NEBRASKA TRADE SECRET PROTECTION: THE FORUM SELECTION CONUNDRUM FACING TRADE SECRET OWNERS AFTER THE DEFEND TRADE SECRETS ACT OF 2016

I. INTRODUCTION

Courts and lawyers have struggled to figure out trade secret law for over a century.1 It remains in disagreement whether trade secrets are creatures of tort, property, contract, or even criminal law.2 However, there is a general consensus that the misappropriation of trade secrets is wrong, and the law should punish those who do so.3 Further, public policy demands trade secret owners be capable of protecting their trade secrets—to allow otherwise would discourage innovation and reflect poorly on standards of commercial ethics within our economy.4

Under the Defend Trade Secrets Act of 20165 (“DTSA”), victims of trade secret misappropriation may now file a private action in federal court to protect their trade secrets.6 Traditionally, victims who alleged trade secret misappropriation could only resort to state common and statutory law in order to find trade secret protection.7 Because the DTSA does not preempt state law, victims of misappropriation...
now face the dilemma of choosing between state and federal court to file an action for misappropriation of trade secrets.\(^8\)

The purpose of this Note is to examine the DTSA as well as Nebraska law in order to determine if a state or federal forum will be more favorable for Nebraska plaintiffs.\(^9\) This Note summarizes the DTSA, the Nebraska Trade Secrets Act,\(^10\) and Nebraska common law.\(^11\) This Note then analyzes the differences between Nebraska law and the DTSA and the likely effects on the outcome of a trade secret suit.\(^12\) This Note concludes that Nebraska plaintiffs should not hesitate to use the federal forum, as the DTSA contains a less restrictive definition of a trade secret, provides for more damages and remedies, and aligns with public policy favoring a uniform federal trade secret forum.\(^13\) This Note closes by encouraging victims of trade secret misappropriation to file suit in federal court under the DTSA, regardless of the fact the DTSA jurisprudence is recent and undeveloped.\(^14\)

II. THE DEFEND TRADE SECRETS ACT AND LEGISLATIVE HISTORY

President Barack Obama signed into law the Defend Trade Secrets Act (“DTSA”) on May 11, 2016.\(^15\) The DTSA received remarkable bipartisan support; it was unanimously passed in the Senate and ratified in the House of Representatives by a vote of 410-2.\(^16\) The DTSA amended the Economic Espionage Act of 1996\(^17\) (“EEA”), created a private civil right of action for victims of trade secret misappropriation, and federally codified the protections of the Uniform Trade Secrets Act, which was adopted in varying degrees by forty-seven states and the District of Columbia.\(^18\)

The DTSA allows a trade secret owner to bring a private civil action if that individual’s trade secret is related to a product or service intended for use in interstate commerce.\(^19\) The DTSA offers trade secret owners a variety of remedies, including injunctions, actual dam-

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\(^9\) See infra notes 15-215 and accompanying text.


\(^11\) See infra notes 15-161 and accompanying text.

\(^12\) See infra notes 162-207 and accompanying text.

\(^13\) See infra notes 208-215 and accompanying text.

\(^14\) See infra notes 208-215 and accompanying text.


\(^18\) See infra notes 15-215 and accompanying text.

ages, unjust enrichment, royalties, exemplary damages, and attorney's fees.\textsuperscript{20} It also has an innovative solution to prevent the dissemination of trade secret information during litigation, which has been a recognized problem with trade secret litigation in the past.\textsuperscript{21} To address the aforementioned problem, the DTSA creates an opportunity for an ex parte civil seizure of property that is alleged by a plaintiff to be a trade secret.\textsuperscript{22} In extraordinary circumstances, the DTSA allows a plaintiff to petition the court for a seizure of any property necessary in order to prevent dissemination of a trade secret.\textsuperscript{23} Although this remedy seems particularly beneficial to plaintiffs, the statute limits itself by reserving ex parte seizure to the narrowest amount of property necessary to achieve its purpose: preventing the dissemination of a trade secret.\textsuperscript{24} A trade secret owner must make a prima facie case before a court will award any ex parte civil seizure of assets, making it difficult for plaintiffs to utilize the effectiveness of this provision.\textsuperscript{25} The ex parte seizure provision in trade secret litigation did not come without limits, as the DTSA ensures plaintiffs will not abuse the provision by providing a property holder whose property was wrongfully seized a civil right of action against an imprudent plaintiff in order to recover punitive damages, lost profits, cost of materials, loss of goodwill, and in some cases attorney's fees.\textsuperscript{26}

\textsuperscript{20} 18 U.S.C. § 1836(b)(3).

\textsuperscript{21} 18 U.S.C. § 1836(b)(2); S. REP. NO. 114-220, at 3.

\textsuperscript{22} 18 U.S.C. § 1836(b)(2).

\textsuperscript{23} Id.

\textsuperscript{24} Id.

\textsuperscript{25} 18 U.S.C. § 1836(2)(b)(2)(a)(ii). The provision lays out eight requirements a plaintiff must meet before an ex parte civil seizure order will be issued, which are:

(I) 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; (II) an immediate and irreparable injury will occur if such seizure is not ordered; (III) 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; (IV) the applicant is likely to succeed in showing that— (aa) the information is a trade secret; and (bb) the person against whom seizure would be ordered has actual possession of— (aa) the trade secret; and (bb) any property to be seized; (V) the person against whom seizure would be ordered has actual possession of— (aa) the trade secret; and (bb) any property to be seized; (VI) the application describes with reasonable particularity the matter to be seized and, to the extent reasonable under the circumstances, identifies the location where the matter is to be seized; (VII) 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 (VIII) the applicant has not publicized the requested seizure.

\textsuperscript{26} 18 U.S.C. § 1836(b)(2)(G). The DTSA provides the following remedy:
The DTSA also ensures that proprietary material and trade secrets, which are the subject matter of a misappropriation claim, will not be presented to the public as a result of litigation; it provides measures to protect confidentiality of court documents.27 Such protection measures include court appointment of a special master, bound by a non-disclosure agreement approved by the court, to locate and isolate all trade secret information and data, and an encryption motion to secure any seized material.28

The DTSA retains most of the definitions of the EEA; however, the DTSA adds the definitions of the terms misappropriation and improper means.29 The DTSA also modifies the EEA’s definition of trade secret.30 Misappropriation under the DTSA consists of any use or disclosure of a trade secret by a person who acquired the secret through an improper means and had reason to know that the trade secret was indeed a trade secret.31 Improper means includes any theft or breach

A person who suffers damage by reason of a wrongful or excessive seizure under this paragraph has a cause of action against the applicant for the order under which such seizure was made, and shall be entitled to the same relief as provided under section 34(d)(11) of the Trademark Act of 1946.

Id.
The Trademark Act of 1946 provides that:

A person who suffers damage by reason of a wrongful seizure ... shall be entitled to recover such relief as may be appropriate, including damages for lost profits, cost of materials, loss of good will, and punitive damages in instances where the seizure was sought in bad faith, and, unless the court finds extenuating circumstances, to recover a reasonable attorney’s fee.

28. Id.; id. at § 1836(b)(2)(H).
29. See 18 U.S.C. § 1836 (defining the terms misappropriation and improper means); but see 18 U.S.C. § 1831 (lacking a definition for the terms misappropriation and improper means).
30. Defend Trade Secrets Act of 2016 § 2. The DTSA modified 18 U.S.C. § 1836, or the EEA, by requiring that trade secret information derive value from not being known by “another person who can obtain economic value from the disclosure or use of the information” rather than simply “the public” at large. Id.
31. 18 U.S.C. § 1839(5) (2012). Misappropriation is defined as:

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

disclosure or use of a trade secret of another without express or implied consent by a person who

used improper means to acquire knowledge of the trade secret;
at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was

derived from or through a person who had used improper means to acquire the trade secret;

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

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

before a material change of the position of the person, knew or had reason to know that-

the trade secret was a trade secret; and
of a duty to maintain a trade secret, and specifically excludes any re-
verse engineering or lawful means of acquisition of a trade secret,
such as taking a device apart to see how it was made.\(^{32}\) The DTSA
adopts the EEA's expansive list of the categories of information that
can be considered trade secrets, including financial information,
codes, patterns, compilations, procedures, and more.\(^{33}\)

Whereas before trade secrets only consisted of secrets that de-
rived independent economic value from not being generally known by
the public, the DTSA modifies the definition of a trade secret to com-
prise of any information that can derive value independently from the
fact it is not generally known to or readily ascertainable by a person
who can obtain economic value from the disclosure or use of the infor-
mation.\(^{34}\) Two circuit courts have recognized this relatively minor dif-
ference in the definition of trade secret as potentially meaningful.\(^{35}\)

The remedies available under the DTSA to an owner of a misap-
propriated trade secret closely resemble those remedies available
under the Uniform Trade Secrets Act (“UTSA”).\(^{36}\) Provided that an
order will not prevent an employee from accepting a job in restraint of
trade, a court has the ability to enter an injunction to prevent any
possible misappropriation.\(^{37}\) A court can also condition future use of a
trade secret to be permissible only upon payment of a reasonable roy-

\(^{32}\) 18 U.S.C. § 1839(6). The statute defines the term improper means as “theft,
bribery, misrepresentation, breach or inducement of a breach of a duty to maintain se-
crecy, or espionage through electronic or other means” and excludes “reverse engineer-
ing, independent derivation, or any other lawful means of acquisition.” Id.

\(^{33}\) Defend Trade Secrets Act of 2016 § 2. The term “trade secret” means any form
or type of “financial, business, scientific, technical, economic, or engineering informa-
tion, including patterns, plans, compilations, program devices, formulas, designs, proto-
types, methods, techniques, processes, procedures, programs, or codes, whether tangible
or intangible, and whether or how stored, compiled, or memorialized physically, electronic-
ically, graphically, photographically, or in writing . . . .” Id.

\(^{34}\) 18 U.S.C. §§ 1839(3)(A)–(B).

\(^{35}\) See United States v. Lange, 312 F.3d 263, 267 (7th Cir. 2002) (discussing the
importance of the terms generally known to and readily ascertainable in the Uniform
Trade Secrets Act); see United States v. Hsu, 155 F.3d 189, 196 (3d Cir. 2001) (iterating
the restrictive nature of the defining phrases generally known to and readily
ascertainable).

\(^{36}\) See 18 U.S.C. § 1836(b)(3) (providing the opportunity to receive damages, attor-
ey’s fees, and injunctions). See also Unif. Trade Secrets Act With 1985 Amend-
ments §§ 2-3 (Unif. Law Comm’n 1985). Because the UTSA and the DTSA operate upon
the same nucleus of facts, a plaintiff can generally bring an action under the DTSA
concurrently with a claim under a particular state's adopted version of the UTSA. See
Cal. Feb. 7, 2017) (granting the plaintiff’s motion for leave to amend its complaint to
add a claim under the DTSA in addition to the California Uniform Trade Secrets Act).

The DTSA alternatively provides for an award of damages for actual loss and any unjust enrichment in lieu of a reasonable royalty. If a trade secret misappropriation was willful and malicious, the DTSA permits an award of exemplary damages, not to exceed twice the compensatory damages awarded. Last, if the misappropriation was done willfully and maliciously, attorney’s fees may also be recovered.

To recover damages or seek another available remedy under the DTSA, a plaintiff must plead with particularity that an act of misappropriation occurred after the date the DTSA became effective. The DTSA then imposes a three-year statute of limitations from the date of misappropriation. The date of misappropriation is considered the date of discovery or the date in which a reasonably prudent person should have discovered the misappropriation.

The DTSA provides criminal and civil immunity to any individual who discloses a trade secret to a federal, state, or local official in confidence, provided that the disclosure was made for the purpose of investigating suspected violations of law. The DTSA also protects employees from retaliation from their employers when the employees disclose trade secret information to government officials for the purpose of whistleblowing suspected violations of law.

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42. See Defend Trade Secrets Act of 2016 § 2(b) (stating that the DTSA shall apply to “any misappropriation of a trade secret” which “occurs on or after the date of the enactment of this Act.”). See also Adams Arms, LLC v. Unified Weapon Sys., Inc., 8:16-cv-1503-T-33AEP, 2016 WL 5391394, at *5-7 (M.D. Fla. Sept. 27, 2016) (rejecting the defendant’s argument that recovery was unavailable under the DTSA because of the DTSA’s statute of limitation provision stating that “a continuing misappropriation constitutes a single claim of misappropriation” and opining instead that so long as a plaintiff pleads with particularity that an “act” of misappropriation occurs after the effective date of the DTSA, a partial recovery under the DTSA is available to the plaintiff in regard to said act); but see Avago Techs. U.S. Inc. v. Nanoprecision Prods., Inc., 16-cv-03737-JCS, 2017 WL 412524, at *9 (N.D. Cal. Jan. 31, 2017) (noting that there is no authority suggesting a claim for partial relief may be made under the DTSA if information, disclosed before the DTSA’s effective date, is merely disclosed again after the effective date because the definition of disclosure “implies that information was previously secret.”).
43. 18 U.S.C. § 1836(d).
44. Id.
45. Defend Trade Secrets Act of 2016 § 7(b).
46. Id.
Trade secret law is the medium of protection for some of America’s most iconic inventions, including Coca-Cola and Colonel Sanders’s famous original recipe. Over the years, the unlawful acquisition of trade secrets has become a particularly economically damaging crime; it is estimated that the annual loss to the American economy attributable to trade secret theft is over $300 billion. It is reported that such theft of trade secrets leads to the loss of 2.1 million domestic jobs each year. This loss gives entrepreneurs less incentive to innovate, slows the development of our economy, and leads to a lesser quality of life for everyone.

Due to technological advancements, protecting trade secrets has become increasingly difficult, trade secret thieves now have sophisticated methods to appropriate trade secrets, and trade secret misappropriation often ventures across state or national borders. Before the DTSA, the only federal law commanding trade secret protection was the EEA, which treats trade secret misappropriation as a criminal offense. It was clear that the EEA only criminalized a small portion of the actual trade secret theft occurring, as the EEA relied on the thinly stretched financial resources of the Department of Justice to seek out and prosecute trade secret misappropriation offenses. In the Congressional hearings, Senator Orrin Hatch of Utah emphasized how the Justice Department would only look into cases with more than $100,000 in damages. In addition, trade secret prosecutions were expensive and complex, as the litigation required a deep technological and scientific background.

Trade secrets also never enjoyed the same federal protections as the other forms of intellectual property such as copyrights, trademarks, and patents. While the EEA made it a federal crime to steal trade secrets, there was no private right of action via federal court available to trade secret owners. Confidential trade secret information is capable of being protected for an unlimited amount of time; in

49. Id.
50. Id.
54. Id.
55. Id.
57. Id.
contrast, with a patent, an inventor discloses his invention to the world in exchange for exclusive access to the patent for twenty years.\textsuperscript{58} Because trade secret protection allows companies and innovators to keep their proprietary and economically valuable information a secret indefinitely, Congress found it especially important for the American economy to place safeguards on the unlawful and unfair acquisition of trade secrets.\textsuperscript{59}

With the DTSA, Congress set out to provide a federal cause of action against trade secret misappropriation that, for the most part, mirrors the UTSA.\textsuperscript{60} The narrowly drawn DTSA provides a single, national standard for trade secret misappropriation with clear rules and predictability for everyone involved.\textsuperscript{61} Trade secret owners are now able to move quickly to federal court with certainty of the rules, standards, and practices to stop trade secrets from winding up disseminated and losing their value.\textsuperscript{62}

III. BACKGROUND

A. COMMON LAW DEVELOPMENT OF TRADE SECRET PROTECTION IN NEBRASKA

Prior to the adoption of the Uniform Trade Secrets Act ("UTSA"), trade secrets received minimal protection under Nebraska common law.\textsuperscript{63} Nebraska only had a limited number of trade secret cases providing a legal right to relief to victims of trade secret misappropriation.\textsuperscript{64} Nebraska’s trade secret jurisprudence began with the

\textsuperscript{58} Id.

\textsuperscript{59} Id. Representative Jackson Lee stated in her testimony before the Senate:

When an inventor seeks patent protection, he or she agrees to disclose to the world their invention and how it works, furthering innovation and research, as well as securing a 20-year exclusive term of protection, and the right to prevent others from making, using, selling, importing, or distributing a patented invention without permission. However, in contrast by maintaining it as a trade secret, an inventor could theoretically keep their invention secret indefinitely (ex: formula for Coca-Cola; the KFC Colonel’s Secret Recipe); but, the downside is there is no protection if the trade secret is uncovered by others through reverse engineering or independent development.

\textsuperscript{60} S. REP. NO. 114-220, at 3.

\textsuperscript{61} 162 CONG. REC. S1,634-35 (daily ed. Apr. 4, 2016) (statement of Sen. Grassley).

\textsuperscript{62} Id.

\textsuperscript{63} See Gerald B. Buechler, Jr., Revealing Nebraska’s Trade Secrets Act, 23 CREIGHTON L. REV. 323, 328 (1989) (discussing that the rationale for deleting the common law displacement provision of the UTSA was because there was no existing Nebraska common law or statutory law in conflict with the provisions of the UTSA, thus the legislature found the addition of the provision unnecessary).

\textsuperscript{64} See Secs. Acceptance Corp. v. Brown, 106 N.W.2d 456, 464-65 (Neb. 1960) [hereinafter Securities I], decision clarified on denial of reh’g, 107 N.W.2d 540, 541-42 (Neb. 1961) [hereinafter Securities II] (recognizing there is an implied term in an employment contract that employee will not use an employer’s trade secret for his or her
employee's common law duty not to disclose confidential information entrusted with the employee by his employer. 65

In Securities Acceptance Corp. v. Brown, 66 a consumer loan and finance company, Securities Acceptance Corporation (“Securities”), sought to enjoin its prior employee, Brown, from breaching non-compete provisions in his employment contract. 67 Brown accepted employment with another company, and Securities alleged that Brown would use his knowledge of Securities's policies, procedures, and customers to Securities's detriment. 68 The Nebraska Supreme Court recognized, as an implied term of an employment contract, an employee's duty to keep secret any confidential information or trade secrets he acquires in the course of employment. 69 The court noted the existence of an implied obligation of the employee not to use information for his individual benefit or for the benefit of a rival, especially to the detriment of his former employer, as use of such information would give one person an unfair advantage over the other. 70 In such cases, the court has held that an injunction would be available to the employer. 71 In Securities, the court refused to grant an injunction, as there was no evidence Brown had breached his duty of secrecy, and the court would not presume wrongdoing just because there was an opportunity to do wrong. 72

In Henkle & Joyce Hardware Co. v. Maco, Inc., 73 a seller of shotgun shell loaders (“Seller”) brought an action against one of its suppliers (“Supplier”) alleging trade secret misappropriation. 74 Supplier manufactured parts for Seller's shell loaders for ten years until the relationship between the two entities deteriorated, and Supplier began to manufacture and sell loaders that were identical to those of their own benefit). See Henkle & Joyce Hardware Co. v. Maco, Inc., 239 N.W.2d 772, 778 (Neb. 1976) (iterating that a confidential relationship between parties is required for an implication of a promise not to use alleged trade secrets). See also Garner Tool & Die Co. v. Laux, 285 N.W.2d 219, 223 (Neb. 1979) (opining that matters of general knowledge are not protectable trade secrets).

65. See Securities I, 106 N.W.2d at 464-65 (recognizing, in an action by a consumer loan company, that there is an implied term in an employment contract that an employee will not use an employer's trade secrets for his own benefit or that of a rival).
66. 106 N.W.2d 456 (Neb. 1960), decision clarified on denial of reh'g, 107 N.W.2d 540 (Neb. 1961).
67. Securities I, 106 N.W.2d at 459.
68. Securities I, 106 N.W.2d at 464.
69. Securities II, 107 N.W.2d at 541-42.
70. Securities I, 106 N.W.2d at 464.
71. Securities II, 107 N.W.2d at 542.
72. Id.
73. 239 N.W.2d 772 (Neb. 1976).
Seller.\textsuperscript{75} Seller alleged that the drawings of the shotgun shell loader parts constituted trade secrets, claiming it sustained substantial damages in the form of loss of sales due to Supplier’s improper use of its trade secrets to manufacture competing shell loaders.\textsuperscript{76} The trial court dismissed the case, opining that no trade secrets existed as the shell loaders were the result of joint efforts by the parties.\textsuperscript{77}

In Henkle, the Nebraska Supreme Court adopted the Restatement of Torts definition of a trade secret, which states that a trade secret consists of any compilation of information, pattern, device, or formula used by an individual in his business that gives him a competitive advantage over all those who do not know or use it.\textsuperscript{78} The court stated that a trade secret must be a device or process for continuous use by a business, not just for a single event such as a bid for a contract, and trade secrets generally relate to the production or sale of goods.\textsuperscript{79} The court clarified that matters of public knowledge in an industry are not trade secrets capable of being misappropriated, and trade secrets can be disclosed so long as they are disclosed with a substantial element of secrecy.\textsuperscript{80} Although the court seemed to define a trade secret, it strayed away from an express definition, laying out several factors to

\begin{footnotesize}
\begin{enumerate}
\item[75.] Henkle, 239 N.W.2d at 774-75.
\item[76.] Id.
\item[77.] Id. at 775.
\item[78.] Id. at 775-76 (citing Restatement (First) of Torts § 757 (Am. Law. Inst. 1939)). Comment (b) of § 757 of the Restatement (First) of Torts defines a trade secret as:
\begin{quote}
any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of a new policy or for bringing out a new model or the like. A trade secret is a process or device for continuous use in the operation of the business . . . .
\end{quote}
Secrecy. The subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret. Matters which are completely disclosed by the goods which one markets cannot be his secret. Substantially, a trade secret is known only in the particular business in which it is used. It is not requisite that only the proprietor of the business know it. He may, without losing his protection, communicate it to employees involved in its use. He may likewise communicate it to others pledged to secrecy. Others may also know of it independently, as, for example, when they have discovered the process or formula by independent invention and are keeping it secret. Nevertheless, a substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring the information . . . .

Restatement (First) of Torts § 757 (Am. Law. Inst. 1939).
\item[79.] Henkle, 239 N.W.2d at 776.
\item[80.] Id.
\end{enumerate}
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be taken into consideration when determining whether information is a trade secret, including the extent to which measures were taken by one to guard the secrecy of information, the value of the information, and the difficulty with which the information could be acquired through proper means or duplicated by others.81

The court noted that an action for damages because of unlawful use of a trade secret was an action at law, as opposed to an action in equity, subject to a clearly erroneous standard of review.82 Affirming the ruling of the trial court and dismissing Seller’s claim, the court ruled that no confidential relationship existed between the parties because they never entered into a written agreement.83 Because the parties had the opportunity to enter into a restrictive agreement, and the negotiations failed, the court determined there was no implied duty of confidentiality intended between the parties and thus no misappropriation of trade secrets.84

In Garner Tool & Die v. Laux,85 Garner Tool was in the business of designing tools and tool-making processes.86 Garner Tool employed the defendants, one of whom was Laux, as tool and die makers, and the defendants left Garner Tool to start their own tool-making business.87 The defendants used the processes they learned at Garner Tool to sharpen knives and punch stretch bands; they were awarded a bid from Goodyear who had previously been on contract with Garner Tool.88 Garner Tool alleged in a cause of action that the defendants breached the common law duty not to disclose a prior employer’s trade secrets.89 The issue before the Nebraska Supreme Court was whether the processes of sharpening knives and punching holes in rubber stretch bands were valid trade secrets.90 The court recognized that an action for both an injunction and damages for misappropriation of

81. *Id.* The court laid out several factors to consider in determining whether information qualifies as a trade secret:

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

*Id.* (citing Restatement (First) of Torts § 757 (A.M. Law. Inst. 1939)).

82. *Id.* at 774; see also Home Pride Foods, Inc. v. Johnson, 634 N.W.2d 774, 780-81 (Neb. 2001) (affirming the standard of review in an action for damages).

83. Henkle, 239 N.W.2d at 779.

84. *Id.*


86. Garner Tool, 285 N.W.2d at 220.

87. *Id.* at 220-21.

88. *Id.* at 221.

89. *Id.*

90. *Id.*
trade secrets was in equity and subject to a de novo standard of re-
view.91 Affirming the trial court, the court determined that the 
processes of sharpening knives and punching holes were matters of 
general knowledge to the tool and die making craft, thus no protect-
able trade secrets were misappropriated.92

In Garner Tool, the court identified the common law elements for 
trade secret misappropriation.93 The court stated that in the absence 
of some agreement with the former employer, an employee’s right to 
compete in business with the former employer is no different than 
that of a stranger to the employment contract—subject to the limita-
tion that a former employee is prohibited from using trade secrets ac-
quired in the course of his employment for his own advantage and to 
the detriment of his former employer.94 Aside from the aforemen-
tioned limitation, once an employee terminates his employment con-
tract, he may seek out his former employer’s customers and use what 
he learned in the course of his former employment.95

In Selection Research, Inc. v. Murman,96 Selection Research en-
gaged in the business of performing the hiring process for other busi-
nesses.97 Selection Research used a structured interview composed of 
questions asked in a certain order and compared the answers with 
themes common to the answers of a focus group of successful per-
sons.98 Selection Research alleged that its structured interview in-
strument was unique to the company, although the structured 
interview technique was widely known across practitioners in the 
field.99 After a dispute, Murman left Selection Research and went to 
work for a prior client where he continued interviewing potential new 
hires and used the structured interview techniques he learned at his 
employment with Selection Research.100 Selection Research brought

91. Id. at 220.
92. Id. at 222-23.
93. Id. at 221. The court stated the elements for a misappropriation of trade secrets cause of action are:
    (1) the existence of a trade secret; (2) the value and importance of the trade secret to the employer in the conduct of his business; (3) the employer’s right by reason of discovery or ownership to the use and enjoyment of the trade secret; and (4) the communication of the trade secret to the employee while he was employed in a position of trust and confidence and under circumstances making it inequitable and unjust for him to disclose it to others or use it to the employer’s prejudice.
Id.
94. Id. at 223.
95. Id.
96. 433 N.W.2d 526 (Neb. 1989).
98. Selection Research, 433 N.W.2d at 528.
99. Id.
100. Id. at 530.
suit against Murman to enjoin his use of the structured interview technique, and the trial court permanently enjoined Murman from using or disclosing the certain interview procedures.\footnote{101}

In \textit{Selection Research}, the court, in its opinion vacating the trial court’s order enjoining the defendant’s use of the structured interview, emphasized the common law concept that matters of general knowledge in an industry cannot be appropriated and are not actionable as trade secrets.\footnote{102} Personnel selection devices were too widely known and publicly documented of a process for Selection Research to successfully assert that its instrument was a trade secret.\footnote{103} Also, there were only superficial similarities between the instruments that Selection Research used and the instrument that Murman used.\footnote{104} The court dismissed the claim, as the interview questions that were alleged to be trade secrets were not sufficiently unique to qualify as trade secrets.\footnote{105}

\textbf{B. NEBRASKA ADOPTS THE UNIFORM TRADE SECRETS ACT}

As common law trade secret protection continued to develop unevenly and confusingly across jurisdictions, industries under economic and technological pressures demanded uniform trade secret jurisprudence.\footnote{106} The American Bar Association’s Special Committee on the Uniform Trade Secrets Protection Act recognized that although there were a substantial number of reported trade secret decisions in commercial centers, agricultural jurisdictions and less populous areas had failed to develop a satisfactory jurisprudence.\footnote{107} Also, even in those jurisdictions where the jurisprudence had developed, there was uncertainty in the boundaries of trade secret protection and the available remedies for misappropriation of a trade secret.\footnote{108} After over seven years of work, the National Conference of Commissioners on Uniform State Laws approved the 1979 Uniform Trade Secrets Act.

\footnote{101. \textit{Id.} at 527.}
\footnote{102. \textit{Id.} at 532.}
\footnote{103. \textit{Id.}}
\footnote{104. \textit{Id.}}
\footnote{105. \textit{Id.} at 533.}
\footnote{106. \textit{UNIF. TRADE SECRETS ACT WITH 1985 AMENDMENTS}, Prefatory Note (UNIF. LAW COMM’N 1985).}
\footnote{107. \textit{UNIF. TRADE SECRETS ACT WITH 1985 AMENDMENTS}, Prefatory Note (UNIF. LAW COMM’N 1985). The Commissioners’ prefatory note stated: Notwithstanding the commercial importance of state trade secret law to interstate business, this law has not developed satisfactorily. In the first place, its development is uneven. Although there typically are a substantial number of reported decisions in states that are commercial centers, this is not the case in less populous and more agricultural jurisdictions. \textit{Id.}}
\footnote{108. \textit{Id.}}
The purpose of the UTSA is to codify the common law principles of trade secret protection and provide uniform trade secret jurisprudence across the jurisdictions that adopt the measure. On July 9, 1988, the Nebraska unicameral legislature signed the Nebraska Trade Secret Act ("NTSA") into law, which was a piece of legislation codifying the UTSA. The legislature enacted the NTSA with the principal objective in mind of clarifying and strengthening trade secret protection in Nebraska. The NTSA provides remedies for misappropriation of a trade secret, which include actual damages, an injunction, as well as the award of a reasonable royalty for misappropriation. The NTSA adopted a statute of limitation of four years for a trade secret misappropriation claim, which runs once the misappropriation is discovered or should have been discovered by the exercise of reasonable diligence.

As is the case with most uniform acts, the NTSA was adopted with several minor deviations from the UTSA. Nebraska inserted language into the NTSA that provides for protective orders of court documents instead of in-camera proceedings in an attempt to retain Nebraska's public policy of maintaining public access to court proceedings. The Nebraska legislature also altered the UTSA's definition of a trade secret by deleting the words generally and readily ascertainable, and instead stating more broadly that a trade secret must not be known or ascertainable by the public by any means, which raised the standard for the definition of a trade secret. Lastly, the NTSA de-

109. Id.
110. Id.
111. Buechler, supra note 63, at 327-28.
112. Buechler, supra note 63, at 326-27.
115. See Buechler, supra note 63, at 325-29 (discussing the discrepancies between the UTSA and the NTSA as adopted by the Nebraska legislature).
116. Buechler, supra note 63, at 327.
117. See Unif. Trade Secrets Act With 1985 Amendments § 1 (Unif. Law Comm’n 1986) (providing: (4) “Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (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.”). But see Neb. Rev. Stat. Ann. § 87-502 (providing: “(4) Trade secret shall mean information, including, but not limited to, a drawing, formula, pattern, compilation, program, device, method, technique, code, or process that: (a) Derives independent economic value, actual or potential, from not being known to, and not being ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”).
leted a provision from the UTSA providing for the displacement of the common law, as Nebraska had not developed a common law trade secret jurisprudence to the point that it conflicted with the provisions of the UTSA, and thus, the displacement provision was not seen as necessary by the legislature.118

The basic principles underlying the NTSA are a valuable contribution to Nebraska’s trade secret jurisprudence because at the time of its enactment the decisional law in the area had not yet fully developed.119 In addition, the NTSA advanced several important public policy objectives of trade secret law, including the establishment of standards for commercial ethics as well as the encouragement of invention.120 Although the NTSA’s implementation furthered the UTSA’s goal of achieving trade secret uniformity across jurisdictions, the NTSA’s variances from the UTSA would not go unnoticed for long.121

C. The Nebraska Supreme Court’s Interpretations of the NTSA

In Richdale Development Co. v. McNeil Co., Inc.,122 a developer brought an action for misappropriation of trade secrets against a competitor, alleging that the competitor misappropriated architectural plans with the intent to use the plans for his own benefit.123 The competitor snagged a set of architectural plans from an apartment complex while it was in the construction process by the developer.124 The competitor removed all the names from the plans, photocopied the plans, and sent the plans out to subcontractors to solicit bids for a new

118. Buechler, supra note 63, at 328-29.
119. Buechler, supra note 63, at 346-47; see Unif. Trade Secrets Act With 1985 Amendments, Prefatory Note (Unif. Law Comm’n 1985) (stating that notwithstanding the importance of trade secret law to business, the law of trade secrets has not developed satisfactorily). See also Cudahy Co. v. Am. Labs., Inc., 313 F. Supp. 1339, 1342 (Neb. 1970) (stating Nebraska’s highest court had yet to rule on the issue of whether information is a trade secret).
120. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 481 (1974) (stating that “the maintenance of standards of commercial ethics and the encouragement of invention are the broadly stated policies behind trade secret law.”).
121. See Buechler, supra note 63, at 344 (contending that the NTSA’s variances from the UTSA run counter to the UTSA’s purpose of establishing uniformity as the variances encourage the development of two inconsistent and separate bodies of law). See also First Express Servs. Grp., Inc. v. Easter, 840 N.W.2d 465, 474 (Neb. 2013) (recognizing that the NTSA’s omission of the words generally and readily significantly restrict what information may qualify as a valid trade secret).
122. 508 N.W.2d 853 (Neb. 1993), opinion modified on denial of reh’g, 510 N.W.2d 312 (Neb. 1994).
124. Richdale, 508 N.W.2d at 855-56.
When the competitor heard he was being sued, he rounded up all the plans and destroyed them. The developer contended that the creation of the plans, which were allegedly a very successful design, cost the developer around $250,000. The Nebraska Supreme Court noted that the City of Omaha only issued construction permits upon the public filing of construction plans, but the developer stated that it did not intend to release its plans into the public domain as it had numbered each version of the plans and required deposits for the return of the plans from subcontractors.

Reversing the trial court’s grant of injunctive relief, the court emphasized that under the NTSA, the existence of an employer-employee relationship was no longer a required element for misappropriation of trade secrets. Thus, the developer had a valid claim for misappropriation, granted it could prove both that the misappropriated information could derive independent economic value from not being known by the public and the developer took reasonable efforts to maintain the information’s secrecy. However, the court found that architectural plans were not capable of trade secret protection, as knowledge of architectural concepts such as balconies and even room sizes can be gained by general observation. The court reversed the trial court’s order enjoining the competitor from using the plans.

In Home Pride Foods, Inc. v. Johnson, a food service company, Home Pride, brought an action under the NTSA against a competitor that acquired Home Pride’s customer list. Home Pride’s customer list contained the contact information of its customers as well as the amount of food each customer ordered in the past. The Nebraska Supreme Court held for the first time that a customer list could be included in the definition of a trade secret under the NTSA, and that in this case the list qualified as a protectable trade secret.

A trade secret misappropriation occurred in Home Pride Foods when the competitor paid $800 for a stolen copy of Home Pride’s customer list that contained information about its customers including

125. Id. at 856.
126. Id.
127. Id.
128. Id.
129. Id. at 859.
130. Id. at 859-60.
131. Id. at 860.
132. Id. at 861.
133. 634 N.W.2d 774 (Neb. 2001).
135. Home Pride Foods, 634 N.W.2d at 781, 782.
136. Id. at 784.
their names, telephone numbers, addresses, food ordered, and number of reorders.137 Home Pride had the customer list stored on its computers protected behind three passwords and safeguarded the paper files.138 The president of Home Pride, his secretary, and the sales manager were the only employees who had access to the list; each sales representative signed an agreement not to compete or discuss trade secrets, including customer lists.139

The issue before the court asked whether a customer list was entitled to protection as a trade secret under the NTSA.140 The court held that the definition of a trade secret is a question of law, and that the appellate court shall review the conclusion of the trial court, which ruled in favor of Home Pride, de novo.141 The court also specified that whether the information sought to be protected is a trade secret is a question of fact; thus, the bench trial verdict would not be set aside unless clearly erroneous, similar to a jury verdict.142

While the court acknowledged that the customer list was clearly misappropriated, as the competitor paid $800 for a stolen list, it also noted how other courts are hesitant to recognize customer lists as trade secrets because the lists contain public information that is readily ascertainable, except to the extent that time and effort had been expended to prepare a list to target customers with particular characteristics or needs.143 In this case, however, the list contained information about the amount of food each customer ordered previously.144 The court opined that such information provided the competitor with a way to undercut the company’s pricing.145 The court determined that the trial court was not clearly wrong in finding that the list was not capable of being ascertained through proper means, as the list contained information that was not available from publicly available lists: the number of orders each customer placed and the amount of such orders.146 Circumstantial evidence proved that the competitor used Home Pride’s list.147 As for damages, the court opined that the trial court erred in awarding lost profits when there was no evidence of net profits, only gross profits.148 The court further held that damages

137. Id. at 777.
138. Id. at 778.
139. Id.
140. Id. at 781.
141. Id.
142. Id. at 780-81.
143. Id. at 782.
144. Id.
145. Id.
146. Id.
147. Id. Many customers were contacted by the competitor without reaching out to the competitor and received discounts on their orders. Id.
148. Id. at 784.
could not be awarded for a reasonable royalty for future use when a permanent injunction had been issued, as the two remedies essentially contradict each other.\textsuperscript{149}

In \textit{First Express Services Group, Inc. v. Easter},\textsuperscript{150} a crop insurance saleswoman resigned from her crop insurance agency to work for her son, who owned a competing agency.\textsuperscript{151} The saleswoman took with her a customer list and transferred to the competing agency many customers from her prior agency.\textsuperscript{152} The crop insurance agency sued for misappropriation of trade secrets and unjust enrichment, and the jury found for the crop insurance agency on all claims.\textsuperscript{153} The Nebraska Supreme Court bypassed the Nebraska Court of Appeals to review the case, reversing the trial court’s ruling as to the proper identification of a customer list as a trade secret.\textsuperscript{154}

The court recognized that the NTSA differs significantly from the UTSA, emphasizing the Nebraska legislature’s deletions of the restrictive adverbs generally and readily in the statutory definition of a trade secret.\textsuperscript{155} The court accepted the opinion of one commentator, who noted that under the liberal terms of the statute, any information that is ascertainable at all via any means that are not improper would technically be excluded from protection by the NTSA.\textsuperscript{156} The court gave the statutory text its plain and ordinary meaning, and found that the crop insurance customer list was not a protectable trade secret as it was technically ascertainable by proper means.\textsuperscript{157} If someone wanted the information, he or she could gather it through a public search of the Internet or simple telephone calls.\textsuperscript{158} The court attempted to reconcile this holding with its holding in \textit{Home Pride Foods} by pointing out that in \textit{Home Pride Foods}, the list had information which was not available through public sources.\textsuperscript{159} The court noted that Home Pride expended time and effort to compile its customers’ information and prior order amounts, and thus its list contained information unobtainable from publicly available lists.\textsuperscript{160} Contrastingly, the insurance agency’s list in \textit{First Express} contained locations and

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\textsuperscript{149} \textit{Id.} \\
\textsuperscript{150} 840 N.W.2d 465 (Neb. 2013). \\
\textsuperscript{151} \textit{First Express Servs. Grp., Inc. v. Easter}, 840 N.W.2d 465, 467 (Neb. 2013). \\
\textsuperscript{152} \textit{First Express}, 840 N.W.2d at 467. \\
\textsuperscript{153} \textit{Id.} \\
\textsuperscript{154} \textit{Id.} at 471, 478. \\
\textsuperscript{155} \textit{Id.} at 474. \\
\textsuperscript{156} \textit{Id.} (citing Buechler, supra note 63, at 339). \\
\textsuperscript{157} \textit{Id.} \\
\textsuperscript{158} \textit{Id.} at 475. \\
\textsuperscript{159} \textit{Id.} \\
\textsuperscript{160} \textit{Id.}
\end{flushleft}
identities of customers, obtainable from public databases, which any person could use to identify potential customers.161

IV. ANALYSIS

The Defend Trade Secrets Act of 2016 ("DTSA") provides a uniform federal civil remedy for victims of trade secret misappropriation without expressly preempts any state law.162 Innovators no longer need to rely on inconsistent state laws to protect their intellectual property and confidential information because trade secrets have protection similar to patents and trademarks, which account for the other forms of intellectual property.163 The DTSA grants federal courts the power to issue orders to seize property, preserve evidence, and prevent the dissemination of a trade secret.164 The DTSA also gives victims of trade secret misappropriation several remedies, most closely resembling those available under the Uniform Trade Secrets Act ("UTSA").165 Such remedies include: equitable relief; payment of a reasonable royalty for future misappropriation; compensatory damages for actual loss and unjust enrichment caused by misappropriation; exemplary damages, if the trade secret is maliciously and willfully misappropriated; and an award of attorney's fees to the prevailing party if a claim or an opposition to a claim was made in bad faith or there was willful and malicious misappropriation.166

First, this Analysis will argue that victims of trade secret misappropriation in Nebraska will find the federal forum under the DTSA favorable as the DTSA has a less restrictive definition of a trade secret than the Nebraska Trade Secrets Act ("NTSA").167 Next, this Analy-

161. Id.
162. 18 U.S.C. §§ 1836, 1838 (2012). The DTSA states that “[a]n owner of a trade secret that is misappropriated may bring a civil action under this subsection if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce.” 18 U.S.C. § 1836(b)(1). Further, the DTSA states “[t]he district courts of the United States shall have original jurisdiction of civil actions brought under this section.” Id. at § 1836(c). Section 1838 states that the DTSA “shall not be construed to preempt or displace any other remedies, whether civil or criminal, provided by United States Federal, State, commonwealth, possession, or territory law for the misappropriation of trade secret . . . .” 18 U.S.C. § 1838.
165. See id. (providing for remedies of damages, injunctions, and the imposition of a reasonable royalty). See also UNIF. TRADE SECRETS ACT WITH 1985 AMENDMENTS § 2-3 (UNIF. LAW COMM’N 1985) ( avail the remedies of monetary damages, an injunction, and the imposition of a reasonable royalty).
166. 18 U.S.C. § 1836.
167. See infra notes 171-179 and accompanying text.
sis will argue that victims should take advantage of the federal forum as the DTSA’s ex parte civil seizure provision provides victims with valuable protection from dissemination of their trade secrets.\textsuperscript{168} Then, this Analysis will argue that the provisions of the DTSA providing for exemplary damages and the recovery of reasonable attorney’s fees are particularly favorable for victims whose trade secrets have been stolen.\textsuperscript{169} Finally, this Analysis will argue that victims should bring suit in the federal forum because public policy favors uniform trade secret jurisprudence.\textsuperscript{170}

A. \textbf{NEBRASKA PLAINTIFFS WILL FIND THE DTSA’S DEFINITION OF A TRADE SECRET LESS RESTRICTIVE THAN THE DEFINITION UNDER THE NTSA}

A major problem victims of trade secret misappropriation in Nebraska face is qualifying the information they seek to protect as a valid trade secret under Nebraska law.\textsuperscript{171} Generally, under the federal DTSA, a trade secret owner must take reasonable measures to keep the information secret, and the information must derive independent economic value from not being generally known to, and not being readily ascertainable by, another person.\textsuperscript{172} The Nebraska legislature’s omission of the words generally and readily from the definition of a trade secret imposes an additional burden on victims of trade secret misappropriation in Nebraska.\textsuperscript{173}

\begin{footnotesize}
\begin{enumerate}
  \item See infra notes 180-190 and accompanying text.
  \item See infra notes 191-199 and accompanying text.
  \item See infra notes 200-207 and accompanying text.
  \item See infra notes 200-207 and accompanying text.
  \item See infra notes 180-190 and accompanying text.
  \item See Richdale Dev. Co. v. McNeil Co., Inc., 508 N.W.2d 853, 860-61 (Neb. 1993) (opining that architectural plans did not meet the definition of a trade secret as the plans were known to and ascertainable by other people due to the fact that anyone could look at an apartment building and take note of the open concepts). \textit{See also} First Express Servs. Grp., Inc. v. Easter, 840 N.W.2d 465, 475-76 (Neb. 2013) (concluding that an insurance customer list containing names, phone numbers, and the insurance policies of crop farmers did not meet the definition of a trade secret as a person exercising a diligent search on the Internet or through a phone book could ascertain all of the information). \textit{But see} Home Pride Foods, Inc. v. Johnson, 634 N.W.2d 774, 782 (Neb. 2001) (finding a customer list met the definition of a trade secret as it contained information only the company could possibly obtain—namely, the amount of food each customer had ordered).
  \item See 18 U.S.C. § 1839 (stating that a trade secret constitutes a certain type of information which “(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.”).
  \item Compare Neb. Rev. Stat. \textit{Ann.} § 87-502 (stating a trade secret derives its value from “not being known to, and not being ascertainable by proper means”), and \textit{First Express}, 840 N.W.2d at 474 (noting that the omission of the words “generally” and “readily” narrowed what constitutes a trade secret), with \textit{Unif. Trade Secrets Act With 1985 Amendments} § 1 (\textit{Unif. Law Comm’n} 1985) (qualifying “known to” and “as-}
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noted the significance of omitting the terms, and the burden imposed by Nebraska’s definition has proven detrimental to plaintiffs. The DTSA, on the other hand, retains the qualifying adjectives generally and readily. With the DTSA’s retention of generally and readily, the architectural plans that failed to satisfy the state law trade secret definition in *Richdale Development Co. v. McNeil Co., Inc.* would pass muster as protectable trade secrets under federal law, as the plans—although capable of being known, ascertained, and circumscribed by someone with the input of a considerable amount of effort—were not generally known or readily ascertainable through proper means by that someone. Thus, the DTSA is more favorable to plaintiffs. As a result, plaintiffs whose trade secrets have been misappropriated should pursue an action in federal court because the DTSA contains a broader definition of a trade secret.

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174. See *First Express*, 840 N.W.2d at 474 (recognizing that the omission of the words generally and readily eliminated any qualification of the words known or ascertainable, thus if information is capable of being known or ascertained by any means, it does not meet the definition of a trade secret, and noting that a simple phone call made the information ascertainable).


176. 508 N.W.2d 853 (Neb. 1993), opinion modified on denial of reh’g, 510 N.W.2d 312 (Neb. 1994).

177. Compare *Richdale*, 508 N.W.2d at 860 (stating that apartment complex architectural plans do not qualify as a trade secret as a person can observe an apartment complex with his or her eyes, thus he or she can theoretically ascertain its architectural plans), *with* United States v. Hsu, 155 F.3d 189, 196 (3d Cir. 2001) (iterating that the EEA, due to its retention of the qualifying adjectives “generally” and “readily” in its definition of a trade secret, broadens the scope of what qualifies as a trade secret as compared to the UTSA), *and* 18 U.S.C. § 1839 (stating that a trade secret must derive economic value 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.”).

178. Compare *First Express*, 840 N.W.2d at 474 (recognizing that the NTSA’s omission of the qualifying adjectives generally and readily restricts the definition of a trade secret, and dismissing the plaintiff’s claim for misappropriation of its trade secret as its customer list was technically ascertainable through a search of public databases), *with* 18 U.S.C. § 1839(3)(B) (retaining the qualifying adjectives “generally” and “readily” in the definition of a trade secret).

179. Compare *NEB. REV. STAT. ANN.* § 87-502 (defining a trade secret as certain information that is not known to or ascertainable through any means), *with* 18 U.S.C. § 1839(3)(B) (defining a trade secret as certain information which is not generally known to or readily ascertainable though any means) (emphasis added).
B. THE EX PARTE CIVIL SEIZURE PROVISION WILL PROVIDE PLAINTEES WITH VALUABLE PROTECTION FROM DESTRUCTION OF EVIDENCE IN TRADE SECRET LITIGATION

Once a plaintiff in Nebraska files a lawsuit for misappropriation of trade secrets, a defendant could attempt to protect itself and destroy all discoverable evidence of the trade secret misappropriation.180 In Nebraska, a victim of trade secret misappropriation may obtain a protective order to stop a person or entity from using alleged trade secrets.181 The NTSA does not provide any ex parte procedure to protect against trade secret dissemination.182 Further, the Nebraska Supreme Court refuses to issue an order that will restrict an employee’s right to work and earn a living, even though it may allow the continued dissemination of a trade secret.183

In contrast to Nebraska law, the DTSA allows a plaintiff to petition the court for a seizure of any property necessary at the forefront of a lawsuit to prevent dissemination of a trade secret.184 The DTSA ex parte civil seizure provision provides the opportunity to contain the theft of trade secrets before secrets are disseminated and their value is depleted.185 Plaintiffs in Nebraska will find the federal ex parte civil seizure provision favorable as it will reduce the burden of going through discovery to find out what information a defendant has misappropriated, and additionally, it will prevent economic loss on the plaintiff’s behalf as the trade secret will not lose its value and the plaintiff will not have to go to great lengths to ascertain damages.186

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180. See Richdale Dev. Co. v. McNeil Co., Inc., 508 N.W.2d 853, 856 (Neb. 1993) (noting that when the defendant learned he was being sued, he destroyed all of the plans he had stolen).
183. See Securities Acceptance Corp. v. Brown, 107 N.W.2d 540, 541-42 (Neb. 1961) (refusing to restrain an employee’s right to work for a new employer due to the fact that he may inevitably disclose trade secrets because the court will not presume wrongdoing by the employee).
184. See 18 U.S.C. § 1836(b)(2)(A)(i) (stating that the court may issue an order “providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action.”).
186. See 18 U.S.C. § 1836(b)(2) (providing an avenue for trade secret owners to quickly and efficiently prevent the dissemination of their trade secrets through an ex parte application). See also Home Pride Foods, Inc. v. Johnson, 634 N.W.2d 774, 784 (Neb. 2001) (noting, in an action where the ex parte seizure provision was not available, the trade secret owner had difficulty calculating damages as it could not ascertain which customers had been contacted and solicited for orders by the defendant).
Further, while Nebraska law states that an injunction must end once a trade secret ceases to exist, the DTSA contains no such provision, providing victims of trade secret misappropriation with endless protection from competitors.\footnote{Compare \textit{Nebr. Rev. Stat. Ann.} § 87-503(1) (stating that “[upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.”), with 18 U.S.C. § 1836 (containing no provision that limits the duration of an injunction enjoining the use of a trade secret).}

The ex parte civil seizure provision greatly limits itself, as a plaintiff must meet several demanding requirements and make a prima facie showing of entitlement to relief before an ex parte order will be issued under extraordinary circumstances.\footnote{See 18 U.S.C. § 1836(b)(2)(A)(i) (stating the court may “upon ex parte application but only in extraordinary circumstances, issue an order providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action.”). To issue an ex parte civil seizure order, the court must find: (1) another form of relief is inadequate, (2) threat of an irreparable and immediate injury, (3) harm to the trade secret owner outweighs harm to the competitor, (4) the trade secret owner is likely to succeed in the action, (5) the defendant actually possesses the trade secret, (6) the application is reasonably particular regarding property to be seized and its location, (7) the defendant would destroy the property, and (8) the trade secret owner has not made the request public. \textit{Id.})}

Further, in the event that an ex parte order is sought by a plaintiff in bad faith, the plaintiff may be subject to penalties and attorney’s fees.\footnote{18 U.S.C. §§ 1836(b)(2)(G), 1836(b)(3)(D).} However, the aforementioned limits should not deter plaintiffs from using the federal forum because the extraordinary circumstances language included in the statute was inserted to acknowledge general disfavor of ex parte procedures, not to impose an additional burden on trade secret owners.\footnote{See 162 Cong. Rec. S1,634 (iterating that “the ‘extraordinary circumstances’ language was not added to add an additional requirement to obtaining an ex parte seizure, but to acknowledge the Judiciary’s general disfavor of ex parte procedures and to reinforce that particular circumstances are required to utilize the seizure provisions, but still provide a much needed avenue for ex parte seizures when necessary.”)}

C. VICTIMS OF MISAPPROPRIATION HAVE THE OPPORTUNITY TO RECOVER MORE DAMAGES UNDER THE DTSA COMPARED TO THE NTSA

The DTSA and the NTSA provide remedies distinct enough to make the federal forum beneficial to plaintiffs.\footnote{Compare 18 U.S.C. § 1836 (providing an opportunity for attorney’s fees and exemplary damages in cases where a trade secret is maliciously and willfully misappropriated), with \textit{Nebr. Rev. Stat. Ann.} § 87-501–87-507 (containing no provision awarding exemplary damages or attorney’s fees).} The DTSA gives victims of trade secret misappropriation the opportunity to be awarded exemplary damages in the case that a trade secret is mali-
In contrast to compensatory damages, which are designed to restore the status quo before a misappropriation occurred, the function of exemplary damages is to punish a wrongdoer for his actions, to force him to atone for his conduct, to deter society and the wrongdoer from repeating said conduct, and to vindicate a plaintiff's sense of entitlement from the wrongdoer. The DTSA permits a jury to award such exemplary damages, and it caps the award available at two times the sum of the actual loss sustained by the plaintiff and any unjust enrichment awarded to the plaintiff. The jury's imposition of such an award serves yet another function: to reflect the public's indignation of the defendant's conduct. Further, the DTSA allows a victim to recover reasonable attorney's fees in the case that a misappropriation occurs willfully or maliciously. In contrast to the DTSA, the NTSA does not provide for exemplary damages or attorney's fees, and Nebraska has prohibited punitive damages or the award of attorney's fees unless expressly granted by a statute. Thus, in a federal cause of action under the DTSA, a plaintiff could recover twice the amount of damages than in an action under Nebraska law. Because trade secret litigation is expensive and time consuming, victims of trade secret misappropriation in Nebraska will find the federal forum favorable, if they are successful with their claim, as the DTSA presents the opportunity to receive an award of a greater amount of damages.

193. See Harv. L. Rev. Assoc., Exemplary Damages in the Law of Torts, 70 Harv. L. Rev. 517, 522 (1957) (outlining the historical purposes of exemplary damages, often also referred to as vindictive or punitive damages).
195. See Harv. L. Rev. Assoc., supra note 193, at 522 (stating that exemplary damages "constitute a kind of public revenge by reflecting the jury's indignation at the defendant's conduct.").
197. See Neb. Rev. Stat. Ann. § 87-504 (failing to provide for the award of attorney's fees or exemplary damages). See also Abel v. Conover, 104 N.W.2d 684, 688 (Neb. 1960) (emphasizing the fundamental rule in Nebraska that punitive damages are unconstitutional, thus damage awards may only be compensatory in nature).
198. Compare 18 U.S.C. § 1836 (providing for the award of exemplary damages, not to exceed twice the sum of the amount of the plaintiff's calculated actual loss and defendant's unjust enrichment, in cases where a trade secret is maliciously and willfully misappropriated), with Neb. Rev. Stat. Ann. § 87-501–87-507 (containing no provision awarding exemplary damages and only allowing a recovery for actual loss sustained and unjust enrichment).
D. Public Policy Favors a Robust Federal Trade Secret Forum Rather Than Diverse, Inconsistent State Jurisprudence

In the modern globalized economy, trade secret misappropriation rarely stays within one state’s borders, and a uniform national standard is necessary as unlawful acquisition of trade secrets is a particularly economically damaging crime.\(^\text{200}\) The economic loss attributable to trade secret misappropriation, which is estimated to be over $300 billion a year, gives entrepreneurs less incentive to innovate.\(^\text{201}\) Trade secret owners need certainty in order to feel confident in investing in the research and development of new trade secrets; inconsistent state law does not provide this certainty.\(^\text{202}\) The DTSA provides a single, uniform national trade secret jurisprudence with clear rules and predictability for all parties involved.\(^\text{203}\) Further, the DTSA gives trade secret owners more protection from the public eye than does the NTSA, it puts the litigation in the hands of federal judges who historically handle intellectual property disputes, and it grants trade secret owners the expansive jurisdictional reach of the federal courts.\(^\text{204}\)

Uniformity of trade secret policy is of international importance also: on May 27, 2016, the European Council adopted a directive that harmonized across the European Union (“EU”) the definition of a trade secret, the protection afforded to trade secrets, and the remedies available to a plaintiff in the event a misappropriation occurs.\(^\text{205}\) The adoption of this measure by the EU, in addition to the adoption of the


\(^{201}\) Id.

\(^{202}\) See 162 CONG. REC. H2,031 (statement of Dean C. Garfield, Information Technology Industry Council) (stating that the state’s trade secret laws are effective for local theft but are incapable of meeting the demands of today’s global trade secret misappropriations).


\(^{204}\) Compare 18 U.S.C. § 1839 (providing for the court appointment of a special master, bound by a non-disclosure agreement, to locate and isolate all trade secret information and data, as well as an encryption motion available to parties to encrypt any seized material and providing for a civil right of action in the federal forum for victims of trade secret misappropriation), with Neb. Rev. Stat. Ann. § 87-501–87-507 (providing only a state civil right of action as opposed to the court appointment of a special master bound by a nondisclosure agreement). See 162 CONG. REC. H2,031 (statement of Dean C. Garfield, Information Technology Industry Council) (noting that the other forms of intellectual property are federally protected). See also Anand B. Patel, Jeffrey A. Pade, Victoria Cundiff & Bradford Newman, The Global Harmonization of Trade Secret Law: The Convergence of Protections for Trade Secret Information in the United States and European Union, 83 Def. Couns. J. 472 (2016) (stating that federal courts will become attractive under the DTSA as they can exercise jurisdiction over extraterritorial conduct if “the misappropriator is a U.S. citizen or entity or ‘an act in furtherance of the offense’ was committed in the U.S.”).

\(^{205}\) Patel, Pade, Cundiff & Newman, supra note 204, at 474-75.
DTSA by the United States, clearly indicates an international consensus that inconsistent trade secret protection across jurisdictions is detrimental to the global economy.\textsuperscript{206} Thus, as both national and international public policy favor uniform trade secret jurisprudence, and the DTSA contemplates a uniform trade secret jurisprudence, victims of trade secret misappropriation in Nebraska should bring their suits in the federal forum under the DTSA.\textsuperscript{207}

V. CONCLUSION

The Defend Trade Secrets Act of 2016 ("DTSA") creates a federal civil private right of action for victims whose trade secrets have been misappropriated.\textsuperscript{208} The DTSA was modeled after the Uniform Trade Secrets Act ("UTSA") and offers trade secret owners a variety of remedies, including injunctions, actual damages, unjust enrichment, royalties, exemplary damages, and attorney’s fees.\textsuperscript{209} It also has an innovative solution to prevent the dissemination of trade secret information during litigation, known as the ex parte civil seizure provision, which allows for immediate seizure of any information that is alleged to be misappropriated.\textsuperscript{210}

With the federal forum now open for trade secret litigation, victims of trade secret misappropriation face the conundrum of deciding whether to file suit in federal or state court.\textsuperscript{211} Although claims made under state common and statutory law may have predictable results, the federal forum will be favorable to victims of trade secret misappropriation as the DTSA’s definition of a trade secret is broader.\textsuperscript{212} Further, the DTSA’s ex parte civil seizure provision provides necessary protection against the dissemination and demise of a trade secret during litigation.\textsuperscript{213} It is also clear that the federal forum is favorable due to the fact that a victim of trade secret misappropriation may recover exemplary damages exceeding those available under Nebraska.

\textsuperscript{206} Id. at 473 (indicating it is clear the United States and European regions “have recognized the substantial value of trade secrets to the global economy and have decided to take analogous stances on the basics of trade secret law . . . .”).

\textsuperscript{207} 18 U.S.C. § 1836; 162 CONG. REC. S1,634 (daily ed. Apr. 4, 2016) (statement of Sen. Grassley) (emphasizing how the United States needs a uniform, national standard for trade secret jurisprudence as the state law is inconsistent across jurisdictions and trade secret misappropriation is a national economically damaging crime); Patel, Pade, Cundiff & Newman, supra note 204, at 474-75 (iterating how the EU recently saw it fit to enact uniform trade secret jurisprudence closely resembling the DTSA).

\textsuperscript{208} 18 U.S.C. § 1836.


\textsuperscript{211} See supra notes 1-8 and accompanying text.

\textsuperscript{212} See supra notes 171-179 and accompanying text.

\textsuperscript{213} See supra notes 180-190 and accompanying text.
Finally, due to the fact that trade secrets are a form of intellectual property and the way that trade secret jurisprudence has inconsistently developed across the states, victims should use the federal forum as public policy favors uniform national and international trade secret standards.215

Nebraska trade secret owners should not hesitate to use the federal trade secret forum under the DTSA. Victims of trade secret misappropriation in Nebraska should file suit under the DTSA with confidence. The broad definition of a trade secret under the DTSA makes it easier for victims to qualify their information as a protectable trade secret. Further, not only will the DTSA provide greater trade secret protection than Nebraska law, but it also supports public policy to encourage the development of a uniform trade secret jurisprudence within the federal forum.

Brennan R. Block—’18

214. See supra notes 191-199 and accompanying text.
215. See supra notes 200-207 and accompanying text.