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TAYLOR DAY, P.A.
Jacksonville, FL
www.taylordaylaw.com

John D. Osgathorpe
jdo@taylordaylaw.com

Taylor McMahon
tmcmahon@taylordaylaw.com

Georgia

1. What is the statutory authority for trade secret protection in your state?

Georgia's statute adopting its version of the Uniform Trade Secrets Act ("GTSA") is Georgia's exclusive civil cause of action for trade secret misappropriation. OCGA § 10–1–761. The statute defines a "trade secret" as "[i]nformation, without regard to form, including, but not limited to, technical or nontechnical data, a formula, a pattern, a compilation, a program, a device, a method, a technique, a process, financial data, financial plans, product plans, or a list of actual or potential customers or suppliers which is not commonly known by or available to the public and which information: (A) Derives economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." OCGA § 10-1-761(4).

2. What are the elements of a trade secret claim in your state, and are any unique?

Georgia's elements to state a trade secret cause of action are not unique. To prevail on a statutory misappropriation claim, the Plaintiff must prove by a preponderance of the evidence that (1) it possessed a trade secret and (2) that the Defendant misappropriated the trade secret. *Contract Furniture Refinishing & Maint. Corp. of Georgia v. Remanufacturing & Design Group, LLC*, 730 S.E.2d 708, 714 (Ga. Ct. App. 2012); *Diamond Power Int'l, Inc. v. Davidson*, 540 F. Supp. 2d 1322, 1332 (N.D. Ga. 2007) (applying Georgia law). "Evaluating whether something is a trade secret is a fact intensive determination to be made on a case by case basis." *FERCO Enterprises, Inc. v. Taylor Recycling Facility LLC*, 2007 WL 9701361, at *19 (N.D. Ga. Oct. 16, 2007), aff'd, 291 Fed. Appx. 304 (11th Cir. 2008).

Misappropriation may occur by acquisition, disclosure, or use of the information or material. OCGA § 10-1-761(2). Misappropriation by acquisition occurs when the person "knows or has reason to know that the trade secret was acquired by improper means." OCGA § 10-1-761(2)(A). Misappropriation by disclosure or use of a trade secret occurs when "without express or implied consent" a person (1) "used improper means to acquire knowledge of a trade secret"; or (2) "at the time of the disclosure or use, knew or had reason to know that knowledge of the trade secret was: (I) derived from or through a person who had utilized improper means to acquire it; (II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use"; or (3) "Before a material change of position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake." OCGA § 10-1-761(2)(B).

"Improper means" is defined as "theft, bribery, misrepresentation, breach or inducement of a breach of a confidential relationship or other duty to maintain

secrecy or limit use." *Healthy-IT, LLC v. Agrawal*, 808 S.E.2d 876, 883 (Ga. Ct. App. 2017) (quoting OCGA § 10-1-761(1).

3. How specific do your courts require the plaintiff to be in defining its "trade secrets?"

A plaintiff "who seeks relief for misappropriation of trade secrets must identify the trade secrets and carry the burden of showing that they exist." *EarthCam, Inc. v. OxBlue Corp*., 49 F. Supp. 3d 1210, 1225 (N.D. Ga. 2014), *aff'd*, 703 Fed. Appx. 803 (11th Cir. 2017) (applying Georgia law) (quoting *Rent Info. Tech., Inc. v. Home Depot U.S.A., Inc*., 268 Fed.Appx. 555, 557 (9th Cir.2008) (applying Georgia law)). "While it has been held that . . . a plaintiff would not be required to make public upon the record of the court the complete details of its trade secrets in order to protect them, still, more must be alleged than the plaintiff has trade secrets; and it must appear that there exists confidential information which is the property of the plaintiff and peculiar to its business, the disclosure or use of which by the defendant would be injurious to the plaintiff." *Vendo Co. v. Long*, 102 S.E.2d 173, 175 (1958). "Significantly, but not always obviously, the party seeking trade secret protection needs to demonstrate that the information does in fact qualify as a trade secret, and first and foremost—identify what the trade secret is. In other words, when a party seeks to invoke the Court's injunctive powers in order to protect an alleged trade secret, it needs to provide sufficient detail about the trade secret for the Court to ascertain whether there is a genuine issue of material fact regarding both the existence and misappropriation of the trade secret." *FERCO Enterprises, Inc. v. Taylor Recycling Facility LLC*, 2007 WL 9701361, at *19 (N.D. Ga. Oct. 16, 2007), *aff'd*, 291 Fed. Appx. 304 (11th Cir. 2008) (applying Georgia law).

4. What is required in your state for a plaintiff to show it has taken reasonable measures to protect its trade secrets?

The Plaintiff has the burden to prove its efforts to protect the secrecy of the information or material were reasonable under the circumstances. *Tronitec, Inc. v. Shealy*, 547 S.E.2d 749, 757 (2001), *overruled on other grounds*, *Williams Gen. Corp. v. Stone*, 614 S.E.2d 758, 760 (2005). However, this burden does not require absolute secrecy for information to retain trade secret status. *Id.* For instance, a "business entity does not lose the right to assert that material is a trade secret unless it does not make reasonable efforts to prevent disclosure to those to whom it is not otherwise legally required to divulge the information." *Georgia Dep't of Nat. Res. v. Theragenics Corp*., 545 S.E.2d 904, 906 (2001) (holding that disclosure of confidential information to the government to satisfy a regulatory requirement is not inconsistent with reasonable efforts to maintain the information's secrecy). Of note, "not all confidential information qualifies as a trade secret." *FERCO Enterprises, Inc. v. Taylor Recycling Facility LLC*, 2007 WL 9701361, at *19 (N.D. Ga. Oct. 16, 2007), *aff'd*, 291 Fed. Appx. 304 (11th Cir. 2008); *see also Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp.,* 139 F.3d 1396, 1411 n.25 (11th Cir. 1998) (applying the Georgia Trade Secrets Act) ("We are cognizant of the fact that not all confidential information rises to the level of a trade secret.")

Factors Georgia courts consider in determining whether a plaintiff has taken reasonable measures to protect its trade secrets include but are not limited to: instructing employees to keep information confidential, e.g., *Smith v. Mid-State Nurses, Inc*., 403 S.E.2d 789 (1991), including requiring employees to sign confidentiality or nondisclosure agreements, e.g., *Priority Payment Systems, LLC v. Signapay, LTD*, 161 F. Supp. 3d 1294 (N.D. Ga. 2016), *extended*, 2016 WL 8938516 (N.D. Ga. 2016) (applying Georgia law); placing proprietary notices on trade secret documents, e.g., *HCC Insurance Holdings, Inc. v. Flowers*, 237 F. Supp. 3d 1341 (N.D. Ga. 2017) (applying Georgia law), limiting employees' access to trade secret information including protecting trade secrets by requiring passwords for access, e.g., *Bacon v. Volvo Service Center, Inc*., 597 S.E.2d 440 (2004), or keeping information under lock and key, e.g., *American Photocopy Equipment Co. of Atlanta v. Henderson*, 296 S.E.2d 573 (1982), and having in place a record keeping process for whenever trade secret information is transmitted, e.g., *Flowers*, 237 F. Supp. 3d 1341,

and/or requiring prior authorization before any transmittal of the trade secret, e.g., *Salsbury Laboratories, Inc. v. Merieux Laboratories, Inc*., 908 F.2d 706 (11th Cir. 1990) (applying Georgia law).

5. Does your state apply the inevitable disclosure doctrine? If so, how is it applied?

While the Supreme Court of Georgia has held that the "inevitable disclosure doctrine is not an independent claim under which a trial court may enjoin an employee from working for an employer or disclosing trade secrets, it has declined to address "whether the inevitable disclosure doctrine may be applied to support a claim for" misappropriation of trade secrets. *Holton v. Physician Oncology Servs., LP*, 742 S.E.2d 702, 706 (2013). No other Georgia state or federal court has subsequently addressed the issue. *AWP, Inc. v. Henry*, 2020 WL 6876299, at *4 (N.D. Ga. Oct. 28, 2020); *see also Games Int'l, Inc. v. Cash,* 2017 WL 542034, at *5 (N.D. Ga. Jan. 25, 2017) ("In Georgia, the inevitable disclosure doctrine as applied to the misappropriation of trade secrets is limited . . . . A court may not base a claim for relief under the GTSA solely on the risk of future disclosures."); *ID Tech., LLC v. Hamilton*, 2014 WL 12703272, at *2 (N.D. Ga. Mar. 24, 2014) ("This Court declines to make a ruling on the viability of the inevitable disclosure doctrine under Georgia's trade secrets law.").

6. How have courts in your state addressed the defense that an alleged trade secret is "reasonably ascertainable?" What needs to be shown to prevail on that theory?

Georgia courts have not addressed the defense that an alleged trade secret is "reasonably ascertainable." However, Georgia courts have rejected the idea that trade secret protection is not available "because it is composed primarily of matters within the public domain." *Essex Grp., Inc. v. Southwire Co*., 501 S.E.2d 501, 503 (1998). "The fact that some or all of the components of the trade secret are well-known does not preclude protection for a secret combination, compilation, or integration of the individual elements." *Id.*; *see also Water Services, Inc. v. Tesco Chemicals, Inc.,* 410 F.2d 163, 173 (5th Cir.1969) (applying Georgia law). Additionally, Georgia courts have rejected the position that "information is not protectable as a trade secret merely because it may be independently discovered or ascertained by others." *Essex Grp., Inc*., 501 S.E.2d 501, 503 (1998). While Georgia law recognizes that trade secrets may be properly acquired through reverse engineering or independent development, it also recognizes that "trade secret information is protectable until it has been acquired by others by proper means." *Id.*

7. What are the most recent "hot button" issues addressed by courts in your state regarding trade secret claims?

The GTSA includes a preemption clause that states that the Act "supersede[s] conflicting tort, restitutionary, and other laws of this state providing civil remedies for misappropriation of a trade secret." OCGA § 10-1-767(a). However, the GTSA explicitly does not preempt "(1) Contractual duties or remedies, whether or not based upon misappropriation of a trade secret . . ., (2) Other civil remedies that are not based upon misappropriation of a trade secret; or (3) The definition of a trade secret contained in Code Section 16-8-13, pertaining to criminal offenses involving theft of a trade secret or criminal remedies . . . ." OCGA § 10-1-767(b). Simply put, the GTSA preempts conflicting torts. *Bd. of Regents of the Univ. Sys. of Georgia v. One Sixty Over Ninety, LLC*, 141, 830 S.E.2d 503, 510 (2019). Despite the plain language of the statute, the Georgia Supreme Court has stretched the preemption clause to cover "lesser and alternate" claims based upon the same factual allegations as a plaintiff's trade secret claim for misappropriation. *Robbins v. Supermarket Equip. Sales, LLC*, 722 S.E.2d 55, 58 (2012). The "GTSA preempts claims [that] rely on the same allegations as those underlying the plaintiff's claim for misappropriation of a trade secret." *Id.* (quoting *ProNvest, Inc. v. Levy*, 705 S.E.2d 204 (2010)).

This past year a federal court, citing the Georgia Supreme Court's ruling in *Robbins*, declined to expand the preemption clause any further while noting that "Georgia courts have gone further" than the statute. *Angel Oak Mortgage Sols. LLC v. Mastronardi*, 2022 WL 875910, at *3 (N.D. Ga. Mar. 23, 2022) (applying Georgia law). In *Angel Oak*, the Court explained that in *Robbins* the Georgia Supreme Court held the GTSA "also preempts 'lesser and alternate' claims based on the same facts, particularly where the alternative claim involves the same misappropriated information as the trade-secret claim." *Id.* The Court in *Angel Oak* declined to expand the preemption to cover claims that "do not involve trade secrets or the same information as [the] Plaintiff's GTSA claim." The Court differentiated the instant case from *Robbins* stating that "unlike in *Robbins*, where all the claims involved" the same information, "the GTSA and non-GTSA in this case involve different information." *Id.* The Court reasoned, "[t]hey have independent force because they seek relief for the misappropriation of different material."

8. How does your state's Trade Secret law differ from the DTSA, as the latter is applied in your Circuit?

The Georgia Uniform Trade Secrets Act ("GTSA") is similar to the Defend Trade Secrets Act of 2016 ("DTSA") in most respects. However, unlike GTSA, the DTSA includes a civil seizure remedy. Under the DTSA, upon *ex parte* application by the trade secret owner, a court can "issue an order providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action." 18 U.S.C. § 1836(b)(1). The DTSA's civil seizure mechanism provides victims of trade secret theft a tool to immediately stop dissemination of stolen proprietary information. 18 U.S.C. § 1836(b)(2)(C).