michelle Evans, *Determining What Constitutes a Trade Secret Under the New Texas Uniform Trade Secrets Act (TUTSA)*, 46 TEX. TECH. L. REV. 469, 477 (2014) (discussing four factors to the UTSA definition, providing that the “information (1) must have independent economic value, actual or potential; (2) must not be generally known to other persons who would benefit from it; (3) must not be readily ascertainable by proper means; and (4) must be the subject of reasonable efforts to maintain its secrecy”); Ramon A. Klitzke, *The Uniform Trade Secrets Act*, 64 MARQ. L. REV. 277, 285 (1980) (discussing three factors to the UTSA definition, including that the trade secret “(1) be information; (2) have actual or potential ‘independent economic value’ stemming from its secrecy; and (3) have been the object of reasonable efforts designed to maintain its secrecy”).

<sup>34</sup> See, e.g., *Apex Tool Grp., LLC v. DMTCO, LLC*, No. 3:13-cv-372, 2014 WL 6748344, \*13 (S.D. Ohio Nov. 25, 2014) (alleging (1) the product line was established in 1929, (2) years of financial investment and product development, invention, testing, and design went into making the product, (3) the product line was sufficient and a widely recognized brand in the industry, and (4) confidentiality agreements and company policies addressing information secrecy used was sufficient); *AWP, Inc. v. Commonwealth Excavating, Inc.*, Civil Action No. 5:13cv031, 2013 WL 3830500, \*5 (W.D. Va. July 24, 2013) (alleging that (1) the plaintiff took efforts maintain secrecy by limiting the number of employees that had access to the trade secrets and by maintaining customer information and pricing at the local level in order to minimize distribution of the information among plaintiff’s employees, (2) it derived economic value from the information not being generally known to other persons, and (3) the disclosure of the information would damage plaintiff’s business and financial interests, as well as its experience, goodwill, and reputation with its customers was sufficient); *Radiator Express Warehouse, Inc. v. Shie*, 708 F. Supp. 2d 762, 767 (E.D. Wis. 2010) (concluding the plaintiff set forth a plausible claim that trade secrets were involved where the information was “highly sensitive and valuable to [the plaintiff], as it included internal documents discussing [plaintiff’s] core business strategies, customer lists that contained a host of information about . . . customers, including their buying preferences, and [the plaintiff’s] manuals on how to run a . . . warehouse, all information that could only be accessed by a few privileged individuals and the information was disclosed in a meeting to two employees . . . who agreed to maintain the secrecy of the information”).

<sup>35</sup> 18 U.S.C. § 1839(3)(B) (2016).

<sup>36</sup> See generally R. Mark Halligan & Richard F. Weyand, *The Economic Valuation of Trade Secret Assets*, J. INTERNET L., Feb. 2006, at 19 (discussing property valuation methods).

<sup>37</sup> See, e.g., *EndoSurg Med., Inc. v. EndoMaster Med., Inc.*, 71 F. Supp. 3d 525, 546 (D. Md. 2014).

<sup>38</sup> See, e.g., *Myung Ga, Inc. v. Myung Ga of MD, Inc.*, Civil Action No. DKC 10-3464, 2011 WL 3476828, at \*6 (D. Md. Aug. 8, 2011) (concluding plausibility as to the value allegation where the complaint asserted that plaintiff’s previous licensing agreements indicated the “secret and marketable nature” of the recipes and plaintiff was “in the business of developing and licensing Korean food recipes and marketing material”); *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) (concluding plausibility on a claim that the database had value, even though the database compiled publicly available information, where the plaintiff asserted the database was not made available to the public or its



addition, trade secret owners have been successful establishing this sub-element where the value is tied to the time, effort, and expense the owner expended in developing the trade secret.<sup>39</sup>

### *C. Pleading not Generally Known to Another Person*

The DTSA also requires that the trade secret information not be “generally known to . . . another person who can obtain economic value from the disclosure or use of the information.”<sup>40</sup> There is only one minor difference between this definition and that of the UTSA definition, using “another person” instead of “other persons,” but these sub-elements are substantively the same.<sup>41</sup> Hence, the UTSA comments and federal cases applying state UTSA’s can be helpful.

One aspect of the DTSA sub-element to consider is how “another person” will be construed. Looking to the UTSA for guidance in its interpretation of “other persons”, the comments offer some suggestions. The UTSA comments state that these “other persons” do not have to be the general public for trade secret status to be lost.<sup>42</sup> Information generally loses its trade secret status if it becomes public knowledge.<sup>43</sup> This includes disclosures to government agencies once the information is publicly available<sup>44</sup> and disclosures on the Internet.<sup>45</sup>

The UTSA comments clarify that if the persons who can obtain an “economic benefit” from it are aware of it, then trade secret status can be lost.<sup>46</sup> Unfortunately, the phrase “economic benefit” is not defined in the comments. Some federal courts applying state UTSA’s have limited this interpretation of “other persons” to the defendant or other competitors, and not applied this to the general public.<sup>47</sup> In some jurisdictions, it is enough if the information is generally known within the trade or

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competitors, and that it derived economic value from the database by licensing it to others on a limited basis).

<sup>39</sup> See, e.g., *Instant Tech., LLC v. DeFazio*, No. 12 C 491, 2012 WL 2567033, at \*1 (N.D. Ill. June, 26, 2012) (alleging that the confidential information was the “product of hundreds of hours of work,” was “developed at a substantial cost . . . deriv[ing] economic value,” and “cannot be independently developed by its competitors without great effort and expense” was sufficient); *Alpha Pro Tech, Inc. v. VWR Int’l LLC*, 984 F. Supp. 2d 425, 436-437 (E.D. Pa. 2013) (alleging that the plaintiff “ex[p]ended significant time, effort, and expense to develop [these] proprietary formulations and methods” and its trade secret methods had “value . . . to the company and its competitors” was sufficient for plausibility of the value claim).

<sup>40</sup> 18 U.S.C. § 1839(3)(B) (2016).

<sup>41</sup> See UNIF. TRADE SECRETS ACT § 1 (amended 1985), 14 U.L.A. 538 (2005).

<sup>42</sup> *Id.* § 1 cmt.

<sup>43</sup> See, e.g., *Ultimax Cement Mfg. Corp. v. CTS Cement Mfg. Corp.*, 587 F.3d 1339, 1355 (Fed. Cir. 2009).

<sup>44</sup> See, e.g., *W.L. Gore & Assocs., Inc. v. GI Dynamics, Inc.*, 872 F. Supp. 2d 883, 899 (D. Ariz. 2012); *Giasson Aerospace Sci., Inc. v. RCO Eng’g, Inc.*, 680 F. Supp. 2d 830, 841 (E.D. Mich. 2010).

<sup>45</sup> For further discussion of trade secrets and the Internet, see generally Elizabeth A. Rowe, *Saving Trade Secret Disclosures On the Internet: Through Sequential Preservation*, 42 WAKE FOREST L. REV. 1 (2007); Ryan Lambrecht, *Trade Secrets and the Internet: What Remedies Exist for Disclosure in the Information Age?*, 18 REV. LITIG. 317 (1999).

<sup>46</sup> UNIF. TRADE SECRETS ACT § 1 cmt. (amended 1985), 14 U.L.A. 538 (2005).

<sup>47</sup> See, e.g., *Brigham Young Univ. v. Pfizer, Inc.*, 861 F. Supp. 2d 1320, 1326 (D. Utah 2012).

business.<sup>48</sup> Therefore, the trade secret owner should be prepared to show that the trade secret information was not disclosed to members of the public or to those in the trade.<sup>49</sup> There may be limited instances in which the trade secret owner must disclose the information to someone with whom the trade secret owner does business.<sup>50</sup> However, if this becomes necessary, the plaintiff should be prepared to show that confidentiality restrictions were in place.<sup>51</sup>

#### *D. Pleading Readily Ascertainable by Proper Means*

The DTSA further provides that the trade secret information not be “readily ascertainable through proper means.”<sup>52</sup> Unfortunately, the DTSA provides no definition for “proper means”<sup>53</sup> or “readily ascertainable.” Again, due to the similarities with the UTSA sub-element, the UTSA comments and federal cases applying state UTSAAs can be helpful.

According to the UTSA comments, proper means includes “discovery by independent invention, reverse engineering, under license, from public observation, or from published literature.”<sup>54</sup> The comments to Section 1 of the UTSA further provide that “information is readily ascertainable if it is available in trade journals, reference books, or published materials.”<sup>55</sup> When the alleged trade secret information can be

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<sup>48</sup> See, e.g., *CDI Energy Servs., Inc. v. West River Pumps, Inc.*, 567 F.3d 398, 402 (8th Cir. 2009) (concluding a customer list was not protectable as a trade secret where the potential customers were a small group of easily identifiable locally operated oilfield companies and could easily be attainable by those in the local oilfield service and equipment industry); *Softchoice Corp. v. MacKenzie*, 636 F. Supp. 2d 927, 937 (D. Neb. 2009).

<sup>49</sup> See, e.g., *IDT Corp. v. Unlimited Recharge, Inc.*, Civil Action No. 11-4992 (ES), 2012 WL 4050298, at \*6 (D. N.J. Sept. 13, 2012) (concluding the plaintiff adequately alleged that the trade secret information was not generally known where the complaint provided that the information was not obvious from the existing public information or from the product as marketed and was not general or basic information known to the industry).

<sup>50</sup> For further discussion of disclosures to outsiders, see generally Thomas J. Oppold, *Top 10 Ways to Help Protect Your Franchise's Trade Secrets*, 35 FRANCHISING WORLD 57 (2003); Thomas J. Scott, Jr. & Eleanor M. Hynes, *Reducing Your Risk as a Licensor or Licensee in Patent and Technology Licensing-The Important Terms to Consider*, 28 LICENSING J. 6 (2008).

<sup>51</sup> See, e.g., *Marc Maghsoudi Enters., Inc. v. Tufenkian Import/Export Ventures, Inc.*, No. 08 C 441, 2009 WL 3837455, at \*2 (N.D. Ill. Nov. 16, 2009) (concluding that disclosure of the buyer's customer list to the seller extinguished any trade secret protection for the list where the disclosure was made without any agreement of confidentiality).

<sup>52</sup> 18 U.S.C. § 1839(3)(B) (2016).

<sup>53</sup> “Improper means” is defined. See *infra* Part VB.

<sup>54</sup> UNIF. TRADE SECRETS ACT § 1 cmt. (amended 1985), 14 U.L.A. 538 (2005).

<sup>55</sup> *Id.*

derived from available sources then the plaintiff's trade secret claim may be dismissed.<sup>56</sup> This is especially true if the information is published on the Internet.<sup>57</sup>

However, federal case law applying state UTSA's suggests there is an exception when available sources are insufficient to develop the information in question without a significant expenditure of time, effort and expense.<sup>58</sup> Furthermore, the fact that some or all of the aspects of the trade secret information are generally known does not automatically preclude trade secret protection for information that combines the various aspects, particularly where there is a competitive advantage.<sup>59</sup> But, this must be clear in the pleadings in order to survive a motion to dismiss.<sup>60</sup>

### *E. Pleading Reasonable Measures to Maintain Secrecy*

The final requirement for the trade secret definition under the DTSA is that the trade secret owner "has taken reasonable measures to keep such information secret."<sup>61</sup> This sub-element is substantively similar to the UTSA definition.<sup>62</sup> Therefore, the UTSA comments and federal cases applying state UTSA's can be helpful.

According to federal case law applying individual state UTSA's, the more efforts pled by the trade secret owner, the greater likelihood the owner will be able to support a plausible claim for trade secret misappropriation.<sup>63</sup> The primary question in these

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<sup>56</sup> See, e.g., *Cablecom Tax Servs., Inc. v. Shenandoah Telecomms. Co.*, Civil Action No. 5:12cv069, 2013 WL 2382969, at \*5 (W.D. Va. May 30, 2013) (concluding the plaintiff's trade secret claim, specifically to applying tax laws and regulations to customer financial information and negotiating property tax discounts with tax officials, was implausible where property tax laws and regulations and identities of local tax officials are reasonably ascertainable by proper means); *McKay Consulting, Inc. v. Rockingham Mem'l Hosp.*, 665 F. Supp. 2d 626, 635 (W.D. Va. 2009) (concluding the plaintiff's alleged trade secret information, specifically advice based on an understanding of various published laws and regulation, was readily ascertainable and could have been independently formulated by others in the industry).

<sup>57</sup> For further discussion of trade secrets and the Internet, see generally Elizabeth A. Rowe, *Saving Trade Secret Disclosures On the Internet: Through Sequential Preservation*, 42 WAKE FOREST L. REV. 1 (2007); Ryan Lambrecht, Note, *Trade Secrets and the Internet: What Remedies Exist for Disclosure in the Information Age?*, 18 REV. LITIG. 317 (1999).

<sup>58</sup> See, e.g., *Edgenet, Inc. v. GS1 AISBL*, 742 F. Supp. 2d 997, 1026 (E.D. Wis. 2010).

<sup>59</sup> See, e.g., *Haggard v. Spine*, Civil Action No. 09-cv-00721-CMA-KMT, 2009 WL 1655030, \*7 (D. Colo. June 12, 2009) (alleging that an outsider could not develop the same type of information about the customers in the territory from a phone book or website alone was sufficient even though the information could be obtained from public sources like a phone book or the internet).

<sup>60</sup> See *Edgenet, Inc.*, 742 F. Supp. 2d at 1026 (alleging the information contained taxonomy categories that organized the otherwise potentially public data in particular ways and that this compilation would not be possible to create without extensive effort and money, and that even then, the result would be a "version" of the documents, not the exact same configuration was sufficient to claim the information was not readily ascertainable by proper means).

<sup>61</sup> 18 U.S.C. § 1839(3)(A) (2016).

<sup>62</sup> The information "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." UNIF. TRADE SECRETS ACT § 1 (amended 1985), 14 U.L.A. 538 (2005).

<sup>63</sup> Compare *Cosmetic Alchemy, LLC v. R & G, LLC*, No. CV-10-1222-PHX-GMS, 2010 WL 4777553, at \*5 (D. Ariz. Nov. 17, 2010) (concluding the pleading lacked any facts that would allow the Court to infer that reasonable efforts were made to maintain the secrecy of the information) with *Vesta Corp. v. Amdocs Mgmt. Ltd.*, 80 F. Supp. 3d 1152, 1166 (D. Or. 2015) (alleging that the plaintiff had required competitors who sought acquisition of plaintiff's company to sign nondisclosure agreements, both initially and upon entry of the plaintiff's facilities, and that it maintained locked

federal cases applying individual state UTSA is what is “reasonable”.<sup>64</sup> Intending to keep information a secret is not enough. Reasonable measures can include, but are not limited to, the following: limiting access to the information on a need-to-know basis;<sup>65</sup> restricting access, such as with controlled access doors or computer network restrictions;<sup>66</sup> using and enforcing computer passwords; and using confidentiality agreements or verbal instructions for confidentiality.<sup>67</sup>

In federal case law interpreting state UTSA, the obligation of confidentiality appears to be the most important consideration for determining whether the trade secret owner used reasonable efforts to protect its trade secret, and this importance is reflected in the plausible pleading requirements.<sup>68</sup> Stating a plausible claim for trade secret misappropriation can require the trade secret owner to allege that any third party who received disclosure of the trade secret information was under either an express or implied duty to keep the information confidential.<sup>69</sup> An express duty

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facilities, computers, and networks in an effort to prevent unauthorized disclosure of secrets related to services it provided to mobile phone network operators was sufficient to make a plausible claim for reasonable measures) *and* T-Mobile USA, Inc. v. Huawei Device USA, Inc., No. C14-1351RAJ, 2015 WL 4308682, \*6 (W.D. Wash. July 14, 2015) (concluding the trade secret owner sufficiently alleged that reasonable efforts were made where the plaintiff limited access to its clean room, which contained the trade secret product, monitored what occurred in the clean room, and immediately addressed the defendant’s alleged theft of information from the clean room) *and* *Edgenet, Inc.*, 742 F. Supp. 2d at 1028 (alleging that the plaintiff contracted with both retailers and suppliers to collect and provide data, that clients were required to sign confidentiality and non-disclosure agreements, and clients were only permitted limited access were sufficient to allege reasonable efforts were made, even though the plaintiff alleged that it shared some of the information with customers and suppliers).

<sup>64</sup> For further discussion about what is “reasonable,” see generally Jermaine S. Grubbs, *Give The Little Guys Equal Opportunity At Trade Secret Protection: Why The “Reasonable Efforts” Taken By Small Businesses Should be Analyzed Less Stringently*, 9 LEWIS & CLARK L. REV. 421 (2005).

<sup>65</sup> See, e.g., *UTStarcom, Inc. v. Starent Networks, Corp.*, 675 F. Supp. 2d 854, 867 (N.D. Ill. 2009) (finding no trade secret status where, among other factors, the list was not stored in a secure location and treated as a trade secret).

<sup>66</sup> See, e.g., *Pyro Spectaculars N., Inc. v. Souza*, 861 F. Supp. 2d 1079, 1090 (E.D. Cal. 2012) (concluding reasonable efforts were made by the plaintiff to protect its customer list where, among other things, the plaintiff compartmentalized data and limited access by geographic region and job function).

<sup>67</sup> *Id.*; but see *Liberty Centrifugal Acquisition Corp., Inc. v. Moon*, 849 F. Supp. 2d 814, 832-833 (E.D. Wis. 2012).

<sup>68</sup> See, e.g., *Telogis, Inc. v. InSight Mobile Data, Inc.*, No. PWG-14-563, 2014 WL 7336678, at \*3 (D. Md. Dec. 19, 2014) (identifying the trade secrets as “confidential business information, such as customer lists, client contact information, contract terms, and pricing information” and alleging that the information was “closely guarded as secret information by the plaintiff,” the employees who received the information “each had a duty to maintain this information as secret,” and the “plaintiff kept this information confidential at all times” were all sufficient); *Events Media Network, Inc. v. Weather Channel Interactive, Inc.*, Civil No. 1:13-03 (RBK/AMD), 2013 WL 3658823, at \*4 (D. N.J. July 12, 2013) (asserting that the license agreement with the defendant included a confidentiality obligation and a reporting requirement for improper use of the database was sufficient to plead that reasonable efforts were taken even though each individual who accessed the database was not obligated to sign a confidentiality agreement).

<sup>69</sup> See, e.g., *MicroStrategy Servs. Corp. v. OpenRisk, LLC*, No. 1:14cv1244 (JCC/IDD), 2015 WL 1221263, at \*7 (E.D. Va. Mar. 17, 2015) (failing to allege that the consultant who received the trade secret information was under an express or implied obligation of confidentiality resulted in dismissal of the claim).

evidenced by agreement is preferred.<sup>70</sup> However, where the trade secret owner fails to allege that an agreement or other restriction was in place, the trade secret claim may be dismissed.<sup>71</sup> The next section looks at the plausibility requirement in relation to the misappropriation claim.

## V. PLEADING MISAPPROPRIATION UNDER THE DTSA

### A. *In General*

After considering plausibility in pleading trade secret status, one must attempt to satisfy this requirement for the misappropriation allegation. As the *Twombly* Court noted, the plausibility requirement “simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the claim element].”<sup>72</sup> But, determining what constitutes “enough fact[s]” for misappropriation under the DTSA may be difficult at the pleading stage. According to the DTSA, misappropriation is defined as:

(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 (II) knowledge of the trade secret had been acquired by accident or mistake.<sup>73</sup>

The DTSA definition is substantively consistent with that of the UTSA so, as with trade secret status, UTSA law should be applicable to interpretation of the DTSA.<sup>74</sup>

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<sup>70</sup> See, e.g., *Shield Techs. Corp. v. Paradigm Positioning, LLC*, 908 F. Supp. 2d 914, 919 (N.D. Ill. 2012) (citing provisions from the plaintiff’s agreements with the defendant prohibiting him from disclosing the plaintiff’s confidential information was sufficient to plead that reasonable measures were taken to protect the secrecy of the information); *Wilcox Indus. Corp. v. Hansen*, 870 F. Supp. 2d 296, 310 (D. N.H. 2012) (indicating the plaintiff required employees exposed to the information to sign confidentiality agreements as a condition of their employment and it outfitted its facilities that contained confidential information with security systems that restricted access to specific employees was sufficient to plead that reasonable efforts were taken).

<sup>71</sup> See, e.g., *MicroStrategy Servs. Corp.*, 2015 WL 1221263, at \*7.

<sup>72</sup> *Twombly*, 550 U.S. at 556.

<sup>73</sup> 18 U.S.C. § 1839(5) (2016).

<sup>74</sup> See UNIF. TRADE SECRETS ACT § 1(2) (amended 1985), 14 U.L.A. 538 (2005).

Unfortunately, the comments to Section 1 of the UTSA do not provide much guidance on interpretation of these sections; however, they do provide an explanation that can be applied to DTSA's Section 5(B)(iii). According to the comments, the accident or mistake cannot have occurred from the claimant's failure to exercise reasonable efforts to protect the secrecy of its information necessary for trade secret status.<sup>75</sup>

There is also no definition of either "use" or "disclosure" found in the DTSA or the UTSA comments. However, the term "disclosure" can be given a standard dictionary definition<sup>76</sup>, while the term "use" can be subject to a number of interpretations depending on the federal court reviewing the case. For example, in the Fifth Circuit "use" was initially defined as commercial use rather than just any type of use.<sup>77</sup> Specifically, commercial use was the use by which a person seeks to profit.<sup>78</sup> More recently, however, the court used the Restatement (Third) of Unfair Competition to expand the definition of use beyond "commercial use" to almost any use that harmed the business owner or benefitted the alleged misappropriator.<sup>79</sup>

Federal case law applying state UTSA's can be instructive. To survive a motion to dismiss, the trade secret owner must provide facts to support at least one of the bases for the defendant's wrongdoing.<sup>80</sup> Without sufficient facts, the case may be

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<sup>75</sup> UNIF. TRADE SECRETS ACT § 1 cmt. (amended 1985), 14 U.L.A. 538 (2005).

<sup>76</sup> Disclosure is the "act of disclosing", "revelation", or "the impartation of that which is secret or not fully understood." BLACK'S LAW DICTIONARY 464 (6th ed. 1990).

<sup>77</sup> See, e.g., *Metallurgical Indus. Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1205 (5th Cir. 1986) (concluding that since the trade secret had not been put into commercial operation to produce a product that could be used, no commercial use had occurred).

<sup>78</sup> See, e.g., *Wellogix, Inc. v. Accenture, LLP*, 823 F. Supp. 2d 555, 566 (S.D. Tex. 2011) (finding the defendant used the plaintiff's trade secret information in its own software programs).

<sup>79</sup> See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40, cmt. C (1995); *Bohnsack v. Varco, L.P.*, 668 F.3d 262, 279-280 (5th Cir. 2012) (concluding that there was sufficient evidence for the jury to find use by the defendant where the defendant's act of filing a patent application to the plaintiff's trade secret information disclosed to the defendant in confidence was likely to result in injury to the plaintiff trade secret owner under the Restatement definition); *Terra Nova Sciences, LLC v. Joa Oil and Gas Houston, LLC*, 738 F. Supp. 2d 689, 696 (S.D. Tex. 2010) (concluding the plaintiffs sufficiently alleged use of the trade secret since plaintiffs alleged the defendant incorporated the plaintiffs' software algorithms into its own software, from which it derived profits).

<sup>80</sup> See, e.g., *DLC DermaCare LLC v. Castillo*, No. CV-10-333-PHX-DGC, 2010 WL 5148073, \*4 (D. Ariz. Dec. 14, 2010) (alleging upon information and belief that after termination of the franchise agreement and without consent, the defendant franchisees operated their competitive businesses using the plaintiff's marks, manuals, training materials and other confidential and proprietary information was sufficient to plead misappropriation); *Ikon Office Solutions, Inc. v. Rezente*, No. CIV. 2:10-1704 WBS KJM, 2010 WL 5129293, at \*3 (E.D. Cal. Dec. 9, 2010) (alleging that one defendant accessed the plaintiff's customer information hours before his resignation and this defendant took "massive amounts of records showing [plaintiff's] account information for all or almost all of the customers serviced by [plaintiff's] Sacramento sales force" and alleging that a second defendant took two customers of one of plaintiff's employees to the competitor and also completed a transaction at the competitor for a customer that she had been working with at plaintiff, and this second defendant made six sales worth \$100,000 for the competitor in the four to six weeks following her resignation from the plaintiff, but made no sales in her last twelve weeks at plaintiff was sufficient to plead misappropriation); *BlueEarth Biofuels, LLC v. Hawaiian Elec. Co.*, 780 F. Supp. 2d 1061, 1079 (D. Haw. 2011) (alleging that the defendant solicited business from the plaintiff's clients, used the plaintiff's proprietary information to solicit proposed funding, interfered with its contracts, breached its nondisclosure with plaintiff, and disparaged plaintiff, even though the defendant argued that the plaintiff did not explain how the defendant misappropriated the contact lists and know-how, distinguish the defendant's acts from the alleged misappropriation by others, or explain how the

dismissed.<sup>81</sup> There is however no requirement that the trade secret owner allege every act supporting the alleged wrong-doing.<sup>82</sup> Furthermore, when multiple acts are alleged, the trade secret owner is not required to plead each act sufficiently in order to survive a challenge as long as one act is sufficiently claimed.<sup>83</sup> In addition, the trade secret owner is not required to allege every time and date when the acts occurred since this information is generally in the hands of the opposing party.<sup>84</sup> Nevertheless, the

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alleged misappropriation was ongoing and would continue in the future was sufficient to plead misappropriation).

<sup>81</sup> See, e.g., *Ciena Commc'ns, Inc. v. Nachazel*, Civil Action No. 09-cv-02845-MSK-MJW, 2010 WL 3489915, at \*4 (D. Colo. Aug. 31, 2010) (granting the defendant's motion to dismiss for failure to state a claim where (1) the complaint only stated that the plaintiff's former employee and new employer misappropriated, or threatened to misappropriate, the plaintiff's trade secrets for the purpose of using and exploiting the information, and (2) the former employee's acquisition and possession of the plaintiff's trade secrets was not imputable to the new employer simply by employment of the former employee in a management position); *Accenture Global Servs. GMBH v. Guidewire Software Inc.*, 581 F. Supp. 2d 654, 663 (D. Del. 2008) (granting the defendant's motion to dismiss for failure to state a claim for trade secret misappropriation where (1) the plaintiff failed to claim that the defendant acquired the trade secrets by improper means but stated only that the defendant "somehow gained access" to plaintiff's trade secrets in creating its software and services, and (2) the plaintiff failed to claim that the defendant used or disclosed the plaintiff's trade secret information but only claimed that defendant "seemed" to develop its product surprisingly quickly in plaintiff's opinion); *All Bus. Solutions, Inc. v. NationsLine, Inc.*, 629 F. Supp. 2d 553, 558-559 (W.D. Va. 2009) (concluding the plaintiff's allegation that the defendant 'sought . . . to appropriate and disclose the names of [plaintiff's] customers, along with other [plaintiff] trade secrets and confidential information' was insufficient to state a claim for trade secret misappropriation without additional facts).

<sup>82</sup> See, e.g., *Eastman Chem. Co. v. AlphaPet Inc.*, Civ. Action No. 09-971-LPS-CJB, 2011 WL 5402767, at \*9 (D. Del. Nov. 4, 2011) (concluding the plaintiff stated a plausible claim for relief even though the plaintiff did not allege every act of wrongdoing where the plaintiff alleged that (1) the former employees disclosed the plaintiff's confidential and proprietary trade secret information to defendant during the design, start-up or operation of the defendant's manufacturing process, (2) defendant obtained trade secret information and used the information without express or implied consent from plaintiff, and (3) defendant improperly used information related to plaintiff's technology during the design, start-up and/or operation of its manufacturing process without express or implied consent from plaintiff); *Edgenet, Inc. v. GS1 AISBL*, 742 F. Supp. 2d 997, 1028-1029 (E.D. Wis. 2010) (finding the plaintiff sufficiently alleged misappropriation of both the Master Collection and Spreadsheet, even though the plaintiff only alleged misappropriation of the Spreadsheet and failed to allege misappropriation of the Master Collection, but alleged the Collection and Spreadsheet both contained categories and since the defendants used the Spreadsheet categories it therefore followed that the defendants used the categories from the Master Collection as well).

<sup>83</sup> See, e.g., *ATS Prods., Inc. v. Champion Fiberglass, Inc.*, No. C 13-02403 SI, 2013 WL 6086924, at \*4 (N.D. Cal. Nov. 19, 2013) (concluding the plaintiff sufficiently alleged misappropriation by acquisition, but did not sufficiently allege misappropriation by use); *Alliance Tech. Grp., LLC v. Achieve 1, LLC*, Civil Action No. 3:12CV701-HEH, 2013 WL 143500, at \*6 (E.D. Va. Jan. 11, 2013) (alleging the defendant had knowledge of the trade secrets, coupled with his alleged use of them was sufficient to raise a reasonable inference of misappropriation).

<sup>84</sup> See, e.g., *Natural Miracles, Inc. v. Team Nat'l, Inc.*, Civil Action No. 09-cv-01379-WDM-KMT, 2009 WL 3234386, at \*3 (D. Colo. Oct. 1, 2009) (finding the plaintiff was not required to allege when and how the unlawful disclosure occurred where the plaintiff had alleged that it developed a unique product for the distributor and the distributor ultimately partnered with another manufacturer to produce a nearly identical product, even using the same packaging as proposed by the plaintiff).

trade secret owner is required to allege more than simply the elements of misappropriation to establish a cause of action.<sup>85</sup>

### *B. Improper Means*

According to the misappropriation definition, three of the ways liability can be established for misappropriation of trade secrets under the DTSA require that the information be obtained by improper means.<sup>86</sup> According to the DTSA, “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.”<sup>87</sup> Section (A) is consistent with the definition provided in the UTSA, while Section (B) is specific to the DTSA definition.<sup>88</sup> However, there is support for Section (B) found in the UTSA comments. “Proper means” is defined, in part, in Section 1 of the UTSA comments to include both “discovery by independent invention” as well as “by reverse engineering.”<sup>89</sup> For the last phrase in the DTSA definition, “any other lawful means of acquisition” presumably this would include the remaining “proper means” indicated in the UTSA Section 1 comments, that is, discovery under license, observation of the item in public use or display, or through published literature.<sup>90</sup>

Federal case law applying state UTSAs can also be helpful for satisfying the plausibility requirement under the DTSA. To survive a plausibility challenge to a claim that the plaintiff’s trade secrets were acquired by improper means, the trade secret owner has several options. It may be sufficient for the trade secret owner to allege that the misappropriator took its confidential information without permission and sent it to a third party.<sup>91</sup> These cases did not require that the trade secret owner

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<sup>85</sup> See, e.g., *StrikeForce Techs., Inc. v. WhiteSky, Inc.*, Civil Action No. 13–1895 (SRC), 2013 WL 3508835, at \*8 (D. N.J. July 11, 2013); *Exal Corp. v. Roeslein & Assocs., Inc.*, No. 4:12cv1830, 2013 WL 6843022, at \*5 (N.D. Ohio Dec. 27, 2013) (alleging future use with only one general statement about actual use by the defendant was insufficient to plead a cause of action for trade secret misappropriation).

<sup>86</sup> 18 U.S.C. §§ 1839(5)(A), (5)(B)(i), and (5)(B)(ii)(I) (2016).

<sup>87</sup> *Id.* § 1839(6).

<sup>88</sup> “Improper means” is defined in the Uniform Trade Secrets Act as “theft, bribery, misrepresentation, breach or inducement of a breach of duty to maintain secrecy or espionage through electronic or other means.” See UNIF. TRADE SECRETS ACT § 1(1) (amended 1985), 14 U.L.A. 538–39 (2005).

<sup>89</sup> UNIF. TRADE SECRETS ACT § 1 cmt. (amended 1985), 14 U.L.A. 538 (2005).

<sup>90</sup> *Id.*

<sup>91</sup> See, e.g., *Joshua David Mellberg LLC v. Will*, 96 F. Supp. 3d 953, 965-966 (D. Ariz. 2015) (asserting that the former employee illegally downloaded the plaintiff’s training and educational videos, a third party had notified plaintiff that the former employee had approached them to launch a program that mirrored the plaintiff’s program, clients and agents had received marketing regarding the program, and the former employee launched websites very similar to the plaintiff’s websites was sufficient to state a plausible claim for misappropriation); *Modus LLC v. Encore Legal Solutions, Inc.*, No. CV–12–00699–PHX–JAT, 2013 WL 6628125, at \*8 (D. Ariz. Dec. 17, 2013) (alleging that former employees copied the former employer’s script library, stored it on computers supplied by their new employer, and used it for the benefit of their new employer was sufficient); *Seneca Cos., Inc. v. Becker*, No. 4:15–cv–00035–JEG, 2015 WL 5783809, at \*5 (S.D. Iowa Sept. 17, 2015) (alleging that the former



identify by name each defendant when there were multiple defendants involved, but sufficient information had to be provided to put the defendants on notice.<sup>92</sup> A trade secret owner may be able to satisfy the plausibility requirement by showing that the misappropriating party had access to the secret and both the secret information and the defendant's design shared similar features.<sup>93</sup> The defendant's knowledge of the trade secret alone is likely insufficient.<sup>94</sup>

### *C. Confidential Relationship*

A trade secret owner can establish a claim for trade secret misappropriation under the DTSA in two additional ways. Both ways require the trade secret owner to show that the trade secret was acquired from a person who had a duty to maintain the secrecy of the information or limit its use.<sup>95</sup> In this instance, federal cases applying state UTSA's are instructive because of the similarity of the UTSA provision to that of the DTSA provision. For example, to allege a claim for breach of a confidential employment relationship sufficiently, the trade secret owner should be prepared to show that the employee had a duty to maintain secrecy of the trade secret information.<sup>96</sup> This duty to maintain secrecy can be evidenced by a written

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employee took trade secret information from the plaintiff and gave it to a competitor was sufficient to plead acquisition by improper means).

<sup>92</sup> See, e.g., *Eastman Chem. Co. v. AlphaPet Inc.*, Civ. Action No. 09-971-LPS-CJB, 2011 WL 5402767, at \*7-8 (D. Del. Nov. 4, 2011) (concluding that even though the plaintiff had not identified by name the specific former employees who allegedly leaked the prohibited information, the totality of information the plaintiff provided was sufficient to establish a plausible claim for trade secret misappropriation, specifically the former employees were those (1) individuals who were transferred from plaintiff to the defendants pursuant to agreement, who also (2) worked on the IntegRex™ technology in connection with the start-up of plaintiff's South Carolina facility, and who also (3) traveled to Alabama as part of the development of the defendants' Alabama facility); *AgJunction LLC v. Agrian Inc.*, No. 14-CV-2069-DDC-KGS, 2014 WL 2557704, at \*7 (D. Kan. June 6, 2014) (alleging one identified employee defendant knowingly received trade secret information provided by each of several employee defendants and the one identified employee defendant disclosed that information was sufficient).

<sup>93</sup> See, e.g., *Apex Tool Grp., LLC v. DMTCO, LLC*, No. 3:13-cv-372, 2014 WL 6748344, \*15 (S.D. Ohio Nov. 25, 2014) (pleading that (1) the defendant former employees were given access to confidential, trade secret, and proprietary information related to the plaintiff's product line, (2) while still employed the former employees formed a competing company, (3) the former employees acquired plaintiff's tools and did not return them, (4) the former employees set up manufacturing equipment at the competing company and immediately put the plaintiff's tools into production, (5) the defendant competitor provided funding and other assistance for the competing company, and (6) representatives of both the competing company and the defendant competitor represented to customers that their new product line was identical to the plaintiff's product line and encouraged customers to test the new products to confirm it, was sufficient to establish a plausible claim that the defendant competitor knew or should have known that the trade secrets used by defendant former employees were acquired by improper means and through a breach of secrecy and/or the disclosure or use of another's trade secret without the other's consent).

<sup>94</sup> See, e.g., *East West, LLC v. Rahman*, 873 F. Supp. 2d 721, 735 (E.D. Va. 2012) (making conclusory allegations that its former employee possessed knowledge of its customers and business information was insufficient to plead trade secret misappropriation).

<sup>95</sup> 18 U.S.C. §§ 1839(B)(ii)(II), (III) (2016).

<sup>96</sup> See, e.g., *Telogis, Inc. v. InSight Mobile Data, Inc.*, No. PWG-14-563, 2014 WL 7336678, \*4 (D. Md. Dec. 19, 2014) (providing that plaintiff's employees "learned plaintiff's confidential business

employment or consultant agreement with a confidentiality provision.<sup>97</sup> A plausible claim can also be made where the duty of confidentiality is implied from the circumstances as well as by the relationship of the parties.<sup>98</sup>

## VI. DAMAGES

The last aspect to consider for a DTSA claim is damages. Under the DTSA, remedies include an award for “(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.”<sup>99</sup> Again, this provision is substantively similar to the UTSA damages provision, so the UTSA comments and federal case law applying state UTSAs can be helpful.<sup>100</sup> Federal cases applying state UTSAs based actual loss on profits lost by the plaintiff or profits gained by the defendant.<sup>101</sup> As an alternative to actual loss damages, the DTSA provides “in lieu of damages measured by any other methods, the damages caused by the misappropriation may be measured by imposition of liability for a reasonable royalty for the misappropriator’s unauthorized disclosure or use of the

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information, such as customer lists, client contact information, contract terms, and pricing information that are trade secrets of plaintiff” while employed, they “knew or had reason to know that these trade secrets were vital to the commercial success of plaintiff and were closely guarded as secret information by plaintiff,” they “had a duty to maintain this information as secret,” and then “disclos[ed] and us[ed] plaintiff’s trade secrets and other confidential business information for the benefit of defendants” at defendants’ “request and insistence” was sufficient to plead misappropriation); *AWP, Inc. v. Commonwealth Excavating, Inc.*, Civil Action No. 5:13cv031, 2013 WL 3830500, at \*6 (W.D. Va. July 24, 2013) (alleging circumstances indicating that the defendants knew the acquisition of the trade secrets by the former employee was improper and that the former employee had a duty to maintain the secrecy of the information was sufficient).

<sup>97</sup> *See, e.g., Wilcox Indus. Corp. v. Hansen*, 870 F. Supp. 2d 296, 310 (D. N.H. 2012) (alleging that the defendants gained knowledge of the trade secrets through their confidential relationships with plaintiff, one through prior employment and the other through a consulting arrangement with the plaintiff, and that both relationships gave rise to a duty to maintain secrecy particularly in light of nondisclosure agreements signed in both relationships was sufficient to plead a breach of confidence); *Apex Tool Grp., LLC*, 2014 WL 6748344, at \*14 (attaching signed confidentiality agreements between the defendants and the plaintiff’s predecessor in interest is sufficient to plead a confidential relationship).

<sup>98</sup> *See, e.g., Vesta Corp. v. Amdocs Mgmt. Ltd.*, 80 F. Supp. 3d 1152, 1166 (D. Or. 2015) (claiming that the plaintiff disclosed the trade secrets to the defendants during acquisition negotiations that failed, the defendants used the secrets, without authorization, to bring a competing product to market in an expedited timeframe, to determine what functionalities it should include and exclude, and to price the product in a way to undercut the plaintiff’s price was sufficient); *Radiator Express Warehouse, Inc. v. Shie*, 708 F. Supp. 2d 762, 768-769 (E.D. Wis. 2010) (finding the plaintiff sufficiently pled that the employees were under a duty to maintain the secrecy of the information provided and they breached that duty by disclosing plaintiff’s trade secrets to a third party where there was an implicit agreement between the parties and the information was acquired during negotiations to purchase a business).

<sup>99</sup> 18 U.S.C. § 836(b)(3)(B)(i) (2016).

<sup>100</sup> UNIF. TRADE SECRETS ACT § 3(a) (amended 1985), 14 U.L.A. 634 (2005) (“Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss.”).

<sup>101</sup> *See, e.g., ClearOne Commc’ns, Inc. v. Biamp Sys.*, 653 F.3d 1163, 1180 (10th Cir. 2011); *Ice Corp. v. Hamilton Sundstrand Corp.*, 615 F. Supp. 2d 1256, 1261 (D. Kan. 2009).

trade secret.”<sup>102</sup> Like the actual loss provision, this provision is also substantively similar to that of the UTSA definition permitting use of the UTSA comments and federal UTSA law as persuasive authority.<sup>103</sup> According to federal cases applying state UTSA, this reasonable royalty is generally used in the absence of proof of unjust enrichment.<sup>104</sup>

Satisfying the plausibility requirement for damages was more forgiving than for trade secret status and misappropriation in federal cases applying state UTSA. Failing to plead the amount of harm or the mechanism of causation was not necessarily harmful as long as the remaining elements were pled sufficiently.<sup>105</sup> Accordingly, a general damages allegation such as “plaintiff has ‘sustained and will continue to sustain in the future injuries and monetary damages in excess of’” a specified amount should still satisfy the plausibility requirement.<sup>106</sup> Nevertheless, merely alleging a belief that future damages will occur was insufficient without an allegation of current damages.<sup>107</sup>

In addition to actual damages, both exemplary damages and attorney’s fees are recoverable under the DTSA. Exemplary damages can be awarded in an amount not to exceed twice the damages award where willful and malicious misappropriation is shown to exist.<sup>108</sup> Furthermore, attorney’s fees may be awarded if willful and malicious misappropriation exists or a motion to terminate an injunction is made in bad faith.<sup>109</sup> Both the exemplary damages<sup>110</sup> provision and the attorney’s fees<sup>111</sup> provision are substantively similar to those of the UTSA. Since pleading for these awards has not

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<sup>102</sup> 18 U.S.C. § 836(b)(3)(B)(ii) (2016).

<sup>103</sup> See UNIF. TRADE SECRETS ACT § 3(b) (amended 1985), 14 U.L.A. 634 (2005) (“In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator’s unauthorized disclosure or use of a trade secret.”).

<sup>104</sup> See, e.g., *Secure Energy, Inc. v. Coal Synthetics, LLC*, 708 F. Supp. 2d 923, 931-932 (E.D. Mo. 2010); *De Lage Landen Operational Servs., LLC v. Third Pillar Sys., Inc.*, 851 F. Supp. 2d 850, 854 (E.D. Pa. 2012).

<sup>105</sup> See, e.g., *Modus LLC v. Encore Legal Solutions, Inc.*, No. CV-12-00699-PHX-JAT, 2013 WL 6628125, at \*8 (D. Ariz. Dec. 17, 2013) (alleging that (1) it “sustained and will continue to sustain actual and/or consequential damages in an amount to be determined at trial;” (2) its scripts were developed at “substantial cost;” and (3) its scripts provided a “unique” interface to its customers was sufficient); *Fortinet Inc. v. FireEye Inc.*, Case No. 5:13-CV-02496-EJD, 2014 WL 4955087, \*8 (N.D. Cal. Sept. 30, 2014) (concluding the plaintiff sufficiently alleged harm by alleging the existence of a valuable trade secret, the improper use of that trade secret, the defendant’s interference with the plaintiff’s potential economic advantage, and the defendant’s disruption of the business relationship between the plaintiff and its customers and distributors); *Mintel Learning Tech., Inc. v. Ambow Educ. Holding Ltd.*, No. 5:11-CV-01504-EJD, 2012 WL 762126, at \*3 (N.D. Cal. Mar. 8, 2012) (alleging the existence of a valuable trade secret, its improper use by the defendant to improve its own competing product, and some lost profits suffered as a result of the competition where the natural inference was that the defendant’s product, once improved with the plaintiff’s trade secrets, competed more effectively and won some of the plaintiff’s business justified denying the defendant’s motion to dismiss).

<sup>106</sup> See, e.g., *Miami Valley Mobile Health Servs., Inc. v. ExamOne Worldwide, Inc.*, 852 F. Supp. 2d 925, 943 (S.D. Ohio 2012).

<sup>107</sup> See, e.g., *Dice Corp. v. Bold Techs.*, No. 11-13578, 2012 WL 263031, at \*7 (E.D. Mich. Jan. 30, 2012).

<sup>108</sup> 18 U.S.C. § 1836(b)(3)(C) (2016).

<sup>109</sup> *Id.* § 1836(b)(3)(D).

<sup>110</sup> See UNIF. TRADE SECRETS ACT § 3(b) (amended 1985), 14 U.L.A. 634 (2005).

<sup>111</sup> See *id.* § 4(ii)-(iii), 14 U.L.A. 642 (2005).

typically been challenged with a motion to dismiss in federal cases applying state UTSA's, they will not be discussed in detail in this article.<sup>112</sup>

## VII. CONCLUSION

While the first reaction to the new DTSA may be a sigh of relief that there is now a federal civil trade secret misappropriation statute, an almost immediate secondary response will be frustration over the federal plausibility requirement. An advantage to this statute, however, is that there are extensive similarities between the definitions of the DTSA and UTSA. Therefore, the use of the UTSA comments and federal cases applying state UTSA's can provide a starting point for those attorneys navigating the plausibility requirement for purposes of a DTSA claim. This approach will also provide consistency to attorneys and the courts as the new law is applied.

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<sup>112</sup> See, e.g., *Baker Hughes, Inc. v. S & S Chem., LLC*, 63 F. Supp. 3d 762, 770 (W.D. Mich. 2014) (denying the defendant's motion to dismiss concerning both punitive damages and attorney fees, where the defendants did not object to the plaintiff's allegation that the misappropriation was willful to support attorney fees nor was it clear which state's law applied to the punitive damages claim).