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Diversity As A Trade Secret


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Diversity as a Trade Secret

JAMILLAH BOWMAN WILLIAMS*

When we think of trade secrets, we often think of famous examples such as the Coca-Cola formula, Google's algorithm, or McDonald's special sauce used on the Big Mac. However, 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. Many of the industries that dominate the economy in wealth, status, and power continue to struggle with a lack of diversity. Various stakeholders have mobilized to improve access and equity, but there is an information asymmetry that makes this pursuit daunting. When potential plaintiffs and other diversity advocates request workforce statistics and related employment information, many companies have responded with virulent attempts to maintain secrecy, including the use of trade secret protection.

In this Article, 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. I argue that instead of permitting companies to hide information, we should treat diversity data and strategies as public resources. This type of open model will advance the goals of equal opportunity law by raising awareness of inequalities 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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INTRODUCTION

Bias and lack of diversity have been systemic problems in our nation’s most powerful and elite industries. Leaders in finance, technology, law, and film have been pressed to dismantle exclusionary practices, such as the old (or 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.¹

A significant challenge to those investigating workplace inequality is that employers almost exclusively possess the relevant information on workforce demographics and on hiring, promotion, compensation, and employment policies and practices. Without this information, potential plaintiffs and other diversity advocates are unable to properly assess the problem, let alone strive for effective solutions. Companies keep close guard of this information, motivated to conceal anything that could even remotely reveal or substantiate claims of bias.

One way that companies resist transparency is with a “diversity as trade secret” argument, a strategy that has been gaining steam. Many companies have adopted this argument to block access to workforce demographic data. For example, Microsoft used the argument in *Moussouris v. Microsoft*, an ongoing sex discrimination lawsuit filed in 2015, to prevent public disclosure of Microsoft’s internal diversity data.² More recently, IBM brought suit in 2018 against its former Chief Diversity Officer to prevent her from taking a similar job at Microsoft. In *IBM v. McIntyre*, IBM alleged that McIntyre had knowledge of diversity data and

1. San Jose Mercury News requested information in 2008 from the fifteen largest Silicon Valley companies. See Mike Swift, *Five Silicon Valley Companies Fought Release of Employment Data, and Won*, MERCURY NEWS (Feb. 11, 2010, 4:52 AM), <https://www.mercurynews.com/2010/02/11/five-silicon-valley-companies-fought-release-of-employment-data-and-won/> [<https://perma.cc/6LCL-GJA5>]. CNN requested information in 2011 from twenty U.S. technology companies. See *Diversity in Silicon Valley: The Fight to Uncover Data*, CNN MONEY (Aug. 18, 2011), <https://money.cnn.com/interactive/technology/diversity-tech/> [<https://perma.cc/5VCM-HZPB>] [hereinafter *Diversity in Silicon Valley*]. California Representative Barbara Lee and North Carolina Representative G.K. Butterfield met with tech leaders in 2015 and 2017 to request greater transparency and urge change. See Will Evans, *Congresswoman to Tech Firms: ‘You’re Hiding Something,’ REVEAL* (Dec. 11, 2017), <https://www.revealnews.org/blog/congresswoman-to-tech-firms-youre-hiding-something/> [<https://perma.cc/9XNH-XEZN>]. Reverend Jesse Jackson and the Rainbow Push Coalition have pressured the tech industry for change since 2014, most recently contacting “25 large technology companies, including Google, Facebook, Tesla and Oracle, calling on them to release information on their hiring practices, board diversity measures and employee retention statistics in addition to their latest diversity data.” Sinduja Rangarajan, *Jesse Jackson Calls Out Silicon Valley ‘Empty Promises’ on Diversity*, REVEAL (Apr. 6, 2018), <https://www.revealnews.org/blog/jesse-jackson-calls-out-silicon-valley-empty-promises-on-diversity/> [<https://perma.cc/GF9R-LB5U>].

2. See No. 2:15-cv-01483 JLR, 2018 WL 1159251, at *11–12 (W.D. Wash. Feb. 16, 2018), *report and recommendation adopted* by No. C15-1483JLR, 2018 WL 1157997 (W.D. Wash. Mar. 1, 2018).

strategies that were protected trade secrets, and that IBM would suffer irreparable economic harm if they were to become known to Microsoft.³

Since 2011, tech companies have routinely used Exemption 4 of the Freedom of Information Act, which covers “trade secrets” and “commercial information,” to prevent exposure of diversity data collected by the government.⁴ 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.⁵

This continued resistance to transparency has made it difficult to both fully understand the nature of the diversity problem in the technology industry and properly strategize about how to move forward. If the diversity as trade secret argument continues to proliferate, the secrecy surrounding diversity data and strategies will acquire even greater legal strength and legitimacy. This is an even greater concern given the sharp rise in employment-related trade secret lawsuits following the 2016 enactment of the federal Defend Trade Secrets Act (DTSA).⁶ It is unclear how the diversity as trade secret argument would fare in federal court. However, it is possible that the current claims may influence the interpretation of the DTSA, which could set standardized nationwide rules regarding trade secret treatment. Given these consequences, this growing trend becomes especially important to analyze.

In 2009, as part of a broader open-government directive, 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.⁷ But despite this pronouncement in favor of transparency, the diversity as trade secret argument has been successful, and many companies have used it to avoid data disclosure. Given the potential utility of diversity data and strategies, as well as the

3. See Complaint at 1–2, *IBM Corp. v. McIntyre*, No. 7:18-cv-0121VB (S.D.N.Y. Feb. 12, 2018).

4. Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4) (2012). Under the exemption, an agency may withhold “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” *Id.* “The exemption applies to two types of records.” *Exemption 4*, FOIA WIKI BETA (Jan. 17, 2019, 7:50 PM), https://foia.wiki/wiki/Exemption_4 [<https://perma.cc/4ZSN-VFAG>]. “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.*

5. See *FOIA Update: Protecting Business Information*, DEP’T JUST. (Jan. 1, 1983), <https://www.justice.gov/oip/blog/foia-update-protecting-business-information> [<https://perma.cc/QQR9-CQ9R>].

6. See *Lex Machina Releases New Trade Secret Litigation Report*, LEX MACHINA (July 18, 2018), <https://lexmachina.com/media/press/lex-machina-releases-new-trade-secret-litigation-report/> [<https://perma.cc/LD9W-5TT2>] (explaining that trade secret case filings increased more than thirty percent from 2016 to 2017 following enactment of the DTSA).

7. See Memorandum on the Freedom of Information Act, 2009 DAILY COMP. PRES. DOC. 1 (Jan. 21, 2009); see also BEV DANKOWITZ, U.S. DEP’T OF LABOR, OBTAINING INFORMATION FROM GOVERNMENT SOURCES FOR INVESTIGATIONS AND LITIGATION 2 (2013), https://www.americanbar.org/content/dam/aba/events/labor_law/2013/04/nat-conf-equal-empl-opp-law/11_dankowitz2.authcheckdam.pdf.

harm that may result from their prolonged secrecy, this legal argument warrants further analysis.

The technology industry, an economic powerhouse plagued with diversity challenges, provides a good case study to analyze this resistance to transparency.⁸ Given the paramount importance of the technology industry in the United States and global economies, the major tech powerhouses have been in 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 in 2015 to invest \$150 million and \$50 million respectively in diversity initiatives.⁹ Some tech firms have created Chief Diversity Officer positions, and some have even dedicated entire sections of their websites to diversity and inclusion.¹⁰ Nevertheless, these firms have made little progress in actually increasing the number of women and racial minorities they employ. For example, in 2014, two percent of Google's workforce was black and three percent was Hispanic;¹¹ these numbers have barely changed since.¹² Importantly, as discussed in the following section, many firms continue to resist calls for transparency with respect to diversity data and related efforts, further compounding the issue.

Although at first blush the diversity as trade secret argument may seem like a positive development—insofar as it suggests that corporate leaders are investing in diversity and trying to protect it. However, the widespread use of this argument can interfere with the advancement of civil rights law and workplace equality by allowing companies to hide race and gender disparities. In this Article, I examine

8. In 2014, only three percent of the employees in the seventy-five top-ranking Silicon Valley tech firms were black, six percent were Hispanic, and thirty percent were women. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *DIVERSITY IN HIGH TECH* 29 tbl.6 (2016), <https://www.eeoc.gov/eeoc/statistics/reports/hightech/upload/diversity-in-high-tech-report.pdf>. Comparatively, in non-tech Silicon Valley firms, forty-nine percent of the employees were women, eight percent were black, and twenty-two percent were Hispanic. *Id.* at 30 tbl.7.

9. See Victor Luckerson, *Here's How Google Plans to Hire More Minorities*, TIME (May 6, 2015), <http://time.com/3849218/google-diversity-investment/> [<https://perma.cc/Z8Z6-QW86>] (noting that Google is using the funds to expand its workforce diversity initiatives by “doubling the number of schools where it actively recruits to find potential job applicants[,] . . . encouraging workers to take workshops to lessen any unconscious bias in the workplace, [and] letting Googlers use 20% of their work time to focus on diversity projects”); see also 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/> [<https://perma.cc/AH35-RWC3>] (noting that Apple invested its funds into partnerships with the Thurgood Marshall College Fund and the National Center for Women and Information Technology to fund scholarships, as well as into trainings and internships to facilitate “a broader pipeline” of women and minority technology workers).

10. See, e.g., *Global Diversity and Inclusion*, MICROSOFT, <https://www.microsoft.com/en-us/diversity/> [<https://perma.cc/9QKJ-C284>] (last visited Apr. 24, 2019).

11. Karyne Levy, *Google Finally Discloses Its Data on Diversity, and the Numbers Aren't Great*, BUS. INSIDER (May 29, 2014, 4:35 AM), <https://www.businessinsider.in/Google-Finally-Discloses-Its-Data-On-Diversity-And-The-Numbers-Arent-Great/articleshow/35698283.cms> [<https://perma.cc/7ZYT-2WZA>].

12. See Natasha Bach, *Google's Latest Report Shows It Still Hasn't Fixed Its Diversity Problem*, FORTUNE (June 15, 2018), <http://fortune.com/2018/06/15/google-diversity-report-2018/> [<https://perma.cc/F4AF-MBQC>] (noting that 2.5% of Google's U.S. workforce is black, and 3.6% is Latinx).

the trending legal argument of treating diversity as a trade secret. In Part I, I establish the challenges that technology companies have faced in increasing diversity and explain how many firms have invoked trade secret protection to conceal diversity information. In Part II, I use *IBM v. McIntyre* to more deeply analyze the “diversity as trade secret” argument. In Part III, through the lens of *IBM v. McIntyre*, I discuss the use of intellectual property law to control the mobility of diverse talent, which commodifies women and people of color and can give rise to a Title VII disparate impact claim. Lastly, in Part IV, I discuss the benefits of an open model that promotes transparency and accountability—advancing the goal of equal opportunity—and propose four ways to achieve this open model. To advance the goals of equal opportunity law, I argue that diversity data and strategies should be treated as public resources rather than lie shrouded in secrecy.

I. EMPLOYING THE DIVERSITY AS TRADE SECRET ARGUMENT TO CONCEAL DIVERSITY INFORMATION: WHAT’S TO HIDE?

In this section, I will provide an overview of the diversity challenges faced by the technology industry, including some illuminating statistics. I will then discuss the three different contexts in which the diversity as trade secret argument has been employed to conceal information. The first context is Freedom of Information Act (FOIA) requests, where companies leverage a trade secret exemption in response to external stakeholders who have attempted to gain access to diversity data and related information from the government. The second context is when companies attempt to block plaintiffs’ requests for diversity information in litigation. Third is when companies use the “diversity as trade secret” argument to control talent in the context of noncompete agreements.

A. WORKFORCE DIVERSITY IN THE TECHNOLOGY INDUSTRY

Technology is one of the United States’ fastest growing and most prosperous industries. The world’s five largest tech companies are located in the United States¹³ and dominate the stock market; all five are within the S&P 500’s top ten constituents by index weight.¹⁴ 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 2026.¹⁵ 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

13. See Jeff Desjardins, *Visualizing the World’s 20 Largest Tech Giants*, VISUAL CAPITALIST (July 6, 2018), <http://www.visualcapitalist.com/visualizing-worlds-20-largest-tech-giants/> [<https://perma.cc/RQ8W-WEZV>].

14. *S&P 500*, S&P DOW JONES INDICES (Mar. 29, 2019), <https://us.spindices.com/indices/equity/sp-500> [<https://perma.cc/CV77-TBXB>].

15. Brian Roberts & Michael Wolf, *High-Tech Industries: An Analysis of Employment, Wages, and Output*, 7 BEYOND THE NUMBERS: EMP. AND UNEMPLOYMENT 1, 6 (2018).

industries,¹⁶ and in 2018, thirteen of the twenty-five highest paying jobs were in tech.¹⁷ Moreover, 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 exceeding \$100,000.¹⁸ 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.¹⁹ Since 2010, approximately 200,000 new tech jobs have been filled each year, and the demand for tech employees continues to rise.²⁰ 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.²¹

Unfortunately, the technology industry has not afforded women and racial minorities the friendliest of environments. In 1998, four percent of all employees in the thirty-three top-ranking Silicon Valley firms were black, and seven percent were Latinx.²² These numbers remain nearly the same twenty years later. In 2014, only three percent of all employees of the seventy-five top-ranking Silicon Valley firms were black, and six percent of employees were Hispanic.²³ The representation of women in the tech industry follows a similar pattern. The percentage of women employees in Silicon Valley has remained stagnant over the past decade at approximately thirty percent of all employees.²⁴ The statistics are even worse when looking specifically at technical roles and at the management and leadership levels.²⁵

For a more specific example, Google, which employs 85,000 workers and generates \$31 billion in quarterly revenue,²⁶ has received pressure for lack of diversity.²⁷ The number of black employees at Google in the United States has

16. Guy Berger, *LinkedIn's State of Salary Report 2017*, LINKEDIN, <https://www.linkedin.com/jobs/blog/linkedin-2017-us-state-of-salary-report> [<https://perma.cc/6ARU-MQXY>] (last visited Apr. 24, 2019).

17. Riley Griffin, *These Are the Highest-Paying Jobs in the U.S. Right Now*, BLOOMBERG (Aug. 15, 2018, 4:00 AM), <https://www.bloomberg.com/news/articles/2018-08-15/these-are-the-highest-paying-jobs-in-the-u-s-right-now> [<https://perma.cc/QS2F-2BW9>].

18. Berger, *supra* note 16.

19. COMPTIA, *CYBERSTATES 2018: THE DEFINITIVE NATIONAL, STATE, AND CITY ANALYSIS OF THE U.S. TECH INDUSTRY AND TECH WORKFORCE* 7, 10 (2018) [<https://perma.cc/4EMM-H8ZZ>].

20. *Id.* at 7.

21. *Id.*

22. Julia Angwin & Laura Castaneda, *The Digital Divide / High-Tech Boom a Bust for Blacks, Latinos*, SFGATE (May 4, 1998, 4:00 AM), <https://www.sfgate.com/news/article/The-Digital-Divide-High-tech-boom-a-bust-for-3007911.php> [<https://perma.cc/AX8K-5436>].

23. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 8, at 29 tbl.6.

24. *Id.*

25. *See id.* at 22 tbl.4 (finding that women represent only 20.44% of executives, senior officials, and managers in high-tech jobs as compared to 28.81% in private-sector jobs overall, and that women are represented at higher rates as first/mid officials and managers, professionals, and technicians in both high-tech and private employment).

26. Press Release, Alphabet Inc., *Alphabet Announces First Quarter 2018 Results* (Apr. 23, 2018), https://abc.xyz/investor/pdf/2018Q1_alphabet_earnings_release.pdf.

27. *See* Jillian D'Onfro, *Google Employees Are Bucking Their Own Company to Advocate for More Diversity at Shareholder Meeting*, CNBC (June 6, 2018, 8:57 AM), <https://www.cnn.com/2018/06/06/>

stagnated at two percent, the lowest percentage amongst the top tech firms, whereas the number of Latinx employees has risen from just two percent to four percent.²⁸ Microsoft, headquartered in Washington State far from its leading tech peers in Silicon Valley, has faced similar criticism for its lack of diversity, demonstrating that this is an industry issue and not just a geographic issue.²⁹ Based on the data it has released, 26% of Microsoft's total workforce are women—the lowest percentage of the top firms—whereas 4% are black and 5.9% are Latinx.³⁰ When looking specifically at Microsoft's leadership positions, these numbers drop to 19% women, 2.2% black, and 4.3% Latinx.³¹

Silicon Valley defenders have argued that this lack of diversity is simply a “pipeline problem.”³² The pipeline problem is the theory that there simply are not enough qualified and interested women and people of color to fill these tech positions.³³ In other words, the lack of diversity is not the fault of technology companies, but the fault of the education system.³⁴ Maxine Williams, head of diversity at Facebook, has credited the pipeline problem, stating: “Appropriate representation in technology or any other industry will depend upon more people having the opportunity to gain necessary skills through the public education system.”³⁵ In reality, the representation of diverse individuals in the tech industry falls far short of the numbers of those trained for these positions. For example, according to the National Science Foundation, blacks in 2016 earned 9.3% of bachelor's degrees in computer science and 10.7% of all STEM master's degrees.³⁶

google-employees-presenting-zevin-shareholder-proposal-at-meeting.html [https://perma.cc/NX2J-EJH5] (describing backlash from Google employees regarding the company's shortfalls in recruiting women and minorities).

28. Rani Molla, *How Facebook Compares to Other Tech Companies in Diversity*, RECODE (Apr. 11, 2018, 2:57 PM), <https://www.recode.net/2018/4/11/17225574/facebook-tech-diversity-women> [https://perma.cc/5GPL-EM2Z].

29. See Davey Alba, *Microsoft Releases More Diversity Stats, and They Aren't Pretty*, WIRED (Jan. 5, 2015, 12:49 PM), <https://www.wired.com/2015/01/microsoft-diversity/> [https://perma.cc/GF2H-ZHPZ].

30. Molla, *supra* note 28.

31. *Id.* Microsoft's representation of women, blacks, and Latinx employees in technical positions is similarly low. Of all Microsoft technical positions, women comprise 19% of the workforce, blacks comprise 2.7%, and Latinx comprise 4.3%. *Id.*

32. See Julia Carrie Wong, *Segregated Valley: The Ugly Truth About Google and Diversity in Tech*, GUARDIAN (Aug. 7, 2017, 3:50 PM), <https://www.theguardian.com/technology/2017/aug/07/silicon-valley-google-diversity-black-women-workers> [https://perma.cc/ZN5U-UZF6].

33. See Nico Grant, *The Myth of the 'Pipeline Problem,'* BLOOMBERG (June 13, 2018, 7:00 AM), <https://www.bloomberg.com/news/articles/2018-06-13/the-myth-of-the-pipeline-problem-jid07tth> [https://perma.cc/7X9X-VCGZ].

34. *See id.*

35. Clare O'Connor, *Facebook's 'Pipeline' Excuse: Black Women in Tech Speak Out on Diversity Failure*, FORBES (July 18, 2016, 6:26 AM), <https://www.forbes.com/sites/clareoconnor/2016/07/18/facebooks-pipeline-excuse-black-women-in-tech-speak-out-on-diversity-failure/#113b7e3421d4> [https://perma.cc/8YTB-SLFB].

36. NAT'L CTR. FOR SCI. & ENG'G STATISTICS, NAT'L SCI. FOUND., WOMEN, MINORITIES, AND PERSONS WITH DISABILITIES IN SCIENCE AND ENGINEERING tbls.5-6 & 6-6 (2019), <https://nces.nsf.gov/pubs/nsf19304/data> [https://perma.cc/GK99-KEPJ].

Moreover, lack of diversity is a problem across the entire tech workforce—not just with technical roles.³⁷ The employment statistics available include the percentage of women and people of color included in all positions across the organization, including sales, marketing, management, support staff, project managers, human resources, legal, business and finance, client services, and others. The pipeline fails to explain the lack of diversity.

B. USING THE DIVERSITY AS TRADE SECRET ARGUMENT TO DEFEAT THE FREEDOM OF INFORMATION ACT

The minimal data reported above have been difficult to come by. Those interested in diversity data have relied on either an occasional government report or voluntary diversity reports that are sporadic and often contain gaps in the data reported.³⁸ For example, information on women of color is often left out of these reports, which can make it difficult to assess the challenges faced by this demographic and recommend appropriate interventions.³⁹ 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 their data and programs.⁴⁰ News sources have even gone so far as to demand the release of confidential government-mandated EEO-1 reports from top firms to access their employment data.⁴¹ Few firms, however, have released the reports willingly; instead, most have ardently fought to conceal their diversity information.⁴² For example, CNN requested diversity data directly from

37. See, e.g., DANIELLE BROWN, GOOGLE, GOOGLE DIVERSITY ANNUAL REPORT 2018 (2018) [<https://perma.cc/UFU9-CWRU>] (reporting that only five percent of Google's non-technical workforce is black).

38. For an example of such a government report on diversity data, see generally U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 8. Tech companies have received scrutiny for the “vague[ness]” of the diversity data they do release. See, e.g., Tina Amirtha, *Why Don't Big Tech Companies Release More Diversity Data?*, FAST COMPANY (June 20, 2014), <https://www.fastcompany.com/3032200/why-dont-big-tech-companies-release-more-diversity-data> [<https://perma.cc/P2FB-K8ZJ>]. Some commentators argue that large tech companies should directly release their federally mandated EEO-1 diversity forms, which companies submit to the government annually. See Sinduja Rangarajan, *5 Reasons Why Companies Should Share Their EEO-1 Diversity Forms*, REVEAL (July 11, 2018), <https://www.revealnews.org/blog/five-reasons-why-companies-should-share-their-eeo-1-diversity-forms/> [<https://perma.cc/7DU6-J6UL>].

39. See Erin Carson, *Tech Industry Is Leaving Behind Women of Color, Report Shows*, CNET (Aug. 7, 2018, 10:24 AM), <https://www.cnet.com/news/tech-leaving-behind-women-of-color/> [<https://perma.cc/TRX5-BAUC>].

40. See Evans, *supra* note 1; Rangarajan, *supra* note 1.

41. See, e.g., Swift, *supra* note 1. An EEO-1 report is a “compliance survey” mandated by federal law that contains company employment data organized by race and ethnicity, gender, and job category. *EEO-1 Frequently Asked Questions and Answers*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/employers/eeo1survey/faq.cfm> [<https://perma.cc/PS47-PJR8>] (last visited Apr. 26, 2019).

42. See, e.g., Will Evans & Sinduja Rangarajan, *Hidden Figures: How Silicon Valley Keeps Diversity Data Secret*, REVEAL (Oct. 19, 2017), <https://www.revealnews.org/article/hidden-figures-how-silicon-valley-keeps-diversity-data-secret/> [<https://perma.cc/DU52-J2EQ>] [hereinafter Evans & Rangarajan, *Hidden Figures*]; Will Evans, *We Sued the Government for Silicon Valley Diversity Data*, REVEAL (Apr. 26, 2018), <https://www.revealnews.org/blog/we-sued-the-government-for-silicon-valley-diversity-data/> [<https://perma.cc/WZ7U-PHSM>] [hereinafter Evans, *We Sued the Government*]; Julianne Pepitone, *Black, Female, and a Silicon Valley 'Trade Secret'*, CNN MONEY (Mar. 18, 2013, 11:59 AM), <https://money.cnn.com/2013/03/17/technology/diversity-silicon-valley/index.html> [<https://perma.cc/P8MS-BGHS>]; Swift, *supra* note 1.

twenty of the most influential tech companies in 2011 as part of its *Black in America* series. Only three companies complied: Dell, Ingram Micro, and Intel.⁴³ The remaining seventeen—Amazon, Facebook, Apple, Hewlett-Packard, IBM, Microsoft, Google, Groupon, LinkedIn, LivingSocial, Hulu, Netflix, Twitter, Yelp, Zynga, Cisco, and eBay—refused.⁴⁴

CNN then tried to bypass the uncooperative companies by obtaining the reports directly, via FOIA requests, from the Equal Employment Opportunity Commission (EEOC) and the Department of Labor (DOL).⁴⁵ The EEOC, the agency responsible for enforcing the federal laws that prohibit job discrimination, requires all employers with more than 100 employees to annually submit an Employer Information Report (EEO-1), which provides data about gender, race, and ethnicity to support research and aid in the EEOC's enforcement efforts.⁴⁶ The DOL also requires all federal contractors with fifty or more employees and \$50,000 in government contracts to submit EEO-1 reports so that it can monitor compliance with nondiscrimination requirements under the Office of Federal Contract Compliance Programs (OFCCP).⁴⁷

FOIA provides that any person has the right to request access to federal agency records or information.⁴⁸ Due to confidentiality provisions in Title VII of the Civil Rights Act, the EEOC only discloses EEO-1 reports in response to a FOIA request if the reports are involved in or related to a litigation.⁴⁹ In most cases, the DOL is required to disclose agency records requested in writing by any person. However, an agency may elect to withhold the information pursuant to nine exemptions and three exclusions contained in the statute.⁵⁰ Under Exemption 4, an agency may withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential."⁵¹

43. Pepitone, *supra* note 42.

44. *Id.*

45. *Id.*

46. In 2016, the Obama Administration adopted a new requirement, effective March 2018, that employers also submit pay data categorized by gender, race, and ethnicity. See Revision of the Employer Information Report (EEO-1), 81 Fed. Reg. 45,479–80 (final comment request July 14, 2016), <https://www.govinfo.gov/content/pkg/FR-2016-07-14/pdf/2016-16692.pdf>. The Trump Administration has since directed the EEOC to halt implementation of this requirement. See *What You Should Know: Statement of Acting Chair Victoria A. Lipnic About OMB Decision on EEO-1 Pay Data Collection*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/newsroom/wysk/eo1-pay-data.cfm> [<https://perma.cc/88NT-WN2Q>] (last visited Feb. 8, 2019). However, on March 4, 2019, the District Court for the District of Columbia ruled that the Administration was wrong to stall the data-collection effort and vacated the OMB's stay of the revised EEO-1 form. See *Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget*, 358 F. Supp. 3d 66, 93 (D.D.C. 2019). It is currently uncertain whether the government will appeal this decision. See Vin Gurrieri, *5 Key Questions with EEOC's Pay Data Rule Now Official*, LAW360 (Mar. 7, 2019, 10:25 PM), https://www.law360.com/articles/1135946?utm_source=LexisNexis&utm_medium=LegalNewsRoom&utm_campaign=articles_search [<https://perma.cc/KB27-GL54>].

47. 41 C.F.R. § 60-1.7(a) (2018).

48. See 5 U.S.C. § 552 (2012).

49. *Freedom of Information Act*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/foia/index.cfm> [<https://perma.cc/Q5T8-ES7D>] (last visited Feb. 8, 2019).

50. See 5 U.S.C. § 552(b).

51. *Id.* § 552(b)(4).

Because none of the other exemptions or exclusions under FOIA fit this type of request, Apple, Google, Hewlett-Packard, IBM, and Microsoft all submitted written objections to the FOIA requests for workforce data,⁵² stating that the release of their employment data would cause a “competitive harm” under trade secret law.⁵³ Typically, businesses rely on trade secrecy doctrine to protect intellectual capital to safeguard inventions, spur innovation, and maximize the economic benefits of their work.⁵⁴ But although far from typical, the companies’ tactic proved successful. The DOL ultimately provided employment information for only five of the twenty companies requested, including denials for those companies that had invoked the trade secret argument.⁵⁵

A large majority of tech companies continues to refuse to publish diversity data.⁵⁶ In 2018, *Reveal News*—from the Center for Investigative Reporting—requested the disclosure of EEO-1 reports from 211 of the largest San Francisco Bay Area-based tech companies.⁵⁷ After most companies refused, *Reveal* filed FOIA requests, again asking the DOL for the reports of several tech companies that qualify as federal contractors.⁵⁸ 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.⁵⁹ This DOL practice is reflective of the Trump Administration’s approach to handling FOIA requests—which has been criticized as “entirely hostile to the notion of transparency.”⁶⁰ This approach contrasts starkly with the openness envisioned by the 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.⁶¹ Moreover, when *Reveal*

52. See, e.g., *Diversity in Silicon Valley*, *supra* note 1.

53. See Pepitone, *supra* note 42; see also Jeremy C. Owens, *Apple, Google, HP and Other Tech Giants Again Refuse to Release Workplace Diversity Data*, MERCURY NEWS (Mar. 18, 2013, 7:03 AM), <https://www.mercurynews.com/2013/03/18/apple-google-hp-and-other-tech-giants-again-refuse-to-release-workplace-diversity-data/> [<https://perma.cc/K2MR-GE2F>] (noting that in response to an earlier 2008 FOIA request by *Mercury News*, the DOL agreed with the trade secret and “competitive 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”).

54. See JAMES POOLEY, TRADE SECRETS § 7.02[2][a] (Law Journal Press ed., 41st Supp. 2018).

55. See Pepitone, *supra* note 42.

56. See Evans & Rangarajan, *Hidden Figures*, *supra* note 42.

57. *Id.*

58. Evans, *We Sued the Government*, *supra* note 42.

59. See *id.*

60. Zachary D. Reisch, Note, *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 (2017) (quoting Ben Norton, “FOIA Superhero” Launches Campaign to Make Donald Trump’s Administration Transparent, SALON (Nov. 27, 2016, 3:00 PM), <https://www.salon.com/2016/11/27/foia-superhero-launches-campaign-to-make-donald-trumps-administration-transparent/> [<https://perma.cc/78S3-MG3PJ>]).

61. *Evans, We Sued the Government*, *supra* note 42 (noting also that PayPal agreed to release its data after *Reveal News* notified the company of its imminent article).

requested copies of the companies' objection letters to assess their justifications for claiming trade secret protection, every company except for PayPal claimed—and the DOL did not disagree—that the objection letters themselves were also trade secrets and thus protected from disclosure.⁶²

The classification of workforce diversity data as trade secrets protected and thus exempt from FOIA is inconsistent with existing law. For FOIA purposes, the D.C. Circuit has adopted a narrow definition of the term “trade secret” as “a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.”⁶³ The Tenth Circuit has also adopted this narrower definition of a “trade secret,” finding it “more consistent with the policies behind the FOIA than the broad Restatement [of Torts] definition.”⁶⁴ This definition supports the argument that workforce diversity data, which simply counts the number of women and racial minorities employed in various roles, should not be treated as a trade secret and withheld under Exemption 4. This numerical “count” is not the product of either innovation or substantial effort.

Along these lines, *Reveal* filed a lawsuit against the DOL in April 2018, claiming that the DOL improperly withheld records under the FOIA Exemption 4 trade secret argument and that there is a public interest in releasing the information.⁶⁵ In October 2018, the DOL capitulated and agreed to disclose the diversity statistics of Oracle, Palantir, Pandora, Gilead Sciences, and Splunk over these companies' objections.⁶⁶ The case was subsequently dismissed.⁶⁷ Thus, the pressure from *Reveal* and other external stakeholders has been somewhat successful, resulting in small steps toward greater transparency in the tech industry.⁶⁸

62. *Id.*

63. *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983); *see also* *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 150–51 (D.C. Cir. 2001) (reiterating the *Public Citizen* definition and emphasizing that it “narrowly cabins trade secrets to information relating to the ‘productive process’ itself”).

64. *Anderson v. Dep't of Health & Human Servs.*, 907 F.2d 936, 944 (10th Cir. 1990).

65. *See* Complaint at 1–2, *Ctr. for Investigative Reporting v. U.S. Dep't of Labor*, No. 3:18-cv-02008-JCS (N.D. Cal. Apr. 2, 2018), ECF No. 1.

66. *See* Will Evans & Sinduja Rangarajan, *We Got the Government to Reverse Its Longtime Policy to Get Silicon Valley Diversity Data*, REVEAL (Nov. 15, 2018), <https://www.revealnews.org/blog/we-got-the-government-to-reverse-its-longtime-policy-to-get-silicon-valley-diversity-data/> [<https://perma.cc/733J-4SNR>].

67. *Ctr. for Investigative Reporting v. U.S. Dep't of Labor*, No. 3:18-cv-02008-JCS (N.D. Cal. Dec. 21, 2018), ECF No. 29.

68. *See* Evans & Rangarajan, *supra* note 66; Will Evans & Sinduja Rangarajan, *Oracle and Palantir Said Diversity Figures Were Trade Secrets. The Real Secret: Embarrassing Numbers*, REVEAL (Jan. 7, 2019), <https://www.revealnews.org/article/oracle-and-palantir-said-diversity-figures-were-trade-secrets-the-real-secret-embarrassing-numbers/> [<https://perma.cc/36H7-X9AA>].

C. RECENT LITIGATION INVOKING THE DIVERSITY AS TRADE SECRET ARGUMENT IN DISCOVERY

Microsoft was the first company to articulate a diversity as trade secret argument in litigation.⁶⁹ In *Moussouris v. Microsoft*, Katherine Moussouris, a former Microsoft employee, filed a discrimination and harassment suit against Microsoft and requested Microsoft's internal diversity data in discovery.⁷⁰ Moussouris's complaint alleged that Microsoft engaged in a "continuing policy, pattern and practice of sex discrimination against female employees in technical and engineering roles."⁷¹ Microsoft moved to seal portions of the documents produced during discovery that related to its diversity initiatives, arguing that the documents "reflect[ed] Microsoft's confidential business strategies related to . . . diversity initiatives." In Microsoft's view, because the information had commercial value and "could harm Microsoft's business interests" if revealed, the court should treat it as a trade secret.⁷²

In support of its trade secret argument, Microsoft noted that it "invests tens of millions of dollars in developing and implementing its diversity initiatives," and that it goes to great lengths to keep its diversity information confidential.⁷³ Disclosure, Microsoft argued, could allow competitors to unjustly access Microsoft's diversity initiatives and use them against Microsoft.⁷⁴ Moreover, Microsoft contended that its diversity data "could be misconstrued by outsiders and cause unnecessary disruption to Microsoft's business or improperly confuse and/or influence Microsoft's customers, employees, or potential employees," which would in turn harm its business interests.⁷⁵

69. See *Moussouris v. Microsoft Corp.*, No. 2:15-cv-01483 JLR, 2018 WL 1159251, at *11–12 (W.D. Wash. Feb. 16, 2018), *report and recommendation adopted by* No. C15-1483JLR, 2018 WL 1157997 (W.D. Wash. Mar. 1, 2018).

70. See Class Action Complaint at 1–2, *Moussouris*, No. 2:15-cv-01483 JLR (W.D. Wash. Sept. 16, 2015), 2015 WL 5460411, at *1–2.

71. *Id.* at 1; see also Matt Day, 'I Felt So Alone': What Women at Microsoft Face, and Why Many Leave, SEATTLE TIMES, <https://www.seattletimes.com/business/microsoft/i-felt-so-alone-what-women-at-microsoft-face-and-why-many-leave/> [<https://perma.cc/YY3V-BEBS>] (last updated Apr. 24, 2018, 5:20 PM) (explaining that its investigation of employee complaints against Microsoft—including internal complaints, court filings, and employee interviews—revealed "a culture of casual sexism, a male-dominated hierarchy slow to change, and poor resolution of employee grievances").

72. Defendant Microsoft Corp.'s Response to Plaintiffs' Motion to Seal at 4, *Moussouris*, No. 2:15-cv-01483-JLR (W.D. Wash. July 27, 2017), ECF No. 177 [hereinafter Microsoft's Apr. 2017 Brief] ("Microsoft seeks to seal portions of these documents that contain confidential and sensitive data regarding diversity metrics, along with confidential information concerning related strategy and analytics."); Defendant Microsoft Corp.'s Response to Plaintiffs' Motion to Seal at 10, *Moussouris*, No. 2:15-cv-01483 JLR, (W.D. Wash. Mar. 1, 2018), ECF No. 269 [hereinafter Microsoft's Nov. 2017 Brief] ("[I]f [the information is] publicly revealed, [it] could harm Microsoft's business interests."); see also *id.* at 9 ("Microsoft seeks to seal portions of these documents that reflect Microsoft's confidential business strategies related to product development, human resources, and diversity initiatives.").

73. See Microsoft's Apr. 2017 Brief, *supra* note 72, at 5.

74. See *Moussouris*, 2018 WL 1159251, at *11 (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").

75. *Id.* at *12.

Microsoft's diversity as trade secret arguments were assessed by a special master; the special master's report and recommendation on the various motions to seal was adopted in full by the court.⁷⁶ The special master declined to find that the raw diversity data should be treated with trade secret protection.⁷⁷ However, Microsoft's argument regarding its diversity and initiatives prevailed. The special master recommended to seal Microsoft's diversity strategy and initiatives information because this information could be used by Microsoft's competitors.⁷⁸ Ultimately, the special master distinguished between information—like strategies—that may be used to enhance the business of competitors and information—like data—that only has the potential to cause reputational damage.⁷⁹

With respect to diversity strategies, the special master credited Microsoft's arguments that: (1) these strategies provide a business advantage against competitors by helping Microsoft recruit and retain talent, (2) Microsoft has invested heavily in developing these strategies, and (3) Microsoft's competitors could utilize these initiatives and strategies to Microsoft's detriment if the information was publicly available.⁸⁰ When evaluating Microsoft's arguments about its diversity data, the special master was not persuaded that the information could cause competitive harm, nor did she credit Microsoft's fear that disclosure of data may cause reputational harm.⁸¹ The special master found that, unlike strategies, raw data are not information requiring significant investment.⁸² The special master also gave less weight to whether the information was the type traditionally kept secret or restricted to only a handful of employees. Although noting that "Microsoft treats the diversity metrics . . . as non-public and highly-sensitive" and "requires its employees that have access to diversity data to sign non-disclosure agreements," the special master nevertheless declined to protect these data.⁸³ Overall, the special master was most persuaded by the amount Microsoft invested in research and development and the extent to which the information could be used to benefit competitors, as opposed to the prospect that the release of information could embarrass Microsoft.

D. THE DIVERSITY AS TRADE SECRET ARGUMENT IN THE NONCOMPETE CONTEXT

In 2018, IBM attempted to claim trade secret protection to hide its diversity data, talent lists, and diversity strategies known by its former Chief Diversity

76. *Moussouris*, No. 2:15-cv-01483 JLR, 2018 WL 1157997, at *2 (W.D. Wash. Mar. 1, 2018).

77. *See Moussouris*, 2018 WL 1159251, at *12 (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").

78. *See id.* at *11–12.

79. *See id.*

80. *See id.* at *11.

81. *See id.* at *12.

82. *See id.*

83. *Id.*

Officer, Lindsay McIntyre. McIntyre, a leader in the HR department 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.⁸⁴ McIntyre had signed a one-year noncompete agreement, as was required of most IBM employees.⁸⁵ In February 2018, IBM sued McIntyre, claiming that she would inevitably misappropriate IBM's trade secrets, including its diversity data, strategies, initiatives, and methodologies.⁸⁶ In formulating its trade secret claim, IBM used the same legal argument that Microsoft formerly invoked when moving to seal its diversity data and strategies, which had been produced during discovery in *Moussouris v. Microsoft*.⁸⁷ As discussed in greater detail in Part III, use of diversity trade secret arguments in the noncompete context is more about the control of labor and commodifying diverse talent than about promoting innovation, which is the fundamental goal of trade secret law.⁸⁸

II. PROTECTING THE SECRET SAUCE

Many types of innovators—ranging from solo inventors to Fortune 500 companies—have long relied on trade secret protections to safeguard the inventions and creativity that keep them competitive.⁸⁹ Only more 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 three categories: (1) *data* on workforce demographics and employment outcomes, (2) *talent lists* identifying top performers, and (3) organizational *strategies*—including methods of recruiting, retaining, and advancing diverse talent—aimed at improving the diversity and inclusion record.⁹⁰ To determine

84. See Complaint at 1–2, 4, IBM Corp. v. McIntyre, No. 7:18-cv-01210-VB (S.D.N.Y. Feb. 12, 2018), ECF No. 1 [hereinafter IBM Complaint].

85. See *id.* at 28.

86. See *id.* at 25, 29. IBM's other two claims included: (1) McIntyre breached the noncompete clause by working for a direct competitor in the same position, and (2) the court should enter a declaratory judgment for the rescission of McIntyre's equity award. See *id.* at 28–30.

87. See Plaintiff IBM's Memorandum of Law in Support of Its Application for a Temporary Restraining Order and a Preliminary Injunction at 7–8, IBM Corp. v. McIntyre, No. 7:18-cv-01210-VB (S.D.N.Y. Feb. 12, 2018), ECF No. 8 [hereinafter Plaintiff's Memorandum].

88. See Jeanne C. Fromer, *The Intellectual Property Clause's Preemptive Effect*, in INTELLECTUAL PROPERTY AND THE COMMON LAW 265, 270 (Shyamkrishna Balganesh ed., 2013) (“[T]he ultimate goal of the patent system is to bring new designs and technologies into the public domain. . . .” (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151 (1989))); Madhavi Sunder, *Trade Secret and Human Freedom*, in INTELLECTUAL PROPERTY AND THE COMMON LAW, *supra*, at 334, 351 (explaining that “[c]ovenants not to compete are distinct from trade secret law,” and that states like California have “long rejected covenants not to compete as inhibiting freedom of movement”).

89. Michelle K. Lee, *Protecting America's Secret Sauce: The Defend Trade Secrets Act Signed Into Law*, HUFFINGTON POST, https://www.huffingtonpost.com/michelle-k-lee/protecting-americas-secre_b_9904770.html [<https://perma.cc/C9XQ-VJVF>] (last updated May 12, 2017).

90. See, e.g., *In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-02509-LHK, 2013 WL 163779, at *4 (N.D. Cal. Jan. 15, 2013) (granting in part and denying in part motion to seal “materials that reflect . . . personal identifying information of employees or candidates”); IBM Complaint, *supra* note 84, at 2 (noting that disclosure of “diversity data, strategies and initiatives” can cause “real and immediate competitive harm”).

whether any of these types of business information may properly qualify as a trade secret, a court must primarily examine state common law protections. The Uniform Trade Secrets Act sets forth recommended legal rules that most states follow.⁹¹

In the following sections, I will briefly provide background information regarding *IBM v. McIntyre*, followed by a short discussion of trade secret protection more generally. I will then use *McIntyre* to analyze whether diversity information may be considered a trade secret in the context of (1) diversity business information and (2) diversity technological innovations.

A. *IBM V. MCINTYRE*: THE WAR FOR DIVERSE TALENT AND SECRETS

In *IBM v. McIntyre*, IBM sued its former Chief Diversity Officer for potential disclosure of diversity trade secrets after she left IBM to begin a new position at Microsoft.⁹² IBM claimed that both its workforce data and its strategies used to promote diversity were trade secrets.⁹³ This case provides useful guidance for assessing the strength of the increasingly popular legal claim that diversity data and strategies are legally protected trade secrets. IBM has always fought release of its workforce demographics⁹⁴ and has previously claimed FOIA Exemption 4 to deny requests to release employment data submitted to the DOL.⁹⁵ In some ways, however, IBM's trade secret claim runs counter to prior practice: at times, IBM has displayed its diversity initiatives, programming, and related strategies with pride, even seeking recognition for these efforts.⁹⁶ Although *McIntyre* ultimately settled, it presents an opportunity to examine the diversity as trade secret argument.

B. TRADE SECRET PROTECTION GENERALLY

The world of intellectual property (IP) law most commonly focuses on patents, trademarks, and copyrights. However, trade secrets are also a key part of the portfolio.⁹⁷ Trade secrets are the oldest form of intellectual property and are distinct in many ways from the other types.⁹⁸ No registration or other procedural formality is required to protect trade secrets, and trade secrets can remain protected for

91. UNIF. TRADE SECRETS ACT (UNIF. LAW COMM'N 1985).

92. See IBM Complaint, *supra* note 84, at 1–2.

93. See *id.*

94. See OPEN DIVERSITY DATA, <http://opendiversitydata.org/> [<https://perma.cc/S2XF-M35L>] (last visited Apr. 27, 2019) (providing links to diversity data released by tech firms and showing that IBM has yet to follow trends to publish such data).

95. See Pepitone, *supra* note 42.

96. See, e.g., David A. Thomas, *Diversity as Strategy*, HARV. BUS. REV., Sept. 2004, at 98–100; Kim Stephens, *Diversity Awards 2016*, IBM: JOBS BLOG (Mar. 30, 2016), <https://blog.ibm.jobs/2016/03/30/diversity-awards-2016/> [<https://perma.cc/Y5J9-WU49>]; *IBM Diversity & Inclusion Awards 2017*, IBM: JOBS BLOG (Mar. 12, 2018), <https://blog.ibm.jobs/2018/03/12/ibm-diversity-inclusion-awards-2017/> [<https://perma.cc/5M7E-EH5U>]; IBM CORP., DIVERSITY AND INCLUSION (2015), https://www.ibm.com/employment/inclusion/downloads/ibm_diversity_brochure.pdf.

97. See Kyle Peterson, *How to Keep Your 'Secret Sauce' Secret*, UPSIZEMAG.COM, <http://www.upsizemag.com/business-builders/trade-secrets> [<https://perma.cc/4MHX-T4KR>] (last visited Apr. 27, 2019).

98. Lee, *supra* note 89.

an unlimited period of time.⁹⁹ 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.¹⁰⁰

All trade secrets are confidential, but not all confidential information rises to the level of a trade secret.¹⁰¹ The Uniform Trade Secrets Act (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.¹⁰²

Put differently, to satisfy the first prong, the information must confer some competitive advantage. To meet 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, or providing it only to employees who need access to carry out their employment duties.¹⁰³

IBM relied on the UTSA definition when it claimed that McIntyre, IBM's former Chief Diversity Officer, had knowledge of IBM's diversity trade secrets. In particular, IBM insisted that its "diversity data, strategies, methodologies, and initiatives" were the types of confidential information that New York courts previously protected,¹⁰⁴ and that Microsoft deployed similar arguments in *Moussouris* to try to conceal diversity information about female employees.¹⁰⁵ IBM also cited other courts that have upheld protections on information related to recruiting.¹⁰⁶

99. Peterson, *supra* note 97.

100. Lee, *supra* note 89.

101. Peterson, *supra* note 97.

102. 104 AM. JUR. 3D *Proof of Facts* § 8 (2008).

103. Peterson, *supra* note 97.

104. See Plaintiff's Memorandum, *supra* note 87, at 41 (citing *Lumex, Inc. v. Highsmith*, 919 F. Supp. 624, 629–31 (E.D.N.Y. 1996) (finding former employer's confidential strategic plans and former employer's competitive analysis of new employer protectable); *IBM Corp. v. Papermaster*, No. 08-CV-9078 (KMK), 2008 WL 4974508, at *3, 8 (S.D.N.Y. Nov. 21, 2008) (finding "confidential information concerning IBM's technical talent 'pipeline' [and] technical recruitment strategies" which is "sensitive and confidential information" and only "disclosed to a select few within the company" protectable); and *DoubleClick, Inc. v. Henderson*, No. 116914/97, 1997 WL 731413, at *4–5 (N.Y. Sup. Ct. Nov. 7, 1997) (finding confidential revenue projections, future plans, and pricing and product strategies protectable)).

105. See *id.* (citing Microsoft's Nov. 2017 Brief, *supra* note 72, at 4–5).

106. See Plaintiff's Memorandum, *supra* note 87, at 42 (citing *In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-02509-LHK, 2013 WL 163779, at *4 (N.D. Cal. Jan. 15, 2013)). The *High-Tech* court found

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.'

Id.

To some extent, IBM appears to argue that there is greater economic and commercial value attributable to talent lists, strategies, and data related to women, people of color, and other underrepresented groups; this perspective is an extreme version of the business case for diversity, which states that companies benefit financially from employing a diverse workforce.¹⁰⁷ That IBM views diversity in this way,¹⁰⁸ and that it would bring its case against McIntyre, suggests that IBM views diversity as a zero-sum game in which IBM achieves and perpetuates its own economic gains from diversity only by keeping diverse talent and information away from others.¹⁰⁹

McIntyre rebutted IBM's claims by asserting that the diversity information, including data and strategies, was not secret and thus did not warrant trade secret protection.¹¹⁰ McIntyre noted that in recent years, technology companies have been investing heavily and publicly, in diversity and inclusion.¹¹¹ 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.¹¹²

C. WHAT'S SO SECRET?: TALENT LISTS, STRATEGIES, AND DATA

Companies may attempt to use trade secret law to protect types of diversity *data*, which primarily includes workforce demographics. They may also seek to hide identification of top diverse professionals, including internal *talent pools* and external recruitment lists.¹¹³ Companies may additionally argue for trade secret protection of diversity *strategies*, including their approaches to monitoring diversity and highlighting areas for improvement, tools for identifying diverse talent (for example, algorithms or pipeline sources), methods of developing and retaining hired talent, and techniques for rewarding managers who meet diversity goals.¹¹⁴ However, for most diversity strategies, talent, and data, it can be argued

107. See Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOC. REV. 208, 208 (2009).

108. See Thomas, *supra* note 96 (noting that IBM's diversity task-force initiative was created in the 1990s to allow the company to "find ways to appeal to a broader set of employees and customers").

109. See IBM Complaint, *supra* note 84, at 9–11.

110. See Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction at 4, IBM Corp. v. McIntyre, No. 7:18-cv-01210-VB (S.D.N.Y. Feb. 13, 2018), ECF No. 14 [hereinafter Defendant's Memorandum].

111. See *id.* at 1.

112. *Id.* at 18–19 (referencing Declaration of Lindsay-Rae McIntyre ¶¶ 29–30, IBM Corp. v. McIntyre, No. 7:18-cv-01210-VB (S.D.N.Y. Feb. 13, 2018), ECF No. 15 [hereinafter McIntyre Decl.]).

113. See, e.g., *In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-02509-LHK, 2013 WL 163779, at *4–5 (N.D. Cal. Jan. 15, 2013) (granting in part and denying in part motion to seal "materials that reflect [defendant's] compensation practices, strategies, and policies; recruiting and hiring data, practices, strategies, and policies; and personal identifying information of employees or candidates").

114. See, e.g., *Moussouris v. Microsoft Corp.*, No. 2:15-cv-01483 JLR, 2018 WL 1159251, at *12–14 (W.D. Wash. Feb. 16, 2018), *report and recommendation adopted by* No. C15-1483JLR, 2018 WL 1157997 (W.D. Wash. Mar. 1, 2018) (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);

that the information is publicly available or generally known and is therefore not secret.

1. Trade Secret Protection for Diversity Business Information

Trade secrets can encompass a range of subject matters but typically fall into two categories: business information and technological developments.¹¹⁵ It is often clear why technological innovations must be kept secret,¹¹⁶ but the reasons for protecting business information are less straightforward.¹¹⁷ Some internal business facts may earn legal protection because they are “of great value” when kept exclusively in the organization but would “operate to the disadvantage, and possibly the ruin, of the business” if disclosed to a competitor.¹¹⁸ For example, trade secret protection could extend to a customer list that a business builds through extensive research and relationship development, or to 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.”¹¹⁹ Still, to be protected, the information cannot be considered general business strategy.¹²⁰ In *IBM v. McIntyre*, IBM sought to protect its (1) diverse talent lists, (2) strategies to promote diversity, and (3) workforce demographic data. No case has directly analyzed whether such diversity information may be considered protected trade secrets, but some cases offer useful parallels. Below, I address each type of diversity information that IBM sought to protect in turn.

Convergys Corp. v. Wellman, No. 1:07-CV-00509, 2007 WL 4248202, at *7 (S.D. Ohio Nov. 30, 2007) (declining to enforce an injunction against the employer’s former HR director because employer’s human resources practices and strategies were unlikely to “constitute confidential information or trade secrets” or to “have much value for” competitors).

115. 3 RUDOLF CALLMANN, *CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES* § 14:14 (Louis Altman & Malla Pollack eds., 4th ed. 2018), Westlaw (database updated Dec. 2018). Specific examples of trade secret subject matters include: secret formulas or processes, computer software, digital databases, passcodes for websites, biotechnology, mechanical configurations, information related 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, and membership and employee information. *Id.*

116. *See, e.g., IBM Corp. v. Papermaster*, No. 08-CV-9078 (KMK), 2008 WL 4974508, at *9 (S.D.N.Y. Nov. 21, 2008) (finding it “likely” that IBM employee recruited by Apple “inevitably will draw upon his experience and expertise in microprocessors and [proprietary IBM technology], which he gained from his many years at IBM, and which Apple found so impressive, to make sure that the iPod and iPhone are fitted with the best available microprocessor technology and at a lower cost”).

117. *See, e.g., IBM Corp. v. Visentin*, No. 11 Civ. 399(LAP), 2011 WL 672025, at *16–20 (S.D.N.Y. Feb. 16, 2011) (finding unlikely the risk of inevitable disclosure by former IBM employee with no technical knowledge or experience but who IBM claimed had general knowledge of IBM’s business strategies).

118. 3 CALLMANN, *supra* note 115, § 14:22.

119. *Id.*

120. *See id.* (citing *Greenberg v. Croydon Plastics Co.*, 378 F. Supp. 806 (E.D. Pa. 1974)).

a. Talent Lists

In *McIntyre*, IBM first sought to protect the identification of diverse internal and external talent.¹²¹ Though this exact issue has not been adjudicated—*McIntyre* settled before the court could resolve the issue—parallels may be drawn to other cases. For example, in *Lockheed Martin v. Atlas Commerce Inc.*, Lockheed Martin sued a former employee and her new employer, alleging that she had shared with her new employer “confidential information regarding . . . employees’ experience, abilities and salaries” which the employer was then using to poach employees from Lockheed Martin.¹²² The court found that business information such as key employees’ identities, abilities, assignments, and experience is not a protectable interest against a competitor.¹²³ This is so, the court reasoned, because information about key talent is generally known in the industry, and competitors can easily find it by asking around.¹²⁴ This principle translates to the diversity domain because customers, clients, and competitors are often aware of who the top women and racial-minority performers are—that is, they know who would be on these lists—just as they know who the top performers are more generally (for example, white males who are also likely on internal lists).¹²⁵ Additionally, many recruiters, some focusing on diversity specifically, maintain company talent lists containing information on employees’ experience, performance, accolades, and clients serviced. A company looking to recruit those identified can easily find this information on social networking and third-party recruitment websites.¹²⁶

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.”¹²⁷ 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.¹²⁸ As the court explained, “[b]ecause Unisource may not prevent its competitors from soliciting and hiring its employees, and because the reputation of sales representatives is

121. See Defendant’s Memorandum, *supra* note 110, at 21; IBM Complaint, *supra* note 84, at 10–11.

122. 725 N.Y.S.2d 722, 724 (App. Div. 2001).

123. See *id.* at 725–26.

124. *Id.* at 726.

125. Key-talent lists are easily accessible online. See, e.g., Helen A. S. Popkin et al., *The World’s Top 50 Women in Tech*, FORBES (Dec. 12, 2018, 10:00 AM), <https://www.forbes.com/top-tech-women/#274fb64a4df0> [<https://perma.cc/4S77-7L7C>]; *List of the Most Influential Blacks in Technology*, BLACK ENTERPRISE (Nov. 9, 2018), <https://www.blackenterprise.com/list-of-the-most-influential-blacks-in-technology/> [<https://perma.cc/MGV3-H5MW>]; *Top 20 Latino Tech Leaders: \$7B in Aggregate Exits & Thousands of Jobs Created in the US*, LATINO TECH LEADERS, <https://www.latinotechleaders.org/> [<https://perma.cc/DU6F-UGY8>] (last visited Apr. 27, 2019).

126. See, e.g., *Women in Technology*, LINKEDIN, <https://www.linkedin.com/company/women-in-technology/> [<https://perma.cc/675J-ZJXX>] (last visited Apr. 27, 2019).

127. 244 F. Supp. 2d 977, 985 (C.D. Ill. 2003).

128. *Id.* at 988.

generally known in the industry, information regarding what its employees do, how much they cost, and how effective they are is not protectable.”¹²⁹ Given that information regarding talent ordinarily is not protectable, it is difficult to argue that information about diverse talent—known by a Chief Diversity Officer—should be treated any differently.

Generally applicable knowledge and skills that employees gain in the course of their employment are not trade secret protectable, even when employers argue that they have invested in the employee by paying for the training necessary to develop skills that their employees take to a competitor.¹³⁰ This is distinguishable from “route cases,” “where the identity of the customer is not generally known and the employee has become familiar with special information regarding customer lists, quantities, price lists, discounts, etc.”¹³¹ For example, in *Metro Traffic Control, Inc. v. Shadow Traffic Network*, Metro Traffic Control, a company whose key employees were identified and recruited away by Shadow Traffic Network, attempted to prevent the employees from working for Shadow due to the employees’ “knowledge of the employer’s customers’ ‘peculiar likes and fancies and other characteristics.’”¹³² The court disagreed with this characterization and asserted that the employees’ “talents belong to them to contract away as they please.”¹³³ The court concluded that “[s]imply hiring personnel who possess the requirements specified by a customer does not convert the employee into a ‘trade secret.’”¹³⁴ The same can be said for employees who may be deemed valuable to particular clients due to their diverse background. This value does not make them trade secrets.

b. Strategies

IBM also argued that its strategies for recruiting and retaining diverse employees were protected trade secrets.¹³⁵ Although 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 diversity recruitment programs and diversity partnerships.¹³⁶ IBM’s 2016 and 2017 Corporate Responsibility Reports also

129. *Id.*; see also *Buffkin v. Glacier Grp.*, 997 N.E.2d 1, 12 (Ind. Ct. App. 2013) (finding that information “which related to specific recruiting assignments and activities was not of the nature or sort of information” which could be used to a former employee’s competitive advantage as an independent contractor).

130. See *Buffkin*, 997 N.E.2d at 12 (“[T]he accumulated training, knowledge, and skills acquired by [the employee] are not, in themselves, legitimate interests to be protected, even where the training and knowledge were acquired or increased through experience while working for [the employer].”).

131. *Metro Traffic Control, Inc. v. Shadow Traffic Network*, 27 Cal. Rptr. 2d 573, 578 (Ct. App. 1994).

132. *Id.* (internal quotation marks omitted).

133. *Id.* at 578–79.

134. *Id.* at 579.

135. IBM Complaint, *supra* note 84, at 1.

136. See IBM CORP., *supra* note 96.

include a section on Employee Inclusion.¹³⁷ These reports highlight diversity awards that IBM has received, discuss pipeline programs for women, and point out affinity groups.¹³⁸ 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.

Again, there is no caselaw directly on point, but courts have ruled that business information such as commonly used marketing strategies are not protected.¹³⁹ However, diversity recruiting and retention strategies may also be compared to business plans that are sometimes considered trade secrets.¹⁴⁰ For example, in *Motor City Bagels v. American 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.¹⁴¹ The business plan in *Motor City Bagels* was found protectable because it “include[d] personal insights and analysis brought to bear through diligent research and by marshaling a large volume of information,” and “an attempt to independently duplicate the plaintiffs’ efforts in the instant case would be an onerous task.”¹⁴² The court distinguished this plan from business plans that are “based on information ‘readily available from the marketplace’” where “defendants could have obtained the same information . . . ‘simply by talking with prospective customers.’”¹⁴³ Thus, whether a particular diversity strategy is a legitimate trade secret may turn on whether it is comparable to a commonly used marketing strategy or is more akin to a business plan created from onerous and diligent research that contains personal insights and analysis. An innovative, proprietary diversity strategy that includes insights and analysis unique to the company that created it would conceivably satisfy this standard and qualify for trade secret protection.

Still, company-specific, proprietary business strategies are not always found to be protectable. In *IBM 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

137. See IBM CORP., 2016 CORPORATE RESPONSIBILITY REPORT 37–39 (2017), <https://www.ibm.com/ibm/responsibility/2016/pdf/IBM-2016-CRReport.pdf>; IBM CORP., 2017 CORPORATE RESPONSIBILITY REPORT 36–38 (2018), <https://www.ibm.com/ibm/responsibility/2017/assets/downloads/IBM-2017-CRR.pdf>.

138. See sources cited *supra* note 137.

139. See, e.g., *Electro Optical Indus., Inc. v. White*, 90 Cal. Rptr. 2d 680, 686 (Ct. App. 1999).

140. See, e.g., *Motor City Bagels, LLC v. Am. Bagel Co.*, 50 F. Supp. 2d 460, 478–80 (D. Md. 1999); *Nat’l Risk Mgmt., Inc. v. Bramwell*, 819 F. Supp. 417, 431 (E.D. Pa. 1993); *Air Prods. & Chems., Inc. v. Johnson*, 442 A.2d 1114, 1117–21 (Pa. Super. Ct. 1982).

141. See *Motor City Bagels*, 50 F. Supp. 2d at 479.

142. *Id.*

143. *Id.* at 478–79 (quoting *Optic Graphics, Inc. v. Agee*, 591 A.2d 578, 587 (Md. Ct. Spec. App. 1991)).

specific IBM products.”¹⁴⁴ Ultimately, the court denied the injunction and found that although the defendant possessed “inside strategic business information about IBM,” he “d[id] not have the sort of information that is considered quintessential trade secret information—detailed technical know-how, formulae, designs, or procedures.”¹⁴⁵ Similarly, diversity strategies can be considered confidential, strategic business information but typically do not include quintessential trade secret information.

c. Data

IBM also asserted that its workforce diversity data was a protected trade secret.¹⁴⁶ 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.¹⁴⁷ 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.

Caselaw also suggests that diversity strategies and data may deserve differing treatment. The special master in *Moussouris v. Microsoft* found “very persuasive” Microsoft’s argument that its diversity initiatives and strategies were trade secrets; however, she did not find the raw data to be protected.¹⁴⁸ Accordingly, the special master recommended that the diversity data not be redacted unless it could be used to reverse engineer confidential diversity initiatives and strategies.¹⁴⁹ According to this perspective, diversity strategies *may* be trade secrets, but raw diversity data typically are not.

2. Trade Secret Protection for Diversity “Technological Innovations”

In *McIntyre*, the information that most closely fit the traditional conceptualization of trade secrets were the strategies that resembled technological innovations. They included (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.”¹⁵⁰ IBM attempted to bring its case against McIntyre more in line with traditional trade secret cases by alleging that McIntyre helped develop proprietary software for IBM in her capacity as IBM’s Chief Diversity Officer.¹⁵¹ Knowledge of such technical information—particularly the ability to

144. 629 F. Supp. 2d 321, 324 (S.D.N.Y. 2009).

145. *Id.* at 335.

146. *See* IBM Complaint, *supra* note 84, at 1.

147. *See* OPEN DIVERSITY DATA, *supra* note 94.

148. No. 2:15-cv-01483 JLR, 2018 WL 1159251, at *12 (W.D. Wash. Feb. 16, 2018), *report and recommendation adopted by* No. C15-1483JLR, 2018 WL 1157997 (W.D. Wash. Mar. 1, 2018).

149. *See id.*

150. Defendant’s Memorandum, *supra* note 110, at 20–21.

151. *See* Plaintiff’s Memorandum, *supra* note 87, at 9; *see also* IBM Complaint, *supra* note 84, at 13.

recreate the algorithms or AI used in such proprietary software—would constitute quintessential trade secret information.¹⁵² A key question is whether IBM would be competitively harmed if Microsoft discovered these technological innovations. Though a court would surely closely examine the nature of these diversity strategies, their economic value, and IBM’s attempts to maintain their secrecy, the software and algorithm claims may be the most straightforward legal arguments under current trade secret law.¹⁵³

McIntyre contested IBM’s contention that any knowledge she had of its proprietary technology could be useful to Microsoft.¹⁵⁴ Although McIntyre knew of the software, or “bot,” she argued that she did not “have any knowledge of the analytics” and that she “[did] not possess the technical skill or knowledge to recreate this software.”¹⁵⁵ 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.¹⁵⁶ McIntyre additionally alleged that “IBM publicly discusses its use of cognitive bots in recruitment and retention, and offers commercially available Watson products to provide this technology to others.”¹⁵⁷

These factors make even the technological diversity strategies at issue in *McIntyre* more like the “business strategies” at issue in *IBM v. Johnson*. In *Johnson*, the strategies—though technical in nature—were not found to be trade secrets because the employee could not recreate them, and they were thus unlikely to be useful for their new employers.¹⁵⁸

Though these strategies are most similar to information that has traditionally garnered trade secret protection, I argue in Part IV that disclosure and transparency remain the best approaches for the effectuation of broader equal opportunity goals.

152. See *IBM Corp. v. Papermaster*, No. 08-CV-9078 (KMK), 2008 WL 4974508, at *8 (S.D.N.Y. Nov. 21, 2008) (“Mr. Papermaster is fully aware of many of IBM’s most sensitive trade secrets, and he does not claim otherwise. He worked for years with some of the crown jewels of IBM’s technology. . . . Because Mr. Papermaster has been inculcated with some of IBM’s most sensitive and closely-guarded technical and strategic secrets, it is no great leap for the Court to find that Plaintiff has met its burden of showing a likelihood of irreparable harm.”).

153. See *IBM Corp. v. Visentin*, No. 11 Civ. 399(LAP), 2011 WL 672025, at *11, 15–17 (S.D.N.Y. Feb. 16, 2011) (concluding that detailed, specific data which is not misappropriated is unlikely to require trade secret protection where it is unlikely the employee will remember it, and distinguishing *Papermaster* where the employee had “highly technical expertise and knowledge of IBM’s ‘power architecture’ trade secrets and had worked on microprocessors,” was recruited by a direct competitor of IBM to improve the efficiency of the competitor’s microprocessors, and therefore would inevitably “bring his technological expertise to bear”).

154. McIntyre Decl., *supra* note 112, ¶¶ 16, 19.

155. *Id.* ¶ 16.

156. Defendant’s Memorandum, *supra* note 110, at 20–21.

157. McIntyre Decl., *supra* note 112, ¶ 16.

158. 629 F. Supp. 2d 321, 335 (S.D.N.Y. 2009).

III. USE OF INTELLECTUAL PROPERTY LAW TO CONTROL DIVERSE TALENT

Trade secret law is primarily designed to provide a remedy for illegal misappropriation—or “theft”—and improper use of a trade secret.¹⁵⁹ When this happens with no consequence, companies may be disincentivized to invest in research and development or to innovate.¹⁶⁰ In addition to seeking to restrict improper use of the trade secret by competitors, the arguments have evolved to seek actual control of the professionals who have knowledge of the information. In *IBM v. McIntyre*, for example, IBM used the doctrine of “inevitable disclosure” and enforcement of a noncompete to control McIntyre’s talent.¹⁶¹ This strategy of using the diversity as trade secret argument to control diverse talent commodifies women and people of color and can lead to a Title VII disparate impact claim.

Relevant here is the second count of IBM’s complaint, 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.¹⁶² In response to IBM’s claims, McIntyre asserted both that her non-compete agreement was unenforceable as overly broad and that she did not hold secret information that could harm IBM competitively.¹⁶³ The disposition of these issues differs based on which state’s law is applied. Accordingly, I will provide an analysis of these issues within the context of New York law, which governed the *IBM v. McIntyre* dispute, and in juxtaposition, I will discuss California law, which offers a different legal framework tailored to maximizing mobility, transparency, and innovation. I will then discuss how the use of these tactics by companies effectively commodifies and hinders diversity in the workforce.

A. MISAPPROPRIATION OF THE DIVERSITY SECRET SAUCE

If valuable trade secrets fall in the wrong hands or are used improperly, it can potentially harm the competitive interests of a business. The principal legal

159. See 127 AM. JUR. *Trials* § 37 (2012).

160. See POOLEY, *supra* note 54, § 7.02[2][a] (noting that “exclusivity [of a trade secret] is the hallmark of value”).

161. See Plaintiff’s Memorandum, *supra* note 87, at 4.

162. IBM Complaint, *supra* note 84, at 29.

163. See Defendant’s Memorandum, *supra* note 110, at 19–23. McIntyre also asserted that her diversity work at Microsoft would not violate her noncompete agreement, contending that effective diversity work must “be specific and customized to the company and workforce at issue.” McIntyre Decl., *supra* note 112, ¶ 12. 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.” *Id.* Nonetheless, the court issued a temporary restraining order prohibiting McIntyre from working for Microsoft. Order to Show Cause for an Order for a Preliminary Injunction & Temporary Restraining Order, *IBM Corp. v. McIntyre*, No. 7:18-cv-01210-VB (S.D.N.Y. Feb. 12, 2018) (granting temporary restraining order), ECF No. 4. A preliminary injunction hearing was scheduled for March 12, 2018. However, the suit was dismissed with prejudice on March 8, 2018. Joint Stipulation & Order of Dismissal with Prejudice, *IBM v. McIntyre*, No. 7:18-cv-01210-VB (S.D.N.Y. Mar. 8, 2018), ECF No. 28. The settlement terms have been sealed. McIntyre began working for Microsoft in July of 2018. See Jan Wolfe, *IBM Settles Legal Dispute with Diversity Officer Hired by Microsoft*, REUTERS (Mar. 5, 2018, 5:49 PM), <https://www.reuters.com/article/us-ibm-microsoft-data/ibm-settles-legal-dispute-with-diversity-officer-hired-by-microsoft-idUSKBN1GH3B9> [<https://perma.cc/YJT9-64NY>].

recourse against this is to claim misappropriation of a trade secret. A successful misappropriation claim ordinarily requires that a plaintiff has a “protectable ‘trade secret’ and that the defendant [took] some sort of ‘improper’ action regarding that matter.”¹⁶⁴ The UTSA protects against both actual and threatened misappropriation. *Actual misappropriation* occurs if: (1) one *acquires* another’s trade secret through improper means, or (2) if one *uses or discloses* a trade secret acquired through improper means, or under circumstances in which he or she has a duty to maintain confidentiality.¹⁶⁵ *Threatened misappropriation* is a proactive measure to preserve a trade secret if the plaintiff sufficiently demonstrates that an imminent threat of future misappropriation exists.¹⁶⁶ The remedy for misappropriating a trade secret is an injunction against the misappropriating party preventing him or her from using the information for the life of the trade secret.¹⁶⁷ In this case, McIntyre had neither used IBM’s diversity information after leaving the company nor threatened to use it, so misappropriation was a weak argument for IBM. Thus, IBM relied more heavily on the inevitable disclosure doctrine and enforcement of McIntyre’s noncompete.

B. INEVITABLE DISCLOSURE OF THE SECRET SAUCE

In addition to misappropriation, a separate cause of action is available through the inevitable disclosure doctrine.¹⁶⁸ This doctrine was developed to prevent an employee from joining a competitor employer where the employee’s new duties are so similar to her old ones that she will inevitably disclose her former employer’s trade secrets.¹⁶⁹ The inevitable disclosure doctrine typically 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.”¹⁷⁰ Courts consider several factors when determining whether the inevitable disclosure doctrine applies, including (1) the level of competition between the former employer and the new employer, (2) whether the former position is similar to the prospective position, (3) the value of the relevant trade

164. 127 AM. JUR. *Trials*, *supra* note 159, § 14; *see also* UNIF. TRADE SECRETS ACT, *supra* note 91, § 1(2).

165. UNIF. TRADE SECRETS ACT, *supra* note 91, § 1(1) (“‘Improper means’ includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.”).

166. *See id.* § 2(a); 127 AM. JUR. *Trials*, *supra* note 159, § 37; 157 AM. JUR. 3D *Proof of Facts* § 5 (2016) (explaining that “[t]hreatened misappropriation is much more than just a risk of misappropriation,” and that “the former employee’s mere possession of the trade secret information is insufficient to establish threatened misappropriation” (citing *IOSTAR Corp. v. Stuart*, No. 1:07-CV-133, 2009 WL 270037, at *6 (D. Utah Feb. 3, 2009); *Pellerin v. Honeywell Int’t, Inc.*, 877 F. Supp. 2d 983, 990 (S.D. Cal. 2012))). 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. *Id.*

167. *See* POOLEY, *supra* note 54, § 7.02[2][a].

168. *See* 136 AM. JUR. 3D *Proof of Facts* § 2 (2013).

169. *See id.*

170. *Id.* § 5.

secrets to the former and new employers, and (4) the nature and characteristics of the industry.¹⁷¹

The outcome of the inevitable disclosure claim varies immensely by jurisdiction. Only certain courts, including New York courts, recognize this doctrine and are willing to enjoin an employee from assuming a new position if these factors are met.¹⁷² California, by contrast, has squarely rejected the inevitable disclosure doctrine.¹⁷³ The doctrine runs counter to the Silicon Valley philosophy favoring employee mobility, knowledge spillover, and innovation.¹⁷⁴ Employers regularly use this doctrine when a noncompete agreement is deemed invalid or when such an agreement never existed. Accordingly, critics often assert that the doctrine serves as a “backdoor noncompete.”¹⁷⁵

IBM relied primarily on the theory of inevitable disclosure, arguing that it satisfied the core requirements because (1) IBM and Microsoft are direct competitors; (2) McIntyre’s new position was identical to her old one, so she could not fulfill her new job without utilizing (whether intentionally or not) IBM’s 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 was such that it would cause harm to IBM if “competitors could unjustly gain access to [IBM’s] business

171. *Id.* § 13.

172. *See* *Del Monte Fresh Produce Co. v. Dole Food Co.*, 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”). Although legally recognized, the inevitable disclosure doctrine has been noted as judicially disfavored in New York. *See* *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299, 310 (S.D.N.Y. 1999) (finding that “the inevitable disclosure doctrine treads an exceedingly narrow path through judicially disfavored territory” and “should be applied in only the rarest of cases”); *Marietta Corp. v. Fairhurst*, 754 N.Y.S.2d 62, 65–66 (App. Div. 2003) (finding that “the doctrine of inevitable disclosure is disfavored . . . absent evidence of actual misappropriation by an employee” (internal quotation marks omitted)).

173. *See* Ryan M. Wiesner, *A State-By-State Analysis of Inevitable Disclosure: A Need for Uniformity and a Workable Standard*, 16 MARQ. INTELL. PROP. L. REV. 211, 218 (2012). States that do recognize the inevitable disclosure doctrine include New York, Massachusetts, New Jersey, Delaware, and Illinois. Those that do not include California, Virginia, Maryland, and Florida. *Id.* at 216–28.

174. *See* *Bayer Corp. v. Roche Molecular Sys., Inc.*, 72 F. Supp. 2d 1111, 1120 (N.D. Cal. 1999) (noting that California does not recognize the inevitable disclosure doctrine and that the doctrine runs counter to the state’s “strong public policy . . . favoring employee mobility”); 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, 624 (1999) (“[T]he inevitable disclosure doctrine threatens just the type of knowledge spillover that has been so critical to Silicon Valley.”); *see also* Danielle Pasqualone, Note, *GlobeSpan, Inc. v. O’Neill*, 17 BERKELEY TECH. L.J. 251, 259 (2002).

175. Bill Donahue, *5 Tips for Employers Using ‘Inevitable Disclosure’ Doctrine*, LAW360 (Sept. 11, 2013), <https://www.law360.com/articles/471200/5-tips-for-employers-using-inevitable-disclosure-doctrine> [<https://perma.cc/NWM6-EUGS>] (explaining that critics see the inevitable disclosure doctrine as a “backdoor noncompete imposed by a court on an employee who never signed one”); *see also* *Whyte v. Schlage Lock Co.*, 125 Cal. Rptr. 2d 277, 281 (Ct. App. 2002) (describing the inevitable disclosure doctrine as an “after-the-fact covenant not to compete restricting employee mobility”); *PepsiCo, Inc.*, 54 F.3d at 1268 (opining that the inevitable disclosure doctrine should “not prevent workers from pursuing their livelihoods when they leave their current positions”).

strategies and initiatives related to diversity.”¹⁷⁶

In responding to the inevitable disclosure argument, McIntyre first challenged IBM’s claim that IBM and Microsoft are direct “competitors in their attempts to create inclusive and diverse workforces” on the grounds that accepting such a claim would make every business a competitor.¹⁷⁷ McIntyre also challenged IBM’s claim that the responsibilities of her new job were identical to those of her old job because, despite potential overlap, she would be focusing exclusively on internal culture at Microsoft, which is unique to that environment.¹⁷⁸ Additionally, McIntyre and Microsoft stated that they would work with IBM to ensure that McIntyre’s duties would not “threaten any IBM protectable interests.”¹⁷⁹ Finally, McIntyre argued that she would have no reason to disclose IBM’s information because Microsoft already has its own existing diversity systems.¹⁸⁰

IBM’s specific focus on McIntyre’s knowledge of diversity-related information is what makes this argument particularly problematic for women and people of color who disproportionately hold these roles.¹⁸¹ IBM did not assert an argument for trade secret protection of non-diversity-related information that McIntyre acquired while working for the company. If HR information is not considered a trade secret outside of the diversity context, then diversity-related HR information and recruitment or talent-management data should arguably not be considered trade secrets. At IBM, McIntyre occupied numerous HR-leadership roles for fifteen years before assuming the position of Chief Diversity Officer, which she held for three years.¹⁸² And even after becoming Chief Diversity Officer, McIntyre continued to hold other responsibilities unrelated to diversity.¹⁸³

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, such as IBM’s recruiting strategies and talent development in general. It should also be noted that IBM has not asserted the inevitable disclosure doctrine to constrain departing HR employees who possess more general information about talent,¹⁸⁴ and it has had little success using the inevitable disclosure doctrine to constrain employees who

176. See Plaintiff’s Memorandum, *supra* note 87, at 24–35.

177. Defendant’s Memorandum, *supra* note 110, at 9.

178. *Id.* at 10.

179. *Id.*

180. *Id.*

181. At Fortune 500 companies, sixty-nine percent of Chief Diversity Officers are people of color and seventy percent are women. Jamillah Bowman Williams, Survey of Fortune 500 Diversity Officers (Mar. 28, 2019) (unpublished survey) (on file with author).

182. See McIntyre Decl., *supra* note 112, ¶ 5–7.

183. *Id.* ¶ 8.

184. I have only identified one case—which did not involve IBM as a party—where a departing HR employee was sued for trade secret information. See *Convergys Corp. v. Wellman*, No. 1:07-CV-509, 2007 WL 4248202 (S.D. Ohio Nov. 30, 2007). The court was quite hostile to the claim that HR information should be afforded trade secret protection. See *id.* at *7–8.

possess general business-strategy information, which it often conflates with employee recruitment and internal-workforce development—information that is at least HR adjacent.¹⁸⁵ IBM used this argument successfully in *IBM v. Papermaster*, but the departing employee there had been recruited by a competitor who sought to use his knowledge of highly technical, traditional trade secret information to its competitive advantage.¹⁸⁶ In addition to his knowledge of technical trade secret information, the defendant in *Papermaster* had served on two different teams, which gave him access to information on IBM's corporate and recruiting strategies.¹⁸⁷ Although the *Papermaster* court found that IBM's "strategic plans and business forecasts" were legitimately protectable, it was most concerned with the defendant's ability to disclose his knowledge of IBM's proprietary microprocessor technology, which falls squarely within the category of traditional trade secrets.¹⁸⁸

Regardless, IBM has attempted to rely on this precedent to constrain departing employees who do not have knowledge of traditional trade secret information but who served on IBM's corporate- and recruitment-strategy development teams.¹⁸⁹ IBM's reliance on *Papermaster* in these cases has not been successful; courts have distinguished *Papermaster* in a way that casts doubt on its usefulness in future cases where IBM may seek to constrain a departing HR employee.¹⁹⁰ Moreover, in post-*Papermaster* cases, courts have afforded IBM less deference

185. See *IBM Corp. v. Visentin*, No. 11 Civ. 399(LAP), 2011 WL 672025, at *2, 4, 20 (S.D.N.Y. Feb. 16, 2011) (denying an injunction against a former IBM business manager, who was hired by HP to work as a business manager); *IBM Corp. v. Johnson*, 629 F. Supp. 2d 321, 323, 338 (S.D.N.Y. 2009) (denying an injunction against IBM's former Vice President of Corporate Development, who was hired by Dell to be their Senior Vice President of Strategy).

186. See No. 08-CV-9078 (KMK), 2008 WL 4974508, at *2, 5, 9, 14 (S.D.N.Y. Nov. 21, 2008) (granting an injunction against IBM's former Vice President of Microprocessor Technology Development, who was recruited by Apple to be its Senior Vice President of Device Hardware Engineering in the iPod and iPhone division).

187. See *id.* at *3. Papermaster served on IBM's Integration & Values Team (I&VT), an "elite group that develops IBM's corporate strategy," and gave him "access to highly confidential information, including strategic plans, marketing plans, product development, and long-term business opportunities for IBM." *Id.* Papermaster additionally served on IBM's Technical Leadership Team (TLT), which worked "to attract, develop, and retain a talented and diverse technical workforce," and where he had "access to confidential information concerning IBM's technical talent 'pipeline,' technical organizational capabilities, and technical recruitment strategies," information that IBM characterized as "highly confidential" parts of its "corporate strategy development." *Id.*

188. See *id.* at *11–13.

189. See Plaintiff IBM's Memorandum of Law in Support of Its Application for a Temporary Restraining Order and Motion for a Preliminary Injunction at 4–5, 9, *IBM Corp. v. Visentin*, No. 11 Civ. 399(LAP), 2011 WL 672025 (S.D.N.Y. Feb. 16, 2011), ECF No. 7; Memorandum of Law in Support of Plaintiff's Motion for a Preliminary Injunction at 4–6, 13, *IBM Corp. v. Johnson*, 629 F. Supp. 2d 321 (S.D.N.Y. 2009), ECF No. 16; see also Plaintiff's Memorandum, *supra* note 87, at 25–26.

190. *Visentin*, 2011 WL 672025, at *17 (distinguishing *Papermaster* as turning on the defendant's "highly technical expertise and knowledge of IBM's 'power architecture' trade secrets and [prior work] on microprocessors" and his recruitment by one of IBM's competitors to take advantage of this knowledge, both factors that were not present in *Visentin*); see also *id.* at *13–14 (rejecting IBM's arguments that information about its client pipelines and strategic business and marketing plans needed protection and finding that IBM failed to demonstrate how such information could be useful to HP or that Visentin recalled enough information for it to be useful).

when it characterizes employees' nontechnical knowledge as "confidential," "sensitive," or a "trade secret."¹⁹¹ Whereas the *Papermaster* court wholly accepted IBM's characterization of information the defendant was exposed to through his work for the I&VT and TLT as "sensitive and confidential" and "competitively valuable,"¹⁹² the *Visentin* court rejected IBM's assertion that the defendant "possesse[d] confidential IBM information that he learned by attending I&VT meetings," finding that IBM failed to show he had been exposed to any trade secrets and crediting his "testimony that he did not recall any specific details from those meetings."¹⁹³ Even in *Johnson*, where the court found that the defendant did have access to confidential business-strategy information that, if disclosed, would likely cause competitive harm to IBM, the court explicitly found that it was not trade secret information.¹⁹⁴ Following *Johnson* and *Visentin*, it is doubtful that courts would readily accept IBM's characterization of information as related to its technical-talent pipeline and recruitment strategies as trade secrets, or even as highly confidential.¹⁹⁵ Under these circumstances, it is difficult to argue for the need to control a departing Chief Diversity Officer who happens to have knowledge about *diverse* talent and related strategies specifically. Is there a more compelling need to keep *diversity* information secret?

Whatever IBM's motive for exclusively pursuing diversity protection, its arguments appear unlikely to succeed given the judicial posture of many states. As discussed below, *IBM v. McIntyre* may be just as much about the control of labor as it is about the protection of diversity trade secrets.

191. See, e.g., *Johnson*, 629 F. Supp. 2d at 336 & n.16 ("IBM's submissions regarding Mr. Johnson's knowledge of its technological information is long on generalities and rather short on details. . . . For instance, IBM contends that Mr. Johnson possesses a 'deep knowledge of virtually all of IBM's technological innovations and initiatives,' and it then provides a laundry list of technological products that IBM sells. Notably absent, however, is any indication of what specific details Mr. Johnson possesses about these products or product areas or how much technical detail his mergers and acquisitions work for IBM required him to know. . . . This makes it extraordinarily difficult to determine whether and, if so, how much of, the information that Mr. Johnson possesses is public and readily available to its competition." (citation omitted)).

192. 2008 WL 4974508, at *8, 11.

193. 2011 WL 672025, at *10.

194. See 629 F. Supp. 2d at 335. The court found that the defendant possessed "inside strategic business information about IBM" but "d[id] not have the sort of information that is considered quintessential trade secret information—detailed technical know-how, formulae, designs, or procedures." *Id.* Although the court found that "IBM would undoubtedly suffer harm absent an injunctive order," the court nevertheless denied the injunction because preventing the defendant from working for one year would do greater damage to his career, personal connections in the industry, and value as an employee to Dell. See *id.* at 335–37.

195. *Johnson* and *Visentin* both distinguished *Papermaster*. *Visentin* further distinguished the caselaw that IBM successfully relied on in *Papermaster: Lumex, Inc. v. Highsmith*, 919 F. Supp. 624 (E.D.N.Y. 1996), and *Estee Lauder Cos. v. Batra*, 430 F. Supp. 2d 158 (S.D.N.Y. 2006). See *Visentin*, 2011 WL 672025, at *17, 19 & n.6. Regardless, IBM has continued to cite *Papermaster*, *Lumex*, and *Estee Lauder* to support its attempts to enjoin employees who have or were exposed to non-technical "strategic information about initiatives and plans in development." See Plaintiff's Memorandum, *supra* note 87, at 33–34.

C. USE OF TRADE SECRETS TO ENFORCE NONCOMPETE 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 noncompete agreements.¹⁹⁶ These contracts prevent employees from subsequently working for competitor companies within certain geographic areas and time frames.¹⁹⁷ Noncompete agreements are not universally recognized, however. Certain states, such as California, have completely banned the agreements and thus find them void when enforcement is sought.¹⁹⁸ Other states uphold noncompete 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.¹⁹⁹ 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 employees, whether adequate consideration was given in exchange for the restrictions, and whether the restrictions violate public policy.²⁰⁰

McIntyre's noncompete clause stated that:

[she] will not directly or indirectly within the "Restricted Area" (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 of [her] employment with IBM.²⁰¹

IBM alleged that McIntyre breached her noncompete agreement by accepting employment with Microsoft, a direct competitor, during the one-year restricted period.²⁰² To support the enforcement of the noncompete agreement, IBM argued that it had a legitimate interest in protecting its confidential information, including diversity-related trade secrets.²⁰³ IBM also argued that the restrictions of the noncompete agreement were reasonable in scope, supporting

196. See Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789, 791 (2015).

197. 104 AM. JUR. 3D *Proof of Facts*, *supra* note 102, § 3.

198. See CAL. BUS. & PROF. CODE § 16600 (West 2012) ("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."); see also 104 AM. JUR. 3D *Proof of Facts*, *supra* note 102, § 3 n.1 ("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." (citing BUS. & PROF. §§ 16600–16602.5)).

199. 104 AM. JUR. 3D *Proof of Facts*, *supra* note 102, § 3.

200. See *id.*; see also Lobel, *supra* note 196, at 827 (describing the inquiry as a "balancing test").

201. IBM Complaint, *supra* note 84, ¶ 44 (alteration in original) (citing the Noncompetition Agreement signed by McIntyre).

202. See *id.* ¶¶ 49–56.

203. *Id.* ¶ 6.

a finding of enforcement.²⁰⁴ 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.²⁰⁵ IBM additionally argued that the scope of activities was reasonable given the overlap between McIntyre's responsibilities at IBM and her new role at Microsoft, especially given the confidential information she had access to at IBM.²⁰⁶ 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.²⁰⁷ IBM claimed that McIntyre's breach was especially distressing because she chose to work for a direct competitor when she could have gone to any other Fortune 100 company given her skills and experience.²⁰⁸

McIntyre challenged the validity of the noncompete agreement as overbroad in scope, time, and geographic restrictions.²⁰⁹ Additionally, she argued that the non-compete agreement was entirely unnecessary because IBM had no legitimate interest to protect, considering that none of the contested information warranted trade secret protection.²¹⁰ States differ vastly in their "friendliness" to employee noncompete agreements, so there is a wide variation in how courts could come out on this issue.²¹¹ For example, New York tends to enforce noncompete agreements when they are deemed reasonable under the circumstances.²¹² 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

204. *Id.* ¶ 47.

205. See Plaintiff's Memorandum, *supra* note 87, at 43–44; see also *Estee Lauder Cos. v. Batra*, 430 F. Supp. 2d 158, 180 (S.D.N.Y. 2006) ("[T]he durational reasonableness of a non-compete agreement is judged by the length of time for which the employer's confidential information will be competitively valuable.").

206. See Plaintiff's Memorandum, *supra* note 87, at 43.

207. See *id.* at 44.

208. See *id.*

209. See Defendant's Memorandum, *supra* note 110, at 22–23.

210. See *id.* at 23.

211. See Gillian Lester & Elizabeth Ryan, *Choice of Law and Employee Restrictive Covenants: An American Perspective*, 31 COMP. LAB. L. & POL'Y J. 389, 392 (2010); see also *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 291 (2008) (noting that California courts have consistently recognized a settled legislative policy in favor of "open competition and employee mobility"); Tait Graves, *Nonpublic Information and California Tort Law: A Proposal for Harmonizing California's Employee Mobility and Intellectual Property Regimes Under the Uniform Trade Secrets Act*, 2006 UCLA J. L. & TECH. 1, 1, 19 (noting that California's employee-mobility scheme is "much more protective" than those of other states); Abigail Shechtman Nicandri, Note, *The Growing Disfavor of Non-Compete Agreements in the New Economy and Alternative Approaches for Protecting Employers' Proprietary Information and Trade Secrets*, 13 U. PA. J. BUS. L. 1003, 1009 (2011) (noting that unlike in New York, "where courts perform an *ad hoc* balancing of employee and employer interests" in resolving noncompete disputes, the California legislature has "pre-determined that the balancing of interests always tips in favor of the employee").

212. See 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. ASS'N J. 27, 28 (2000).

general public and not unreasonably burdensome to the employee.”²¹³ New York courts are therefore willing to enforce noncompetes and operate under the general theory that intellectual property must be closely guarded to incentivize companies to invest in research and development.²¹⁴

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].”²¹⁵ The California model values free exchange, so rather than restrict talent and carefully monitor intellectual property, the state has adopted a theory that all companies will invest in innovation and that everyone will benefit by the dissemination of knowledge and by building off of competitors’ innovations.²¹⁶ Uncertain how the noncompete 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 noncompete agreement proves invalid.²¹⁷ Accordingly, IBM pursued several strategies to block McIntyre’s move to Microsoft.

D. COMMODIFICATION OF DIVERSITY AND OWNERSHIP OF LABOR

The trade secret argument in the inevitable disclosure context illuminates how companies commodify and assert ownership of diverse talent, consistent with the theory of “racial capitalism.”²¹⁸ This phenomenon is worsened with the use of noncompete agreements, with 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 of another person at that person’s expense.²¹⁹ Nancy Leong argues that amidst

213. *Id.* (quoting *Reed, Roberts Assocs., Inc. v. Strauman*, 353 N.E.2d 590, 593 (N.Y. 1976)).

214. *See* Gilson, *supra* note 174, at 627 (noting that “[e]valuating 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”).

215. Nicandri, *supra* note 211, 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”).

216. *See* Pasqualone, *supra* note 174, at 252 (noting that “trade 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” (footnotes omitted)).

217. *See, e.g., Bayer Corp. v. Roche Molecular Sys., Inc.*, 72 F. Supp. 2d 1111, 1120 (N.D. Cal. 1999) (noting that “[t]o 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.*, 125 Cal. Rptr. 2d 277, 281 (Ct. App. 2002) (finding the inevitable disclosure doctrine to be “contrary to California law and policy because it creates an after-the-fact covenant not to compete restricting employee mobility”).

218. *See generally* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013) (analyzing the phenomenon of racial capitalism, which is “the process of deriving social and economic value from the racial identity of another person”).

219. *Id.* at 2153, 2190.

intense legal and social preoccupation with the notion of diversity, nonwhiteness is essentially commodified and exploited for its market value.²²⁰ This theory can be expanded to better understand exploitation of gender identity and marginalization of women as well, including within the technology industry. Such a theory is known more broadly as “identity capitalism.”²²¹

The companies asserting trade secret arguments benefit economically by claiming exclusive ownership of diversity data and strategies and by claiming control of the talent holding this information. They claim that secrecy is warranted because diversity information is extremely valuable for business.²²² For example, companies seek to maintain secrecy and exclusive ownership of information to recruit and promote diverse talent and to keep clients happy—all of which they argue bring profits and economic success.²²³ However, the economic benefit that may accrue 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.²²⁴

In *IBM v. McIntyre*, IBM used the trade secret argument by asserting the value of its diversity in an effort to stifle the trajectory of McIntyre—one of its top women leaders who theoretically should be the beneficiary of diversity and equity programming.²²⁵ As McIntyre’s counsel noted, “[r]ather than recognizing her past contributions 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.”²²⁶ In this sense, IBM sought to control diverse talent and diversity strategies.

Similarly, capture, possession, and use of this race and gender “diversity commodity” (that is, diverse talent and intellectual capital) have become prevailing goals that companies seek to achieve through the enforcement of noncompete

220. *See id.* at 2154.

221. Nancy Leong, *Identity Entrepreneurs*, 104 CALIF. L. 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”).

222. However, in recessions or times of economic turmoil, those in diversity roles are among the first to be terminated. *See* Kenneth A. Couch & Robert Fairlie, *Last Hired, First Fired? Black-White Unemployment and the Business Cycle*, 47 DEMOGRAPHY 227, 237 (2010). This raises suspicion of 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.

223. *See, e.g.*, IBM Complaint, *supra* note 84, ¶¶ 22–24.

224. *See* Leong, *supra* note 218, at 2152.

225. *See* Defendant’s Memorandum, *supra* note 110, at 3 (“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 personal and family 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.”).

226. *Id.*

agreements.²²⁷ Orly Lobel has extensively studied the abounding negative effects of using noncompetes to restrict talent mobility.²²⁸ The control theorized in the identity-commodification literature parallels the “Orthodox Model” of intellectual property, which, according to Lobel, maintains that firms must control talent and information to reap the benefits of innovation.²²⁹ These efforts to commodify and control talent and diversity-related information puts 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 individuals from other underrepresented identity groups.²³⁰ The majority of Chief Diversity Officers who hold these purported diversity trade secrets are women or racial minorities.²³¹ Seventy percent of Chief Diversity Officers at Fortune 500 companies are women, and fifty-six percent are African-American.²³² Thus, diverse talent is exceedingly likely to suffer the career consequences of restricted mobility resulting from a company’s concern that supposedly protected diversity information may be shared, whether intentionally or inadvertently. McIntyre almost suffered these exact consequences.

Had IBM prevailed in its lawsuit, 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. Not only do women and people of color disproportionately occupy diversity-type roles, but they are also the professionals identified on recruitment and succession planning lists for which trade secret protection is claimed.²³³ If the identities of diverse incumbent employees and recruits are considered trade secrets, these individuals will be precluded from leaving the company; the company will seek to keep them hidden so they can continue to gain from their presence. Again, if this is a strategy for diverse talent but not for majority talent, it could limit opportunities and advancement in a disproportionate way. Given that the diversity as trade secret arguments and related

227. See Leong, *supra* note 218, at 2155.

228. See generally ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING (2013) (noting the potential for noncompete agreements to prevent workers from “pursuing their passions and . . . earning a living” and to “limit [employees’] available career options”).

229. See *id.* at 28–29; Leong, *supra* note 218, at 2172; Leong *supra* note 221, at 1367.

230. See Leslie Kwoh, *Firms Hail New Chiefs (of Diversity)*, WALL ST. J. (Jan. 5, 2012), <https://www.wsj.com/articles/SB10001424052970203899504577129261732884578> [<https://perma.cc/9JXL-QSHR>].

231. See *id.* Compare NAT’L ASS’N OF INDEP. SCHS., 2014 NAIS DIVERSITY PRACTITIONER SURVEY 29, 31 (2014), <https://www.nais.org/Articles/Documents/Member/2014-NAIS-Diversity-Practitioner-Survey-Final.pdf> (reporting that seventy-seven percent of diversity practitioners working in independent schools are female and forty-eight percent are black), with *Human Resource Managers*, DATA USA, <https://datausa.io/profile/soc/113121/#demographics> [<https://perma.cc/53KD-UPYZ>] (last visited Apr. 28, 2019) (showing that 60.7% of HR managers are female and 78.9% are white).

232. Williams, *supra* note 181.

233. See IBM Complaint, *supra* note 84, ¶¶ 27(b), 27(c), 28, 30 (claiming that McIntyre had knowledge of the identity of this diverse talent—in the context of IBM’s recruitment and succession planning—as part of what IBM was seeking to protect).

noncompete 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.

That noncompetes tend to be more problematic for diverse talent compounds the risks of identity commodification. For example, some courts take the position that a noncompete should be voided if enforcement would strip the employee of his or her only means of support.²³⁴ Because men are more likely to be the sole breadwinner in a family, this approach makes it less likely that the court will void a noncompete agreement against a married woman than a similarly situated man.²³⁵ Additionally, employees who work at companies that zealously enforce noncompetes are less likely to try to leave their companies out of fear of being sued by their employer.²³⁶ This effect may be more pronounced for minority and female employees, who are typically less tolerant of financial risk due to historically having less intergenerational financial wealth.²³⁷

These imbalances are 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 using trade secret arguments, companies fail to acknowledge and remedy practices that perpetuate prejudice, bias, and racial resentment. Accordingly, if employers use noncompetes and the inevitable disclosure doctrine in this way, diverse talent will likely continue to suffer exclusion, isolation, and limited opportunities in the workplace. Companies may perceive this as economically beneficial, but the employee will be robbed of working in a more equitable environment where they have a better chance to gain important experience and ultimately thrive.

Further, due to noncompetes, members of marginalized groups are unable to leave hostile or exclusionary environments to pursue better jobs with more inclusive cultures. For example, women and racial minorities often experience co-workers' biases and prejudices, as well as encounter structural barriers that limit their ability to gain important skills.²³⁸ Members of these groups are less likely to leave companies with which they are dissatisfied for fear of being sued.²³⁹ When they do choose to leave an employer with which they signed a noncompete agreement, women and racial minorities are less likely to be in a position where buying

234. See LOBEL, *supra* note 228, at 59.

235. See *id.*

236. See *id.* at 72.

237. See, e.g., Rui Yao et al., *The Financial Risk Tolerance of Blacks, Hispanics and Whites*, 16 FIN. COUNSELING & PLAN. 51, 56, 58 (2005).

238. A survey of women in STEM jobs in majority-male workplaces revealed that fifty percent experienced gender discrimination in the workplace, and twenty percent believed their gender made it harder to succeed at work. CARY FUNK & KIM PARKER, PEW RESEARCH CTR., WOMEN AND MEN IN STEM OFTEN AT ODDS OVER WORKPLACE EQUITY 6 (2018). "Among blacks in STEM jobs, 72% say discrimination in recruitment, hiring, and promotions is a major reason" for the underrepresentation of blacks in these jobs. *Id.* at 22.

239. See LOBEL, *supra* note 228, at 72.

out of the noncompete 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.²⁴⁰ Employees who are able to successfully buy out of their noncompetes are typically executives, who are overwhelmingly white and male.²⁴¹ 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 their field of expertise—or at all.²⁴² Thus, noncompetes place women and racial minorities in a situation with no favorable outcome: leaving a company may result in preclusion from working in one's chosen profession, whereas 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 engage in identity capitalism by avoiding legal liability for discrimination, which carries economic value.²⁴³ Treating diversity data and strategies as trade secrets ensures that this information remains secret and shielded from public and legal scrutiny. If diversity initiatives and strategies are trade secret protectable, individuals in new diversity roles may face lawsuits if they choose to talk about the former employer's workplace culture, treatment of minorities, or failures to achieve diversity and inclusion goals. These companies also conceal data that could otherwise reveal discriminatory patterns and practices.

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

Although *IBM v. McIntyre* settled out of court, the case presents legal issues that are likely to reappear, especially as employers—both tech and non-tech—continue to argue that diversity data are trade secrets in response to FOIA requests. It is also possible that these types of claims will eventually arise in federal courts under the 2016 Defend Trade Secrets Act. Accordingly, examination of the merits of these arguments is warranted.

In this Part, I will first discuss the potential upside of the diversity as trade secret argument. I will then discuss how, despite the value this approach seems to place on diversity, we should instead prefer an open model that will promote transparency and accountability and advance the goal of equal opportunity.

240. See *id.* at 37–38 (explaining the limitations of the Coase Theorem as applied to noncompetes and concluding that buying out of a restrictive post-employment covenant is typically infeasible for average employees who either do not have the resources to buy out or have employers that are unwilling to bargain for a buyout).

241. See Stacy Jones, *White Men Account for 72% of Corporate Leadership at 16 of the Fortune 500 Companies*, FORTUNE (June 9, 2017), <http://fortune.com/2017/06/09/white-men-senior-executives-fortune-500-companies-diversity-data/> [<https://perma.cc/CY67-RMCG>].

242. See LOBEL, *supra* note 228, at 205.

243. See Leong, *supra* note 218, at 2190.

A. POTENTIAL BENEFITS OF TRADE SECRET PROTECTION

Organizational investment in diversity and inclusion, if properly executed, is 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 may work to develop the talent pipeline, an approach demonstrated by the programs established at Facebook and Google.²⁴⁴ Companies may also create accountability structures—for instance, by hiring a Chief Diversity Officer—which have been linked to the increased presence of women and racial minorities in management roles over time.²⁴⁵ Importantly, the more progressive organizations may even begin to change their internal cultures and disassemble structural barriers that hinder women and racial minorities from succeeding.²⁴⁶

These types of strategies and institutional changes can be beneficial in reducing discrimination and inequality, even absent the direct pressure of civil rights law.²⁴⁷ Trade secret protection may also encourage companies to voluntarily engage in internal audits and self-critical analysis to better understand diversity challenges and 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 in discrimination lawsuits of embarrassing conversations or information.²⁴⁸ However, even without trade secret protection, companies will still be incentivized to engage in self-critical analysis to prevent largescale lawsuits and to remedy toxic cultures that may interfere with work performance and productivity.²⁴⁹ And in some cases, these efforts may still be protected by attorney work-product privilege even when

244. See Richard Feloni, *Here's Everything Facebook Is Doing This Year to Address Its 'Pathetic' Diversity Numbers*, BUS. INSIDER (Jan. 20, 2016, 9:39 AM), <https://www.businessinsider.com/facebook-2016-strategy-for-improving-diversity-2016-1> [<https://perma.cc/M6UF-GSCJ>]; Ellen McGirt, *An Inside Look at How Google Is Embracing Diversity*, FORTUNE (Jan. 20, 2017, 6:30 AM), <http://fortune.com/google-diversity/> [<https://perma.cc/5AM3-TLQC>].

245. See Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 591–95 (2006) (recommending three approaches for businesses to use to increase managerial diversity).

246. See generally TRISTIN K. GREEN, *DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW* (2017) (identifying flaws with current organizational and legal efforts to minimize discrimination in the workplace and recommending alternative approaches); Barbara F. Reskin, *Including Mechanisms in Our Models of Ascriptive Inequality*, 68 AM. SOC. REV. 1 (2003) (proposing that analysis of ascriptive inequality shift from a focus on actors' motives to a focus on the mechanisms responsible for varying levels of inequality); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (proposing a “structural regulatory solution” to “more subtle and complex forms of workplace inequity. . . . [which] result from patterns of interaction, informal norms, networking, mentoring, and evaluation”).

247. See GREEN, *supra* note 246, at 116–44.

248. See Pam Jenoff, *The Case for Candor: Application of the Self-Critical Analysis Privilege to Corporate Diversity Initiatives*, 76 BROOK. L. REV. 569, 609 (2011).

249. See *id.* at 574.

they are not given trade secret protection.²⁵⁰ Although 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.

B. TRANSPARENCY AND ACCOUNTABILITY

When it comes to workplace equity, knowledge is power. From this perspective, equal opportunity objectives would best be served by favoring transparency and treating diversity data and strategies as public resources rather than safeguarding them as trade secrets. Such an approach would include making workforce demographic data publicly available, disseminating best practices, and—given that some well-intentioned practices have proven ineffective²⁵¹—allowing such practices to be refined in the public eye with some scrutiny and accountability. Treating diversity information as a public resource 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. In section IV.B.1 below, I will address each of these benefits in turn. I will then discuss four possible models of transparency to demonstrate how this type of open model can be achieved.

1. Benefits of an Open Model

First, by placing diversity data in the discerning public eye, employers would be incentivized to pursue *effective* diversity initiatives. For example, demands made by socially conscious investors and advocates, outside directors, brand-conscious consumers, and other stakeholders would encourage employers to invest in diversity to reap reputational rewards and avoid reputational sanctions.²⁵² 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 justifying these awards remain hidden, as is often the case.²⁵³ For example, many granting organizations do not publicly disclose their methods for assessing and ranking companies, or they disclose the factors they consider but not how

250. See David P. Leonard, *Codifying a Privilege for Self-Critical Analysis*, 25 HARV. J. ON LEGIS. 113, 121–22 (1988).

251. See Kalev et al., *supra* note 245, at 590; Jamillah Bowman Williams, *Breaking Down Bias: Legal Mandates vs. Corporate Interests*, 92 WASH. L. REV. 1473, 1512–13 (2017).

252. See Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 378 (2011); see also Alexander M. Nourafshan, *From the Closet to the Boardroom: Regulating LGBT Diversity on Corporate Boards*, 81 ALB. L. REV. 439, 481 (2017) (noting that transparency regarding workplace demographics incentivizes diversification “to avoid embarrassing disclosures that reveal a lack of diversity, which can be a reputational liability” (footnote omitted)).

253. See, e.g., *IBM Diversity & Inclusion Awards 2017*, *supra* note 96 (listing awards and recognition IBM received for its diversity achievements in 2017). IBM prominently features the diversity awards and recognition it receives each year, but often does not provide a link to the granting organization’s website, press release, or report on how candidates were considered for the award.

heavily each factor is weighted.²⁵⁴ Organizations that are transparent about their methodology, including how data are collected and what factors contribute to the rankings they create, typically do not disclose the core data they collected to perform their assessments.²⁵⁵ Data are instead collected directly from the companies through surveys,²⁵⁶ although it may be “independently evaluated for completeness and accuracy.”²⁵⁷

Second, in addition to motivating companies to prioritize inclusion, transparency can inform the industry and 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 effective strategies moving forward. For example, it would benefit firm leaders to know specifically how their demographics and employment outcomes compare to those of their peers; this would help inform how well these companies are doing relative to the broader market. Assessing performance relative to the competition helps the company measure whether it is actually achieving a return on the investment it is making in diversity efforts. 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.”²⁵⁸

Third, not only would greater transparency raise awareness of core challenges and opportunities, but it would also encourage information pooling and increased collaboration across firms with mutual goals of sustainable diversity and inclusion in the industry.²⁵⁹ This amalgamation of information would tie diversity initiatives to employment outcomes and help firms learn how specific policies and practices affect representation and equitable outcomes.²⁶⁰ Unfortunately, this type of collaboration on diversity efforts is rare in the technology industry.

254. See, e.g., Brian Hucik, *Nation's Top Military Friendly Employers Announced*, MILITARY FRIENDLY (Nov. 30, 2017), <https://www.militaryfriendly.com/military-friendly-employers-announced-2018/> [<https://perma.cc/66S8-2CJE>]; *Mogul's Top 100 Innovators in Diversity & Inclusion in 2017*, MOGUL, <https://onmogul.com/stories/top-100-innovators-in-diversity-inclusion> [<https://perma.cc/R6L8-6NR4>] (last visited Mar. 11, 2019).

255. See, e.g., WORKPLACE PRIDE FOUND., *NEW HORIZONS FOR LGBTI WORKPLACE INCLUSION: GLOBAL BENCHMARK EDITION 2018*, at 3–4, 7 (2018); WORKING MOTHER RESEARCH INST., *2016 WORKING MOTHER BEST COMPANIES FOR MULTICULTURAL WOMEN: EXECUTIVE SUMMARY 3* (2016), https://www.workingmother.com/sites/workingmother.com/files/mcw_executive_summary_2016_final.pdf; Jennifer London, *Insights from the 2017 DBP Inclusion Index*, DIVERSITY BEST PRACTICES (Oct. 25, 2017), <https://www.diversitybestpractices.com/2017inclusionindexinsights> [<https://perma.cc/85EB-3J56?type=image>].

256. See, e.g., WORKPLACE PRIDE FOUND., *supra* note 255, at 3; WORKING MOTHER RESEARCH INST., *supra* note 255, at 3; Hucik, *supra* note 254.

257. Hucik, *supra* note 254.

258. See Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1074 (2011).

259. See *id.* at 1073–75.

260. See *id.* at 1074–75.

Fourth, greater transparency would foster more innovative diversity strategies. Few companies share both diversity data *and* strategies; but the emphasis on transparency for *both* is critical, because tech companies and external stakeholders have typically focused more on numerical diversity than culture change and support of diverse talent in the workplace.²⁶¹ Some tech companies publish their workforce-diversity data; others mention their recruitment efforts to improve the problem. However, tech companies rarely discuss their efforts to improve workplace culture and help diverse talent thrive.²⁶² This disconnect has the potential to create a revolving door that keeps workplace demographics stagnant. For example, a company may find some success at recruiting diverse talent, but at the same time may lose employees due to its poor culture. This is common in technology companies with “boys club” environments dominated by whites and Asians where women, blacks, and Hispanics often feel isolated and unvalued.²⁶³ This type of company may recruit through women’s professional organizations to increase its representation of women but does not improve the organization’s culture *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.²⁶⁴ Broader sharing of both workplace demographic data and diversity and inclusion strategies would incentivize such companies to work more on internal culture and to eliminate structural barriers that harm the career prospects of women and people of color in the workplace. This sharing would also open diversity strategies to productive critique by employees and external stakeholders, which in turn would spur innovation in diverse recruiting, workplace-culture improvements, and other interventions designed to increase equity.

Fundamental to IBM’s argument in *McIntyre* is the contention that IBM’s diversity data and strategies are *competitive assets* and, as such, should be protected

261. See Leong, *supra* note 218, at 2155.

262. See *id.* at 2169–70 (explaining that “many institutions gravitate” toward “superficial” diversity efforts that emphasize “numbers and appearances” rather than viewing diversity “as a prerequisite to cross-racial interaction, which fosters inclusivity and improves cross-racial relationships, thereby benefiting institutions and individuals of all races”).

263. See Stewart Mitchell, *The Uncomfortable Truth About Sexism in Tech*, ALPHR (May 27, 2015), <https://www.alphr.com/technology/1000773/the-uncomfortable-truth-about-sexism-in-tech> [<https://perma.cc/E7V5-MN5H>] (noting how “[w]omen continue to leave the [tech] industry because [the male-dominated culture is] so toxic”); Salvador Rodriguez, *Facebook Has a ‘Black People Problem,’ Says Former Employee Who Quit This Month*, CNBC, <https://www.cnbc.com/2018/11/27/facebook-has-black-people-problem-mark-luckie-former-employee.html> [<https://perma.cc/7BGY-UMPR>] (last updated Nov. 27, 2018, 7:03 PM).

264. See Jena McGregor, *Keeping Women in High-Tech Fields Is Big Challenge, Report Finds*, WASH. POST (Feb. 12, 2014), https://www.washingtonpost.com/business/economy/keeping-women-in-high-tech-fields-is-big-challenge-report-finds/2014/02/12/8a53c6ac-93fe-11e3-b46a-5a3d0d2130da_story.html?utm_term=.ebad331ab2e7 [<https://perma.cc/CW27-9T8C>] (noting that women in high-tech fields are 45% more likely than their male colleagues to leave the industry within one year because of “gender bias”); Lisen Stromberg, *Problem With Women in Tech? The Pipeline or the Revolving Door*, HUFFINGTON POST, https://www.huffingtonpost.com/lisen-stromberg/problem-with-women-in-tech-the-pipeline-or-the-revolving-door_b_6992522.html [<https://perma.cc/MT7F-45Z8>] (last updated June 3, 2015) (explaining how gender bias has contributed to a “revolving door” in the tech industry where women are more likely to leave the industry than men).

from disclosure to competitors who may profit from using them.²⁶⁵ However, this zero-sum conceptualization prevents collaboration amongst tech companies, the product of which could prove universally beneficial.

One potential risk of an open, sharing-based model is the spread of, and deference to, *ineffective* diversity practices.²⁶⁶ However, the open model also exposes these strategies to scrutiny, which encourages accountability, evaluation, and an opportunity for improvement. Transparency helps employers reach the goals of civil rights law 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 equal opportunity law.

Lastly, a transparent environment also increases accountability by allowing consumers to make informed decisions regarding their market behavior. For example, investors and consumers, who often value diversity, can choose to patronize companies that promote inclusiveness while avoiding those that do not.²⁶⁷ Faced with public scrutiny, firms are induced to reach beyond mere compliance and to follow evolving best practices.²⁶⁸ This accountability is especially important because although many employers “talk the talk”—articulating commitments to increase diversity and adopting formal policies reflecting the same—women and minority groups remain underrepresented.²⁶⁹ Treating diversity data as a public good would introduce a sense of responsibility for companies that “tout a commitment to diversity” without actually executing on these commitments.²⁷⁰

265. See IBM Complaint, *supra* note 84, ¶¶ 22, 24.

266. See, e.g., Williams, *supra* note 251 (presenting two experimental studies that demonstrate how common training strategies and diversity narratives like the “business case for diversity” can exacerbate racial bias, having detrimental effects on racial minorities). Organizations may adopt formal diversity narratives to shield them from liability and scrutiny from enforcement agencies such as the EEOC and the OFCCP. Less invested leaders may implement these symbolic inclusion practices as “window dressing” with little concern about what practices are most appropriate for their specific context or the potential informal consequences that may result. See generally Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589 (2001) (explaining that managerial rhetoric about diversity can have the effect of refiguring legal ideas, such as by “disassociat[ing] diversity from civil rights law”).

Empirical studies demonstrate that the extent to which organizations formally endorse diversity values often drives the outcome in discrimination cases and federal audits. See Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOC. 888 (2011). Judges and investigators commonly reward organizations by deferring to formal diversity narratives and recognizing them as “good faith efforts,” and thus a valid defense to discrimination charges, without examining the extent to which the efforts are effective at reducing bias and systems of inequality. See *id.* at 894. This becomes particularly problematic when there is no true “buy-in” to the value of inclusiveness or when resistance to such policies operates within the organization. See *id.* at 898–99. In these cases, there are formal efforts on paper that signal compliance, yet informal bias still limits opportunities and outcomes. See *id.*

267. See Nourafshan, *supra* note 252, at 481–82.

268. See Estlund, *supra* note 252, at 378.

269. See Nourafshan, *supra* note 252, at 445, 447.

270. *Id.* at 487.

Sharing diversity information also leads to greater accountability by promoting employer compliance with antidiscrimination law. Although reporting obligations exist, diversity data are not truly a public good because most employer-reported information remains confidential, even after FOIA requests.²⁷¹ Moreover, it is questionable whether companies that voluntarily publish are reporting their full data or just favorable slices or subsets.²⁷² The transparent treatment of diversity data would therefore expose antidiscrimination law violations and facilitate more robust enforcement.²⁷³ Transparency would also prevent the insulation from legal liability that employers may be afforded when diversity data are treated as a trade secret.

Information asymmetry already disadvantages plaintiffs in discrimination lawsuits against their employers, who hold most of the relevant information related to employment and workforce patterns.²⁷⁴ Although employers' EEO reporting data are kept confidential, the EEOC usually makes these data available to plaintiffs who sue their employers.²⁷⁵ Courts can also order production of these data when plaintiffs submit discovery requests for information to support claims of discriminatory practices.²⁷⁶ However, Federal Rule of Civil Procedure 26(c)(1)(G) opens the door to protective orders barring or limiting the discovery of "a trade secret or other confidential research, development, or commercial information."²⁷⁷ Therefore, treating diversity data as a trade secret may exacerbate the existing information asymmetry, making it even more difficult for victims of workplace discrimination to gain the necessary information through discovery if it is considered a trade secret. Treating diversity data in this manner may also allow for the records to be sealed, making it impossible for other potential litigants to determine whether they also have a related claim. This result is problematic because statistical data are often essential to investigators of individual and systemic discrimination claims to confirm or rebut the claims.²⁷⁸

271. See Estlund, *supra* note 252, at 373.

272. See Carson, *supra* note 39.

273. See Estlund, *supra* note 252, at 396.

274. See Suzette M. Malveaux, *The Jury (or More Accurately the Judge) Is Still Out for Civil Rights and Employment Cases Post-Iqbal*, 57 N.Y.L. SCH. L. REV. 719, 726 (2013) (noting that the "informational asymmetry" in discrimination lawsuits "puts plaintiffs at a significant disadvantage when challenging the misconduct of employers, corporations, and other institutions").

275. Michelle Y. DiMaria, *The Fine Line Employers Walk: Is It a Justified Business Practice, or Discrimination?*, 6 AM. U. LAB. & EMP. L.F. 1, 32 (2016).

276. *Id.*

277. FED. R. CIV. P. 26(c)(1)(G).

278. See, e.g., Alfred W. Blumrosen & Ruth G. Blumrosen, *Intentional Job Discrimination—New Tools for Our Oldest Problem*, 37 U. MICH. J.L. REFORM 681, 698 (2004) (describing operational uses of EEO statistical data to "confirm or rebut claims of discrimination"); 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 (2005) (finding that data play a key role in litigation as it is used "to support or defend against charges of employment discrimination").

2. Four Models of Transparency

I will outline four models of transparency to illustrate how this type of open model can be achieved. Two of the models, *Visionary* and *Mandated*, involve government intervention, whereas two models, *Reactive* and *Voluntary*, involve action on the part of companies without requiring the government to play a role. These models are not mutually exclusive, and a hybrid model combining the strengths of each may prove to be the most effective approach.

a. Visionary

The Obama Administration presented an example of the *Visionary* model when it issued the “Memorandum on Transparency and Open Government” on January 21, 2009, the President’s second day in office.²⁷⁹ This initiative was an effort to create “an unprecedented level of openness in Government.”²⁸⁰ Although this model is an important commitment made by the government, in the context of employment data it remained more of a vision and never reached the point of full transparency in practice. As discussed above, diversity statistics and strategies for meeting diversity goals are already collected by government agencies such as the EEOC and DOL, but this information is not made publicly available. In a separate memorandum issued the same day, the Obama Administration instructed the agencies to “take affirmative steps to make information public” and to “use modern technology to inform citizens about what is known and done by their Government.”²⁸¹ This instruction never translated into disclosure about any specific employers. But if the vision were fully executed, this information could be made more accessible to the public.

b. Mandated

Mandated disclosure to the public is a stronger step toward transparency taken by the government. An example in the UK is the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017.²⁸² These regulations require all employers with 250 or more employees to publish aggregate pay data by sex on their websites²⁸³ and to make these data publicly available for at least three years.²⁸⁴ The Obama Administration started in this direction in 2016 by requiring companies to submit pay data to the EEOC.²⁸⁵ However, because there are no plans to mandate disclosure of this pay data to the public, this requirement is substantially weaker than the UK version. The Trump Administration attempted to roll back the data collection by arguing that it was too burdensome on employers, but this was effectively challenged: in March 2019, the District Court for the District of

279. Memorandum on Transparency and Open Government, 2009 DAILY COMP. PRES. DOC. 1 (Jan. 21, 2009).

280. *Id.*

281. Memorandum on the Freedom of Information Act, *supra* note 7, at 1.

282. The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172 (UK).

283. *Id.* art. 1, 2.

284. *Id.* art. 15, ¶ (1)(b).

285. See Revision of the Employer Information Report (EEO-1), *supra* note 46, at 45, 479–80.

Columbia ruled that the Office of Management and Budget was wrong to stall the data collection effort.²⁸⁶

c. Reactive

The next two models of transparency involve companies taking initiative without government intervention. The *Reactive* model is when the company publishes information but only after substantial external pressure. An example of this model in practice is [Opendiversitydata.org](https://www.opendiversitydata.org),²⁸⁷ a website providing a centralized database for tech companies to post EEO-1 reports after requests from media, nonprofit organizations, customers, and other external stakeholders. The website provides links for members of the public to request data from the companies and links to thank the company once it posts the information.²⁸⁸ This is reactive because the data tends to be posted sporadically in response to pressure rather than on the employer's own initiative.

d. Voluntary

The *Voluntary* model is one in which companies are forthcoming and transparent on their own initiative without external social pressure or legal mandates. This is the ideal model of transparency. For example, in 2001, the presidents of nine leading research universities met to address gender equity for female faculty, each pledging to evaluate their own university's progress on the issue and to circulate the findings.²⁸⁹ This agreement has facilitated the sharing of diversity information across many colleges and universities; Stanford Law School even created a website database to compile policies, reports, and resources regarding female faculty nationwide for public access.²⁹⁰ Stanford University used this resource in its review of other schools' practices and initiatives to inform its own diversity recommendations.²⁹¹ 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 of diversity.²⁹²

When CNN first reached out to tech companies requesting information on race and gender representation, only three were willing to share.²⁹³ Intel was the outlier at the time, as it favored transparency and even voluntarily made its

286. See *Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget*, 358 F. Supp. 3d 66, 92–93 (D.D.C. 2019).

287. See OPEN DIVERSITY DATA, *supra* note 94.

288. See *id.*

289. See STANFORD UNIV., BUILDING ON EXCELLENCE: GUIDE TO RECRUITING AND RETAINING AN EXCELLENT AND DIVERSE FACULTY AT STANFORD UNIVERSITY app. vi (2005) [<https://perma.cc/8BG2-R4XH>].

290. See *id.*

291. See *id.*

292. See Rhode, *supra* note 258, at 1075 n.227.

293. See Pepitone, *supra* note 42 (noting that Dell, Ingram Micro, and Intel were the only companies willing to share their diversity information).

employment diversity data public on its website.²⁹⁴ Intel's 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 need to get beyond our fears that the numbers are a poor reflection on our individual organizations and work together to address the issue collectively.'²⁹⁵

Intel has continued with this transparency, releasing a report in October 2018 summarizing its company-wide progress toward meeting its diversity goals.²⁹⁶ This is nothing new for Intel. Intel's first Global Citizenship Report, published in 2001, compared U.S. workforce demographic data to Intel's own workforce demographics, breaking Intel's own raw employment data down by ethnicity, gender, and position at the company.²⁹⁷ Intel has remained transparent in its disclosure of diversity data and the strategies it uses to develop and retain its diverse workplace, and has invested heavily in its diversity initiatives.²⁹⁸ As a result of these efforts, Intel met its goal of achieving "full representation of women and underrepresented minorities in its U.S. workforce by 2020" two years early.²⁹⁹ Although other tech companies have released some slices and glimpses into strategies, few have followed suit in a consistent and comprehensive way that would be useful to external stakeholders.

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 significant step backward. Although trade secret arguments may superficially appear to place value in inclusion, they have negative ramifications for social change. For the reasons presented above, diversity trade secret arguments like those articulated in *IBM v. McIntyre* will ultimately interfere with the goals of civil rights law.

The diversity trade secret argument casts inclusion as a zero-sum game rather than an imperative that all firms can collaboratively strive to achieve. If the trade

294. *See id.*

295. *Id.*

296. *See Intel Achieves Goal of Full U.S. Workforce Representation, Notes It's Just the Beginning*, INTEL NEWSROOM (Oct. 29, 2018), <https://newsroom.intel.com/news/intel-achieves-goal-full-us-workforce-representation-notes-just-beginning/#gs.89CaKFFz> [<https://perma.cc/XFP2-4JL8>] [hereinafter *Intel Achieves Goal*].

297. INTEL, VISION & VALUES: GLOBAL CITIZENSHIP REPORT 2001, at 30 (2002), http://csrreportbuilder.intel.com/PDFfiles/archived_reports/Intel%202001%20CSR%20Report.pdf.

298. *See Intel Achieves Goal*, *supra* note 296.

299. Jill Griffin, *Two Years Ahead of Schedule, Intel's Diversity & Inclusion Campaign Has Major Traction*, FORBES (Dec. 3, 2018, 5:59 PM), <https://www.forbes.com/sites/jillgriffin/2018/12/03/two-years-ahead-of-schedule-intels-diversity-inclusion-campaign-has-major-traction/#25af407916fd> [<https://perma.cc/3HPX-2BZT>].

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 secret argument and related commodification of diversity include the prevention of market benefits that result from continuous investment in shared cognitive capital in the diversity space. This will stifle future innovation.³⁰⁰

If tech companies such as IBM truly view diversity as a competitive advantage capable of impressing recruits and key clients, wouldn't this same audience be impressed if the companies shared their diversity programs and success stories showcasing their 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 these companies as forerunners whose transparency helped the entire industry build a more diverse and inclusive workforce. Intel is a great example of this.³⁰¹ Indeed, openness would impress clients and talent who value diversity and—assuming companies genuinely seek such approval—would allow tech companies to reach their stated goals.³⁰²

Rather than remaining hidden behind trade secret doctrine, diversity information should be treated as a public resource. In the same way that the California model of free exchange permitted Silicon Valley to thrive, the law should encourage the free flow of diverse talent and diversity-related information across organizations to facilitate innovation in the diversity realm.³⁰³ Sharing this type of knowledge can help the tech industry as a whole to refine strategies to improve inclusion efforts and equal opportunity.³⁰⁴ This model could potentially lead to a

300. See LOBEL, *supra* note 228, at 76 (noting that regions that promote employee mobility encourage positive spillovers of knowledge, leading to economic growth and innovation, whereas those that restrict employee mobility stifle growth). See generally Leong, *supra* note 218 (contending that “the superficial process of assigning value to nonwhiteness within a system of racial capitalism displaces measures that would lead to meaningful social reform”).

301. See Pepitone, *supra* note 42 (noting how Intel, “in stark contrast to the rest of the tech industry,” makes its employment diversity data publicly available on its website); *Intel Achieves Goal*, *supra* note 296 (noting how Intel achieved its goal of full representation in its U.S. workforce).

302. See, e.g., Cyrus Mehri et al., *One Nation, Indivisible: The Use of Diversity Report Cards to Promote Transparency, Accountability, and Workplace Fairness*, 9 FORDHAM J. CORP. & FIN. L. 395, 445 (2004) (noting the competitive advantage garnered by employers “that are able to say, ‘We have enacted best practices to promote diversity’”).

303. See Gilson, *supra* note 174, at 575 (explaining that “[b]ecause California does not enforce post-employment covenants not to compete, high technology firms in Silicon Valley gain from knowledge spillovers between firms”); Lester & Ryan, *supra* note 211, at 392 (noting that weak enforcement of covenants not to compete “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”); Pasqualone, *supra* note 174, at 257 (noting that “several commentators have attributed the success of Silicon Valley . . . to the mobility of its employees and particularly to section 16600” (footnotes omitted)).

304. See Rhode, *supra* note 258, at 1075 (noting that “[n]ational groups such as the Leadership Council on Legal Diversity, as well as many local bar organizations, have initiatives to promote collaboration,” and, further, that “nine elite research universities” have worked toward achieving “gender equity in science and engineering by monitoring data and sharing results annually” (citations and internal quotations omitted)).

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 would also lead to greater progress in the realm of diversity, inclusion, and equal opportunity. Companies would be incentivized to invest in inclusion, and leaders would 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 than seeing them as merely a commodity; such changes would also help the industry and society more broadly. Diversity does not need to be a zero-sum game.