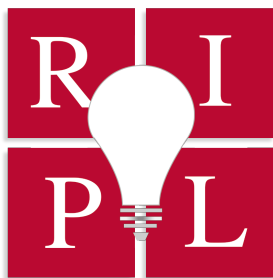


# UIC

## REVIEW OF INTELLECTUAL PROPERTY LAW



### DEFEND TRADE SECRETS ACT AND THE SEIZURE PROVISION: USEFUL OR SUPERFLUOUS?

SACHIN BHATMULEY

#### ABSTRACT

Over three years have passed since the Defend Trade Secrets Act (DTSA) was passed by Congress. One of the remarkable and ground-breaking provisions of the act was the *ex parte* seizure provision. With its inherent expediency and the element of surprise, the *ex parte* seizure provision found instant appeal among the trade secret owner community. But the opponents saw a provision ripe for abuse and anti-competitive behaviour. In the three years since its enactment, the *ex parte* seizure provision has been used sparingly. Plaintiffs have found other provisions equally effective or at least “good enough.” Even when plaintiffs sought *ex parte* seizure, the courts often found other available remedies—such as Rule 65 temporary restraining orders (TRO)—sufficient for the desired protection. This article provides a background and overview of the DTSA and its jurisprudence. The philosophical and policy underpinnings behind the inclusion of the *ex-parte* seizure provision are described to provide the appropriate context. The article then takes a retrospective look at the concerns raised by (primarily) the academic community highlighting the potential for abuse, and assesses if such concerns played out in reality. Further, the effectiveness of the seizure provision, especially in light of alternative provisions available, is also investigated. Finally, recommendations are made for potential reforms to improve the predictability and probability of success of *ex parte* seizure requests in future applications. Specifically, a multi-factor test focusing on the defendant’s characteristics is proposed to determine the circumstances where a Rule 65 remedy could be used with the same effect as the seizure provision. A second multi-factor test is then proposed as a framework to analyse the likelihood and propriety of *ex parte* seizure grants.

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SACHIN BHATMULEY

I. INTRODUCTION .....	218
II. DTSA AND EX-PARTE SEIZURE PROVISION.....	219
A. Trade Secret Law and UTSA.....	219
B. Defend Trade Secrets Act (DTSA).....	221
C. Ex Parte Seizure Provision.....	222
1. Supporters' Views .....	223
2. Opponents' Views.....	224
III. EX PARTE SEIZURE JURISPRUDENCE .....	224
A. Trademark Law and Lanham Act Seizures.....	224
B. Ex Parte Seizure Granted Without the DTSA .....	225
C. The Seizure Provision Under DTSA .....	227
IV. HOW EFFECTIVE HAS IT BEEN? .....	229
A. Why Was Seizure Granted .....	229
1. The Nature of Trade Secret.....	230
2. Defendant's Profile.....	230
B. Why Seizure Was Denied.....	230
C. Did the Risk of Abuse Materialize?.....	232
D. Over Three Years In – Who Was Right?.....	233
E. Is Any Reform Necessary? .....	234
V. CONCLUSION.....	236
VI. Appendix .....	237

## DEFEND TRADE SECRETS ACT AND THE SEIZURE PROVISION: USEFUL OR SUPERFLUOUS?

SACHIN BHATMULEY\*

### I. INTRODUCTION

It has been over three years since the Defend Trade Secrets Act (DTSA) was passed by Congress.<sup>1</sup> In addition to creating a federal civil cause of action from trade secret misappropriation, one of the remarkable and arguably groundbreaking provisions of the act was the *ex parte* seizure provision. With its inherent expediency and the element of surprise, the *ex parte* seizure provision found instant appeal among the trade secret owner community.<sup>2</sup> But, the opponents saw in it a provision ripe for abuse and anti-competitive behavior.<sup>3</sup> To address these concerns, Congress included constraints in the operation of the seizure provision to limit it to a narrow set of situations.

Even though several empirical studies on the DTSA jurisprudence in its first year are available,<sup>4</sup> those studies have not specifically focused on seizure provision, nor have they been updated in the recent past. In the three years since its enactment, the seizure provision has been used only sparingly. Plaintiffs have found other provisions equally effective or “good enough,” given the high bar of “extraordinary circumstances” required by the courts for *ex parte* seizure grants.<sup>5</sup> Even when plaintiffs sought *ex parte* seizure, the courts often found other available remedies—most often Rule 65 temporary restraining orders (TRO)—sufficient for the desired protection.<sup>6</sup> Nevertheless, the courts have started to identify situations in which the seizure provision is found appropriate. The nature of the trade secret—often electronic information that can be easily destroyed and disseminated—coupled with the defendant’s computer proficiency and prior conduct, namely misrepresentation and disregard for prior court orders, appear to weigh strongly in favor of granting the

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\* © 2020 Sachin Bhatmuley. Author is a graduate of the University of San Diego School of Law ‘19. Author sincerely thanks Prof. Ted Sichelman for his valuable guidance and unwavering support.

<sup>1</sup> S. 1890, 114th Cong. (2015-2016).

<sup>2</sup> Sharon K. Sandeen & Christopher B. Seaman, *Toward a Federal Jurisprudence of Trade Secret*, 32 BERKELEY TECH. L. J. 829, 854-55 (2018) (“The effect of this cost shifting results in anticompetitive behavior, is ripe for abuse, and offers no added benefit to what is provided via state trade secret causes of action and remedies.”).

<sup>3</sup> *Id.* at 856-57.

<sup>4</sup> David S. Levine & Christopher B. Seaman, *The DTSA at One: An Empirical Study of the First Year of Litigation Under the Defend Trade Secrets Act*, 53 WAKE FOREST L. REV. 106, 150 (2018) (“the statutory *ex parte* seizure remedy has been a little-used provision by trade secret plaintiffs. Out of 486 cases in the dataset, only 2% (10 cases) involve a motion for an *ex parte* seizure. In only two cases was an *ex parte* seizure granted. Courts denied a seizure in seven other cases, and there was no decision in the remaining case.”).

<sup>5</sup> *Panera, LLC v. Nettles*, No. 4:16-CV-1181-JAR, 2016 WL 4124114, at \*5 (E.D. Mo. Aug. 3, 2016).

<sup>6</sup> *Magnesita Refractories Co. v. Mishra*, No. 2:16-CV-524-PPS-JEM, 2017 U.S. Dist. LEXIS 22656 (N.D. Ind., Feb. 17, 2017); *OOO Brunswick Rail Mgmt. v. Sultanov*, 2017 U.S. Dist. LEXIS 2343, at \*5 (N.D. Cal. Jan. 6, 2017).

seizure provision.<sup>7</sup> Even in these situations, courts have attempted to further restrict the scope of seizures to narrowly defined articles, sometimes to even a single laptop or one document.<sup>8</sup> The sparse use of *ex parte* seizure grants notwithstanding, the vague language in the statute for “extraordinary circumstances” nevertheless has potential for ongoing confusion.<sup>9</sup> But, the courts have largely avoided any widespread abuse of the provision and have limited *ex parte* seizure orders to narrowly defined targets while also providing guidance on what is considered an “extraordinary circumstance” worthy of the seizure provision.<sup>10</sup>

Part I of this paper provides a background and overview of the DTSA. The philosophical and policy underpinnings behind the inclusion of the *ex-parte* seizure provision are briefly described to provide the appropriate context. Similarly, the opposing view, theorizing that the existing mechanisms in UTSA were sufficient and that the potential for abuse and weaponization of the seizure provision make it unnecessary, is also explored.

Part II briefly surveys the jurisprudence involving the seizure provision over the past three years since its enactment. Of the forty cases where the seizure provision was either requested or ordered, the early patterns suggest that the courts are reluctant and hesitant in finding the “extraordinary circumstances” required by the act to grant *ex parte* seizure. But, by mid-2017, the courts started to define specific circumstances that would satisfy the “extraordinary circumstances” criterion and granted *ex parte* seizure in nearly a third of the cases where such relief was requested.

Part III takes a retrospective look at the concerns raised (primarily) by the academic community highlighting the potential for abuse of the seizure provision and assesses if such concerns played out. Further, the effectiveness of the seizure provision, especially considering alternative provisions available to plaintiffs and the courts, is also investigated. Finally, recommendations are made for potential reforms to improve its predictability and probability of success for future application. Specifically, a multi-factor test is proposed to determine the circumstances where a Rule 65 remedy could be used to the same effect as the seizure provision. This test primarily focuses on the defendant’s characteristics. A second multi-factor test is then proposed as a framework to analyze the likelihood and propriety of *ex parte* seizure grants.

## II. DTSA AND EX-PARTE SEIZURE PROVISION

### A. Trade Secret Law and UTSA

A trade secret typically comprises of valuable, proprietary information or “know-how” that a business protects from use by competitors by taking reasonable efforts to

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<sup>7</sup> *Axis Steel Detailing, Inc. v. Prilex Detailing Ltd. Liab. Co.*, No. 2:17-cv-00428-JNP, 2017 U.S. Dist. LEXIS 221339 at \*4 (D. Utah June 29, 2017).

<sup>8</sup> *Thoroughbred Ventures, LLC v. Disman*, No. 4:18-CV-00318, 2018, 2018 U.S. Dist. LEXIS 133697, at \*18 (E.D. Tex. Aug. 8, 2018).

<sup>9</sup> See Sandeen & Seaman, *supra* note 2, at 895-96.

<sup>10</sup> See *Axis*, 2017 U.S. Dist. LEXIS 221339, at \*2.

maintain its secrecy.<sup>11</sup> The Supreme Court explained in *Kewanee Oil Co. v. Bicron Corp* that there are important public interests compelling protection of trade secrets.<sup>12</sup> Trade secrets are arguably the most litigated and the most important form of intellectual property.<sup>13</sup> Friedman, Landes, and Posner suggest that firms may prefer trade secrecy (to other forms of IP protection, such as patents) because it is more cost-effective than seeking other formal protection for their innovation, especially when the innovation is minor, or the firm is either too inexperienced or lacks resources.<sup>14</sup> Alternatively, the firm may simply not want to disclose the innovation to the public due to its secrecy being central to the firm's competitiveness and (even) existence (e.g., Coca-Cola). The essential rights of a trade secret owner are the right to use the trade secret and the right to disclose it to employees and others within a confidential or contractual relationship, subject to restrictions on unauthorized use or disclosure.<sup>15</sup> The majority of trade secret misappropriation thus tends to be an "inside job," often committed by departing or disgruntled employees or business partners.<sup>16</sup> When key employees depart, there is a real threat that the trade secrets have already been stolen and may be shared with a future employer, perhaps even a competitor. However, there is often no evidence of this until after damage to the business is done.<sup>17</sup>

Historically, trade secret causes of action evolved from state common law. The 1939 *Restatement of Torts* § 757 summarized the then-common law relating to trade secrets.<sup>18</sup> The classic definition of trade secrets is stated in *comment b* of § 757.<sup>19</sup> Under the Restatement, wrongful disclosure and wrongful use of a trade secret were actionable. Posner and Landes posited that historically, trade secret misappropriation relied for the most part on wrongdoing that was independent of any "trade secret law," relying instead, for example, on a breach of contract or trespass claim.<sup>20</sup>

Beginning in the 1980s, states began to adopt the Uniform Trade Secrets Act ("UTSA"). The UTSA largely codified the common law but added a few features, such as potential statutory increases in damages and discretionary attorneys' fees.<sup>21</sup> The UTSA's substantive aspect closely paralleled the 1939 Restatement except that the UTSA had no requirement that, to be protected, information must be used in one's trade or business. Further, courts continued to determine whether a matter is a trade secret by using the *comment b* six-factor test.<sup>22</sup>

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<sup>11</sup> David Bohrer, *Threatened Misappropriation of Trade Secrets: Making a Federal (DTSA) Case Out of It*, 33 SANTA CLARA HIGH TECH L.J. 506, 511 (2017).

<sup>12</sup> *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 482-83, 485-86 (1974).

<sup>13</sup> Josh Lerner, *The Importance of Trade Secrecy: Evidence from Civil Litigation* (Harvard Bus. Sch., Working Paper No. 95-043, 1999).

<sup>14</sup> See David D. Friedman et al., *Some Economics of Trade Secret Law*, 5 J. ECON. PERSP. 61, 63-70 (1991).

<sup>15</sup> 1 ROGER M. MILGRIM & ERIC E. BENSON, MILGRIM ON TRADE SECRETS § 1.01 (119th ed. 2019).

<sup>16</sup> See Sandeen & Seaman, *supra* note 2, at 857.

<sup>17</sup> See *id.* at 857, 901.

<sup>18</sup> RESTATEMENT OF TORTS § 757 (AM. LAW INST. 1939).

<sup>19</sup> *Id.* at cmt. b ("A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.").

<sup>20</sup> See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 355 (2003).

<sup>21</sup> 1 MILGRIM & BENSON, *supra* note 15, at § 1.01.

<sup>22</sup> See RESTATEMENT OF TORTS § 757 cmt. b (1939).

The UTSA's procedural aspect required a showing that the information in question was the subject of efforts "reasonable under the circumstances to maintain . . . secrecy."<sup>23</sup> In addition, the UTSA did not preempt contract claims (whether or not based on the same facts).

The UTSA also provided for and codified injunctive relief in case of actual or *threatened* misappropriation. Because injunctive relief was now available for threatened misappropriation, a trade secret owner did not have to wait until misappropriation had occurred to seek injunctive relief. "Threatened" misappropriation comprised of both a statement of an intent to misappropriate a trade secret, and a circumstance that is likely to result in the misappropriation of a trade secret.<sup>24</sup> In exceptional circumstances, the injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited.<sup>25</sup>

The UTSA has now been adopted by forty-nine states and the District of Columbia in one form or another since its promulgation.<sup>26</sup> However, not all states have adopted or interpreted the UTSA in the same manner, particularly the provisions regarding threatened misappropriation.<sup>27</sup>

### *B. Defend Trade Secrets Act (DTSA)*

On May 11, 2016, Congress signed into law the Defend Trade Secrets Act of 2016 ("DTSA"). DTSA, for the first time, created a federal *civil* cause of action for trade secret misappropriation, in contrast to the Economic Espionage Act ("EEA") of 1996, which had created a federal *criminal* cause of action for trade secret misappropriation. Prior to the EEA, there was no federal civil or criminal law directed specifically at trade secret misappropriation by private actors. EEA provided for *criminal* penalties for two forms of trade secret theft: (1) espionage on behalf of a foreign entity and (2) theft of trade secrets for pecuniary gain (regardless of who benefits).<sup>28</sup> But no federal *civil* cause of action existed for trade secret theft in the EEA. In the second decade of the 21<sup>st</sup> century, the high-profile case of Delaware based DuPont's trade secret misappropriations by Kolon Industries,<sup>29</sup> a Korean firm, prompted Delaware Senator Coons and the Congress to take action.<sup>30</sup> In July 2015, Sen. Coons and other lawmakers

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<sup>23</sup> 1 MILGRIM & BENSON, *supra* note 15, at § 1.01.

<sup>24</sup> *Id.* at § 101 n. 51.2.

<sup>25</sup> *Id.* at § 101.

<sup>26</sup> *See, id.*; *see also Trade Secrets Laws and the UTSA: 50 State and Federal Law Survey*, BECK REED RIDEN, LLP (last updated Aug 8, 2018), <http://www.beckreedriden.com/trade-secrets-laws-and-the-utsa-a-50-state-and-federal-law-survey-chart> ("As of 2018, every state but Massachusetts and New York has adopted the Uniform Trade Secrets Act (the UTSA) in one form or another. (There is some debate about whether Alabama or North Carolina actually adopted the UTSA; the Uniform Law Commissioners say that Alabama has adopted it, while North Carolina has not.")).

<sup>27</sup> *Id.*

<sup>28</sup> Economic Espionage Act, 18 U.S.C. § 1831 (2018).

<sup>29</sup> *E.I. Dupont De Nemours & Co. v. Kolon Indus.*, 269 F.R.D. 600, 2010 U.S. Dist. LEXIS 77075 (E.D. Va. 2010).

<sup>30</sup> Currency Exchange Rate Oversight Reform Act of 2011, S. Amend. 729, S. 1619, 112th Cong. (2011), *reprinted in* 157 CONG. REC. S6229-S6230 (daily ed. Oct. 5, 2011) (to be codified at 18 U.S.C. §§ 1836(a)(2), 1836(b)(4)(A)-(B)) (authorizing injunctive relief, damages for actual loss due to the

introduced identical bills in the House and Senate called the Defend Trade Secrets Act of 2015.<sup>31</sup>

Among other things, the bills would modify the EEA to permit the “owner of a trade secret” to “bring a civil action” if “the person is aggrieved by the misappropriation of a trade secret that is related to a product or service used in, or intended for use in, interstate or foreign commerce;” authorize “seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action” upon an *ex parte* application, subject to numerous requirements; create a cause of action for a person damaged by a “wrongful or excessive seizure” order and authorize monetary damages, attorney's fees, and punitive damages in cases of bad faith; and reaffirm that the EEA/DTSA would not “preempt or displace any other remedies, whether civil or criminal . . . for the misappropriation of a trade secret” under federal, state, or local law.<sup>32</sup>

Following several amendments triggered by, among other things, feedback (and pushback) from academics, and after further aligning the provisions of the bills with the existing state laws, Congress approved the bill, which was then signed into law by President Obama on May 11, 2016.<sup>33</sup>

### *C. Ex Parte Seizure Provision*

The most innovative, and arguably the most discussed feature of the DTSA was the seizure provision, enabling trade secret owners to obtain seizure orders on an *ex parte* basis. *Ex parte* seizure was the most notable aspect of the DTSA that set it apart from the UTSA. Neither the UTSA nor any state trade secret law had a trade secret-specific *ex parte* seizure process.<sup>34</sup> This seizure provision would allow the plaintiff an avenue to obtain an order on an *ex parte* basis to seize from the defendant the allegedly misappropriated trade secret.

The seizure provision, because of its potential to inflict quick and powerful impact, was subject to eight well-articulated requirements and may be ordered only in “extraordinary circumstances.”

To issue an *ex parte* seizure order, a court must first find that other forms of extraordinary relief, such as a temporary restraining order, would be inadequate because the restrained party would evade, avoid, or otherwise not comply.<sup>35</sup> Second, the court must find that the applicant will suffer “immediate and irreparable injury” without the order.<sup>36</sup> Third, the harm the applicant will suffer should “outweigh the harm to the legitimate interests” of the defendant.<sup>37</sup> Fourth, the court must find that

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misappropriation, and disgorgement of any unjust enrichment due to the misappropriation to the extent not considered in calculating actual damages).

<sup>31</sup> S. 1890, 114th Cong. (2015) (enacted); H.R. 3326, 114th Cong. (2015) (enacted).

<sup>32</sup> *Id.*

<sup>33</sup> 162 Cong Rec D 501 (May 12, 2016).

<sup>34</sup> Eric Goldman, *Ex Parte Seizures and the Defend Trade Secrets Act*, 72 WASH. & LEE L. REV. 284, 285 (2015).

<sup>35</sup> Defend Trade Secrets Act, 18 U.S.C. § 1836(b)(2)(A)(ii)(I) (2018).

<sup>36</sup> *Id.* § 1836(b)(2)(A)(ii)(II).

<sup>37</sup> *Id.* § 1836(b)(2)(A)(ii)(III).



the applicant will likely succeed at trial on the merits of its misappropriation claim.<sup>38</sup> Fifth, the person against whom seizure is ordered must have actual possession of the trade secret and any property to be seized.<sup>39</sup> Sixth, the court must find that if the applicant provided notice before the issuance of the order, the defendant would destroy, move, hide, or otherwise make the alleged trade secret inaccessible.<sup>40</sup> Seventh, the application should describe with reasonable particularity the matter to be seized and, to the extent reasonable under the circumstances, identify the location where the matter is to be seized.<sup>41</sup> Finally, the applicant must not have publicized the requested seizure.<sup>42</sup>

Like the security requirement with temporary restraining orders, the DTSA plaintiff must provide security (i.e. bond) for the payment of damages to the defendant in case of a wrongful or excessive seizure.<sup>43</sup> Further, the court may order only “the narrowest seizure of property necessary” to protect the alleged trade secret.<sup>44</sup> Moreover, the seizure must be “conducted in a manner that minimizes any interruption of the business operations of third parties” and, to the extent possible, must not interrupt the legitimate operations of the defendant.<sup>45</sup>

The DTSA requires a hearing no later than seven days after an *ex parte* seizure order is issued.<sup>46</sup> In the hearing, the court will determine if the order should be modified or dissolved, and if the seizure was wrongful or excessive.<sup>47</sup> In the event of a wrongful or excessive seizure, the defendant can recover damages for any lost profits, cost of materials, and loss of goodwill caused by the seizure, as well as reasonable and necessary attorney’s fees.<sup>48</sup> The defendant may also recover punitive damages upon a showing that the plaintiff sought the seizure in bad faith.<sup>49</sup>

### 1. Supporters’ Views

The primary motivation for the supporters and sponsors to promulgate the DTSA was to introduce a federal civil cause of action for trade secret misappropriation. This was spurred on by actual cases of and threats of industrial espionage by foreign corporations against American companies.<sup>50</sup> Specifically, the supporters contended that the existing state trade secret laws varied significantly in their treatment of trade secrets and that a harmonized federal law or a “single national baseline” for trade secret protection was necessary. They further contended that trade secret owners would benefit from access to federal courts just as with other intellectual property owners. In addition, the supporters believed that the seizure provision would provide

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<sup>38</sup> *Id.* § 1836(b)(2)(A)(ii)(IV).

<sup>39</sup> *Id.* § 1836(b)(2)(A)(ii)(V).

<sup>40</sup> *Id.* § 1836(b)(2)(A)(ii)(VII).

<sup>41</sup> *Id.* § 1836(b)(2)(A)(ii)(VI).

<sup>42</sup> *Id.* § 1836(b)(2)(A)(ii)(VIII).

<sup>43</sup> *Id.* § 1836(b)(2)(B)(vi).

<sup>44</sup> *Id.* § 1836(b)(2)(B)(ii).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* § 1836(b)(2)(B)(v).

<sup>47</sup> *See* § 1836(b)(2)(F).

<sup>48</sup> *See* § 1836(b)(2)(G).

<sup>49</sup> Goldman, *supra* note 34, at 285.

<sup>50</sup> *See* E.I. Dupont De Nemours & Co. v. Kolon Indus., 269 F.R.D. 600 (E.D. Va. 2010).

an expeditious avenue to prevent dissemination of trade secrets and/or to preserve evidence of misappropriation.<sup>51</sup>

## 2. Opponents' Views<sup>52</sup>

The opposition to the DTSA primarily came from the academic community. In a letter to the Congress, forty-two academics highlighted their opposition to the DTSA and concerns regarding its provisions.<sup>53</sup> Specifically, they contended that the seizure provision language in the DTSA is “impermissibly vague,” and therefore contains significant potential to cause anticompetitive harm, especially to small businesses and startups.<sup>54</sup> Further, they feared that the DTSA implicitly recognized the so-called inevitable disclosure doctrine, which permitted trade secret holders to obtain injunctive relief against a former employee if the employee's new job “will inevitably lead [him or her] to rely on the plaintiff's trade secrets.”<sup>55</sup> This, they feared, would be in conflict with existing laws in some states, like California.<sup>56</sup> Another concern expressed was that the DTSA would likely increase the length and cost of trade secret litigation, including through the liberal discovery permitted under the Federal Rules of Civil Procedure, and would result in less uniformity.<sup>57</sup>

As for the remedies, the opponents contended that the remedies already available to trade secret owners, including those in *ex parte* proceedings like TRO, were sufficient, and that the additional benefit provided by the *ex parte* seizure provision created a disproportionate risk of anti-competitive seizures and harm to smaller (and innocent) parties. The opponents found the DTSA safeguards “miscalibrated” to achieve the desired protections against abusive seizures.<sup>58</sup> They suggested that the highly fact-sensitive nature of the trade secret cases required adversarial proceedings, and that the additional safeguards in *ex parte* seizures would not address the question of accurate factual determinations.<sup>59</sup>

### III. EX PARTE SEIZURE JURISPRUDENCE

#### A. Trademark Law and Lanham Act Seizures

The Lanham Act (also known as the Trademark Act of 1946) authorized the issuance of civil seizure orders, codified under 15 U.S.C. § 1116(d), to permit trademark plaintiffs “to preserve the evidence necessary to bring trademark counterfeiters to

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<sup>51</sup> See, e.g., Sandeen, *supra* note 2 at 855 (“Numerous large industrial, high-technology, and pharmaceutical and medical device firms promoted enactment of the DTSA . . .”).

<sup>52</sup> *Id.* at 856.

<sup>53</sup> *Id.* at 857.

<sup>54</sup> *Id.*

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

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 858.

<sup>58</sup> See Goldman, *supra* note 34, at 287.

<sup>59</sup> *Id.*

justice.”<sup>60</sup> The trademark law civil seizure remedy is available for a violation that consists of using a counterfeit mark.<sup>61</sup> Under 15 U.S.C. § 1116(d), a court may, upon application, issue an *ex parte* seizure order “providing for the seizure of goods and counterfeit marks involved in such violation and the means of making such marks, and records documenting the manufacture, sale, or receipt of things involved in such violation.”<sup>62</sup> The statute requires, among other things, that the United States Attorney in the district where the order is sought be notified,<sup>63</sup> and that the application be based on an affidavit or similar sworn document.<sup>64</sup> A party seeking a seizure order must post a bond against claims of wrongful seizure, and the court must hold a hearing between ten and fifteen days after the issuance of *ex parte* seizure.<sup>65</sup>

Because we are focused primarily on the seizure provision in the context of trade secrets, seizure jurisprudence under 15 U.S.C. § 1116(d) will not be reviewed in any further detail, but contextual awareness of it is nonetheless useful to understand the justifications and rationale for *ex parte* seizure jurisprudence under the DTSA.

### *B. Ex Parte Seizure Granted Without the DTSA*

As it turns out, the courts had considered and granted *ex parte* seizures under Fed. Rule Civ. P. 65(b) even when the plaintiffs had not specifically asked for *ex parte* seizure under DTSA, 18 U.S.C. § 1836(b)(2). Under Rule 65(b)(1), trade secret owners could seek *ex parte* TROs that could include impoundment. An *ex parte* TRO with impoundment under Rule 65(b)(1) operates similar to § 1836(b)(2) *ex parte* seizure in that both are *ex parte* proceedings. No notice of the complaint is provided to the defendant, nor is the defendant present during the proceedings that result in the judge’s order. There is however, one key difference between a Rule 65(b)(1) TRO and the seizure provision. A TRO with impoundment under Rule 65(b)(1) is directed to and served on the defendant without the express involvement of law enforcement authorities. The TRO demands the defendant to turn over the pertinent property upon service. As such, it promises to be less intrusive and disruptive for defendants.

The seizure provision on the other hand, orders the United States Marshals Service (“U.S. Marshal”) to seize the identified property as soon as possible. While most of the showings required for the seizure provision are identical to those for a Rule 65(b)(1) TRO, the seizure provision requires the plaintiff to make an additional showing of “extraordinary circumstances” to justify the involvement of a U.S. Marshal.

A Rule 65(b)(1) TRO could provide an alternative remedy to plaintiffs and could likely address the need for an expedited action satisfactorily, but it may fall short if a defendant has the means and the motivation to evade the TRO. The defendant could thus continue to inflict harm on the plaintiff by rapidly destroying or disseminating the trade secrets in question by ignoring or evading the TRO. If a defendant indeed proceeds to do that, the potential consequence to a plaintiff could be catastrophic at

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<sup>60</sup> *In re Lorillard Tobacco Co.*, 370 F.3d 982, 987 (9th Cir.2004).

<sup>61</sup> 15 U.S.C. § 1116(d) (2018).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

times. For example, if the trade secret in question is the cornerstone (or the sole reason) of the plaintiff's business advantage (e.g. Coca-Cola formula or Google search algorithm), relying on the defendant's compliance with a Rule 65 TRO would effectively eliminate the plaintiff's chances of seeking any meaningful relief if the defendant chooses to ignore or evade the Rule 65 TRO. The seizure provision thus promises a quick and effective solution to stop further dissemination and destruction of the misappropriated trade secrets.

On the other hand, trade secret misappropriation situations could be highly fact-sensitive in that the allegedly misappropriated information may turn out to be, *inter alia*, not a trade secret after all. Without the benefit of adversarial proceedings to tease out the facts, the seizure provision threatens to disrupt business operations of an innocent (or unprepared) defendant. Not to mention reputational and goodwill harm resulting from the U.S. Marshal raiding the business. A Rule 65 TRO thus aims to maintain the status quo to ensure that the plaintiff gets immediate relief, while also saving the defendant the ignominy of a U.S. Marshal's raid.

The Committee Notes on Rules to the 2001 amendment provide additional guidelines referring to a similar provision in trademark law and cases in trademark law further illustrating the required showing to justify *ex parte* impoundment.<sup>66</sup>

In *Panera v. Nettles, et. al*,<sup>67</sup> the plaintiffs did not request an *ex parte* seizure. Instead, a request was made for a temporary restraining order (TRO) under Rule 65(b) to have the defendant turn over, *inter alia*, his personal laptop and any other devices that contained information relating to Panera. The court granted the request asking the defendant to turn over his laptop to a forensic expert. Similarly, in *Earthbound Corporation v. MiTek USA, Inc.*,<sup>68</sup> the court granted the TRO requiring the defendants to turn over the misappropriated thumb drives pursuant to Rule 65(b). Neither of these were *ex parte* proceedings.

In *Magnesita Refractories Co. v. Mishra*,<sup>69</sup> the court used Rule 65(b) *ex parte* impoundment provision to grant *ex parte* seizure of defendant's laptop. There, the court relied on Rule 65(b) TRO and found it adequate to sidestep the issue of the DTSA and its (higher) showing of "extraordinary circumstances" required to grant *ex parte* seizure under 18 U.S.C § 1836(b)(2). Curiously, the court justified the *ex parte* TRO impoundment in *Magnesita Refractories* by citing *Panera v. Nettles, et. al* and *Earthbound Corporation v. MiTek USA, Inc*, neither of which in fact were *ex parte* TRO proceedings. *Magnesita Refractories* remains good law and does not show any negative appellate history so far.

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<sup>66</sup> FED. R. CIV. P. 65 ("Impoundment may be ordered on an *ex parte* basis under subdivision (b) if the applicant makes a strong showing of the reasons why notice is likely to defeat effective relief. . . .").

<sup>67</sup> *Panera*, 2016 WL 4124114, at \*2-4.

<sup>68</sup> *Earthbound Corporation v. MiTek USA, Inc.*, No. C16-1150 RSM. 2016 WL 4418013, at \*11 (W.D. Wash. Aug. 19, 2016).

<sup>69</sup> *Magnesita Refractories Co.*, 2017 U.S. Dist. LEXIS 10204.

### C. The Seizure Provision Under DTSA

The first case requesting *ex parte* seizure under DTSA § 1836(b)(2) is *Dazzle Software II, LLC v. Kinney*.<sup>70</sup> In *Dazzle*, filed just a month after the DTSA was signed into law by President Obama, the plaintiff sought *ex parte* seizure of computer storage devices and computers in a third party's possession. The court declined, without explanation, to grant the requested relief on an *ex parte* basis and instructed plaintiffs to serve the application on defendants. The court did not provide any § 1836(b)(2) analysis for its rejection nor did it specifically provide reasons for proceeding with a hearing under Rule 65(b). The court later dismissed the DTSA claims altogether stating that the misappropriation took place before the DTSA was enacted.

Between June 2016 and March 2017, a string of cases followed that sought the *ex parte* seizure remedy, but the courts rejected each time, and instead granted alternate remedies such as a TRO (in most cases), and an NDA (in one case – *Sapienza v. Trahan et al*<sup>71</sup>).

In *Balearia Caribbean Ltd., Corp., v. Calvo*,<sup>72</sup> the court granted the TRO but denied *ex parte* seizure. In its rejection, the court referred to the DTSA's legislative history and pointed to the DTSA's applicability only in "extraordinary circumstances" such as in "instances in which a defendant is seeking to *flee the country* or planning to disclose the trade secret to a third party immediately or is otherwise not amenable to the enforcement of the court's orders."<sup>73</sup> The court cited *AT&T Broadband v. Tech Commc'ns, Inc.*,<sup>74</sup> under Cable Communications Policy Act ("CCPA") explaining that (an *ex parte* seizure order under CCPA) "must show that the defendant, or persons involved in similar activities, had concealed evidence or disregarded court orders in the past." Finally, in the Lanham Act context, the court found the seizure provision appropriate only "where destruction of evidence is likely and where entities similar to the defendants had a history of destroying evidence and disobeying court orders."<sup>75</sup> The *Balearia* court did not find any of these circumstances and thus denied the *ex parte* seizure opting in favor of a TRO instead.

Subsequently, in *Jones Printing LLC v. Adams Lithographing Company*,<sup>76</sup> *OOO Brunswick Rail Management v. Sultanov et al*,<sup>77</sup> *OOO Brunswick Rail Management v. Ostling*,<sup>78</sup> and *Unum Group v. Loftus*,<sup>79</sup> various district courts engaged in similar

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<sup>70</sup> *Dazzle Software II, LLC v. Kinney*, No. 16-cv-12191, 2016 U.S. Dist. LEXIS 155992 (E.D. Mich. Aug. 22, 2016).

<sup>71</sup> *Sapienza v. Trahan*, No. 16-CV-01701, 2017 U.S. Dist. LEXIS 200319, at \*29 (W.D. La. Oct. 23, 2017).

<sup>72</sup> *Balearia Caribbean, Corp. v. Calvo*, No. 16-23300-CIV, 2017 WL 8780944 (S.D. Fla. Aug. 3, 2017).

<sup>73</sup> *Protection of Trade Secrets: Overview of Current Law and Legislation*, CONGR.RES. SERV. REP. (Dec. 14, 2018), <https://www.everycrsreport.com/reports/R43714.html>

<sup>74</sup> *AT&T Broadband v. Tech Commc'ns, Inc.*, 381 F.3d 1309, 1319 (11th Cir. 2004).

<sup>75</sup> *Balearia Caribbean, Corp. v. Calvo*, No. 16-23300-KMV (S.D. Fla. Aug. 5, 2016).

<sup>76</sup> *Jones Printing LLC v. Adams Lithographing Co.*, No. 1-16-cv-00442, Dkt. 8 (E.D. Tenn. Nov 3, 2016).

<sup>77</sup> *OOO Brunswick Rail Mgmt. v. Sultanov*, No. 5:17-CV-00017-EJD, 2017 WL 67119 (N.D. Cal. Jan. 6, 2017).

<sup>78</sup> *OOO Brunswick Rail Mgmt. v. Ostling*, No. 3:17-CV-00114 (ACV), 2017 WL 8948259 (D. Conn. Nov. 13, 2017).

<sup>79</sup> *Unum Grp. v. Loftus*, 220 F. Supp. 3d 143 (D. Mass. 2016).

reasoning to ultimately find Rule 65 adequate for effective relief and did not find the “extraordinary circumstances” necessary for the *ex parte* seizure relief under § 1836(b)(2).

The courts appeared to weigh the potential harm of an *ex parte* seizure to an unprepared (or an otherwise compliant) defendant heavily over the needs of a plaintiff potentially at risk of losing some commercial advantage. As a practical consequence, it became obvious that courts were unwilling to order *ex parte* seizure without the higher showing of “extraordinary circumstances.” Nevertheless, no meaningful guidance emerged from these cases to guide plaintiffs to determine situations that would meet the elusive “extraordinary circumstances” criterion.

In what may be the first case (*Mission Capital Advisors LLC v. Romaka*, filed in June 2016) where *ex parte* seizure was sought and ultimately (albeit only partially) granted, employer Mission Capital Advisors sought *ex parte* seizure as well as Rule 65 preliminary injunction (PI) and TRO, accusing ex-employee Romaka of trade secret theft.<sup>80</sup> Mission Capital had apparently managed to image Romaka’s home computer before filing the complaint and was therefore able to identify the nature and the location of some of the misappropriated trade secrets (e.g., a contact list) with particularity. The court granted *ex parte* seizure for the contact list but denied it for the remaining allegedly misappropriated information stating that the confidentiality and the ensuing irreparable harm if such information was disclosed, was not stated with particularity and hence *ex parte* seizure was not warranted. In granting the seizure on the contact list, the court noted that Romaka did not appear at a show cause hearing and had evaded service on two occasions in the past. Given this prior history of evasive conduct, the court reasoned that Rule 65 would be inadequate in providing effective relief with respect to the highly-proprietary contact list.

Starting with *AVX Corporation v. Kim*,<sup>81</sup> filed in March 2017 in the District Court in South Carolina, and soon thereafter in *Axis Steel Detailing v. Prilex Detailing*,<sup>82</sup> filed in May 2017 in the District Court in Utah, a somewhat discernible pattern started to emerge where the district courts found “extraordinary circumstances” required for granting *ex parte* seizure. The defendants’ familiarity and proficiency with computer and software tools coupled with their history of prior lies and non-compliance with court orders seemed to be common denominators in both cases.

In *AVX Corporation v. Kim*, employee Kim, a software engineer, had repeatedly lied to his employer about his conduct and about having possessed the trade secrets. The court reasoned that “Kim’s likelihood to evade, avoid, or otherwise not comply with such an order is demonstrated by his deceptive actions when he repeatedly lied and attempted to conceal the fact that he surreptitiously accessed and downloaded the Stolen Computer Files.” Addressing the second requirement of § 1836(b)(2), the court reasoned that “[a]n immediate and irreparable injury will occur if such seizure is not

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<sup>80</sup> Complaint at 1, *Mission Capital Advisors LLC v. Romaka*, No. 16-CV-5878 (RA), 2016 WL 11517040 (S.D.N.Y. July 22, 2016) (“Romaka’s misappropriation was discovered when, after he was absent for several days, Mission checked the download logs of one of its databases and learned of his actions. Romaka feigned ignorance and even permitted computer consultants to inspect his computer . . . .”)

<sup>81</sup> *AVX Corp. v. Junhee Kim*, No. 6:17-cv-00624-MGL, 2017 U.S. Dist. LEXIS 227657 (D.S.C. Mar. 13, 2017).

<sup>82</sup> *Axis Steel Detailing, Inc. v. Prilex Detailing*, 2017 U.S. Dist. LEXIS 221339 (D. Utah June 29, 2017).

ordered, namely any Stolen Computer Files stored on the Property Subject to *ex parte* seizure at any moment could be transferred or conveyed to a third party such as a competitor of AVX.”<sup>83</sup>

In *Axis Steel Detailing*, defendants were ex-employees of Axis, and started their own competing company allegedly taking specific confidential software (“Tekla”) files with them. The court reasoned that “[a]t least some of the Defendants have a high level of computer technical proficiency and there have been attempts by Defendants in the past to delete information from computers, including emails and other computer data. Further, Defendants have shown a willingness to provide false and misleading information. Accordingly, it appears that Defendants would evade, avoid, or otherwise not comply with an order issued pursuant to Rule 65 of the Federal Rules of Civil Procedure or other equitable remedy.” To address the irreparable injury prong, the court reasoned, “[i]f *ex parte* seizure were not allowed, immediate and irreparable injury to Axis is almost certain. Injury to Axis may include destruction of probative evidence and a continued disadvantage in the marketplace.”

In the cases following *Axis* in various district courts around the nation seeking seizure under the DTSA, *ex parte* seizure was granted in four instances. In the fifteen cases before *Axis*, *ex parte* seizure (under the DTSA) was granted in only two cases broadly (*Axis* and *AVX*), and in one case narrowly (limited to a single document in *Mission Capital*). A summary of all the DTSA cases either directly or indirectly requesting the *ex parte* seizure provision, with the corresponding outcome and the court’s rationale is included in the Appendix.

In general, the courts continued to be selective in granting *ex parte* seizure. Nevertheless, the courts appeared more willing to grant Rule 65 TROs (fourteen cases). The courts also (though less frequently) seemed to prefer other remedies such as a preliminary injunction, expedited discovery, or a stay order. The main reasons for this clear preference for Rule 65 remedy were most likely the first (of eight) requirements listed under 1836(b)(2)(A)(ii)<sup>84</sup> and the courts’ unwillingness to find the “extraordinary circumstances” necessary for the *ex parte* seizure grant.

#### IV. HOW EFFECTIVE HAS IT BEEN?

##### A. Why Was Seizure Granted

The notably higher occurrence of the seizure provision grants post-*Axis* and *AVX* appears to be a combination of the specific defendant characteristic and conduct requirements articulated by earlier courts, including the *Axis* and *AVX* courts. This has guided plaintiffs to identify specific defendant characteristics in their seizure requests, allowing courts to be less hesitant in approving the seizure when the nature and location of the trade secrets is identified with particularity.

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<sup>83</sup> *AVX Corp. v. Junhee Kim*, 2017 U.S. Dist. LEXIS 227657, at \*6.

<sup>84</sup> 18 U.S.C.S. § 1836 (“[A]n order issued pursuant to Rule 65 of the Federal Rules of Civil Procedure or another form of equitable relief would be inadequate to achieve the purpose of this paragraph because the party to which the order would be issued would evade, avoid, or otherwise not comply with such an order.”).

### 1. *The Nature of Trade Secret*

Under DTSA, the definition of information that qualifies as trade secret has largely remained unchanged from UTSA and other prior definitions such as the Restatements.<sup>85</sup> Although the list of information qualifying as trade secrets under DTSA is quite long,<sup>86</sup> the nature of trade secrets the courts have found to warrant “extraordinary circumstances” required by § 1836(b)(2) can be primarily narrowed down to those that exist in softcopy format and hence are prone to either quick dissemination to competitors and/or quick destruction by the defendant.<sup>87</sup>

### 2. *Defendant’s Profile*

Defendants’ proficiency with computers and software has played an important role in cases where the courts perceived the need for expediency and caution in securing the trade secrets.<sup>88</sup> For instance, the court in *Solar Connect, LLC v. Endicott*<sup>89</sup> cited defendants’ “high level of computer and technical proficiency” as a key factor in deciding that any equitable relief other than an *ex parte* seizure would be inadequate. The *Axis* court too, reasoned that a technically savvy defendant may find ways to hide, quickly disseminate, or otherwise destroy key evidence in a non *ex parte* proceeding.<sup>90</sup>

Another conspicuous and consistent theme among *ex parte* seizure orders has been the prior conduct of the defendant. The courts have not treated kindly any instances of evasion (no-show at hearings or evading service), lies and misrepresentation, or refusal to comply with requests of turning over the data or ceasing use of trade secrets. As illustrated by *Axis*, *AVX*, *Vice Capital*,<sup>91</sup> *Thoroughbred Ventures*,<sup>92</sup> and *Solar Connect*,<sup>93</sup> the courts had an easier time finding the “extraordinary circumstance” required to necessitate *ex parte* seizure whenever plaintiffs highlighted defendants’ prior lies, non-compliance, and proclivity to evade.

### *B. Why Seizure Was Denied*

Of the forty *ex parte* seizure cases filed, the courts denied the seizure provision in thirty-two instances. The predominant reason for denial was finding the use of alternative remedies to be adequate.<sup>94</sup> The primary alternative remedy preferred by

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<sup>85</sup> RESTATEMENT OF TORTS § 757 cmt. b.

<sup>86</sup> 18 U.S.C.S. § 1839.

<sup>87</sup> 18 U.S.C.S. § 1836.

<sup>88</sup> *Vice Capital LLC et al v. CBD World LLC et al*, Docket No. 5:18-cv-00566 (W.D. Okla. Jun 08, 2018).

<sup>89</sup> *Solar Connect, LLC v. Endicott*, No. 2:17-cv-1235, 2018 WL 2386066, at \*2 (D. Utah Apr. 6, 2018).

<sup>90</sup> *See Axis Steel Detailing, Inc.*, 2017 U.S. Dist. LEXIS 221339 at \*4.

<sup>91</sup> *See, e.g., Vice Capital LLC et al v. CBD World LLC et al*, Docket No. 5:18-cv-00566 (W.D. Okla. Jun 08, 2018).

<sup>92</sup> *Thoroughbred Ventures, LLC v. Disman*, 2018 U.S. Dist. LEXIS 133697 (E.D. Tex. Aug. 8, 2018).

<sup>93</sup> *See, e.g., Solar Connect*, WL 2386066, at \*2.

<sup>94</sup> *See infra* Appendix.



the courts was the Rule 65(b) temporary restraining order (TRO). In addition to the thirty-seven cases that expressly sought *ex parte* seizure, *Magnesita* discussed applicability of *ex parte* seizure under the DTSA, and ultimately rejected it, instead granting *ex parte* TRO under Rule 65(b)'s impoundment provision. In every instance of the seizure provision denial, especially in the early cases, the courts struggled to find the "extraordinary circumstances" required by § 1836(b)(2). Not having state law or UTSA jurisprudence to draw from, the courts looked to the Cable Communications Policy Act (e.g., *AT&T Broadband v. Tech Commc'ns, Inc.*<sup>95</sup>) and Lanham Act jurisprudence (e.g. *SATA GmbH & Co. Kg v. Wenzhou New Century International, Ltd.*<sup>96</sup>) and treaded cautiously. Even as late as in *Cochrane USA, INC. v. Filiba*,<sup>97</sup> filed in February 2018, the court had difficulty finding "extraordinary circumstances" despite the plaintiff having highlighted the risk of the defendant fleeing the country with trade secrets. (DTSA's legislative history lists defendant's flight risk as one of the factors to consider toward finding the "extraordinary circumstance."<sup>98</sup>).

In *Snively, Inc. v. Blank, et al.*,<sup>99</sup> the court denied *ex parte* seizure pointing out that it saw no "irreparable harm," and granted a Rule 65(b) TRO instead. The absence of particularity and lack of emphasis on the confidential nature of the stolen information may also weigh strongly in the court's the decision-making. In *Mission Capital Advisors LLC v. Romaka*,<sup>100</sup> the court denied the seizure for all other information except the contact list because it found that "such information and related facts such as confidentiality and irreparable harm are not described with sufficient particularity in the moving papers."<sup>101</sup>

In general, the lack of UTSA and state law jurisprudence on civil seizures as well as the lack of additional guidance (or clear language) in DTSA relating to the "extraordinary circumstances" requirement left the courts treading cautiously and denying *ex parte* seizure when in doubt. Unlike Lanham Act seizures, the factual situations in a trade secret theft are broader and leave much room for interpretation, further pushing the courts away from *ex parte* proceedings. Availability of Rule 65(b) TRO also appears to be sufficient in most situations where the *ex parte* nature of the seizure doesn't appear critical and where the courts see the likelihood of the defendants complying with TRO. In addition, the lack of particularity in plaintiff's motion also becomes a factor in the courts denying an *ex parte* seizure.

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<sup>95</sup> *AT&T Broadband*, 381 F.3d at 1319.

<sup>96</sup> *SATA GmbH & Co. Kg v. Wenzhou New Century Int'l, Ltd.*, No. CV 15-08157-BRO (Ex), 2015 WL 6680807, at \*10 (C.D. Cal. Oct. 19, 2015) (ordering *ex parte* seizure of counterfeit paint reservoirs where "similarly situated defendants in analogous trademark infringement cases have a history of disposing of counterfeit goods and refusing to comply with court orders").

<sup>97</sup> *Cochrane USA, Inc. v. Filiba*, No. 18-341 (EGS), 2018 U.S. Dist. LEXIS 185726 (D.D.C. Mar. 9, 2018).

<sup>98</sup> *Protection of Trade Secrets: Overview of Current Law and Legislation*, CONGRESSIONAL RESEARCH SERVICE REPORTS, at 22 (Dec. 14, 2018), <https://www.everycrsreport.com/reports/R43714.html>

<sup>99</sup> *Snively, Inc. v. Blank, et al.*, Docket No. 4:18-cv-00519 (N.D. Ohio March 06, 2018).

<sup>100</sup> *See, e.g., Mission Capital Advisors LLC v. Romaka*, 2016 WL 11517104 (S.D.N.Y July 22, 2016).

<sup>101</sup> *Id.* at \*2.

### *C. Did the Risk of Abuse Materialize?*

Opponents of the DTSA and the seizure provision articulated numerous risks.<sup>102</sup> Specifically, they contended that the seizure provision language in the DTSA is “impermissibly vague,” and therefore carries significant potential to cause anticompetitive harm, especially to small businesses and startups. Further, they feared that the DTSA implicitly recognized the so-called inevitable disclosure doctrine, which permitted trade secret holders to obtain injunctive relief against a former employee if the employee's new job “will inevitably lead [him or her] to rely on the plaintiff's trade secrets.” This, they feared, would conflict with existing laws in some states, like California. Another concern expressed was that DTSA would likely increase the length and cost of trade secret litigation, perhaps through the liberal discovery permitted under the Federal Rules of Civil Procedure, and would thus result in less uniformity.

Subsequently, the courts indeed struggled with a consistent definition of “extraordinary circumstances” in DTSA cases. While some courts weighed the defendant's characteristics and prior conduct heavily in making this determination and ultimately granted the seizure where they saw a prior history of lies or evasion,<sup>103</sup> at least one court (D.D.C) refused to find such (“extraordinary”) circumstance even when the defendant was a flight risk.<sup>104</sup> Even though certain factors are starting to emerge to help determine the “extraordinary circumstances,”<sup>105</sup> the sample size is still low, and no binding appeals court or Supreme Court precedent has emerged.

Despite the lack of clear criteria defining “extraordinary circumstances,” the fear of abuse, anticompetitive behavior, and harm to innocent third parties has not materialized. A survey of the forty cases, where the seizure provision was either requested or granted,<sup>106</sup> reveals that none of the defendants have asserted the “inevitable disclosure” defense prior to or following an *ex parte* seizure order. Similarly, “wrongful or excessive seizure” claims also have not been asserted. Admittedly, three years is a short time window since the enactment and therefore rich case law is yet to develop. Nevertheless, the perceived risk of abuse, “inevitable disclosure,” and “wrongful or excessive seizure” has either not played out, or the courts have been careful to only grant *ex parte* seizures where the facts strongly supported such action.

Other stated fear, namely that of accidental disclosures by plaintiffs when pleading under Fed. Rule of Civ. P. Rule 8, does not appear to have materialized either. While the courts have demanded particularity in granting the seizure, the particularity requirement is directed at identifying the information or device to be seized with specificity as in *Mission Advisors* (where the contact list was identified

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<sup>102</sup> See Sandeen & Seaman, *supra* note 2 at 857.

<sup>103</sup> See, *Axis Steel Detailing, Inc. v. Prilex Detailing*, 2017 U.S. Dist. LEXIS 221339 (D. Utah June 29, 2017); *AVX Corp. v. Junhee Kim*, No. 6:17-cv-00624-MGL, 2017 WL 11316598 (D.S.C. March 13, 2017); *Blue Star Land Services LLC v. Coleman et al*, Docket No. 5:17-cv-00931, 2017 WL 11309528 (W.D. Okla. Aug 29, 2017).

<sup>104</sup> See *Cochrane USA, Inc. v. Filiba*, 2018 U.S. Dist. LEXIS 185726 (D.D.C. Mar. 9, 2018).

<sup>105</sup> See *supra* Part III.

<sup>106</sup> See *infra* Appendix.

with particularity), and in *Thoroughbred Ventures*<sup>107</sup> (where the laptop was identified with particularity) and not its contents.

The fear that the DTSA would result in less uniformity stemmed from the belief that the DTSA would not follow established state law or UTSA precedent and would therefore result in inconsistency. DTSA, apart from the seizure provision and some other minor features, largely follows UTSA, and forty-eight of the fifty states have adopted UTSA. However, neither UTSA nor any state law had the *ex parte* seizure provision, and thus there appears no risk of inconsistent rulings contrary to precedent as far as the seizure provision goes.

#### *D. Over Three Years In – Who Was Right?*

The proponents celebrated the DTSA's *ex parte* seizure provision for the expediency it offered in securing the misappropriated information and its cost-shifting aspects, which shifted some discovery costs to the defendant and to federal authorities.<sup>108</sup> The opponents, on the other hand, feared a rampant misuse of the seizure provision, and its weaponization to the detriment of small (and sometimes innocent) companies and startups.

Three years in, the proponents' early euphoria has been significantly tempered by the courts' caution and reluctance to find the "extraordinary circumstances" required for the seizure provision. Nevertheless, the courts *have* granted *ex parte* seizure, and thereby started to provide guidance for future plaintiffs regarding the criteria important for a successful *ex parte* seizure action.

On the other hand, the courts have taken note of the concerns highlighted by the opponents and have granted *ex parte* seizure only in limited situations where, *inter alia*, the defendant(s) demonstrated a history or tendency to lie or otherwise evade court's orders. Furthermore, even when seizures have been granted, they have often been tailored narrowly to a specific device or a single data file. This limited and careful exercise of the seizure provision should largely assuage any lingering fears the opponents may have. Interestingly, even though over 1000 cases have been filed to date involving the DTSA,<sup>109</sup> only around forty to fifty plaintiffs have sought the *ex parte* seizure remedy under § 1836(b)(2).<sup>110</sup> This alone should provide a significant reassurance to the opponent community that the constraints placed on the seizure provision by the DTSA have successfully mitigated risks of its rampant misuse, abuse, or weaponization.

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<sup>107</sup> See, e.g., *Thoroughbred Ventures*, 2018, 2018 U.S. Dist. LEXIS 133697; see also *Mission Capital Advisors*, 2016 WL 11517040.

<sup>108</sup> Yvette Joy Liebesman, *Ex Parte Seizures Under the DTSA and the Shift of IP Rights Enforcement*, 1 BUS. ENTREPRENEURSHIP & TAX L. REV. 383 (2017).

<sup>109</sup> BLOOMBERG LAW, <https://www.bloomberglaw.com/product/blaw/search/results/55304edb7963e43bff3328f7e1009b68> (last visited Aug. 25, 2018) (enter search terms "DTSA" and "Trade Secrets" in Bloomberg Law News search bar).

<sup>110</sup> BLOOMBERG LAW, <https://www.bloomberglaw.com/search/results/f9de2c7382ab7a0b14a1fd5a4897ec06> (last visited April 1, 2020) (enter search terms "DTSA" and "Trade Secrets" and "1836(b)(2)" and "seizure" in Bloomberg Law News search bar).

*E. Is Any Reform Necessary?*

*Ex parte* seizure is here to stay. Whether it is granted or not essentially turns on whether the courts find the “extraordinary circumstances” that warrant an *ex parte* remedy involving the U.S. Marshals Service. The “extraordinary circumstances” determination is performed pursuant to eight requirements (factors).<sup>111</sup> However, the courts have typically focused on the first two requirements, namely those of the “inadequacy of Rule 65 equitable relief,” and the finding of “immediate and irreparable injury.” DTSA’s legislative history notwithstanding, the guidance on what clears the “extraordinary circumstances” bar and how to determine if Rule 65 equitable relief is not adequate is still unclear and left to the individual court’s discretion. There is little jurisprudence on when Rule 65 equitable relief is inadequate in either trade secret law or any other areas of IP law. A clarification on the circumstance(s), either by legislative action, or via appellate court precedent, regarding when Rule 65 relief may not be adequate could be very useful to trade secret owners, employees, and competitors.

To that end, a test is proposed below that includes the analysis of key factors the courts have emphasized. This test is expected to provide a useful framework for subsequent plaintiffs to draft their complaints appropriately and to tailor the requested relief to maximize chances of an *ex parte* seizure grant. Similarly, such a framework may also assist the courts in expeditious analysis and disposition of future *ex parte* seizure requests.

The first factor of the test focuses on the nature of the trade secret. A trade secret that is prone to being destroyed quickly or disseminated broadly using digital media may require *ex parte* seizure to prevent irreparable harm to plaintiffs. A corollary to this factor is the defendant’s ability to destroy or quickly disseminate the trade secret. A computer-savvy defendant would be capable of quick action, and hence *ex parte* seizure may be appropriate.

The second factor would determine if the requested relief is particularized to a narrow set of documents, data, or devices. *Ex parte* seizure requests identifying specific documents or devices to be seized may be easier to execute and could thus result in minimal intrusion or disruption to defendants versus a mass-scale confiscation of large amounts of documents and devices, which could be highly intrusive, disruptive, and potentially damaging to unprepared defendants.

The third factor would assess if the defendant has previously evaded or defied court orders, or otherwise has a history of misrepresentation. A prior history of evasion or misrepresentation by the defendant may necessitate *ex parte* seizure due to a strong likelihood of the defendant resorting to similar behavior in response to a Rule 65 TRO, thus rendering it inadequate.

The fourth factor would consider the time lapse between the misappropriation and the complaint. A complaint lodged a considerable time after the trade secret was allegedly misappropriated would weigh heavily against the seizure provision. The extended time lapse would imply that the threat of evidence destruction or information dissemination is either absent or has already been carried out. Thus, an *ex parte* seizure would not serve a meaningful purpose.

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<sup>111</sup> See 18 U.S.C. § 1836 (b)(2) (2018).

Finally, the fifth factor would consider the flexibility of the timing of the *ex parte* seizure. If the *ex parte* seizure could be carried out after-hours, the risk of reputational harm to the business and its goodwill erosion are mitigated.

Curiously, the *Magnesita* court skirted this issue of *ex parte* seizure under DTSA entirely by finding an *ex parte* Rule 65(b)(1) TRO with impoundment to be an adequate (and available) remedy instead of granting *ex parte* seizure. The practical result of the order was identical to that of an *ex parte* seizure, except that the US Marshal's involvement was not necessitated. The *Magnesita* finding remains unchallenged and remains good law within the Northern District of Indiana. Other federal courts too, may find it persuasive where an *ex parte* proceeding is critical to preserve evidence but where a U.S. Marshal's involvement may not be necessary. Further clarification, either by legislative action, or via appellate court precedent, regarding when an *ex parte* Rule 65(b)(1) TRO with impoundment is appropriate and what circumstances necessitate an *ex parte* seizure involving the U.S. Marshal may be useful to future plaintiffs in order to seek an appropriately tailored relief.

Because the success of a Rule 65(b)(1) remedy essentially hinges on the likelihood of the defendant's compliance with a TRO, a multi-factor test, described below, to determine the defendant's likelihood of compliance with a Rule 65 TRO, may prove to be of some utility.

The first factor of the test would consider if the parties are already involved in a broader litigation. An ongoing litigation between parties establishes an existing mechanism for exchanging information and provides a strong disincentive for bad-faith behavior such as evading court order or destroying evidence, for such actions may adversely impact the rest of the litigation. In such circumstances, a Rule 65 TRO with impoundment may be adequate, and an *ex parte* seizure requiring U.S. Marshal may be unnecessary.

The second factor to consider would be the importance of reputational harm to the defendant. Where the defendant may be averse to reputational harm resulting from a law enforcement-guided *ex parte* seizure, a Rule 65 TRO with impoundment may elicit adequate compliance. A highly-placed officer of a company, a public figure, a large corporation, or a B-2-C (Business to Consumer) enterprise may be especially concerned of their public reputation, and therefore would be unlikely to disobey—even in the absence of a U. S. Marshal—a Rule 65 TRO.

The third factor would consider the defendant's prior history of evasion, non-compliance, or misrepresentation. Where the defendant has not demonstrated any prior bad-faith behavior or disregard for court orders, a Rule 65 TRO with impoundment may be adequate to secure the pertinent documents and devices.

This three-factor test could clarify for plaintiffs if they should even attempt to clear the high bar of "extraordinary circumstances" required for *ex parte* seizure grants. Instead, upon applying this test, plaintiffs may elect to seek the relatively easier (and favored) path of a Rule 65 TRO with impoundment, effectively providing them the same relief as an *ex parte* seizure, but without the additional showing of the "extraordinary circumstances."

## V. CONCLUSION

DTSA provided a federal civil cause of action to trade secret plaintiffs and the seizure provision provided a potent weapon capable of inflicting quick and effective control on trade secret dissemination. However, the seizure provision also invoked much fear in and opposition from the academic community—principally for its potential for abuse by plaintiffs against unsuspecting and unprepared defendants. The three years of jurisprudence since DTSA’s enactment tells a different story however. Indeed, such potential for abuse has not materialized and only a handful of DTSA cases even requested the *ex parte* seizure remedy. More importantly, the courts were vigilant, and struck down most of the *ex parte* seizure requests by finding the “extraordinary circumstances” absent or by finding a Rule 65 TRO to be an adequate relief instead. In the nine instances where *ex parte* seizure was granted, the courts provided guidance on the factors that positively influenced the grant. The proposed framework of two separate multi-factor tests based on DTSA *ex parte* seizure jurisprudence so far, could therefore prove useful to both the plaintiff and the defendant communities in tailoring their complaints and responses, and in requesting appropriate relief.

## VI. APPENDIX

Date Filed (Date Closed)	Parties	Def. an Employee ?	Ex Parte Seizure Granted	Alternate Provision Used (if any)	Rationale/ Analysis
6/14/2016 (Closed 12/15/2017)	Dazzle Software II, LLC, et al. v. Kinney, et al., No. 2:16-cv-12191 (E.D. Mich.)	No <sup>112</sup>	No		Court declined <i>ex parte</i> basis. Required notice being given to Defendant.
6/22/2016	Mission Capital Advisors LLC v. Romaka, No. 1:16-CV-05878 (S.D. N.Y.)	Yes	Yes	Rule 65(b)	Court granted partial Seizure narrowly limited to a contact list.
7/19/2016 (Closed 8/3/2016)	Panera, LLC v. Nettles, et al., No. 4:16-cv-01181 (E.D. Mo.)	Yes	No <sup>113</sup>	Rule 65(b)	Rule 65 analysis satisfied.
7/25/2016 (Closed 8/19/2016)	Earthbound Corporation et al. v. Mitek USA, et al., Docket No. 2:16-cv-01150 (W.D. Wash.)	Yes	Yes <sup>114</sup>	Rule 65(b)	PI and TRO requiring seizure requested by plaintiff.
8/2/2016 (Closed 3/5/2019)	Balearia Caribbean Ltd., Corp., v. Calvo, No. 1:16-cv-23300 (S.D. Fla.)	Yes	No	Rule 65(b)	Court granted TRO. Court cites to AT&T Broadband v. 381, F.3d. at 1319, and explains that to invoke seizure standard, defendant must have concealed evidence or disregarded court orders in the past.
9/29/2016 (Closed 9/25/2017)	Moxie Pest Control LP v. Romney, et al., No. 3:16-cv-02775 (N.D. Tex.)	Yes	No		The court denied seizure requested and asked Plaintiff to amend complaint to focus on TRO.
11/1/2016 (Closed 4/19/2018)	Jones Printing LLC v. Adams Lithographing Co., et al., No. 1:16-cv-00442 (E.D. Tenn.)	Yes	No	Rule 65(b)	Court said allegations were conclusory, the high bar required by civil seizures was not met, and that Plaintiff did not show why TRO under Rule 65 will be inadequate.

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<sup>112</sup> Defendant was a third party.

<sup>113</sup> No *ex parte* seizure was requested.

<sup>114</sup> No *ex parte* seizure was requested.

12/9/2016 (Closed 1/25/2017)	Magnesita Refractories Company v. Mishra, No. 2:16-cv-00524 (N.D. Ind.)	Yes	Yes <sup>115</sup>	Rule 65(b)	Court stated that a seizure under Rule 65 is permitted, and Rule 64 need not be implicated as Rule 64 is limited to seizures to effectuate judgment satisfaction whereas Rule 65 seizure is used to preserve/protect evidence.
12/9/2016 (Closed 3/12/20)	Sapienza v. Trahan, et al., No. 6:16-cv-01701 (W.D. La.)	Yes	No	NDA	Court met and conferred with counsels and had Defendant agree to confidentiality and NDA while further enjoining them from disclosing the alleged trade secrets to any third parties.
1/4/2017 (Closed 8/6/2017)	OOO Brunswick Rail Management, et al. v. Sultanov, et al., No. 5:17-cv-00017 (N.D. Cal.)	Yes	No	Rule 65(b)	Court ordered the laptop and phone to be brought to hearing and kept secure until then - as such seizure was not needed per court. But court approved the ex-parte TRO motion citing attorney affidavit requirement as satisfied.
1/17/2017 (Closed 4/2/2018)	Digital Ally, Inc. v. Corum, No. 2:17-cv-02026 (D. Kan).	Yes	No		The court ignored the (passingly made) Seizure request and denied the TRO motion.
1/25/2017 (Closed 7/31/2018)	OOO Brunswick Rail Management, et al. v. Ostling, No. 3:17-cv-00114 (D. Conn.)	Yes	No	Rule 65(b)	See above.
2/15/2017 (Closed 4/7/2017)	Oncam Incorporated v. Tonn Investments LLC, et al., No. 2:17-cv-00501 (D. Ariz.)	Yes	No		Denied as "moot" pursuant to a dismissal of the case.
3/7/2017 (Closed 9/28/2017)	AVX Corporation v. Kim, No. 6:17-cv-00624 (D.S.C.)	Yes	Yes		Court reasoned that D has lied before and therefore the likelihood of him evading, avoiding, or otherwise not complying with Rule 65 order was

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<sup>115</sup> No ex parte seizure was requested.



					adequately demonstrated.
3/28/2017 (Closed 5/29/2018)	Val-Chris Investments, Inc. v. Does 1-10, No. 8:17-cv-00561 (C.D. Cal.)		No	Rule 55(b)	The court found a default judgment to be an adequate remedy.
4/3/2017 (Closed 10/15/2018)	Document Technologies, Inc., et al. v. West, et al., No. 1:17-cv-02405 (S.D.N.Y)	Yes	No		Seizure denied by court finding Preliminary Injunction (PI) to be more appropriate. PI was ultimately denied as well finding that plaintiff failed to show a likelihood of success on the merits.
4/4/2017 (Closed 10/15/2018)	Document Technologies, Inc., et al. v. Hosford, No. 1:17-cv-02586 (N.D. Ill.)	Yes	No		See above DTI (S.D. NY case).
4/7/2017 (Closed 9/28/2018)	KCG Americas LLC, et al. v. Zhang, No. 5:17-cv-01953 (N.D. Cal.)	Yes	No		Seizure was not discussed by the court. PI motion also denied finding no likelihood of irreparable harm.
5/18/2017 (Closed 9/7/2017)	Axis Steel Detailing v. Prilex Detailing, et al., No. 2:17-cv-00428 (D. Utah)	Yes	Yes		Finding other <u>equitable remedies</u> available because defendants would otherwise not comply with a Rule 65 order and Defendants held expert level computer proficiency with a history of deleting digital data.
5/24/2017 (Closed 10/15/2018)	Document Technologies, Inc., et al. v. Hosford, No. 1:17-cv-03917 (S.D.N.Y.)	Yes	No		See above DTI (S.D. NY case).
8/7/2017 (Closed 6/21/2019)	The Revolution FMO, LLC v. Mitchell, No. 4:17-cv-02220 (E.D. Mo.)	No <sup>116</sup>	No		Parties tried to settle during an initial ex parte hearing but the discussions broke down. Subsequently TRO was sought by P. D agreed / proposed a protective order (non-disclosure) instead. TRO was denied.

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<sup>116</sup> Defendant was a non-employee agent.

8/29/2017	Blue Star Land Services LLC v. Coleman, et al., No. 5:17-cv-00931 (W.D. Okla.)	Yes	Yes		Given the manner in which Defendants allegedly took the trade secret(s), their alleged duplicity with Plaintiff, and considering the nature of the trade secret(s), an Order pursuant to Fed. R. Civ. P. 65 would be ineffective. Defendants could easily copy the information onto another computer or other storage Case 5:17-cv-00931-R Document 10 Filed 08/31/17 Page 2 of 5 3 media without the knowledge of Plaintiff or the Court. Further, Defendants' prior actions demonstrate a willingness to evade or ignore the law.
9/14/2017 (Closed 11/8/2017)	Inksoft Incorporated v. Webby Central LLC, No. 2:17-cv-03168 (D. Ariz.)	No <sup>117</sup>	No		Court found that the P did not carry the burden of demonstrating the damage that will result if the adverse party is notified, and also did not demonstrate any efforts to notify the D of the request for <u>injunctive relief</u> .
9/27/2017	Orochem Tech., Inc. v. Whole Hemp Co, LLC, et al., No. 1:17-cv-06983 (N.D. Ill.)	No <sup>118</sup>	No	Rule 65(b)	Seizure not granted. A PI hearing ordered.
11/29/2017	Solar Connect v. Endicott et al., No. 2:17-cv-01235 (D. Utah)	Yes	Yes	Rule 65(b)	The court granted the civil seizure. It cited the D's high level of computer and technical proficiency and prior attempts to delete data <u>and hide information</u> .
2/13/2018	Cochrane usa, Inc., et al. v. Filiba, et al., No. 1:18-cv-00341 (D.D.C)	Yes	No	Rule 65(b)	Court found no "extraordinary circumstance" when Plaintiff contended that Defendant would flee the country and could disseminate the

<sup>117</sup> Defendant was a competitor.

<sup>118</sup> Defendant was a partner.

					secret to another competitor
3/8/2018 (Closed 10/4/2018)	Snively, Inc. v. Blank, et al., No. 4:18-cv-00519 (N.D. Ohio)	Yes	No		Court saw no possibility of "irreparable harm" and civil seizure was not granted. TRO was initially granted but later revoked.
4/18/2018 (Closed 7/19/2018)	The Center for Advancing Innovation, Inc. v. Bahreini, et al., No. 8:18-cv-01119 (D. Md.)	Yes	No	Rule 65(b)	Court rejected civil seizure demand and proceeded to review Rule 65 TRO motions. Not ex parte. Ultimately, no irreparable harm was found.
4/20/2018 (Closed 5/7/2019)	Lokring Technology, LLC v. Elliott, No. 1:18-cv-00907 (N.D. Ohio)	Yes	No	Rule 65(b)	Court did not consider a separate plea for Seizure. Focused on TRO instead. Denied TRO as moot on the merits.
4/30/2018 (Closed 8/8/2018)	Thoroughbred Ventures, LLC v. Disman, et al. No. 4:18-cv-00318 (E.D. Tex).	Yes	Yes		Laptop possession crucial, and without seizure, D could continue to harm P by propagating P's trade secrets. Seizure necessary to mitigate harm.
5/18/2018 (Closed 11/6/2019)	International Automotive Technicians Network, Inc., et al. v. Thomas Winzig, et al., No. 2:18-cv-04208 (C.D. Cal.)	Yes	No	Rule 65(b)	Seizure denied for multiple reasons: 1. no extraordinary circumstance showing made as relating to "defendant not complying with court order" or "otherwise evade," because D had already threatened litigation on the same issues, 2. D had apparently turned "pale" at the threat of having her laptop taken away, and 3. the court found the time lapse between the defendant's conduct and the complaint to be long-enough so as to not warrant an immediate civil seizure.

6/8/2018 (Closed 2/13/2020)	Vice Capital LLC, et al. v. CBD World LLC, et al., No. 5:18-cv-00566 (W.D. Okla.)	No <sup>119</sup>	Yes		Defendants have improperly retained Plaintiffs' customer list and have shown a willingness to provide false and misleading information to said customers.
8/23/2018 (Closed 8/16/2019)	Pearl Insurance Group LLC v. Baker, et al., No. 0:18-cv-02353 (D.S.C.)	Yes	No	Rule 65(b)	Court granted TRO but wanted to schedule a hearing on Civil Seizure with Defendants having briefed on the issue.
10/31/2018 (Closed 6/21/2019)	Western Union Company, The, et al. v. Michael, No. 1:18-cv-02797 (D. Colo.)	Yes	No	Rule 65(b)	Defendants had not shown tendency to disobey court orders. Thus <i>ex parte</i> seizure not needed.
1/11/2019 (Closed 9/13/2019)	Hayes Healthcare Services, LLC., et al. v. Meacham, No. 0:19-cv-60113 (S.D. Fla.)	Yes	No	Preliminary Injunction	Court did not consider a separate plea for Seizure. Focused on preliminary injunction by giving defendant notice of action.
3/11/2019	Austar International Limited v. Austarpharma LLC, et al., No. 2:19-cv-08356 (D.N.J.)	No <sup>120</sup>	No		<i>Ex parte</i> seizure was alluded to but never specifically asked as the relief. Only a "seizure" was requested. The court proceeded to provide notice to defendants of the action. The harm alleged was not of the nature that necessitated or gave rise to "extraordinary circumstance" required to issue <i>ex parte</i> seizure.
3/18/2019 (Closed 8/21/2019)		Yes	No		Plaintiff requested either a preliminary injunction or a permanent injunction or an <i>ex parte</i> seizure. The court thus proceeded to summon defendant to answer the complaint, thereby deciding that <i>ex parte</i> action was unnecessary.

<sup>119</sup> Defendant was a Franchisee.

<sup>120</sup> Defendant was a non-employee third party.

4/29/2019	LG Chem, Ltd. et al. v. SK Innovation Co., Ltd. et al., No. 1:19-cv-00776 (D. Del.)	Yes	No	Stay	Motion to stay granted due to a pending action before ITC. Parties are involved in parallel litigation before ITC and thus ex parte seizure is unnecessary.
5/30/2019 (Closed 7/11/2019)	Pallet Consultants Corp. v. AJ Cheponis, et al., No. 0:19-cv-61359 (S.D. Fla.)	Yes	No		The court issued summons to defendants to provide answer to the complaint. Unclear why ex parte seizure was not considered.
6/25/2019	Ultra Premium Services, LLC v. OFS International, LLC, et al., No. 4:19-cv-02277 (S.D. Tex.)	No	No	Expedited Discovery	The court did not find the extraordinary circumstances to consider ex parte seizure. Instead it considered a TRO and ultimately declined to grant it in favor of an expedited discovery order.