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Diversity As A Trade Secret

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Throughout history, women and racial minorities have been excluded and marginalized in the United States workforce. Many of the industries that dominate the economy in wealth, status, and power continue to struggle with a lack of diversity. Various stakeholders have been mobilizing to improve access and equity, but there is an information asymmetry that makes this pursuit daunting. When potential plaintiffs and other diversity advocates use FOIA and discovery requests to access relevant employment information, many companies have responded with virulent attempts to maintain secrecy. To conceal this information, companies have increasingly made the novel argument that diversity data and strategies are protected trade secrets. This may sound like an unusual, even suspicious, legal argument. When we think of trade secrets, we often think of famous examples such as the Coke formula, Google’s algorithm, or McDonald’s special sauce used on the Big Mac sandwich. In this essay, I use the technology industry as an example to examine the trending legal argument of treating diversity as a trade secret. I discuss how companies can use this tactic to hide gender and race disparities and interfere with the advancement of civil rights law and workplace equity. Instead of hiding information, I argue that diversity data and strategies should be treated as public goods. This type of open model will advance the goals of equal opportunity law by raising awareness of inequities and opportunities, motivating employers to invest in effective practices, facilitating collaboration on diversity goals, fostering innovation, and increasing accountability for action and progress.

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I. INTRODUCTION

Lack of diversity and bias have been systemic problems in our nation’s most powerful and elite industries. Leaders in finance, technology, the legal profession, and film have been pressed to dismantle exclusionary practices, such as the old (in some cases young) boys’ networks that maintain inequality. For example, media outlets, members of Congress, social justice groups, and other stakeholders have called on these industries to improve representation of women and racial minorities, make their workplace environments more inclusive, and adopt more equitable practices. A major challenge to those investigating workplace inequality is that employers almost exclusively possess the relevant information on workforce demographics, hiring, promotion, compensation, and employment policies and practices. Without this information, potential plaintiffs and other diversity advocates are unable to properly assess the problem and strive for effective solutions. Companies keep close guard of this information, with motives to conceal anything that could remotely reveal or substantiate claims of bias.

The technology industry, an economic powerhouse plagued with diversity challenges, provides a good case study to analyze this resistance to transparency. Given the paramount importance of the technology industry in the U.S. and global economies, the major tech powerhouses have been on the hot seat in recent years, pressed to account for their lack of diversity. This criticism has prompted companies to introduce a range of diversity initiatives and strategies, but the effectiveness of such strategies remains unclear. For example, Google and Apple pledged to invest $150 million and $50 million in diversity initiatives respectively in 2015.1 Most tech firms have created

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1 Victor Luckerson, Here’s How Google Plans to Hire More Minorities, TIME (May 6, 2015), http://time.com/3849218/google-diversity-investment/ (noting that Google is using the funds to expand its workforce diversity initiatives by “doubling the number of schools where it
Chief Diversity Officer positions, and many have dedicated entire sections on their websites to diversity and inclusion. Nevertheless, these firms have made little progress in actually increasing the number of women and racial minorities. Importantly, most continue to resist calls for transparency with respect to diversity data and related efforts, further compounding the issue.

One novel way that companies resist transparency is with a “diversity as trade secret” argument, a strategy that has been gaining steam. Many companies, tech and otherwise, have adopted this argument to block access to workforce demographic data. For example, Microsoft used the argument in a sex discrimination lawsuit, Moussouris v. Microsoft, to prevent public disclosure of Microsoft’s internal diversity data. More recently, in IBM v. McIntyre, IBM brought suit against its former Chief Diversity Officer to prevent her from taking a similar job at Microsoft. IBM argued that McIntyre had knowledge of diversity data and strategies that are protected trade secrets, and that IBM would suffer irreparable economic harm if they were to become known to Microsoft.

In addition to the claims made in these lawsuits, tech companies commonly use Exemption 4 of the FOIA, which covers “trade secrets” and “commercial information,” to prevent exposure of diversity data routinely collected by the government. Exemption 4 is intended to protect information that is proprietary, privileged, or confidential when disclosure of the information would cause competitive harm to a person or business. In 2009, actively recruits to find potential job applicants,” by encouraging workers to take workshops to lessen any unconscious bias in the workplace, and by letting Googlers use 20% of their work time to focus on diversity projects; Michal Lev-Ram, Apple Commits More Than $50 Million to Diversity Efforts, FORTUNE (Mar. 10, 2015), http://fortune.com/2015/03/10/apple-50-million-diversity/ (noting that Apple invested its funds into partnerships with the Thurgood Marshall College Fund and the National Center for Women and Information to fund scholarships, as well as into trainings and internships to facilitate a broader pipeline of women and minority technology workers).

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4 Id.

5 5 U.S.C. § 552(b)(4). Under the exemption, an agency may withhold “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” Federal FOIA Appeals Guide, Exemption 4, REPORTERS COMMITTEE FOR FREEDOM OF PRESS, https://www.rcfp.org/federal-foia-appeals-guide/exemption-4/#_ftn1. The exemption applies to two types of records. Id. The first category of records that falls under Exemption 4 is trade secrets. The second category consists of information that is a) commercial or financial, and b) obtained from a person, and c) privileged or confidential. Id.

6 36 C.F.R. §902.54.
President Barack Obama issued guidance to executive departments, including the Department of Labor (DOL), instructing them to: (1) adopt a presumption favoring disclosure; (2) take affirmative steps to make information public; and (3) use technology to inform citizens about what is known and done by the government. Despite this pronouncement, the diversity trade secret argument has been largely successful and many companies have used it to avoid data disclosure. Given the potential utility of diversity data and strategies as well as the harm that may result from their prolonged secrecy, this trending legal argument warrants further analysis. And because diversity is already so lacking in tech firms, examination of this industry in particular is doubly important.

On one hand, the diversity as trade secret argument seems like a positive development for equity and civil rights. After all, when corporate leaders invest in diversity, claim its value, and try to protect it, they seem to be prioritizing inclusion of historically underrepresented groups. On the other hand, the characterization of diversity as a trade secret can be used by companies to hide race and gender disparities and interfere with the advancement of civil rights law and workplace equity. In this essay, I examine the trending legal argument of treating diversity as a trade secret and set forth examples of how it damages broader goals of equity and inclusion by: (1) hindering transparency and accountability; and (2) commodifying diversity which limits the mobility of diverse talent. In light of these severe consequences, this growing trend is particularly important to analyze, especially given the sharp rise in trade secret lawsuits following the enactment of the federal Defend Trade Secrets Act in 2016.

II. RESISTANCE TO CALLS FOR TRANSPARENCY: WHAT’S TO HIDE?

Technology is one of the United States’ fastest-growing, most prosperous industries. The world’s five largest tech companies are located in the United States and dominate the stock market, together accounting for

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8 Vin Gurrieri, Trade Secret Suits Rise Sharply in Wake of Landmark IP Law, LAW 360 (July 18, 2018, 12:02 AM EDT), https://www.law360.com/articles/1063760/trade-secret-suits-rise-sharply-in-wake-of-landmark-ip-law (noting a roughly a 30 percent bump in case filings from 2016 to 2017, which was likely due to the passage of the DTSA).

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45% of the S&P 500’s year-to-date gain. In 2016, the U.S. high-tech sector produced $5.3 trillion of output, accounting for 18.2% of the country’s total output, and it is anticipated that this number will increase by $2.1 trillion by 2026. Tech employees earn more than those in any other field: in 2017, software & IT services and hardware & networking were the nation’s two highest-paying industries, and in 2018, 13 of the 25 highest-paying jobs have been in tech. Further, the San Francisco Bay Area, home to Silicon Valley, leads the United States with the highest average salary, and is the only city with a median total compensation that exceeds one hundred thousand dollars. Behind this economic powerhouse is a sizable workforce. In 2017, an estimated 11.5 million individuals comprised the net tech workforce—about 7.2% of the overall U.S. workforce. Since 2010, approximately 200,000 new tech jobs have been filled each year, and the demand for tech employees continues to increase. Projected tech growth exceeds that of national employment, and it is anticipated that the tech workforce will need an additional 1.2 million members by 2026 to sustain itself.

Unfortunately, though, the technology industry has not afforded women and racial minorities the friendliest of environments. In 1998, 4% of all employees in the 33 top-ranking Silicon Valley firms were Black and 7% were Hispanic. In 2014, only 3% of the 75 top-ranking Silicon Valley firms

14 Berger, supra note 12.
16 Id. at 7.
17 Id.
were Black and 6% were Hispanic.\textsuperscript{19} The representation of women in tech follows a similar pattern. The percentage of women employees in Silicon Valley has remained stagnant over the past decade at approximately 30% of all employees.\textsuperscript{20} The statistics are even worse for technical roles and at the management and leadership levels.\textsuperscript{21}

Hoping to counteract the secrecy around diversity in the technology industry, members of Congress, shareholders, and diversity organizations, among others, have called on tech leaders to fully disclose data and programs.\textsuperscript{22} News sources have even gone so far as to demand the release of otherwise confidential government-mandated EEO-1 reports from top firms in order to access their employment data.\textsuperscript{23} Few firms, though, have released the reports willingly; rather, most have ardent fighting to maintain the concealment of their diversity information.\textsuperscript{24} For example, when CNN requested diversity data directly from twenty tech companies in 2011, only three complied: Dell, Ingram Micro, and Intel.\textsuperscript{25} The remaining seventeen refused: Amazon, Facebook, Apple, Hewlett-Packard, IBM, Microsoft, Google, Groupon, LinkedIn, Living Social, Hulu, Netflix, Twitter, Yelp, Zynga, Cisco, and eBay.\textsuperscript{26} CNN then tried to bypass the uncooperative companies by submitting FOIA requests in an attempt to obtain the reports directly from the Equal Employment Opportunity Commission (EEOC) and the DOL, which require private employers and federal contractors to submit

\begin{itemize}
\item \textsuperscript{19} U.S. Equal Emp’t. Opportunity Comm’n, Diversity in High Tech, 29 tbl. 6 (2016) https://www.eeoc.gov/eeoc/statistics/reports/highotech/upload/diversity-in-high-tech-report.pdf. Comparatively, in non-tech Silicon Valley firms, 49% were women, 8% were Black and 22% were Hispanic. \textit{Id.}
\item \textsuperscript{20} \textit{Id.} (finding that women represented 30% of all employees in the 75 top ranked Silicon Valley tech firms in 2014).
\item \textsuperscript{21} \textit{Id.} at 22 tbl. 4 (finding that women represent only 20.44% of executives, senior officials, and managers in high tech compared to 28.81% in private sector jobs overall, and are represented at higher rates as first/mid officials and managers, professionals, and technicians in both high tech and private employment).
\item \textsuperscript{22} Will Evans, Congresswoman to Tech Firms: ‘You’re Hiding Something,’ REVEAL (Dec. 11, 2017); Sinduja Rangarajan, Jesse Jackson Calls Out Silicon Valley ‘Empty Promises’ on Diversity, REVEAL (Apr. 6, 2018).
\item \textsuperscript{24} See, e.g., \textit{id.;} Will Evans & Sinduja Rangarajan, Hidden Figures: How Silicon Valley Keeps Diversity Data Secret, REVEAL (Oct. 19, 2017); Will Evans, We Sued the Government for Silicon Valley Diversity Data, REVEAL (Apr. 26, 2018); Julianne Pepitone, Black, Female, and a Silicon Valley ‘Trade Secret,’ CNN Money (Mar. 18, 2013).
\item \textsuperscript{25} Pepitone, \textit{supra} note 24.
\item \textsuperscript{26} \textit{Id.}
periodic reports detailing workforce demographics including sex, race/ethnicity, and pay.\textsuperscript{27}

In response to the DOL FOIA requests, Apple, Google, Hewlett-Packard, IBM, and Microsoft all submitted written objections stating that the release of their employment data would cause a “competitive harm” under trade secret law.\textsuperscript{28} The argument was novel—generally, businesses rely on trade secrecy doctrine to protect intellectual capital in order to safeguard inventions, spur innovation, and maximize the economic benefits of their work.\textsuperscript{29} Still, it proved successful. Ultimately, CNN received data from the DOL for only five companies and was denied the rest, including those that had invoked the trade secret argument.\textsuperscript{30} Google, Microsoft, and IBM, three tech powerhouses, provide useful examples. Each company has been in the diversity spotlight in recent years. Further, in navigating their respective battles with transparency, each company has made the case for treating diversity data and/or strategies as trade secrets that must be protected to avoid economic harm.

Google, a prominent tech firm that employs 85,000 workers and generates $31 billion in annual revenue,\textsuperscript{31} has repeatedly resisted outside efforts to access its data on the representation of women and racial minorities.\textsuperscript{32} Google was one of the firms to challenge CNN’s FOIA request in 2011.\textsuperscript{33} Further, in 2015, Google refused to provide its diversity data to the DOL, which was conducting an equal pay law audit, under the guise of protecting its employees’ personal data and information.\textsuperscript{34} In response to the

\textsuperscript{27} Id.

\textsuperscript{28} See Diversity in Silicon Valley: The Fight to Uncover Data, CNN MONEY (last visited Aug. 22, 2018); Pepitone, supra note 24; Swift, supra note 23 (noting that in response to an earlier 2008 FOIA request by Mercury News, the Department of Labor agreed with the trade secret and “commercial” harm argument, noting that the data could “demonstrate a company’s evolving business strategy” which could in turn be used by “less mature corporations … to assist in structuring their business operations to better compete against more established competitors.”).


\textsuperscript{30} Pepitone, supra note 24.


\textsuperscript{33} Pepitone, supra note 24.

\textsuperscript{34} Catherine Shu, Women in Tech: The Numbers Don’t Add Up, TECH CRUNCH (July 16, 2017), (noting that the DOL subsequently sued Google for its diversity data in 2016 and the administrative law judge ruled in favor of Google in 2017 because the demand was “overbroad, intrusive on employee privacy, unduly burdensome, and insufficiently focused on
mounting pressure of transparency demands, Google has released self-reported diversity data since 2014 that exposes how far it trails its Silicon Valley peers. The number of Black employees at Google in the United States has stagnated at 2%, the lowest percentage amongst the top tech firms, while the number of Hispanic employees has risen from just 2% to 4%.

Though secretive about its diversity data, Google is more forthright about its inclusion strategies, and it has even shared an “equity toolkit” online for other companies to benefit from what it has learned as a result of its various diversity programs. These strategies would have to be examined further in the context of specific workplace outcomes to determine whether these strategies should indeed be implemented by peer companies.

Though headquartered in Washington State far from its leading tech peers in Silicon Valley, Microsoft has faced similar criticism for its lack of diversity. Like Google, Microsoft has fought to prevent exposure of its diversity data by objecting to CNN’s FOIA requests and providing only minimal transparency through voluntary reporting.

Based on what data it has released, 26% of Microsoft’s total workforce are women, the lowest percentage of the top firms, while 4% are Black and 5.9% are Hispanic. When looking specifically at Microsoft’s leadership positions, these numbers drop to 19% women, 2.2% Black, and 4.3% Hispanic. In tech positions, 19% are women, 2.7% are Black and 4.3% are Hispanic.

Microsoft articulated a “diversity as a trade secret” argument in a lawsuit even prior to IBM v. McIntyre. In Moussouris v. Microsoft, Katherine Moussouris, a former Microsoft employee, filed a discrimination and harassment suit against Microsoft and requested Microsoft’s internal
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diversity data in discovery. Moussouris’ complaint alleged that Microsoft engaged in a “continuing policy, pattern and practice of sex discrimination against female employees in technical and engineering roles,” and accused Microsoft of maintaining “a culture of casual sexism, a male-dominated hierarchy slow to change, and poor resolution of employee grievances.” Microsoft moved to seal portions of the documents produced during discovery which related to its diversity initiatives, arguing that the documents “reflect[ed] Microsoft’s confidential business strategies related to… diversity initiatives” and that, because the information had commercial value and “could harm Microsoft’s business interests” if revealed, the court should treat it as a trade secret. In support of its trade secret argument, Microsoft noted that it invests tens of millions of dollars in developing and implementing diversity initiatives and that it goes to great lengths to keep its diversity information confidential. Disclosure, Microsoft argued, could allow competitors to unjustly access Microsoft’s diversity initiatives and use them against Microsoft. Further, Microsoft contended that its diversity data could be misconstrued by “outsiders [making] uninformed conclusions about the [data’s] cause, meaning, or significance” which would in turn harm its business interests. Ultimately, Microsoft’s argument prevailed, and the contested information was sealed.

IBM has been quite consistent in its efforts to keep its diversity data secret, but has been slightly more forthcoming with its strategies. Like Google and Microsoft, the company both declined to provide its data to CNN in 2011 and formally objected to FOIA requests with a trade secret argument. And, while the two aforementioned companies followed the 2014 Silicon Valley trend by voluntarily releasing diversity reports in response to public

44 Defendant’s Response to Plaintiff’s Motion to Seal at 4, Moussouris, No. 2:15-cv-01483 (W.D. Wash. Apr. 12, 2017), ECF No. 177 (“Microsoft seeks to seal portions of these documents that contain confidential and sensitive data regarding diversity metrics, confidential information concerning related strategy and analytics.”); see also Defendant’s Response to Plaintiff’s Motion to Seal at 9, Moussouris, No. 2:15-cv-01483 (W.D. Wash., Nov. 29, 2017), ECF No. 269 (“Microsoft seeks to seal portions of these documents that reflect Microsoft’s confidential business strategies related to product development, human resources, and diversity initiatives.”).
45 Defendant’s Response to Plaintiff’s Motion to Seal at 5, Moussouris, No. 2:15-cv-01483 (W.D. Wash. Apr. 12, 2017), ECF No. 177.
46 See Report and Recommendation on Motions to Seal, supra note 42, at 24-5 (expressing concern that “Microsoft’s competitors could unjustly gain access to Microsoft’s diversity initiatives, strategies, and representation data to implement on their own and to try to recruit Microsoft’s talent.”).
47 Id. at 25.
pressure, as of this date, IBM still has not released its data. Yet, while extremely secretive about its workforce demographics, IBM has been somewhat more transparent about its diversity strategies. For example, IBM offers an online brochure that asserts the company’s commitment to diversity and describes some diversity recruitment programs and diversity partnerships. IBM’s 2016 Corporate Responsibility Report also includes a section on Employee Inclusion. This report highlights diversity awards that IBM has received, discusses pipeline programs for women, and points out affinity groups. Unfortunately, the brochure provides few details about how the company executes these strategies, and there is no way to examine the effectiveness of such strategies without reliable workforce data to measure outcomes. In 2018, IBM attempted to claim trade secret protection to hide both its diversity data and the diversity strategies known by former Chief Diversity Officer, Lindsay McIntyre.

Like IBM, a large majority of tech companies continue to staunchly refuse to publish diversity data. Recently, in 2018, Reveal from The Center for Investigative Reporting requested the disclosure of EEO-1 reports from 211 large San Francisco Bay Area tech companies. When most companies refused, Reveal filed FOIA requests, asking for the reports of several tech companies that qualify as federal contractors. The DOL subsequently asked each of the companies if they would like to object to the request, and, in doing so, provided careful instructions explaining how to invoke the trade secret argument. This DOL practice, which is currently being used under the Trump administration, has been criticized as “entirely hostile to the notion of transparency,” and contrasts starkly with the openness envisioned by the

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52 Evans & Rangarajan, supra note 24.
53 Id.
54 Id.
55 Id.
56 Zachary D. Reisch, The FOIA Improvement Act: Using a Requested Record’s Age to Restrict Exemption 5’s Deliberative Process Privilege, 97 B.U. L. REV. 1893, 1930 n. 226
Obama administration when it issued guidance to the executive departments in 2009. Several companies took advantage of the opportunity to object: Oracle, Palantir, Pandora, PayPal, Gilead Sciences, Splunk, and Synnex each claimed that their diversity statistics were trade secrets.\(^\text{57}\) Further, when Reveal requested copies of the companies’ objection letters in order to assess their justifications for claiming trade secret protection, Oracle, Palantir, Pandora, Gilead Sciences, Splunk, and Synnex claimed—and the DOL did not disagree—that the objection letters themselves were also trade secrets and thus protected from disclosure.\(^\text{58}\) Reveal has since filed a lawsuit against the DOL, currently pending in the U.S. District Court for the Northern District of California.\(^\text{59}\)

This continued resistance to transparency has made it difficult to fully understand the nature of the diversity problem in the technology industry and to properly strategize about how to move forward. If the ‘diversity as trade secret’ argument continues to proliferate, this secrecy will acquire even greater legal strength and legitimacy. In order to analyze the nature and potential of this argument, one must have a basic familiarity with the law of trade secrets, misappropriation, non-compete agreements, and inevitable disclosure.

III. PROTECTING THE SECRET SAUCE

Many types of innovators ranging from solo inventors to Fortune 500 companies have long relied on trade secret protection to safeguard the inventions and creativity that keep them competitive.\(^\text{60}\) However, only recently has the claim arisen that diversity information is entitled to such legal protection. The diversity “secrets” that so many tech companies claim to possess have thus far fallen into two categories: (1) organizational strategies aimed at improving the diversity and inclusion record; and (2) data on workforce demographics and employment outcomes. In order to determine whether either type of business information may properly qualify as a trade secret, one must examine state common law protections. The Uniform Trade Secrets Act (UTSA) sets forth recommended legal rules that most states

\(^{57}\) Evans, supra note 24 (noting also that PayPal has since released its data).

\(^{58}\) Id.


follow. In addition, the Defend Trade Secrets Act helps protect intellectual property by creating a more uniform federal civil cause of action for trade secret theft.

A. The Law of Trade Secrets

The world of intellectual property (IP) law most commonly focuses on patents, trademarks, and copyright. However, trade secrets are also a key part of the portfolio. Trade secrets are the oldest form of intellectual property and are in many ways distinct from the other types. No registration or other procedural formality is required to protect trade secrets, and they can remain protected for an unlimited period of time. Trade secrets generate value because others do not know about them, which permits trade secret owners to establish and maintain competitive positions in the market.

All trade secrets are confidential, but not all confidential information rises to the level of a trade secret. The UTSA defines a trade secret as information, including “a formula, pattern, compilation, program device, method, technique, or process that (1) derives independent economic value… from not being generally known to… other persons who can obtain economic value from its disclosure or use, and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” Thus, the information must confer some competitive advantage to satisfy the first prong. To satisfy the second prong, companies must follow specific safety measures to protect the information, such as marking it confidential, storing it with care to maintain confidentiality, and providing it only to employees who need access in order to carry out their employment duties.

A range of subject matters can be trade secrets, but trade secrets generally fall into two categories: technological developments and business

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61 UNIFORM TRADE SECRETS ACT (UNIF. LAW COMM’N 1985).
62 DEFEND TRADE SECRETS ACT OF 2016, 18 U.S.C. § 1836 (providing a federal private right of action for misappropriation of trade secrets. Damages include actual loss and unjust enrichment, attorney’s fees, and (double) exemplary damages for willful and malicious misappropriation of a trade secret. Federal courts can also issue injunctions for threatened misappropriation, and inevitable disclosure.)
64 Lee, supra note 60.
65 Peterson, supra note 63.
66 Lee, supra note 60.
67 Peterson, supra note 63.
69 Peterson, supra note 63.
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information.\textsuperscript{70} It is clear why technological innovations must be kept secret, but the reasons for protecting business information are less straightforward. However, some internal business facts may earn legal protection because they are of great value when kept exclusively in the organization, but when they become known to a competitor, they “operate at the disadvantage, and possibly the ruin, of the business.” For example, a customer list the business builds through extensive research and relationship development or a strategic plan for rolling out an innovative new product. The subject matter need not be novel or unique; it may simply be something which, “when connected with a known factor, may become so valuable to a business that its continued concealment from others is of paramount importance.”\textsuperscript{71} Still, in order to be protected, the information cannot be considered general business strategy.\textsuperscript{72}

B. Misappropriation of Trade Secrets

To successfully claim misappropriation of trade secrets, it is generally required that a plaintiff has a “protectable ‘trade secret’” and that “the defendant [took] some sort of ‘improper’ action regarding that matter.”\textsuperscript{73} The UTSA protects against both actual and threatened misappropriation. Actual misappropriation occurs under two circumstances.\textsuperscript{74} One is liable if he or she acquires another’s trade secret through improper means.\textsuperscript{75} One is also liable if he or she uses or discloses a trade secret acquired by improper means or under circumstances in which he or she has a duty to maintain confidentiality.\textsuperscript{76} Improper means “include theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.”\textsuperscript{77}

In addition to permitting suits for actual misappropriation, the UTSA also allows employers to file injunctions to prevent threatened

\textsuperscript{70} CALLMANN § 14.14 (other examples include: a secret formula, process, computer software, digital databases, the passcode for a website, biotechnology, mechanical configurations, information relating to the finding and extraction of natural resources, plans, layouts and design drawings, recipes, customer lists, instructional materials, internal business practices, manufacturing cost data, sales histories and forecasts, materials and plans for advertising and distribution, membership and employee information, collections of data, and budgets).
\textsuperscript{72} Id. at n.25 (citing Greenberg v. Croydon Plastics Co., 378 F. SUPP. 806 (E.D. Pa. 1974)).
\textsuperscript{73} 127 AM. JUR. Trials § 283 (2012). See UNIFORM TRADE SECRETS ACT § 1(1).
\textsuperscript{74} UNIFORM TRADE SECRETS ACT § 1(2); 127 AM. JUR. Trials § 283.
\textsuperscript{75} UNIFORM TRADE SECRETS ACT § 1(2); 127 AM. JUR. Trials § 283.
\textsuperscript{76} UNIFORM TRADE SECRETS ACT § 1(2); 127 AM. JUR. Trials § 283.
\textsuperscript{77} UNIFORM TRADE SECRETS ACT § 1(1).
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misappropriation, which serve to preserve the secrecy of the trade secret.\(^{78}\)

In order to succeed in attaining an injunction, a plaintiff must make a sufficient showing that an imminent threat of future misappropriation exists. Mere possession of a trade secret is insufficient, and the threat presented must be greater than a risk of misappropriation.\(^{79}\) A plaintiff can demonstrate that a threat exists through a defendant’s words and conduct, prior possession and misuse of trade secrets, and wrongful refusal to return a trade secret after a demand has been made.\(^{80}\) The remedy for misappropriating a trade secret is an injunction against the misappropriator which prevents him or her from using the information for the life of the trade secret.\(^{81}\) This secures privacy by placing the disputed information back in the hands of its owner.\(^{82}\)

C. Non-compete Agreements

Given the value of technological innovation, and employers’ desire to protect and preserve it, new employees in the tech industry are typically required to sign non-compete agreements.\(^{83}\) These contracts prevent employees from subsequently working for competitor companies within certain geographic areas and time frames. Non-compete agreements are not universally recognized, however. Certain states, such as California, have completely banned the agreements and thus deemed them entirely void when enforcement is sought.\(^{84}\) Other states uphold non-compete agreements only if the terms and restrictions are found to be reasonable. In such states, courts look to different factors to determine reasonableness. Most courts seek to determine whether the geographic area and duration limits are reasonable. Additionally, some courts assess reasonableness by looking to the scope of restricted activities, whether the restrictions actually protect employers’ legitimate interests, whether the restrictions impose undue hardships on

\(^{78}\) UNIFORM TRADE SECRETS ACT § 2(a); 127 AM. JUR. Trials § 283.


\(^{80}\) 157 AM. JUR. 3D Proof of Facts § 511 (2016).

\(^{81}\) See Trade Secrets § 7.02[2][a], supra note 29.

\(^{82}\) Id.


\(^{84}\) 104 AM. JUR. 3D Proof of Facts § 393 (quoting CAL. BUS. & PROF. CODE §§ 16600 to 16602.5 (West 2012) (“Contracts restraining a person from exercising a lawful profession, trade, or business are void except when contained within contracts for the sale of goodwill or dissolution of a partnership or limited liability company.”); CAL. BUS. & PROF. CODE § 16600 (Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.).
employees, whether adequate consideration was given in exchange for the restrictions, and whether the restrictions violate public policy.  

In addition to misappropriation and non-compete enforcement, a separate cause of action is available through the inevitable disclosure doctrine. This doctrine was developed to prevent an employee from joining a competitor employer where his or her new duties are so similar to the old ones that the employee will inevitably disclose the former employer’s trade secrets. Only certain courts recognize this doctrine and are willing to enjoin an employee from assuming a new position if the elements are met. Employers generally use this doctrine when a non-compete agreement is deemed invalid or when such an agreement never existed. Accordingly, critics often assert that the doctrine serves as a “backdoor non-compete.” The inevitable disclosure doctrine generally requires that “the former employee possess timely, sensitive, strategic, and/or technical information that poses a serious threat to the former employer’s business or a specific segment of that business.”

IV. IBM v. McIntyre: The War for Diverse Talent and Secrets

Based on the legal rules set forth above, how strong is the argument that diversity data and strategies are legally protected trade secrets? IBM v. McIntyre is a useful guide for assessing the strength of this increasingly popular legal claim. McIntyre, a Human Resources (HR) leader with no technical training, served as the Chief Diversity Officer for IBM before resigning to pursue a new opportunity at Microsoft under the same title. McIntyre had signed a one-year non-compete agreement as was required of most of IBM’s employees. On February 12, 2018, IBM sued McIntyre on three counts, claiming: 1) McIntyre breached the non-compete clause by working for a direct competitor in the same position; 2) McIntyre would inevitably misappropriate IBM’s trade secrets, including its diversity data, strategies, initiatives, and methodologies; and 3) the court should enter a

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85 Lobel, supra note 83, at 826.
86 136 AM. JUR. 3D Proof of Facts § 1.
87 Id.
88 Id.
90 136 AM. JUR. 3D Proof of Facts § 1.
92 Id.
declaratory judgment for the rescission of McIntyre’s equity award. In formulating its trade secret claim, IBM used the same legal argument that Microsoft formerly invoked in a motion to seal its diversity data and strategies that had been produced during discovery in *Moussouris v Microsoft*.

As discussed above, IBM has always fervently fought release of its workforce demographics. However, in some ways, the trade secret claim runs counter to prior practice as IBM, at times, has displayed its diversity initiatives with pride and sought recognition for these efforts. Ironically, in employing the trade secret argument by claiming the value of its diversity, IBM’s lawsuit attempted to stifle the trajectory of one of its top women leaders who theoretically should be the beneficiary of diversity and equity programming. McIntyre’s counsel noted, “[r]ather than recognizing her past contribution and sending her off to continue her great work improving diversity and inclusion in the technology industry, IBM [sought] to block McIntyre’s professional mobility—and thereby mitigate her career opportunities….” In this sense, IBM is seeking to control diverse talent and diversity strategies. This suggests that IBM views inclusion as a zero-sum game in which its own economic gains from diversity are achieved and perpetuated only by keeping diverse talent and secrets away from others.

In response to IBM’s claims, McIntyre asserted that the non-compete agreement was unenforceable as overly broad and that she did not hold secret

93 *Id.* at 28-30.
94 Plaintiff IBM’s Memorandum of Law in Support of Its Application for a Temporary Restraining Order and a Preliminary Injunction at 7-8, IBM v. McIntyre, No. 7:18-cv-01210-VB (S.D.N.Y. March 8, 2018) ECF No. 8 [hereinafter Plaintiff’s Memo].
95 *OPEN DIVERSITY DATA*, supra note 48.
97 Memorandum of Law in Opposition to Motion for a Temporary Restraining Order and Preliminary Injunction at 3, McIntyre, No. 7:18-cv-01210-VB (S.D.N.Y. 2018) ECF No. 14 [hereinafter Defendant’s Memo] (“McIntyre — a mother of three young children and the primary wage earner in her household — was thrilled to land this role [at Microsoft], as it would both allow her to continue to advance her career and meet her family and personal needs. Indeed, McIntyre sought and accepted the Microsoft role in part because it would allow her and her family to relocate from New York to Washington, just a few hours drive from her parents and other extended family.”).
98 *Id.*
DIVERSITY AS A TRADE SECRET

information that could harm IBM competitively. Nonetheless, the court issued a temporary restraining order prohibiting McIntyre from working for Microsoft. A preliminary injunction hearing was scheduled for March 12, 2018. However, the suit was dismissed with prejudice on March 8, 2018. The settlement terms have been sealed. McIntyre began working for Microsoft in July of 2018.

Despite this settlement, the case presents an opportunity to examine the “diversity as a trade secret” argument. Of primary relevance to a diversity discussion is IBM’s second count which asserts that by taking a position at Microsoft, McIntyre would “inevitably misappropriate IBM’s trade secrets,” including its diversity data, strategies, initiatives, and methodologies. To analyze this claim, it is important to determine: (1) whether diversity information may be considered a trade secret; (2) the enforceability of the non-compete clause; and (3) whether the misappropriation or inevitable disclosure doctrine may provide relief. The disposition of these issues differs based on which state’s law is applied. Accordingly, I will first provide an analysis within the context of New York law, which governed the IBM v. McIntyre dispute. In juxtaposition, I will also discuss California law, which is uniquely tailored to favor mobility, transparency, and innovation.

A. What’s so Secret?

In response to IBM’s claim that she had knowledge of protected trade secrets, McIntyre argued that IBM’s diversity data and strategies were not in fact trade secrets. In its counts, IBM insisted that its “diversity data, strategies, methodologies, and initiatives” were the types of confidential information that had been previously protected by New York courts, and that Microsoft deployed similar arguments in its Motion to Seal in the

99 Defendant’s Memo, supra note 97, at 19-23 (She also asserted that her diversity work at Microsoft would not violate her non-compete agreement, contending that effective diversity work must “be specific and customized to the company and workforce at issue.” She further contended that Microsoft’s culture and goals are entirely distinct from IBM’s culture and goals, and that the work of IBM “is not practically useful in [her] role at Microsoft.”).

**Moussouris** case to conceal diversity information about female employees.\(^{102}\) IBM also cited other courts that have upheld protections on information relating to recruiting.\(^{103}\) In response, McIntyre noted that in recent years, technology companies have been investing heavily, and very publicly, in diversity and inclusion.\(^{104}\) She argued that the diversity information was not secret because “IBM publicly discloses its diversity efforts through its own website,” “provides details [...] to diversity related-organizations,” and even encouraged McIntyre to share that information publicly.\(^{105}\)

McIntyre built her rebuttal around the obvious counter-argument to IBM’s claims—she asserted that the diversity information, including data and strategies, is not secret, and thus does not warrant trade secret protection. Companies may attempt to use trade secret law to protect types of data including: workforce demographics, identification of internal talent pools, and external recruitment lists.\(^ {106}\) Further, companies may also argue for trade secret protection of their strategies including: approaches to monitor diversity and highlight where the company needs improvement, tools to identify diverse talent (e.g. algorithm, pipeline sources), ways to develop and retain hired talent, and techniques to reward managers for meeting diversity goals.\(^ {107}\) For most diversity data and strategies, it can be argued that (1) this

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\(^{102}\) See Defendant’s Response to Plaintiff’s Motion to Seal, supra note 45, at 5.

\(^{103}\) Plaintiff’s Memo, supra note 94, at 42 (citing In re High-Tech Employee Antitrust Litigation, No. 11-CV-02509-LHK, 2013 WL 163779, at *4 (N.D. Cal. Jan. 15, 2013) (finding good cause to seal documents containing “compensation and recruiting strategies, policies, and procedures, including quantitative data,” where public disclosure could cause harm “by giving third-parties... insights into confidential and sensitive aspects of each of the Defendants’ strategies, competitive positions, and business operations, allowing these third-parties to potentially gain an unfair advantage in dealings with and against each of the Defendants).)

\(^{104}\) Defendant’s Memo, supra note 97, at 1.

\(^{105}\) Id. at 18-19 (referencing Declaration of Lindsay-Rae McIntyre at ¶ 29, McIntyre, No. 7:18-cv-01210-VB (S.D.N.Y. 2018), ECF No. 15 [hereinafter McIntyre Decl.]).

\(^{106}\) In re High-Tech Employee Antitrust Litigation, No. 11-CV-02509-LHK, (N.D. Cal. Jan. 15, 2013), 2013 WL 163779, at *4 (granting in part and denying in part defendant’s motion to seal “materials that reflect compensation practices, strategies, and policies; recruiting and hiring data, practices, strategies, and policies; and personal identifying information of employees or candidates”).

\(^{107}\) Report and Recommendation on Motions to Seal, supra note 42, at 21-23 (allowing Microsoft to redact information related to actual strategies and initiatives, but finding that raw data, including internal survey data and the results from diversity initiatives, is not protectable unless it can be used to reverse-engineer confidential strategies); Convergys Corp. v. Wellman, No. 1:07-CV-509. (S.D. Ohio Nov. 30, 2007) (declining to enforce an injunction against the employer’s former HR director because the their human resources practices and strategies were unlikely to “constitute confidential information or trade secrets” or to “have much value for” competitors).
information is publicly available or generally known and thus not secret and (2) this type of HR recruitment/talent management information should not be treated as a trade secret in the diversity context if it is not considered to be a trade secret more broadly outside of the diversity context.

There is no existing case law that directly analyzes whether diversity information may be considered a protected trade secret, but some cases do analyze whether other types of business information can qualify. In *IBM v. McIntyre*, IBM sought to protect the identification of diverse internal and external talent. Though this exact issue has not been adjudicated, parallels may be drawn to other cases. For example, in *Lockheed Martin v. Aatlas Commerce Inc.*, Lockheed Martin brought suit against a former employee and her new employer, alleging that she had shared “confidential information regarding...employees’ experience, abilities and salaries” with her new employer, which, it was argued, the employer was then using to poach employees from the plaintiff’s company. The court found that business information such as key employees’ identities, abilities, assignments, and experience is not a protectable interest against a competitor. This is because, the court reasoned, information about key talent is generally known in the industry and competitors can easily find it by asking around. This principle translates to the diversity domain because customers are aware of who the top talent is, many recruiters have talent lists, and it is easy to find such information on social networking and third party recruitment websites should a competitor seek to recruit those identified.

Similarly, in *Unisource Worldwide, Inc. v. Carrara*, Unisource brought suit against several former employees to protect assorted business intelligence including “information regarding key Unisource personnel, including what they do, how much they cost, and how effective they are.” The court refused to issue an injunction, instead finding that “[i]nformation regarding key Unisource personnel... is not the type of information that” is protectable. “Because Unisource may not prevent its competitors from soliciting and hiring its employees, and because the reputation of sales representatives is generally known in the industry, information regarding what its employees do, how much they cost, and how effective they are is not protectable.” Given that information regarding talent generally is not

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110 *Id.*
112 *Id.* at 988.
113 *Id.; see also Buffkin v. Glacier Group*, 997 N.E.2d 1 (Ind. Ct. App. 2013) (denying the injunction, finding that “[t]he information provided to Buffkin which related to specific
protectable, it is difficult to argue that information about diverse talent known by a Chief Diversity Officer should be treated any differently.

Beyond arguing for the protection of its specific talent lists, IBM also asserted that its broader workforce diversity data is a protected trade secret. In addition to fighting early FOIA requests for such data by using the trade secret argument, IBM has continued to refuse voluntary disclosure, despite many other tech companies opting to fully disclose their diversity data, even when it appears unflattering. Given that courts have declined to give trade secret protection to talent lists that identify specific names, it seems unlikely that a court would find it imperative to grant trade secret protection for aggregate workforce data.

Finally, IBM also argued that its strategies for recruiting and retaining diverse employees are protected trade secrets. Again, there is no case law directly on point, but courts have ruled that business information such as commonly used marketing strategies are not protected. However, the diversity strategies may also be compared to business plans that are sometimes considered trade secrets. For example, in Motor City Bagels v. Am. Bagel Co., a business plan that included an extensive compilation of information and analysis was held protectable as a whole, even though some individual items of information within the larger plan were available in the public domain.

Still, business strategies are not always found to be protectable. In International Business Machines Corp. v. Johnson, IBM sued its former Vice President of Corporate Development who had assumed a role as Dell’s Senior Vice President of Strategy, arguing that “Mr. Johnson gained access to confidential information concerning the Company’s strategic plans, marketing plans, and long-term business opportunities, including information regarding the development status of specific IBM products.” Ultimately an injunction was denied as the court found that while the defendant possessed “inside strategic business information about IBM,” he “did not recruiting assignments and activities was not of the nature or sort of information” which could be used to the employee’s competitive advantage).

114 Complaint, supra note 91, at 1.
115 OPEN DIVERSITY DATA, supra note 48.
116 Complaint, supra note 91, at 1-2.
119 Motor City Bagels, 50 F.Supp.2d at 489.
120 Id.
have the sort of information that is considered quintessential trade secret information—detailed technical know-how, formulae, designs, or procedures.”

Case law also suggests that diversity strategies and data may compel differing treatment. In *Moussouris v. Microsoft*, Microsoft’s diversity trade secret arguments were assessed by a special master whose report and recommendation on the various motions to seal was adopted in its entirety by the court. The special master found “very persuasive” Microsoft’s argument that its diversity initiatives and strategies are trade secrets. However, the special master did not find that the actual raw diversity data could cause competitive harm, nor did she credit Microsoft’s fear of reputational harm. Accordingly, the special master recommended that diversity data not be redacted unless it could be used to reverse-engineer confidential diversity initiatives and strategies. According to this perspective, diversity strategies *may* be trade secrets, but raw diversity data typically are not.

In *IBM v. McIntyre*, the strategies that most closely fit the traditional conceptualization of trade secrets are those that resemble technological innovations. They include (1) what McIntyre described as a software that analyzes demographic data and highlights where a group can improve diversity in its applicant pool and interview selections and (2) an algorithm developed by IBM to track career development goals. Although McIntyre knew of the software or “bot,” she argued that she did not “have any knowledge of the analytics” and further that she “does not possess the technical skill or knowledge to recreate this software.” With respect to the algorithm, McIntyre also argued that she had no knowledge of the analytics or the design, nor did she have the technical know-how to replicate the programs. Though a court would surely examine more closely the nature of these diversity strategies, their economic value, and IBM’s attempts to

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123 Report and Recommendation on Motions to Seal, supra note 42, at 25.
124 Id. (finding Microsoft’s argument that raw diversity data should be redacted because “releasing diversity demographic analyses could be misconstrued to cause business harm” unpersuasive because it “suggests that Microsoft’s concern is that the release of the data would have a negative effect on its reputation and not so much that it is a trade secret”,” and recommending that raw diversity data not be “redacted unless it also reveals confidential information regarding Microsoft’s diversity initiatives and strategies.”).
125 Id.
126 Id. at 21-22.
127 Id. at 20.
128 Id. at 20-21.
maintain their secrecy, the software and algorithm claims may be the most straightforward legal arguments under current trade secret law. Nonetheless, while these strategies are most similar to information that has traditionally garnered trade secret protection, I argue that disclosure and transparency remain the best approach for the effectuation of broader equal opportunity goals.

B. Enforcement of Non-compete to Control Talent

This case may be concerned more with the control of labor than with the protection of diversity trade secrets. McIntyre’s non-compete clause stated that:

she will not directly or indirectly within the ‘Restricted Areas’ (i) ‘Engage in or Associate with’ (a) any ‘Business Enterprise’ or (b) any competitor of the Company; or (ii) … solicit, for competitive business purposes, any customer of the Company with which [she was] directly or indirectly involved as part of [her] job responsibilities during the last twelve (12) months at IBM.

IBM alleged that McIntyre breached her non-compete agreement by accepting employment with Microsoft, a direct competitor, during the one-year restricted period. To support the enforcement of the non-compete agreement, IBM argued that it had a legitimate interest to protect its confidential information, including diversity-related trade secrets. IBM also argued that the restrictions of the non-compete agreement were reasonable in scope, supporting a finding of enforcement. It asserted that the duration was reasonable because the diversity information would remain valuable for more than one year and that the geographic limit was reasonable because, though headquartered in different cities, Microsoft and IBM compete for talent and business globally. IBM additionally argued that the scope of activities was

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129 IBM v. Visentin, No. 11 Civ. 399(LAP) (S.D.N.Y. Feb. 16, 2011), 2011 WL 672025, at *14 (concluding that detailed specific data which is not misappropriated is unlikely to require trade secret protection if it’s unlikely the employee will remember it) (distinguishing IBM v. Papermaster, No. 08–CV–9078 (KMK) (S.D.N.Y. Nov. 21, 2008), 2008 WL 4974508, at *17 because the employee had “highly technical expertise and knowledge of IBM’s ‘power architecture’ trade secrets and had worked on microprocessors,” was by a direct competitor of IBM to improve the efficiency of its microprocessors, and therefore would inevitably “bring his technological expertise to bear.”).

130 Complaint, supra note 91, at 21 (citing the Noncompetition Agreement signed by McIntyre).

131 Estee Lauder v. Batra, 430 F. Supp. 2d 158, 180 (S.D.N.Y. 2006) (The “durational reasonableness of a non-compete agreement is judged by the length of time for which the
reasonable given the overlap in responsibilities between McIntyre’s old job at IBM and new role at Microsoft, especially considering the confidential information to which she had access at IBM.132 Lastly, IBM argued that the restriction was reasonable because it did not prevent McIntyre from working as a Chief Diversity Officer at all companies, but rather only prevented her from joining IBM’s direct competitors. IBM claimed that McIntyre’s breach was especially foul because she chose to work for a direct competitor when she could have gone to any Fortune 100 company given her skills and experience.133

McIntyre challenged the validity of the non-compete agreement by arguing that the scope, time, and geographic restrictions were overbroad and entirely unnecessary, especially since IBM had no legitimate interest to protect because, as McIntyre asserted, none of the contested information warranted trade secret protection.134 States differ vastly in their friendliness to employee non-compete agreements, so there is a wide variation in how courts could come out on this issue.135 For example, New York tends to enforce non-competes when they are deemed reasonable under the circumstances.136 Specifically, New York courts assess whether the agreements are “reasonable in time and area, necessary to protect the employer’s legitimate interests, not harmful to the general public and not employer’s confidential information will be competitively valuable.” Thus, IBM claimed the one year restriction was reasonable because the value of IBM’s trade secrets will likely remain valuable for more than one year.); Plaintiff’s Memo, supra note 94, at 43 (The worldwide limit is also reasonable because “IBM and Microsoft compete globally and McIntyre’s responsibilities are global.”).

132 Plaintiff’s Memo, supra note 94, at 43.
133 Id. at 44.
134 Defendant’s Memo, supra note 97, at 22-3.
136 David L. Gregory, Courts in New York Will Enforce Non-compete Clauses in Contracts Only if They are Carefully Contoured, 72 N.Y. ST. B. J. 27, 28 (2000).
unreasonably burdensome to the employee.”

New York is therefore willing to enforce non-competes and operates under the general theory that intellectual property must be closely guarded to incentivize companies to invest in research and development.

California, on the other hand, has such a strong policy favoring employee mobility that its laws are interpreted “as almost completely banning [covenants not to compete].” The California model values free exchange, so rather than restricting talent and carefully monitoring intellectual property, the state adopts a theory that all companies will invest in innovation and everyone will benefit by the dissemination of knowledge and building off of competitors’ innovations. Because it was uncertain how the non-compete issue would be resolved, IBM also relied on the trade secret argument and specifically invoked the doctrine of inevitable disclosure, which has frequently been critiqued as a backdoor attempt to restrict mobility when a non-compete agreement proves invalid. Accordingly, IBM pursued several strategies to block McIntyre’s move to IBM, and thereby attempted to exert control over her career trajectory.

C. Disclosing the Diversity Secret Sauce to IBM’s Economic Detriment

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137 Id. (quoting Reed, Roberts Assoc., Inc. v. Strauman, 40 N.Y.2d 303, 307(1976)).
138 Ronald J. Gilson, The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete, 74 N.Y.U. L. Rev. 575, 627 (1999) (noting that evaluating the prohibition of covenants not to compete requires a trade-off between the districtwide benefits of knowledge spillovers through employee mobility, and the costs of the reciprocal reduction in the incentive for intellectual property investment that results from the dilution of employers’ property rights).
139 Nicandri, supra note 135, at 1008 (noting that “[a]s applied by the courts, California law allows for CNCs in only three narrow circumstances: those agreements related to (1) the sale or business, (2) dissolution of a partnership, or (3) termination of a member’s interest in a limited liability company.”).
140 Danielle Pasqualone, Globespan, Inc. v. O’Neill, 17 Berkeley Tech. L. J. 251, 252 (2002) (noting that “[t]rade secrets law spurs innovation by providing an efficient means through which businesses can protect their investments in research and development. However, overbroad application of trade secrets law can interfere with competition and employee mobility. Thus, trade secrets law must strike a careful balance between protecting business’ proprietary information and promoting competition through employee mobility.”).
141 E.g., Bayer Corp. v. Roche Molecular Sys., 72 F. Supp. 2d 1111, 1120 (1999) (noting that “to the extent that the theory of inevitable disclosure creates a de facto covenant not to compete without a nontrivial showing of actual or threatened use or disclosure, it is inconsistent with California policy and case law”); Whyte v. Schlage Lock Co., 101 Cal. App. 4th 1443, 1447 (2002) (finding the inevitable disclosure doctrine to be “contrary to California law and policy, since it creates an after-the-fact covenant not to compete that restricts employees’ mobility.”).
IBM relied primarily on the theory of inevitable disclosure in arguing its case. New York is one of the few courts that recognizes the inevitable disclosure doctrine.142 IBM argued that it satisfied the factors for inevitable disclosure because: (1) IBM and Microsoft are direct competitors; (2) McIntyre’s new position is identical to her old one, so she cannot fulfill her new job without utilizing (whether intentionally or not) IBM business secrets; (3) the IBM secrets at issue [diversity data, strategies, initiatives, and methodologies] would be valuable to competitors including Microsoft; and (4) the competitively sensitive nature of the information is such that it would cause harm to IBM if… “competitors could unjustly gain access to [IBM’s] business strategies and initiatives related to diversity.”143 Although legally recognized, the inevitable disclosure doctrine has been noted as judicially disfavored in New York.144

In responding to the inevitable disclosure argument, McIntyre first challenged IBM’s claim that IBM and Microsoft are “direct competitors in the attempt to create inclusive and diverse workforces” because, she purported, accepting such a claim would make every business a competitor.145 McIntyre also challenged IBM’s claim that the responsibilities of her new job were identical to those of her old one because, despite potential overlap, she would be focusing exclusively on internal culture at Microsoft, which is unique to that environment. Additionally, McIntyre and Microsoft stated that they would work with IBM to ensure that McIntyre’s duties would not “threaten any IBM protectable interests.”146 Next, McIntyre argued that she would have no reason to disclose IBM’s information because Microsoft has its own existing diversity systems and she would be working specifically on those procedures. The outcome of the inevitable disclosure claim varies immensely by jurisdiction. For example, in the same way that non-compete agreements are disfavored in California, the doctrine of inevitable disclosure also runs counter to the Silicon Valley philosophy favoring mobility,

142 See Del Monte Fresh Produce Co. v. Dole Food Co., Inc., 148 F. Supp. 2d 1326, 1336-37 (S.D. Fla. 2001) (citing PepsiCo., Inc. v. Redmond, 54 F.3d 1262 (7th Cir.1995) as “the principal case on inevitable disclosure” and noting that “many states that have been asked to adopt the [PepsiCo. inevitable disclosure] doctrine… [have] rejected it.”).
143 Plaintiff’s Memo, supra note 94, at 24-35.
145 Defendant’s Memo, supra note 97, at 9-10.
146 Id. at 10.
knowledge spillover, and innovation. Thus, California courts have squarely rejected the doctrine.\footnote{Pasqualone, \textit{supra} note 140, at 258; Gilson, \textit{supra} note 138, at 624; Bayer Corp. v. Roche Molecular Sys., 72 F. Supp. 2d 1111, 1120 (1999) (noting that California trade secret law does not recognize inevitable disclosure and that it runs counter to the state’s strong public policy favoring employee mobility); DANJAQ LLC v. Sony Corp., 263 F.3d 942 (9th Cir. 2001).}

Interestingly, and perhaps significantly, IBM only appeared interested in a subset of the information that McIntyre acquired while working for the company. McIntyre was employed by IBM and occupied numerous HR leadership roles for fifteen years before assuming the position of CDO, which she held for three years.\footnote{McIntyre Decl., \textit{supra} note 105, at ¶ 5-7.} And even after becoming CDO, McIntyre continued to hold other responsibilities unrelated to diversity.\footnote{\textit{Id.} at ¶ 8-9.} It is unclear why IBM argued that the diversity information and strategies known to McIntyre were trade secrets, but did not claim protection for the multitude of other HR information that she had been exposed to regarding IBM’s recruiting strategies and talent development more generally. It should also be noted that the inevitable disclosure doctrine has not been used by IBM to constrain other departing HR employees who possess information about talent broadly. Under these circumstances, it is difficult to argue for the need to control a departing CDO who happens to have knowledge more specifically about diverse talent. Is IBM purporting that greater economic and commercial value is attributable to strategies and data related to women, people of color, and other underrepresented groups? Is there a more compelling need to keep diversity information secret? Whatever IBM’s motivation for exclusively pursuing diversity protection, its arguments appear unlikely to succeed given the judicial posture of many states.

V. DIVERSITY INSIGHTS: TO SHARE OR NOT TO SHARE?

Although \textit{IBM v. McIntyre} settled outside of court, it presents legal issues that are likely to reappear, especially as employers continue to argue that diversity data is a trade secret in response to FOIA requests, even outside of the tech industry. Further, if this argument proliferates, it may influence the interpretation of the federal Defend Trade Secrets Act, which could set standardized nationwide rules regarding trade secret treatment. Accordingly, examination of the arguments presented—as well as their implications for women and racial minorities—is warranted. While arguing that diversity data and strategies are trade secrets may superficially appear to place a value on inclusion, this approach has negative ramifications for equal opportunity
by: (1) hindering transparency and accountability; and (2) commodifying
diversity which limits the mobility of diverse talent.

Before discussing some of the possible consequences of diversity
trade secrets, it is first important to acknowledge the potential upside.
Organizational investment in diversity and inclusion, if properly executed, is
generally a positive, worthy pursuit that can lead to expansion of opportunity
for members of historically excluded groups. For example, corporate leaders
may prioritize the recruitment of underrepresented individuals and work to
develop the pipeline, an approach demonstrated by the programs established
structures, such as hiring a Chief Diversity Officer, which have been linked
to the increased presence of women and racial minorities in management
roles over time.\footnote{\textit{Alexandra Kalev et al., Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies}, 71 \textit{AM. SOC. REV.} 589, 591–95 (2006) (providing three approaches to increasing managerial diversity often used by businesses).} Even more importantly, the more progressive among
these organizations may even begin to change their internal cultures and
disassemble structural barriers that may hinder women and racial minorities

These types of strategies and institutional changes can be beneficial
in reducing discrimination and inequality, even absent the direct pressure of
civil rights law.\footnote{\textit{Green, supra} note 152.} Trade secret protection may also encourage companies to
voluntarily engage in internal audits and self-critical analysis to better
understand diversity challenges and to set related goals. Many companies
may be reluctant to “review their actions, foster dialogue, and take proactive
steps toward improving diversity” if there is no privilege to prevent the
mandated disclosure of embarrassing conversations or information in
discrimination lawsuits.\footnote{\textit{Pam Jenoff, Application of the Self-Critical Analysis Privilege to Corporate Diversity Initiatives}, 76 \textit{BROOK. L. REV.} 569 (2011).} While placing a value on inclusion is a positive
step and any incremental change can be seen as progress, it is also important
to understand how treating diversity information as protected trade secrets can undermine the ultimate goal of reducing discrimination and promoting equality.

A. Transparency and Accountability

When it comes to workplace equity, knowledge is power. From this perspective, equal opportunity would best be served by favoring transparency and treating diversity data and strategies as public goods rather than safeguarding them as trade secrets. Such an approach would include making workforce demographics publicly available, disseminating best practices, and, given that some well-intentioned practices have been shown to be ineffective, allowing such practices to be refined in the public eye with some scrutiny and accountability. This concept makes particular sense in the technology industry, which traditionally, has valued, pursued, and thrived on transparency.\(^\text{155}\) Treating diversity information as a public good would motivate employers to invest in effective practices, raise awareness of inequities and opportunities, facilitate collaboration on diversity goals, foster innovative diversity strategies, and increase accountability for action and progress—each addressed in turn below.

First, by placing diversity data in the discerning public eye, transparency creates a strong incentive for employers to pursue effective diversity initiatives. For example, in response to the demands made by socially conscious investors, outside directors, consumers, and other stakeholders, employers will invest in diversity to reap reputational rewards—\

\(^{155}\) See Greg R. Vetter, The Collaborative Integrity of Open-Source Software, 2004 Utah L. Rev. 563, 586, 594 (2004) (noting that while software used to be proprietary, and IP law was applied to protect it, the common open source model has flipped traditional copyright and grown impressively, achieving technological, social, and commercial success); Shawn W. Potter, Opening Up to Open Source, 6 Rich. J. L. & Tech. 24 (2000), at ¶ 7-8; (describing that by providing users with the software codes, the open source model allows “anyone to read and alter the program or to build a new derivative program.”). Further, through the use of a public licensing scheme, the open source model encourages users “to make improvements, write new programs, and communicate all improvements and changes back to the original developer,” which continuously improves the program.; Vetter, supra, at 617-18 (explaining that in fact, IBM’s early embrace of Linux legitimized the open source model and is regarded as a “notable tipping point” signaling the approach’s viability and bringing it into the mainstream.); Potter, supra, at ¶ 9 (noting that from a social perspective, it is argued that everyone should be able to freely “run, copy, distribute, study, change, and improve the software” so that it is not controlled by only a few powerful individuals.); Max Henrion, Open-Source Policy Modeling, 3 I/S: J. L. & Pol’y for Info. Soc’y 355 (2007) (describing the remarkable success enjoyed by many open source/content products such as Linux, Apache, MySQL, Firefox, Wikipedia, and the open dictionary project).
and to avoid reputational sanctions. This incentive structure is already partly achieved by diversity awards and rankings, but such information is less than useful if the core data and strategies that the awards are based on remain hidden, which tends to often be the case.

In addition to motivating companies to prioritize inclusion, transparency can more generally inform the industry and the public about the nature and extent of the inequity problem. Without information and data on workplace representation, pay equity, and best practices for promoting inclusion, it is difficult to know what problems exist and how to create strategies to best move forward. For example, it would benefit firm leaders to know specifically how their demographics and employment outcomes compare to those of their peers. Achieving this type of comparison requires collecting and sharing both quantitative and qualitative data on matters such as advancement, retention, compensation, satisfaction, mentoring, leadership opportunities, and work/family conflicts. Not only will increased transparency raise awareness of core challenges and opportunities, but it will also encourage information pooling and increased collaboration across firms with mutual goals of sustainable diversity and inclusion in the industry. This amalgamation of information will tie diversity initiatives to employment outcomes and help firms learn how specific policies and practices affect representation and equitable outcomes.

Unfortunately, this type of collaboration on diversity efforts is rare in the technology industry. When CNN first reached out to tech companies to request information on race and gender representation, only three were willing to share. Intel was the outlier at the time, as it favored transparency and even voluntarily made data on its employment diversity available on its public website before being asked. Its Chief Diversity Officer told CNN,

> Intel believes that transparency with our data is the best way to have a genuine dialogue...We are tech companies and data drives our business; we

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156 Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 378 (2010-2011); see also Alexander M. Nourafshan, *From the Closet to the Boardroom: Regulating LGBT Diversity on Corporate Boards*, 81 ALB. L. REV. 439, 481 (2018) (noting that transparent information about workplace demography incentivizes diversification “to avoid embarrassing disclosures that reveal a lack of diversity, which can be a reputational liability.”).


158 *Id.* at 1073.

159 Pepitone, *supra* note 24 (noting that Dell, Ingram Micro, and Intel were the only companies willing to share their diversity information).

160 *Id.*
need to get beyond our fears that the numbers are a poor reflection on our individual organizations and work together to address the issues collectively.\textsuperscript{161}

IBM has selectively shared this collective approach dating back to 2004, sharing its best practices for diversity strategy with the \textit{Harvard Business Review} so that business professionals at other companies, including tech sector competitors, could learn and make similar progress on diversity.\textsuperscript{162}

Few companies share both diversity data \textit{and} strategies. The emphasis on transparency for \textit{both} data and strategies is critical, because generally, tech companies and external stakeholders have placed a focus on numerical diversity over culture change and support of diverse talent in the workplace. Some tech companies publish their workforce diversity data and others mention they have recruitment efforts to improve the problem. However, the companies rarely discuss what efforts are used to improve workplace culture and help diverse talent thrive. This disconnect has the potential of creating a revolving door that makes workplace demographics remain stagnant. For example, a technology company recruits through women’s professional organizations to increase its representation of women upward a tick, but does not improve the culture of the organization to retain the women hired. The women then leave the organization, potentially for another industry, in a revolving door phenomenon that yields no long term benefits. Broader sharing of both workplace demographic data and diversity and inclusion strategies would incentivize such companies to work more on internal culture and eliminating structural barriers that harm the career prospects of women and people of color in the workplace. This sharing will also open such strategies to productive critique by employees and external stakeholders, which in turn will spur innovation in diverse recruiting, workplace culture improvements, and other interventions designed to increase equity.

Fundamental to IBM’s argument in \textit{IBM v. McIntyre} is the contention that its diversity data and strategies are \textit{competitive assets} and, as such, should be protected from disclosure to competitors who may profit from using them. However, this zero-sum conceptualization prevents collaboration amongst tech companies, the product of which could prove universally beneficial. For example, in 2001, the presidents of nine leading research universities formed a committee to address gender equity for female faculty, each pledging to evaluate their own university’s progress on the issue and to circulate the findings.\textsuperscript{163} This agreement has facilitated the sharing of diversity

\textsuperscript{161} Id.
\textsuperscript{162} Thomas, \textit{supra} note 96.
\textsuperscript{163} \textsc{Stanford Univ., Building on Excellence: Guide to Recruiting and Retaining An Excellent and Diverse Faculty at Stanford University} app. vi (Sept. 2005),
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information across many colleges and universities, and a website database has even been created to compile policies, reports, and resources that anyone can access.  

Stanford University utilized this resource in its review of other schools’ practices and initiatives to inform its own diversity recommendations. Therefore, even institutions that are vying for the same talent pool or are otherwise competitive can mutually benefit from collaborating in the pursuit of a common goal.

One potential risk of an open sharing-based model is that deference to and spread of ineffective diversity practices may result. However, the open model also exposes these strategies to scrutiny, which encourages accountability, evaluation, and an opportunity for improvement. Thus, transparency helps employers reach the goals of Title VII in the long run because it facilitates the development and dissemination of diversity practices that actually achieve equity and it holds employers both legally and socially responsible for their progress. Thus, transparency of both data and strategy is necessary to reduce the likelihood of symbolic and ineffective solutions and to realize the remedial purposes that underlie Title VII.

A transparent environment also increases accountability by allowing consumers to make informed decisions regarding their market behavior. For example, investors and consumers, who often greatly value diversity, can choose to patronize companies that promote inclusiveness while avoiding those that do not. Faced with public scrutiny, firms are induced to reach beyond mere compliance and to follow evolving best practices. This accountability is especially important because while many employers “talk the talk,” articulating commitments to increased diversity and adopting formal policies reflecting the same, women and minority groups remain underrepresented.


164 Id.
165 Id.
166 Rhode, supra note 157, at n. 227.
168 Id.
169 Nourafshan, supra note 156, at 481.
170 Estlund, supra note 156, at 378.
171 Nourafshan, supra note 156, at 445.
sense of responsibility and liability for companies that tout a commitment to diversity without actually reflecting this diversity.  

Lastly, sharing diversity information also leads to greater accountability by promoting employer compliance with anti-discrimination law. Although reporting obligations exist, diversity data is not truly a public good since most employer-reported information remains confidential, even after FOIA requests. Further, it is questionable whether companies that voluntarily publish are reporting their full data or just favorable slices or subsets. The transparent treatment of diversity data as a public good would therefore expose antidiscrimination law violations and facilitate more robust enforcement. Transparency would also prevent the legal insulation from lawsuits and liability that employers may be afforded when diversity data is treated as a trade secret.

Although employers’ EEO reporting data is kept confidential, this data is still readily available upon discovery or by court order and is commonly used against employers by the EEOC and individual litigants to support claims of discriminatory practices in individual and in class action lawsuits. However, FRCP Rule 26(C)(1)(G) requires “that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way.” Therefore, treating diversity data as a trade secret may make it difficult for victims of workplace discrimination to sue their employers, as they will have a hard time gaining the necessary information in the discovery phase. This result is problematic because statistical data is often essential to investigators of individual and systemic discrimination claims to confirm or rebut the claims.

B. Commodification of Diversity and Ownership of Labor

In addition to restricting transparency and hindering accountability, the trade secret argument also illuminates how companies commodify and

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172 Id. at 487.
173 See Estlund, supra note 156, at 373.
174 Id. at 396.
176 Alfred W. Blumenrosen & Ruth G. Blumenrosen, Intentional Job Discrimination—New Tools for Our Oldest Problem, 37 U. MICH. J. REFORM 681, 698 (2004); see also Thomas H. Barnard & Adrienne L. Rapp, Are We There Yet? Forty Years after the Passage of the Civil Rights Act: Revolution in the Workforce and the Unfulfilled Promises That Remain, 22 HOFSTRA LAB. & EMP. L.J. 627, 634 (finding that data plays key a role in litigation as it is used by plaintiffs and defendants to support or defend against charges of employment discrimination).
assert ownership of diverse talent, consistent with the theory of racial capitalism. This has negative repercussions for women and racial minorities in the technology industry and beyond. Racial capitalism has been defined as the derivation of social and economic value from the racial identity—and at the expense—of another person. Nancy Leong argues that amidst intense legal and social preoccupation with the notion of diversity, nonwhiteness is essentially commodified and exploited for its market value. This theory can be expanded to better understand exploitation of gender identity and marginalization of women in some contexts as well, including the technology industry, known more broadly as “identity capitalism.”

The companies asserting trade secret arguments benefit economically by claiming exclusive ownership of diversity data and strategies, as well as control of the talent holding this information. They claim that secrecy is warranted because diversity information is extremely valuable for business. For example, companies prefer to maintain secrecy and exclusive ownership of information in order to recruit and promote diverse talent that they identify and in order to keep clients happy—all of which bring profits and economic success. However, the economic benefit that accrues when trade secret claims are invoked is not without consequences. Paradoxically, the argument is often used to the detriment of the diverse talent whose identities provide the value.

Similarly, capture, possession, and use of this race and gender “diversity” commodity (i.e., diverse talent and intellectual capital), have become prevailing goals that are achieved through the enforcement of non-compete agreements. Orly Lobel has extensively studied the abounding negative effects of using non-competes to restrict talent more generally. The control theorized in the identity commodification literature is consistent

178 Id. at 2153, 2190.
179 Id. at 2154.
180 Nancy Leong, Identity Entrepreneurs, 104 CAL. LAW REV. 1333, 1334 (2016) (explaining that “individual in-group members and predominantly in-group institutions—usually individuals or institutions that are white, male, straight, wealthy, and so on—can and do derive value from out-group identities.”).
181 However, in recessions or times of economic turmoil, those in diversity roles are among the first to be eliminated. This raises suspicion about the argument that diversity is critical to financial success, and raises the question of whether trade secret arguments are really more about controlling diverse labor and hiding problematic data and strategies.
182 Complaint, supra note 91, at 9-11.
183 Leong, supra note 177, at 2155.
184 ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING (2013).
with Lobel’s critique of the Orthodox model of intellectual property, which asserts that we must control talent and information in order to reap the benefits of innovation.185 These efforts to commodify and control talent and diversity-related information put members of underrepresented groups in a particularly precarious position. For example, across industries, most individuals engaged in diversity-related work are women, people of color, and others from other underrepresented identity groups.186 The majority of Chief Diversity Officers who hold these purported diversity trade secrets are women or racial minorities.187 Sixty-five percent of Chief Diversity Officers at Fortune 500 companies are women while 37% are African-American.188

Thus, diverse talent is exceedingly likely to suffer the career consequences of restricted mobility due to the perception of risk that supposedly protected diversity information may be shared, whether intentionally or inadvertently. McIntyre almost suffered these exact consequences. Had IBM prevailed in its lawsuit against her, McIntyre would have been forced to forego a career opportunity so that IBM could protect its own economic interest, regardless of the harms that she would face.

Besides the fact that women and people of color disproportionately occupy diversity-type roles, they are also the professionals identified on recruitment and succession planning lists for which trade secret protection is claimed. If the identities of diverse incumbent employees and recruits may in fact be considered to be trade secrets, it will naturally result that these individuals’ accomplishments will not be permitted to be shared outside of the company, which could further limit opportunities and advancement. Given that the diversity trade secret arguments and related non-compete agreements put diverse employees in a disadvantaged economic position relative to their non-diverse peers, there is also potential for disparate impact claims should these strategies continue to proliferate.

These risks of identity commodification are compounded by the fact that, more generally, non-competes tend to be more problematic for diverse talent. For example, courts which take the position that a non-compete should

185 Leong, supra note 177; Leong supra note 180; LOBEL, supra note 184.
187 Kwoh, supra note 186; See NAT’L ASS’N OF INDEP. SCH. 2014 NAIS DIVERSITY PRACTITIONER SURVEY 29-31 (Aug. 2014), https://www.nais.org/Articles/Documents/Member/2014-NAIS-Diversity-Practitioner-Survey-Final.pdf (showing that 77% of diversity practitioners working in independent schools are female and 48% are black); compare Human Resource Managers, DATA USA, https://datausa.io/profile/soc/113121/#demographics (last visited Aug. 23, 2018) (showing that 61.3% of HR professionals are female and 78.5% are white).
188 Kwoh, supra note 186.
be voided if enforcement would strip the employee of their only means of support may be more likely to enforce a non-compete agreement against a married woman than a similarly-situated man.\textsuperscript{189} Additionally, employees who work at companies that zealously enforce non-competes are less likely to even try to leave their company out of fear of litigation being brought against them by their employer.\textsuperscript{190} This effect may be more pronounced for minority and female employees, who are generally less tolerant of financial risk.\textsuperscript{191} This imbalance is further exacerbated in industries with diversity challenges, and in situations in which diversity is seen to have economic value. By focusing on the economic benefits of diverse talent, and by securing these benefits through use of trade secret arguments, companies fail to acknowledge and remedy a practice that perpetuates prejudice, bias, and racial resentment. Accordingly, diverse talent will likely continue to suffer exclusion, isolation, and limited opportunities in the workplace, and will thus be robbed of the chance to gain important experience and rewards.

Further, due to non-competes, members of marginalized groups are unable to leave hostile or exclusionary environments in order to pursue better jobs with more inclusive cultures. For example, women and racial minorities often experience coworkers’ bias and prejudice as well as structural barriers that limit their ability to gain important skills. Members of these groups are less likely to leave companies with which they are dissatisfied for fear of lawsuits. When they do choose to leave an employer with which they signed a non-compete agreement, women and racial minorities are less likely to be in a position where buying out of the non-compete agreement is an option, either because they do not have the resources or knowledge to do so themselves, or because their new employer is unwilling to do so.\textsuperscript{192} Employees who successfully buy out of their non-compete agreements are typically executives, who are overwhelmingly white and male.\textsuperscript{193} Those who are unable to buy out of their agreements must choose between staying with a company where they are unhappy, or spending a year or more not working in

\textsuperscript{189} LOBEL, \textit{supra} note 184, at 59.
\textsuperscript{190} \textit{Id.} at 72.
\textsuperscript{192} LOBEL, \textit{supra} note 184, at 38 (explaining the limitations of the Coase theorem as applied to the issue of NCAs and concluding that buying out of a restrictive post-employment covenant is typically not feasible for average employees who either don’t have the resources to buy out, or whose employers are unwilling to bargain for a buy-out).
their field of expertise or at all.\footnote{Lobel, supra note 184, at 205.} Thus, non-competes place women and racial minorities in a situation with no favorable outcomes: leaving a company may result in being prevented from working in a one’s chosen profession, while staying with a company may result in continued subjection to bias and underutilization of skill.

In addition to commodifying women and racial minorities and obstructing career advancement, the companies claiming trade secret protection also engage in identity capitalism by avoiding legal liability for discrimination, which carries economic value.\footnote{See Leong, supra note 177, at 2190.} Treating diversity data and strategies as trade secrets ensures that this information remains secret and shielded from public and legal scrutiny. If diversity initiatives/strategies are trade secret protectable, individuals in diversity roles may face lawsuits when leaving the company if they choose to talk about workplace culture, treatment of minorities, or failures to achieve diversity/inclusion goals. The companies also conceal data that could otherwise reveal discriminatory patterns and practices.

VI. CONCLUSION

There is an inherent conflict between the values of trade secrecy doctrine and the broader goals of equal opportunity. Some major employers in the tech industry have made marked progress in terms of transparency in recent years. Arguing that diversity data and strategies are trade secrets is a major step backward. While trade secret arguments may superficially appear to place a value on inclusion, they have negative ramifications for social change. For the reasons presented above, diversity trade secrets such as those articulated in \textit{IBM v. McIntyre} will ultimately interfere with the goals of civil rights law.

The diversity trade secrets argument casts inclusion as a zero-sum game rather than an imperative that all firms can collaboratively strive to achieve. If the trade secret argument prevails, it may encourage companies to conceal data and best practices, which is detrimental to the broader quest for expansion of opportunity across industries and society. Consequences of the diversity trade secrets argument and related commodification include the prevention of market benefits that result from continuous investment in shared cognitive capital in the diversity space, which will stifle future innovation.\footnote{Lobel, supra note 184 (noting that regions that promote employee mobility encourage positive spillovers of knowledge, leading to economic growth and innovation, while those that restrict employee mobility stifle growth); Leong supra note 183.}
If tech companies such as IBM truly do view diversity as a competitive advantage capable of impressing recruits and key clients, wouldn’t these same parties be impressed if the companies share their diversity programs and success stories showcasing a steadfast commitment to equal opportunity and related progress in the workplace? Rather than working to the economic detriment of leading tech companies, such openness would instead mark them as forerunners whose transparency helped the entire industry build a more diverse and inclusive workforce. This result would indeed impress clients and talent who value diversity and, assuming that such approval is what is genuinely sought, would allow tech companies to reach their stated goals.197

Rather than remaining hidden behind trade secret doctrine, diversity information should be treated as a public good. In the same way that the California philosophy permitted Silicon Valley to thrive, the free flow of diverse talent and diversity-related information across organizations should be encouraged to facilitate innovation in the diversity realm.198 Sharing this type of knowledge can help the tech industry as a whole to refine strategies to improve inclusion efforts and equal opportunity.199 This model could potentially lead to a large compilation of information that allows firms to benchmark performance, identify best practices, collaborate with peers, and identify what works and what fails. This type of open model will lead to more progress in the realm of diversity, inclusion, and equal opportunity. Companies will be incentivized to invest in inclusion, and leaders will be aware of opportunities and challenges faced by the industry by having open access to data. This type of transparency, accountability, and collaboration has the potential to reduce bias against women and racial minorities rather

197 See, e.g., Cyrus Mehri, Andrea Giampetro-Meyer &Michael B. Runnels, One Nation, Indivisible: The Use of Diversity Report Cards to Promote Transparency, Accountability, and Workplace Fairness, 9 FORDHAM J. CORP. & FIN. L. 395, 444 (2004) (noting the competitive advantage garnered by employers “that are able to say, ‘We have enacted best practices to promote diversity.’”).
198 Pasqualone, supra note 140, at 257 (noting that several commentators have attributed the success of Silicon Valley to the mobility of its employees and particularly to section 16600); Gilson, supra note 138, at 575 (explaining that because California does not enforce post-employment covenants not to compete, high technology firms in Silicon Valley gain from knowledge spillovers between firms); Lester, supra note 135, at 392 (noting that weak enforcement [of CNCs] within “high velocity” labor markets—where highly-skilled employees move fluidly between firms taking ideas and innovations with them—permits the rapid diffusion of information, leading to industry-wide technological gains).
199 Rhode, supra note 157, at 1075 (noting that national groups like the Leadership Council on Legal Diversity, as well as many local bar organizations, have initiatives to promote collaboration; further, nine elite universities have worked toward gender equity in science and engineering by “monitoring data and sharing results annually.”).
than seeing them as a commodity, and to help the industry and society more broadly. Diversity does not need to be a zero-sum game.