

Notes

BUSINESS INFORMATION AND NONDISCLOSURE AGREEMENTS: A PUBLIC POLICY FRAMEWORK

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ABSTRACT—Trade secret law, as codified in the Uniform Trade Secrets Act, gives businesses in nearly every U.S. jurisdiction a uniform, clearly defined right to protect secret and valuable business information from misappropriation. But how can businesses protect information that, while potentially useful, falls short of the legal definition of a trade secret? Businesses often require their employees to sign nondisclosure agreements (NDAs) to protect this category of information, which this Note refers to as “confidential business information” or “CBI.” These CBI NDAs are often drafted so broadly that, read literally, they would encompass every piece of information an employee learns at her job. There is cause for concern that these CBI NDAs could have anticompetitive effects and that enforcing them may conflict with the fundamental purposes of trade secret law. This Note systematically surveys existing law surrounding CBI NDA enforcement and develops a judicial framework for determining when such CBI NDAs should be enforceable.

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INTRODUCTION

In July 2020, Tesla, the world’s largest electric automotive manufacturer,¹ sued several of its former employees and Rivian, a small competitor, in California state court.² According to Tesla, Rivian “encourage[d]” the former Tesla employees, who left the company for Rivian, to furnish Rivian with Tesla trade secrets and/or “proprietary information,” even though Rivian knew those individuals had signed nondisclosure agreements (NDAs) with Tesla.³ The former employees allegedly misappropriated, among other things, materials related to Tesla recruiting⁴ and manufacturing,⁵ as well as a list of Tesla employees with expertise in vehicle-charging networks.⁶ As the litigation continues, Tesla insists that this information, if known to Rivian, would give the company a “huge competitive advantage.”⁷ Meanwhile, Rivian characterizes the suit as

¹ Fred Lambert, *Tesla Becomes World’s Largest EV Automaker, Surpasses China’s BYD*, ELECTREK (Dec. 6, 2019, 4:35 PM), <https://electrek.co/2019/12/06/tesla-worlds-largest-ev-automaker-byd/> [<https://perma.cc/Q5GK-UWD4>].

² Complaint at 1–2, *Tesla, Inc. v. Pascale*, No. 20CV368472 (Cal. Super. Ct. July 17, 2020).

³ *Id.* at 6.

⁴ *Id.* at 6–8.

⁵ *Id.* at 9.

⁶ *Id.* at 10.

⁷ *Id.* at 1. Since this Note was first drafted (in late 2020), there have been significant developments in the *Tesla* litigation. The court mostly overruled the defendants’ demurrer to Tesla’s Second Amended

an attempt to stifle competition. In particular, Rivian asserts that Tesla filed suit just days after Rivian secured a multi-billion-dollar investment.⁸ Rivian also asserts that Tesla is using litigation to deter other Tesla employees from leaving the company: “[Tesla] crafted its complaint to achieve a second improper purpose—namely to send a threatening message to its own employees: don’t dare leave Tesla.”⁹ Additionally, Rivian cites numerous internet articles that it argues show that Tesla’s recruiting processes are publicly available, thus calling into question whether that information should be legally protectable.¹⁰

Tesla’s first complaint contained three claims. It contended (1) that the defendants contravened California’s Uniform Trade Secrets Act,¹¹ (2) that the former employees breached their NDAs,¹² and (3) that Rivian intentionally interfered with those NDAs.¹³ How do these claims relate to one another? Do Tesla’s NDA claims merely duplicate its trade secret claim, or do they operate independently?

Some background information is needed to answer these questions. An NDA, or confidentiality agreement, as its name implies, is a contractual agreement that a party will not reveal certain information. Businesses often require their employees to sign NDAs to protect company information.¹⁴ Some of that information may qualify as trade secrets, which are pieces of business information that are not widely known, that have some value or potential value, and that the business has made a reasonable effort to keep secret.¹⁵ But other business information that does not necessarily satisfy the definition of a trade secret is still potentially valuable to the business that

Complaint. Order on Submitted Matters After Hearing at 29–31, *Tesla, Inc. v. Pascale*, No. 20CV368472 (Cal. Super. Ct. Apr. 1, 2021). Tesla has now filed its third amended complaint in the case, and the court recently granted its contested motion to file a fourth. Third Amended Complaint, *Tesla, Inc. v. Pascale*, No. 20CV368472 (Cal. Super. Ct. May 12, 2021); Order on Motion of Tesla, Inc. for Leave to File Fourth Amended Complaint, *Tesla, Inc. v. Pascale*, No. 20CV368472 (Cal. Super. Ct. Sept. 28, 2021). These changes are all noted as of October 4, 2021; further updates may have taken place since then. For purposes of convenience, this Note will refer to Tesla’s initial complaint and Rivian’s initial demurrer throughout, but it will note any significant updates to the litigation that have taken place since then.

⁸ Demurrer at 8–9, *Tesla, Inc. v. Pascale*, No. 20CV368472 (Cal. Super. Ct. Aug. 10, 2020).

⁹ *Id.* at 10.

¹⁰ *See id.* at 9 & n.2.

¹¹ Complaint, *supra* note 2, at 12–14.

¹² *Id.* at 14–15.

¹³ *Id.* at 15–16. Tesla’s third amended complaint also contains a claim for violation of the California Computer Access Data and Fraud Act. Third Amended Complaint, *supra* note 7, at 22–23.

¹⁴ Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627, 627 (1999) (“Employees routinely sign confidentiality agreements, promising not to disclose employer confidential information.”).

¹⁵ See *infra* Section I.A for the most common statutory definition of a trade secret (under the Uniform Trade Secrets Act).

owns it. This class of information, called “confidential business information” or “CBI” in this Note, may be protected via an NDA.¹⁶ But NDAs protecting CBI, or “CBI NDAs,”¹⁷ can come with negative public consequences. If these NDAs are drafted very broadly—for example, if they cover information that an employee would learn in the course of on-the-job training—they may render it difficult for employees to leave their positions and obtain similar employment elsewhere, meaning that the NDA would essentially function as a noncompete agreement.¹⁸ Overly broad NDAs may hinder economic competition by deterring competitors from hiring employees away from their rivals.¹⁹ Thus, CBI NDAs present a conflict between competing values: on the one hand, businesses’ interests in protecting CBI, and on the other, employees’ interests in their own mobility and the public interest in healthy economic competition. This conflict and others are raised in *Tesla* itself. Consider the following questions about the *Tesla* case:

How should courts classify business information, and what types of business information are legally protectable?

Tesla asserts that an expansive range of information, from manufacturing information to a mere list of employees, constitutes company trade secrets and/or CBI.²⁰ How do, and should, courts determine the protectability of such information? What is a trade secret, and how is it different from CBI? Moreover, when, if ever, does CBI cease to be “confidential” or lose legal protectability? Or may parties protect by contract even publicly available information?

How broadly may businesses draft CBI NDAs?

Tesla’s NDA classifies as CBI “all information, in whatever form and format, to which [employees] have access by virtue of and in the course of

¹⁶ See *infra* Section I.C.

¹⁷ “CBI” and “CBI NDA” are not new terms; other commentators have used them. See Craig P. Ehrlich & Leslie Garbarino, *Do Secrets Stop Progress? Optimizing the Law of Non-Disclosure Agreements to Promote Innovation*, 16 N.Y.U. J.L. & BUS. 279, 279, 298 (2020).

¹⁸ See *infra* Section III.B. Noncompete agreements, or “noncompetes,” are “a popular contractual tool used by employers to restrict an employee’s post-employment ability to work for a competitor or start a competing enterprise.” Norman D. Bishara, *Covenants Not to Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment*, 27 BERKELEY J. EMP. & LAB. L. 287, 294 (2006). Noncompetes are disfavored contracts in many jurisdictions because they restrain trade and restrict employee mobility. *Id.* at 298 & n.42. As a result, many jurisdictions require noncompetes to comply with limitations meant to ensure reasonableness. See *infra* note 153 and accompanying text.

¹⁹ See *infra* note 305 and accompanying text.

²⁰ See *supra* notes 4–6 and accompanying text.

[their] employment by [Tesla].”²¹ Read literally, this provision would protect broad swaths of knowledge a Tesla employee gains during her employment.²² Can, and should, businesses wield such significant power over their employees?

When do CBI NDAs functionally become noncompete agreements?

Rivian suggests that Tesla is attempting to circumvent California’s “strong public policy favoring employee mobility” by punishing departing employees with NDA litigation.²³ Indeed, California law generally bans employee noncompetes: in the state, “every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.”²⁴ Is Tesla attempting to accomplish through a CBI NDA what it cannot legally do in California with a noncompete?

Do CBI NDAs conflict with trade secret law?

By definition, CBI is information that is not a trade secret.²⁵ Does contractually protecting CBI pose a threat to the policy choices underlying trade secret law? If so, should courts prohibit businesses from contractually protecting information other than trade secrets?

This Note endeavors to answer these questions by advancing two primary contributions. First, this Note systematically surveys and classifies current judicial approaches to the enforceability of CBI NDAs. As will be demonstrated, judicial attitudes toward such contracts vary widely: some courts enforce the contracts entirely as written, others refuse to recognize any category of protectable business information apart from trade secrets, and many courts occupy a middle ground between these two extremes. Second, this Note develops and presents a framework courts should use to evaluate the enforceability of CBI NDAs. This framework, which is based on the public policy defense to contractual enforcement, invites courts to consider the extent to which enforcing a CBI NDA would protect employees’ bargaining power and economic mobility and also reflect the policy interests underlying trade secret law.

²¹ Complaint, *supra* note 2, Ex. A, at 1.

²² The NDA purports to exclude from its scope “information that is or lawfully becomes part of the public domain,” but the employee must prove that this exclusion applies by clear and convincing evidence. *Id.*

²³ Demurrer, *supra* note 8, at 10.

²⁴ CAL. BUS. & PROF. CODE § 16600 (West 2021).

²⁵ See Ehrlich & Garbarino, *supra* note 17, at 279–80 (stating that CBI is information that “is not quite a trade secret but is not publicly known either”).

The validity of CBI NDAs is of especially pressing interest nowadays. In just the past few years, there has been a surge of scholarly interest in NDA law. For instance, #MeToo, a movement focused on exposing instances of sexual harassment and assault,²⁶ has drawn scholars' attention to NDAs. Some have argued that NDAs impose negative social costs when they are used to protect sexual abusers and prevent victims from speaking out.²⁷ And former President Donald Trump's use of NDAs in his personal life and during his Administration has drawn ire from commentators who believe such contracts should not be enforceable.²⁸ Both of these lines of discussion, though very different in terms of their substantive content, rest on a common belief that the enforcement of NDAs can restrict individual freedom and negatively impact public life. This Note investigates that belief further, in the specific context of CBI NDAs. Like other NDAs, CBI NDAs can be publicly harmful and hazardous to individual freedom if they stifle innovation and employee mobility. This is especially the case in our increasingly integrated national and global economy, in which employee mobility is of central importance and employer–employee loyalty has been comparatively diminished.²⁹ In such an environment, it makes sense to ask whether the information-protection benefits that accrue to employers as a result of CBI NDAs can justify their potentially adverse public impacts. Thus, this Note's approach to NDAs is similar to those taken by other

²⁶ See Lauren del Valle & Eric Levenson, *Harvey Weinstein to Be Extradited to Los Angeles to Face Further Sexual Assault Charges*, CBS58 (June 15, 2021, 4:34 PM), <https://www.cbs58.com/news/harvey-weinstein-to-be-extradited-to-los-angeles-to-face-further-sexual-assault-charges> [<https://perma.cc/PJ2Z-5LUB>] (describing the #MeToo movement as “a wave of women speaking publicly about the pervasiveness of sexual abuse and harassment”).

²⁷ See, e.g., David A. Hoffman & Cathy Hwang, *The Social Cost of Contract*, 121 COLUM. L. REV. 979, 989 (2021) (“This work argues that ‘hush contracts’—nondisclosure agreements that suppress information about sexual wrongdoing—harm society by . . . allowing society to believe it has remedied issues of sexual harassment and abuse, insulating perpetrators from accountability, and allowing perpetrators to continue harming new victims.”); Emily Otte, Comment, *Toxic Secrecy: Non-Disclosure Agreements and #MeToo*, 69 U. KAN. L. REV. 545, 546 (2021) (questioning “whether NDAs should exist at all,” given their potential use in concealing acts of sexual abuse); Maureen A. Weston, *Buying Secrecy: Non-Disclosure Agreements, Arbitration, and Professional Ethics in the #MeToo Era*, 2021 U. ILL. L. REV. 507, 513 (“The ability to ‘buy secrecy’ [with] NDAs . . . can result in harm and trauma to others.”).

²⁸ See, e.g., Heidi Kitrosser, *Trump's Political NDAs Are an Abomination to the First Amendment*, SLATE (July 2, 2020), <https://slate.com/news-and-politics/2020/07/mary-trump-political-ndas-first-amendment.html> [<https://perma.cc/RB5Z-FRZT>] (arguing that President Trump's use of NDAs on his campaign staffers represents an attempt to “circumvent[]” the First Amendment by preventing the staffers from criticizing him). Professor Kitrosser is “an expert on the constitutional law of federal government secrecy and on separation of powers and free speech law more broadly.” Heidi Kitrosser, UNIV. OF MINN. L. SCH., <https://www.law.umn.edu/profiles/heidi-kitrosser> [<https://perma.cc/T2R4-5HL3>].

²⁹ See Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 166 (2008).

contemporary commentators, but the Note applies that approach to a comparatively less studied type of NDA (CBI NDAs).

Part I of this Note describes the three categories of business information and the legal protection they receive from courts. Part II introduces the public policy defense to contract enforcement and explains why this defense could be useful in analyzing CBI NDAs. Part III examines case law surrounding CBI NDA enforcement. Part IV examines courts' public policy attitudes toward NDAs outside the CBI context. Finally, Part V presents a public policy framework for evaluating CBI NDAs' enforceability in which courts should examine the various interests favoring and contrary to such NDAs' enforcement. This Note concludes that the public policy framework will help courts balance businesses' interests in protecting CBI with the public interests in safeguarding employee mobility and an open, competitive marketplace.

I. THE WORLD OF BUSINESS INFORMATION

To understand efforts to protect business information contractually, it is important to understand what types of business information exist. There are three: trade secrets; CBI, sometimes referred to as "proprietary information"; and nonconfidential information, also known as "general skills and knowledge."³⁰ These types of information are entitled to varying levels of protection. At one extreme, trade secrets are safeguarded by statute or common law in every state.³¹ Conversely, courts have seen little value in protecting general skills and knowledge. Agreements purporting to protect such information have often been adjudged unenforceable.³² Resting

³⁰ See *Bernier v. Merrill Air Eng'rs*, 770 A.2d 97, 104 (Me. 2001) (describing CBI as "information that does not rise to the level of a trade secret but is more than general skill or knowledge"); *Orthofix, Inc. v. Hunter*, 630 F. App'x 566, 567 (6th Cir. 2015) (listing trade secrets, CBI, and "general skills and knowledge" as the "three separate categories of business information"); Chris Montville, Note, *Reforming the Law of Proprietary Information*, 56 DUKE L.J. 1159, 1159–60 (2007) (describing "proprietary information" as "a different and far more vaguely defined category of protection" from the protection provided by trade secret law).

³¹ Montville, *supra* note 30, at 1162.

³² See, e.g., *AssuredPartners, Inc. v. Schmitt*, 44 N.E.3d 463, 475 (Ill. App. Ct. 2015) (explaining that a provision aimed at protecting "every kind of information that [the employee] learned during the period of his employment even if non-confidential" is "an impermissible restraint of trade and . . . void as a matter of law" (quoting *N. Am. Paper Co. v. Unterberger*, 526 N.E.2d 621, 624–25 (Ill. App. Ct. 1988))); *Disher v. Fulgoni*, 464 N.E.2d 639, 644 (Ill. App. Ct. 1984) (holding that an NDA that left the "subject matter" of the employee's confidentiality obligation "open-ended" could not be enforced); *Serv. Ctrs. of Chi., Inc. v. Minogue*, 535 N.E.2d 1132, 1137 (Ill. App. Ct. 1989) (holding that an NDA "defining confidential information as essentially all of the information . . . 'concerning or in any way relating' to the services offered" was void); *McGough v. Nalco Co.*, 496 F. Supp. 2d 729, 756 (N.D. W. Va. 2007) (holding that an NDA was unenforceable because it was "written so broadly as to cover everything [the

uneasily between these extremes is CBI.³³ Because CBI is protected in most jurisdictions by contract alone,³⁴ a key issue in many legal disputes over CBI is whether those contracts are enforceable.

This Part will describe these three categories of information, beginning with trade secrets and general skills and knowledge before turning to the more abstruse category of CBI.

A. Trade Secrets

Trade secrets give their owners full property rights and thus also allow their owners remedies in the case of misappropriation.³⁵ The history of American trade secret law has been muddy, with only relatively recent efforts providing some clarity and uniformity in the law.³⁶

The most significant of these efforts was the Uniform Trade Secrets Act (UTSA). Drafted by the National Conference of Commissioners on Uniform State Laws in 1979 and amended in 1985,³⁷ the UTSA has been enacted in forty-eight states as of 2018 (plus the District of Columbia and two territories).³⁸ The UTSA provides a cause of action against trade secret misappropriation³⁹ and defines a “trade secret” as:

information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.⁴⁰

employee] might have learned while working at [his employer]”); *Softchoice Corp. v. MacKenzie*, 636 F. Supp. 2d 927, 939 (D. Neb. 2009) (holding that a claim for breach of an NDA failed because “the information at issue . . . [was] not confidential and not a trade secret,” but was instead “freely available throughout the industry”).

³³ *Montville*, *supra* note 30, at 1162.

³⁴ *Id.* at 1166.

³⁵ Ehrlich & Garbarino, *supra* note 17, at 295.

³⁶ Unlike patents and copyrights, which were mentioned in the Constitution and subject to federal legislation early in American history, trade secrets “ha[ve] no constitutional provenance.” Deepa Varadarajan, *The Trade Secret-Contract Interface*, 103 IOWA L. REV. 1543, 1549 (2018). Until recently, “there [was] no federal trade secret law.” Alan J. Tracey, *The Contract in the Trade Secret Ballroom—A Forgotten Dance Partner?*, 16 TEX. INTELL. PROP. L.J. 47, 54 (2007). *But see* Defend Trade Secrets Act, 18 U.S.C. § 1836(b)(1) (2016) (providing a federal cause of action against trade secret misappropriation).

³⁷ Tracey, *supra* note 36, at 57.

³⁸ *Understanding the Uniform Trade Secrets Act*, FREIBERGER HABER LLP (Apr. 4, 2018), <https://fhnylaw.com/understanding-uniform-trade-secrets-act/> [https://perma.cc/V79C-YBLJ].

³⁹ *See* UNIF. TRADE SECRETS ACT §§ 2(a), 3(a) (NAT’L CONF. COMM’RS ON UNIF. STATE L. 1985) (“Actual or threatened misappropriation [of trade secrets] may be enjoined.”).

⁴⁰ *Id.* § 1(4).

This definition contains “three specific and mandatory requirements”: secrecy, economic value, and reasonable efforts to maintain secrecy.⁴¹ Most important is secrecy, a “uniformly critical” predicate to legal protection.⁴² In other words, the UTSA focuses primarily on the nature of the information to be protected, including its secrecy—the existence of an actual trade secret.

The UTSA also preempts other civil remedies for trade secret misappropriation.⁴³ Most courts to address the issue have held that this preemption provision displaces common law actions to protect CBI.⁴⁴ But the UTSA does *not* preempt “contractual remedies, whether or not based upon misappropriation of a trade secret.”⁴⁵ As such, contractual actions are the sole basis for protecting CBI in many jurisdictions.⁴⁶

B. Nonconfidential Information (General Skills and Knowledge)

There is no similar protection for nonconfidential information or “general skills and knowledge.” Indeed, this class of information often cannot even be protected by contract.⁴⁷ General skills and knowledge is information known to most every participant in an industry.⁴⁸ For example, most journalists probably know how to write headlines and conduct interviews. Such information is not legally protectable because protecting it would “unnecessarily restrict employees’ mobility” and “unduly hamper legitimate competition.”⁴⁹ This is true because protecting general knowledge an employee gains from her job would effectively prevent the employee from working the same job again. In the journalism example, a journalist who

⁴¹ Sharon K. Sandeen, *The Evolution of Trade Secret Law and Why Courts Commit Error When They Do Not Follow the Uniform Trade Secrets Act*, 33 *HAMLIN L. REV.* 493, 521 (2010). The UTSA also represents a modern “refocusing of trade secret law” from its earlier history. Sharon K. Sandeen, *A Contract by Any Other Name Is Still a Contract: Examining the Effectiveness of Trade Secret Clauses to Protect Databases*, 45 *IDEA* 119, 130 (2005) [hereinafter Sandeen, *A Contract by Any Other Name*]. Many early trade secret cases “focus[ed] more on the relationship between the parties than the existence of a trade secret.” *Id.* at 128. By contrast, the UTSA fixes courts’ “attention on the character of the [information] to be protected.” *Id.* at 129.

⁴² Montville, *supra* note 30, at 1163.

⁴³ UNIF. TRADE SECRETS ACT § 7(a).

⁴⁴ *Atl. Med. Specialists, LLC v. Gastroenterology Assocs., P.A.*, No. CV N15C-06-245 CEB, 2017 WL 1842899, at *14 (Del. Super. Ct. Apr. 20, 2017) (“The ‘majority view’ of [UTSA] section 7 displacement holds that non-trade secret information is not a protectable class of information and therefore common law claims that seek to protect it are preempted.”).

⁴⁵ UNIF. TRADE SECRETS ACT § 7(b)(1).

⁴⁶ *See* Montville, *supra* note 30, at 1166.

⁴⁷ *See supra* note 32 and accompanying text.

⁴⁸ *See* Robert Unikel, *Bridging the “Trade Secret” Gap: Protecting “Confidential Information” Not Rising to the Level of Trade Secrets*, 29 *LOY. U. CHI. L.J.* 841, 844, 889 (1998) (describing a class of “Category 1” information that is analogous to general skills and knowledge).

⁴⁹ *Id.* at 850–51.

could not use her knowledge about conducting interviews would be practically barred from working as a journalist.⁵⁰ Accordingly, as a general matter, the only way general skills or knowledge can be protected is with an enforceable noncompete.⁵¹ In other words, courts often presume that employees can freely use general skills and knowledge when they leave an employer,⁵² because holding otherwise would have anticompetitive effects.

C. CBI

CBI is less well defined than the previous categories. Most jurisdictions recognize CBI “implicitly . . . without acknowledging it as specifically protectable.”⁵³ CBI is frequently identified by what it is not, rather than what it is. For instance, Professors Craig Ehrlich and Leslie Garbarino describe CBI as “that which is not quite a trade secret but is not publicly known either.”⁵⁴ Similarly, one court outlines CBI when describing “information that does not rise to the level of a trade secret but is more than general skill or knowledge.”⁵⁵ These comments provide two fundamental insights regarding CBI: (1) CBI is not a trade secret, meaning that CBI fails to meet

⁵⁰ See *McGough v. Nalco Co.*, 496 F. Supp. 2d 729, 756 (N.D. W. Va. 2007) (“The [NDA] provisions are written so broadly as to cover everything [the employee] might have learned while working [for his employer], [so] if he were to strictly abide by its terms, he would be unable to ever work in a similar field again.”).

⁵¹ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 cmt. d (AM. L. INST. 1995). Note, however, that some courts permit NDAs to protect such nonconfidential information. See *infra* Section III.A.1.

⁵² See, e.g., *Samuel Bingham Co. v. Maron*, 651 F. Supp. 102, 106 (N.D. Ill. 1986) (“A terminated employee is free to use general skills and knowledge acquired during employment.”); *Boost Co. v. Faunce*, 86 A.2d 283, 286 (N.J. Super. Ct. App. Div. 1952) (“It is a well settled rule of law that an employee, upon terminating his employment, may carry away and use the general skill or knowledge acquired during the course of the employment.”); *Jet Spray Cooler, Inc. v. Crampton*, 282 N.E.2d 921, 924 (Mass. 1972) (“[A]n employee may carry away and use general skill or knowledge acquired during the course of his employment . . .” (quoting *New England Overall Co. v. Woltmann*, 176 N.E.2d 193, 198 (Mass. 1961))).

⁵³ *Montville*, *supra* note 30, at 1166. *But see* FLA. STAT. § 542.335(1)(b)(2) (2021) (specifying that CBI is protectable in Florida).

⁵⁴ Ehrlich & Garbarino, *supra* note 17, at 279–80; see also *Structural Dynamics Rsch. Corp. v. Eng’g Mechs. Rsch. Corp.*, 401 F. Supp. 1102, 1113 (E.D. Mich. 1975) (finding that limiting the application of NDAs to trade secrets is “too restrictive, especially in . . . area[s] of knowledge and rapid technological change”).

⁵⁵ *Bernier v. Merrill Air Eng’rs*, 770 A.2d 97, 104 (Me. 2001); see also *Orthofix, Inc. v. Hunter*, 630 F. App’x 566, 567–68 (6th Cir. 2015) (finding that NDAs can protect more information than trade secrets but that general skills and knowledge are not the proper subject of an NDA); *Am. Software USA, Inc. v. Moore*, 448 S.E.2d 206, 209 (Ga. 1994) (holding that NDA properly restricted disclosure of “trade secrets” and “confidential business information” that was not publicly available); *Unikel*, *supra* note 48, at 889 (arguing that “valuable business information” should be classified as “trade secrets,” “confidential information,” or “general skill and knowledge”).

one or more of the UTSA's requirements,⁵⁶ and (2) CBI is not publicly available. Still, the relative scarcity of insight regarding what information constitutes CBI raises thorny issues when business entities attempt to protect CBI contractually.⁵⁷

Courts frequently conceive of CBI NDAs as expanding businesses' legal protection beyond that provided by trade secret law.⁵⁸ But the extent to which business entities may use NDAs to enhance the legal protectability of their information is unclear.⁵⁹ One reason for this uncertainty is that authority is divided regarding the proper relationship between CBI law and trade secret law. Should trade secret law inform courts' approach when determining CBI's protectability, or should the two classes of information be subject to different criteria? The Sixth Circuit has taken up the former position, asserting that "the rules governing trade secrets are . . . relevant in analyzing the reasonableness and enforceability of [NDAs] because, in order to justify the contractual restraint, information subject to [NDAs] must share at least some characteristics with information protected by trade secret statutes."⁶⁰ A few courts have gone further, asserting that non-trade-secret information should receive no legal protection under an NDA.⁶¹ Other courts, however, view CBI as independent from trade secrets and thus not subject to the limitations of trade secret law.⁶² Still other courts avoid imposing the

⁵⁶ See *supra* notes 40–41 and accompanying text (noting the three UTSA requirements of secrecy, economic value, and reasonable efforts to maintain secrecy).

⁵⁷ Further complicating attempts to conceptualize CBI is the fact that some types of information that are capable of attaining trade secret status, such as "client and customer lists, pricing information, . . . strategies[. . .] information regarding vendors, suppliers, manufacturing or purchasing, . . . plans, formulae, [and] R&D methods and practices," may also qualify as mere CBI if they do not meet the UTSA's definition. Ehrlich & Garbarino, *supra* note 17, at 296. In other words, in a particular case, if a customer list does not qualify for trade secret protection, it may still be protectable as CBI. However, some classes of business information appear ubiquitous in CBI cases, including "customer lists and information about customers" and "business knowledge" such as "knowledge of cost information and pricing formulas." See Montville, *supra* note 30, at 1170–71.

⁵⁸ See, e.g., *Orthofix*, 630 F. App'x at 567–68 ("[A] nondisclosure agreement prohibiting the use or disclosure of particular information can clarify and extend the scope of an employer's rights' beyond the protection afforded by trade secret statutes." (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 cmt. g (AM. L. INST. 1995))); *Empower Energies, Inc. v. SolarBlue, LLC*, No. 16CV3220, 2016 WL 5338555, at *10 (S.D.N.Y. Sept. 23, 2016) ("Information entitled to protection, however, may be broader than trade secrets.").

⁵⁹ Ehrlich & Garbarino, *supra* note 17, at 297.

⁶⁰ *Orthofix*, 630 F. App'x at 568 (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 41 cmt. d).

⁶¹ See *infra* Section III.A.2.

⁶² For instance, in *Roboserve, Ltd. v. Tom's Foods, Inc.*, the Eleventh Circuit stated that "[a] confidential relationship is distinguished by the expectations of the parties involved, while a trade secret is identified through rigorous examination of the information sought to be protected." 940 F.2d 1441,

requirements of trade secret law on CBI by enforcing NDAs largely as written, with little concern for the secrecy or value of the information protected.⁶³

This Part has described the three categories of business information and summarized how courts assess legal efforts to protect them. The next Part, centered on the public policy defense, will examine a particular doctrine of nonenforcement that applies to contract law generally.

II. THE PUBLIC POLICY DEFENSE TO CONTRACT ENFORCEMENT

This Part will summarize the public policy defense to contract enforcement and argue that it provides a useful framework for courts to use in CBI NDA cases.

Contract law provides individuals with broad freedom to strike legally enforceable private bargains.⁶⁴ Despite this general principle, some contracts will not be enforced if they are contrary to public policy. The concept of public policy balances individual freedom with “public order, public security, public health, [and] public interest.”⁶⁵ In other words, public policy becomes relevant to contract law when the rights of the few contracting parties would injure the rights of the many because the contract harms public values.⁶⁶ The clearest example of such a contract is one that is expressly outlawed;⁶⁷ for example, California has broadly prohibited employee noncompete agreements.⁶⁸ But even contracts not proscribed by statute are susceptible to a public policy defense.⁶⁹ Lord Hardwicke, writing in 1750,

1456 (11th Cir. 1991) (citation omitted). While the court made this statement with respect to a confidential business relationship rather than an NDA, *id.*, the court’s analysis certainly suggests that CBI entails different policy considerations from those underlying trade secret law.

⁶³ See *infra* Section III.A.1 (describing the “Enforcement-as-Written” approach).

⁶⁴ Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 264 (1998); see also *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972) (holding that the Fourteenth Amendment guarantees “not merely freedom from bodily restraint but also the right of the individual to contract,” among other things).

⁶⁵ Farshad Ghodoosi, *The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements*, 94 NEB. L. REV. 685, 686 (2016).

⁶⁶ Myanna Dellinger, *Trophy Hunting Contracts: Unenforceable for Reasons of Public Policy*, 41 COLUM. J. ENV’T L. 395, 427 (2016).

⁶⁷ See RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (AM. L. INST. 1981) (“A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable . . .”).

⁶⁸ CAL. BUS. & PROF. CODE § 16600 (West 2020). See *supra* note 18 for the definition of a noncompete agreement.

⁶⁹ See Dellinger, *supra* note 66, at 424 (“Courts are not prohibited from deciding whether a contract is . . . against public policy simply because there is not a statute that specifically limits contract terms [Such a ruling] is an inherent equitable power of the court and does not require prior legislative action.” (quoting *State ex rel. King v. B & B Inv. Grp., Inc.*, 329 P.3d 658, 670 (N.M. 2014))).

described the doctrine of public policy as follows: if a contract is a “general mischief to the public,” it may be unenforceable on grounds of public policy.⁷⁰

The public policy defense has been criticized for its alleged uncertainty and lack of clear analytical criteria. One famous commentary referred to public policy as an “unruly horse”: “when you get astride of it, you never know where it will carry you.”⁷¹ Indeed, attempts to reduce public policy to a precise legal formula have been unsuccessful. The formulation of public policy in the *Second Restatement of Contracts* weighs various factors for and against the enforcement of a contract and holds a contract unenforceable if “the interest in its enforcement is clearly outweighed . . . by a public policy against [its] enforcement.”⁷² But the *Restatement’s* impact on judicial decisions appears minimal. A study of the public policy defense found that only one opinion in a sample of 104 cited the *Restatement’s* formulation, and only four engaged in any of the “balancing or weighing” the *Restatement* calls for.⁷³

As Professor Farshad Ghodoosi has noted, public policy’s unruly nature is attributable to its “depart[ure] from the structure of legal reasoning.”⁷⁴ The defense is not primarily concerned with the “internal” fairness of a bargain *between the parties*: it instead examines the impact the bargain would have on society as a whole.⁷⁵ In this way, public policy is distinct from the related doctrine of unconscionability, which is concerned with the internal fairness of a contract and its impact on the contracting parties.⁷⁶ Public policy, by

⁷⁰ Ghodoosi, *supra* note 65, at 692 (quoting W.S.W. Knight, *Public Policy in English Law*, 38 LAW Q. REV. 207, 209 (1922)).

⁷¹ *Id.* at 693 (quoting *Richardson v. Mellish* (1824) 130 Eng. Rep. 294, 303 (K.B.)).

⁷² RESTATEMENT (SECOND) OF CONTRACTS § 178(1). Interests favoring enforcement include “(a) the parties’ justified expectations, (b) any forfeiture that would result if enforcement were denied, and (c) any special public interest in the enforcement of the particular term.” On the other hand, interests against enforcement include

(a) the strength of [a] policy [against enforcement] as manifested by legislation or judicial decisions, (b) the likelihood that a refusal to enforce the term will further that policy, (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and (d) the directness of the connection between that misconduct and the term.

Id. § 178(2)–(3).

⁷³ David Adam Friedman, *Bringing Order to Contracts Against Public Policy*, 39 FLA. ST. U. L. REV. 563, 614 (2012).

⁷⁴ Ghodoosi, *supra* note 65, at 695.

⁷⁵ *See id.* at 697 (distinguishing public policy from unconscionability on this basis).

⁷⁶ *Id.*

contrast, invites judges to weigh political and moral factors not intrinsic to the contract itself.⁷⁷

The public policy defense provides an appropriate framework for evaluating the enforceability of CBI NDAs. Take *Tesla* as an example. Tesla's effort to enforce its CBI NDA portends numerous outcomes potentially against public policy. For instance, Tesla's litigation may cause other Tesla employees to fear a lawsuit if they attempt to leave the company.⁷⁸ In addition, Tesla's use of the CBI NDA to sue a competitor (Rivian) may inhibit competition and deter smaller firms from hiring larger competitors' employees. CBI NDAs, such as those at issue in *Tesla*, should be subject to public policy scrutiny to ensure that public interests in employee mobility and economic competition are protected. The next Part begins a survey of existing case law to examine how CBI NDA enforceability is currently assessed in practice.

⁷⁷ See *id.* (explaining that, under the public policy defense, “[e]ven if all four corners of [a contract] complied with provisions of jurisprudence of contract law, an external moral or legislative concern could render it unenforceable”); see also *id.* at 692 (quoting Lord Hardwicke’s view that “political arguments” are relevant to determining contracts’ enforceability). As discussed above, unconscionability is related to, but distinct from, public policy. In order to establish unconscionability, a party must show (1) that the contract’s “bargaining process” was “adhesive or unduly one-sided” (procedural unconscionability) and (2) that the contract itself is “unduly oppressive or otherwise unfair” (substantive unconscionability). Amy J. Schmitz, *Embracing Unconscionability’s Safety Net Function*, 58 ALA. L. REV. 73, 75 (2006). Courts’ “increasingly rigid” use “of a two-prong unconscionability test” has, according to Professor Amy Schmitz, impaired unconscionability’s ability to serve “as a ‘safety net’ for flexibly protecting societal values and norms of morality, fairness, and equality that cannot be intellectualized” in contract law. *Id.* Therefore, public policy, which has resisted formal classification to a fault, may be better positioned than unconscionability to ensure that social values remain part of contract law. However, courts seem to have implemented *some* rules to tame the unruly horse of public policy. Courts are more likely to credit public policy defenses that are based on existing statutes or regulations, while general appeals to the doctrine are less likely to succeed. See Friedman, *supra* note **Error! Bookmark not defined.**, at 566.

Modern public policy may be illustrated by *State ex rel. King v. B & B Investment Group, Inc.*, 329 P. 3d 658 (N.M. 2014). This case involved “signature loans,” which are “loans of \$50 to \$300 in principal” that carry APRs of over 1000%. *Id.* at 663. The court found that these loans were against public policy, noting that, even if no statute directly outlawed the terms of the loans, the terms might still be against public policy. *Id.* at 670. The loans’ providers argued that the New Mexico Legislature’s removal of the state’s cap on interest rates in 1981 showed that New Mexico had no public policy against usurious interest rates. *Id.* at 672. The court rejected this argument and concluded that a series of other statutes stood for New Mexico’s policies of small-loan regulation and consumer protection. See *id.* at 672–74. *King* shows that, while public policy technically leaves courts free to introduce extralegal factors into their decision-making, in practice judges will often find the most reliable sources of public policy to be written statutes, regulations, and related materials.

⁷⁸ See *supra* note 9 and accompanying text.

III. THE ENFORCEABILITY OF CBI NDAs AND PUBLIC POLICY

This Part will survey the landscape of CBI NDA case law, building on Chris Montville's note in the *Duke Law Journal*.⁷⁹ Montville asked two questions in classifying CBI case law: "what types of information do courts protect" and "when do they protect it"?⁸⁰ To answer these questions, Montville examined how courts protect CBI in noncompete cases (and then examined how courts apply noncompete law—if at all—to NDAs).⁸¹ The following is a brief summary of Montville's categorization of these cases.

In Montville's view, courts taking the "Categorical Enforcement" approach to noncompetes focus primarily on "whether the former employee might cause economic damage to his former employer," while the "nature of the alleged proprietary information" to be protected by the noncompete occupies "a secondary role."⁸² By contrast, courts using the "Specificity Approach" impose substantive requirements to determine what categories of CBI deserve protection; for instance, these courts may oblige employers to specifically identify the CBI to be protected by a noncompete.⁸³ Montville then identified three ways in which courts conceive of the relationship between NDAs and noncompetes: some courts treat NDAs and noncompetes identically, others impose some limitations on NDAs but do not strictly apply the law of noncompetes to NDAs, and others hold that NDAs and noncompetes are different sorts of contracts entirely.⁸⁴

This Part builds on and adds nuance to Montville's categorizations. Section III.A addresses which types of information CBI NDAs are permitted to protect, and Section III.B assesses judicial approaches to the relationship between CBI NDAs and noncompetes. These courts, while not frequently doing so explicitly, are essentially applying a public policy rubric to the enforceability of CBI NDAs. These cases present a conflict between, on the one hand, public interests such as employee well-being and "the flow of information necessary for competition among businesses" and, on the other hand, the "proprietary interests of the employer."⁸⁵ Courts differ substantially when deciding which of these interests to protect, and to what extent, in CBI NDA cases. While this Part will compare the merits and drawbacks of varying approaches taken by courts, it does not purport to

⁷⁹ See generally Montville, *supra* note 30, at 1179–87 (providing a survey of courts' evaluations of "proprietary information under nondisclosure agreements").

⁸⁰ *Id.* at 1169.

⁸¹ *Id.* at 1173–87.

⁸² *Id.* at 1173.

⁸³ *Id.* at 1177–79.

⁸⁴ *Id.* at 1180–83.

⁸⁵ *Disher v. Fulgoni*, 464 N.E.2d 639, 643 (Ill. App. Ct. 1984).

present a comprehensive public policy standard for courts to apply; that is left to the final Part of this Note.

*A. Substantive Enforceability: What Information May a CBI
NDA Protect?*

This Note’s analysis begins with Montville’s first question: “what types of information do courts protect”?⁸⁶ Montville primarily examined NDA cases indirectly, first examining how courts treat CBI in noncompete cases and then examining how courts treat NDAs relative to noncompetes.⁸⁷ This Note will attempt to examine CBI NDA enforcement cases more directly, while acknowledging that noncompete litigation is more common than NDA litigation.⁸⁸ Courts approach CBI NDAs’ Substantive Enforceability in many ways: they may (1) enforce CBI NDAs as written, without considering the nature of the information to be protected (“Enforcement-as-Written”);⁸⁹ (2) refuse to recognize CBI as protectable (“Coextensivity”);⁹⁰ (3) provide some minor substantive requirements to ensure that information under a CBI NDA is not publicly available (“Light-Touch Reasonableness”); or (4) require a more substantial showing that information covered by a CBI NDA is worthy of protection, often borrowing elements from trade secret law (“Close-Look Reasonableness”).⁹¹

1. Enforcement-as-Written

Courts applying the Enforcement-as-Written approach will protect any information defined as CBI in an NDA, even if the information is not actually confidential or valuable. The cases in this Section, also analyzed by Professors Ehrlich and Garbarino, “illustrate the costs of enforcing an NDA when the information is not confidential.”⁹² The Eighth Circuit endorsed the Enforcement-as-Written approach in *Loftness Specialized Farm Equipment, Inc. v. Twiestmeyer*.⁹³ In that case, the court encountered an NDA defining

⁸⁶ Montville, *supra* note 30, at 1169.

⁸⁷ *Id.* at 1173–87.

⁸⁸ *McGough v. Nalco Co.*, 496 F. Supp. 2d 729, 744 (N.D. W. Va. 2007) (“[C]ases discussing the validity of non-disclosure or confidentiality provisions are far fewer in number [than cases assessing the validity of noncompetes].”).

⁸⁹ This approach is analogous to Montville’s “Categorical Enforcement” category, under which courts will deemphasize “[t]he exact nature of the alleged proprietary information” to be protected. Montville, *supra* note 30, at 1173.

⁹⁰ Montville, too, identified some courts that “refus[e] to recognize proprietary information” in specific circumstances. *Id.* at 1183.

⁹¹ This category shares some features with the “Specificity Approach” identified by Montville. *See id.* at 1177.

⁹² Ehrlich & Garbarino, *supra* note 17, at 299.

⁹³ 742 F.3d 845, 850–51 (8th Cir. 2014).

“Confidential Information” as “[s]uch information that [the plaintiffs] consider[] to be proprietary and/or confidential.”⁹⁴ The court held that the plain language of the CBI NDA included the information the plaintiffs wished to protect and made no inquiry as to whether that information was actually secret or had any value; indeed, the court never even challenged the district court’s holding that the plaintiffs had “made no effort to keep their ideas and information confidential.”⁹⁵

Under the Enforcement-as-Written approach, as demonstrated by *Loftness*, courts’ only consideration is the CBI NDA itself. “Confidential” information becomes whatever the contract says it is, even if the information protected is publicly available.⁹⁶ Courts applying this test justify it by reference to a need to protect contractual relationships. One court, for instance, stated that courts can legitimately protect publicly available information contractually because such information is confidential “between the parties.”⁹⁷ The Enforcement-as-Written rule is thus in tension with trade secret law. While secrecy is the hallmark of business information’s identity as a trade secret, secrecy is entirely irrelevant to Enforcement-as-Written courts when examining a CBI NDA.

The Enforcement-as-Written approach is used to enforce nominal “NDAs” that are, in substance, noncompetes. For example, in *ChemiMetals Processing, Inc. v. McEneny*, a chemicals distributor and a manufacturer formed a distribution agreement prohibiting the distributor from producing the manufacturer’s products.⁹⁸ The distributor argued that the agreement restrained trade and was therefore unenforceable.⁹⁹ The court disagreed, holding instead that the agreement designated the manufacturer’s product line as confidential information and, therefore, that the agreement’s purpose was not to stifle competition but to protect CBI.¹⁰⁰ Despite the court’s reasoning, however, the agreement was essentially a noncompete because it prevented a company from manufacturing products without evidence that the methods of manufacture were confidential.¹⁰¹

⁹⁴ *Id.* at 848.

⁹⁵ *Id.* at 850–51.

⁹⁶ Ehrlich & Garbarino, *supra* note 17, at 301 (discussing *Loftness*).

⁹⁷ *Platinum Mgmt., Inc. v. Dahms*, 666 A.2d 1028, 1038 (N.J. Super. Ct. Law Div. 1995) (“The fact that such information may be available from public sources does not mean that the information is not confidential as between the parties.”).

⁹⁸ 476 S.E.2d 374, 375 (N.C. Ct. App. 1996); Ehrlich & Garbarino, *supra* note 17, at 300.

⁹⁹ *ChemiMetals*, 476 S.E.2d at 376.

¹⁰⁰ *Id.* at 376–77.

¹⁰¹ Ehrlich & Garbarino, *supra* note 17, at 300 (discussing *ChemiMetals*). The *ChemiMetals* court vaguely mentions, without elaboration, that the products’ method of manufacture was “confidential to

Some arguments favor the Enforcement-as-Written approach. Chief among them is efficiency: Enforcement-as-Written is “a simple rule, easy to follow, and relatively inexpensive to enforce.”¹⁰² In addition, Enforcement-as-Written is most faithful to the idea that parties ought to be able to order their private affairs through contract as they see fit.¹⁰³ These considerations, however, cannot compensate for the rule’s deficiencies. To begin, the freedom-of-contract justification is less credible in the context of employee NDAs, which are often broadly drafted and so common in many industries as to be a practical prerequisite to employment.¹⁰⁴ In such cases, employees are often accepting take-it-or-leave-it deals rather than contracting with their employers freely.¹⁰⁵ Moreover, Enforcement-as-Written’s focus on contractual relationships ignores public interests against enforcement of overbroad CBI NDAs. Contract law, through the public policy defense, recognizes that some contracts are so publicly harmful they should not be enforced.¹⁰⁶ Protecting publicly available information because a CBI NDA defines it as confidential could have negative public impacts. For instance, safeguarding such information may “imped[e] cumulative innovation” if it prevents a contracting party from using information others are free to access.¹⁰⁷ Enforcing overly broad CBI NDAs also impedes competition, as shown in *ChemiMetals*. In that case, the court utilized a formal distinction between NDAs and noncompetes to prohibit a company from manufacturing the same products as its competitor.¹⁰⁸ This absurd result, if adopted widely, would allow businesses to avoid judicial reluctance to enforce

[the plaintiff].” 476 S.E.2d at 377. It is not clear what the court means by this, and the opinion does not expressly state “that the formulae were not generally known in the industry.” Ehrlich & Garbarino, *supra* note 17, at 300. This Note will follow Professors Ehrlich and Garbarino in their interpretation of *ChemiMetals*, *see id.*; if the information protected in that case were actually secret, it seems the court would have said so more clearly.

¹⁰² Ehrlich & Garbarino, *supra* note 17, at 302.

¹⁰³ *See supra* note 64 and accompanying text.

¹⁰⁴ *See* Montville, *supra* note 30, at 1188; *see also* Sharon Florentine, *NDAs Stifling Tech Workers’ Voices*, CIO (Sept. 7, 2018, 2:30 AM), <https://www.cio.com/article/3304297/ndas-stifling-tech-workers-voices.html> [<https://perma.cc/5RFT-XGWZ>] (noting the ubiquity of NDAs in the technology industry); Orly Lobel, *NDAs Are Out of Control. Here’s What Needs to Change*, HARV. BUS. REV. (Jan. 30, 2018), <https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change> [<https://perma.cc/2JLD-HBF6>] (“New data shows that over one-third of the U.S. workforce is bound by an NDA.”).

¹⁰⁵ *See infra* note 241 and accompanying text.

¹⁰⁶ *See supra* Part II.

¹⁰⁷ *See* Ehrlich & Garbarino, *supra* note 17, at 302. For instance, suppose Tesla interpreted its NDA so as to prevent employees from using information about electric vehicle charging networks. If charging network experts left Tesla, they would effectively be barred from working in the charging-networks field again, thus reducing the total number of potential innovators in the field.

¹⁰⁸ *See supra* notes 98–101 and accompanying text (discussing *ChemiMetals*).

noncompetes¹⁰⁹ by dressing up anticompetitive provisions as information-protection measures. In sum, the Enforcement-as-Written approach is deficient because courts should typically require NDA plaintiffs to show, at a minimum, that the information they seek to protect is “confidential in fact.”¹¹⁰ Enforcement-as-Written, which fails to require this threshold showing, is not an optimal judicial approach to NDA enforcement.

2. Coextensivity

In contrast to Enforcement-as-Written courts, other courts will not enforce CBI NDAs to the extent they protect anything *but* trade secrets.¹¹¹ This rule is referred to here as the Coextensivity rule because it argues that trade secrets and CBI are “coextensive.”¹¹² Put differently, Coextensivity courts do not believe that CBI exists independently of trade secrets at all.¹¹³

One notable articulation of the Coextensivity approach came in *Dynamics Research Corp. v. Analytic Sciences Corp.*¹¹⁴ In that case, the court held that “a[n] [NDA] which seeks to restrict the employee’s right to use an alleged trade secret which is not such in fact or in law is unenforceable as against public policy.”¹¹⁵ The court further insisted that the NDA in the case “c[ould] only affirm the intent of the parties to be bound” by trade secret law.¹¹⁶ Other courts have found that “trade secrets and [CBI] ‘are essentially identical concepts.’”¹¹⁷ Coextensivity is thus the opposite of the Enforcement-as-Written approach. Courts adhering to the latter examine only the CBI NDA’s language, while courts applying the former ignore the CBI NDA and ask only if the information to be protected meets trade secret requirements.

Courts using the Coextensivity rule have raised several arguments in its favor. The *Dynamics Research* court argued that protecting information other than trade secrets runs a risk that a CBI NDA could have anticompetitive effects.¹¹⁸ Another court, while not strictly applying a Coextensivity rationale, provided ammunition for the rationale when it used the UTSA’s definition of a trade secret to argue that CBI that does not meet

¹⁰⁹ See *supra* note 18.

¹¹⁰ Ehrlich & Garbarino, *supra* note 17, at 302.

¹¹¹ See Montville, *supra* note 30, at 1183.

¹¹² *Id.* at 1184.

¹¹³ *Id.*

¹¹⁴ 400 N.E.2d 1274, 1288 (Mass. App. Ct. 1980).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Take it Away, Inc. v. Home Depot, Inc.*, No. 05–12484–DPW, 2009 WL 458552, at *8 (D. Mass. Feb. 6, 2009) (quoting *United Rug Auctioneers, Inc. v. Arsalen*, No. CA03-0347, 2003 WL 21527545, at *6 (Mass. Super. Ct. Apr. 11, 2003)).

¹¹⁸ See *Dynamics Rsch.*, 400 N.E.2d at 1288 n.32.

the UTSA definition is “either worthless, generally known or readily ascertainable, or not the subject of reasonable secrecy efforts.”¹¹⁹ While just as extreme as Enforcement-as-Written, Coextensivity is arguably more justifiable. The rule is more sensitive to the public hazards inherent in sweeping CBI NDAs. Additionally, the same efficiency argument justifying the Enforcement-as-Written rule applies with at least equal force to the Coextensivity rule, since, like a contract, the elements of a trade secret are clearly defined. Eliminating CBI as a protectable category of information would clarify CBI NDA law, particularly since CBI is such a hazy and poorly defined categorization to begin with.¹²⁰

However, the Coextensivity rule is not without its flaws. The chief ill of this approach is the burden it places on the freedom-of-contract principle. While Enforcement-as-Written prioritizes freedom of contract over countervailing public policy considerations, Coextensivity swings too far in the opposite direction. The Coextensivity rule’s insistence that there can be no protectable business information other than trade secrets can thwart contrary contractual language, and thus significantly alter private bargains, in some cases. Consider the *Dynamics Research* court’s argument that the NDA “[c]ould] only affirm the intent of the parties to be bound by the common law of trade secrets.”¹²¹ As a matter of contractual interpretation, this statement is clearly wrong: The NDA in *Dynamics Research* expressly applied to “any trade secrets *or confidential information*.”¹²² To conclude that this agreement only evinced the parties’ intent to be bound by trade secret law is to ignore what the CBI NDA actually says. Had the parties intended only to be bound by trade secret law, the reference to “confidential information” would be superfluous. The court’s holding thus effectively rewrites the NDA.

Additionally, for all the emphasis Coextensivity courts place on trade secret law, the Coextensivity rule is in tension with the UTSA, which “does not affect . . . contractual remedies, whether or not based upon misappropriation of a trade secret.”¹²³ This provision indicates that the UTSA did not intend to remove parties’ ability to protect business information contractually, *even if* the information at issue is a non-trade-secret. In disallowing contractual actions based on misappropriation of CBI, Coextensivity courts ignore the UTSA’s intention that such actions be

¹¹⁹ *IDX Sys. Corp. v. Epic Sys. Corp.*, 165 F. Supp. 2d 812, 820 (W.D. Wis. 2001), *overruled in part* by *IDX Sys. Corp. v. Epic Sys. Corp.*, 285 F.3d 581, 585 (7th Cir. 2002).

¹²⁰ *See supra* Section I.C.

¹²¹ 400 N.E.2d at 1288.

¹²² *Id.* at 1287 n.31 (emphasis added).

¹²³ UNIF. TRADE SECRETS ACT § 7(b)(1) (NAT’L CONF. COMM’RS ON UNIF. STATE L. 1985).

preserved. Although Massachusetts had not adopted the UTSA at the time *Dynamics Research* was decided, courts in UTSA jurisdictions have likewise occasionally applied the Coextensivity rule, despite its apparent conflict with the UTSA.¹²⁴

Finally, the argument that information not meeting the definition of a trade secret is by definition unworthy of protection is ultimately unpersuasive. As one court has said, “us[ing] the doctrine of trade secrets in the decisional process” for NDA cases is “too restrictive, especially in . . . area[s] of knowledge and rapid technological change.”¹²⁵ It is unlikely that all valuable business information would qualify as a trade secret from the moment of its discovery. For example, depending on a jurisdiction’s interpretation of the UTSA, a business may have difficulty establishing a brand-new idea’s “actual or potential” value, as required by the UTSA’s trade secret definition.¹²⁶ A contractual category of CBI gives businesses a means to protect information that may not meet the rigors of the UTSA’s definition but is still worth protecting. Finding CBI totally unprotectable may frustrate businesses’ ability to prevent disclosure of potentially valuable ideas while they are developed. Although CBI NDA law can at times be confusing and inequitable, that is no reason to dispense with it completely. Courts should protect CBI truly worthy of protection while also guarding against the enforcement of overly broad or onerous CBI NDAs.

The remaining two categories of CBI NDA case law attempt to do just that, forming a middle ground between the Enforcement-as-Written and Coextensivity approaches. Courts adhering to these middle-ground rules recognize CBI as protectable, independently from trade secrets, but do not give parties total latitude to define it. Rather, these middle-ground rules ensure that CBI meets some substantive requirements before it is protected via an NDA.

3. *Light-Touch Reasonableness*

In the first of these middle-ground categories, courts will not interpret CBI NDAs to protect nonconfidential information or general skills and

¹²⁴ See RF Lawyers, *Massachusetts Adopts the Uniform Trade Secrets Act*, RUDOLPH FRIEDMANN LLP (May 8, 2019), <https://www.rflawyers.com/massachusetts-adopts-the-uniform-trade-secrets-act-2/> [perma.cc/EW2M-E7QT] (“On October 1, 2018, . . . Massachusetts . . . became the second-to-last state to adopt the Uniform Trade Secrets Act”); see also *Orthofix, Inc. v. Hunter*, 55 F. Supp. 3d 1005, 1012, 1015 (N.D. Ohio 2014) (holding that CBI protected by an NDA was “coterminous with information protected by achieving trade secret status under Ohio law,” which had adopted the UTSA, and holding that, because the plaintiff could not maintain a trade secret misappropriation claim, it could also not maintain an NDA breach claim), *rev’d*, 630 F. App’x 566 (6th Cir. 2015).

¹²⁵ *Structural Dynamics Rsch. Corp. v. Eng’g Mechs. Rsch. Corp.*, 401 F. Supp. 1102, 1113 (E.D. Mich. 1975).

¹²⁶ UNIF. TRADE SECRETS ACT § 1(4).

knowledge, but they will generally otherwise enforce CBI NDAs as written. Hence, while these courts do apply a criterion of reasonableness to CBI NDAs, it is applied with a “light touch,” and freedom of contract remains the primary consideration. The rule is best stated by the Sixth Circuit in *Orthofix, Inc. v. Hunter*: “‘confidential information’ is generally defined by the parties, and not by achieving trade-secret status, so long as it does not encompass publicly available information or an employee’s general knowledge or skills.”¹²⁷ The reasonableness inquiry thus typically focuses on whether the information at issue is actually confidential. For instance, in *McGough v. Nalco Co.*, the court held that an NDA was unenforceable because it defined CBI as “essentially all of the information provided to [the employee] during his employment.”¹²⁸ The broad scope of the NDA’s definition, in the court’s estimation, had converted the “NDA” into an unreasonable noncompete.¹²⁹

The chief virtue of the Light-Touch Reasonableness approach is that it effectively identifies, and withholds enforcement from, the “worst-offender” CBI NDAs. The CBI NDA in *McGough*, for instance, was so unreasonably broad that, if enforced literally, employees subject to it would never be able to find similar work again.¹³⁰ Indeed, the action in *McGough* was triggered by the employee’s decision to pursue alternative employment.¹³¹ Unlike the Enforcement-as-Written approach, the Light-Touch Reasonableness rule recognizes the deleterious effects of these contracts on employee mobility and economic competition. Despite these benefits, however, the Light-Touch Reasonableness rule is still used to enforce CBI NDAs that restrict employee mobility without furthering a clear business interest.¹³²

¹²⁷ 630 F. App’x at 574.

¹²⁸ 496 F. Supp. 2d 729, 756 (N.D. W. Va. 2007).

¹²⁹ *Id.* In *North American Paper Co. v. Unterberger*, the court invalidated an NDA that protected “any and all items of whatever nature or kind” the employee became aware of during employment, reasoning that NDAs that “purport[] to protect virtually every kind of information” an employee learns at her job, “even if non-confidential,” cannot be enforced. 526 N.E.2d 621, 624–25 (Ill. App. Ct. 1988). In *Unterberger*, too, the court’s primary problem with the NDA seemed to be that it covered nonconfidential information.

¹³⁰ 496 F. Supp. 2d at 756.

¹³¹ *Id.* at 736 (explaining that the employee left his employer to work for another and that his new job entailed “rendering service” to former customers of his former employer). The employee filed for a declaratory judgment of his rights related to the contracts he had signed with his former employer, and the former employer counterclaimed for breach of contract. *Id.*

¹³² For one example, see *Orthofix*, 630 F. App’x 573–74. In that case, salesman Eric Hunter and Orthofix signed an NDA. *Id.* at 569. Hunter later left Orthofix to join a competitor. *Id.* at 570. Orthofix sued him when he failed to return an employee “playbook” containing information subject to the NDA. *Id.* The district court found that the information in the playbook was “valuable, not readily available, and acquired at great expense and effort by Orthofix.” *Orthofix, Inc. v. Hunter*, 55 F. Supp. 3d 1005, 1013 (N.D. Ohio 2014). The Sixth Circuit held Hunter had breached the NDA; it determined that, under Texas

Ultimately, the Light-Touch Reasonableness approach, while preferable to the categorical rules discussed above, falls short because it too is still overly rigid. Making confidentiality the sole touchstone of the reasonableness inquiry will lead to inequitable results in some cases. “There is a great deal of information that is not ‘generally’ known to the public; not all of it merits protection under a confidentiality provision.”¹³³ Courts ought to engage in a closer analysis of information safeguarded under a CBI NDA to ensure that potential anticompetitive outcomes are justified by compelling business interests. For instance, imagine an employer gave employees a handbook containing confidential information but did not require employees to return the handbook after leaving the company. A court might fairly question how valuable the information in the handbook is to the employer, given the employer has made no real effort to prevent its disclosure. The Light-Touch Reasonableness approach would find this information contractually protectable because it is confidential, despite its dubious value.¹³⁴ A better-reasoned approach would recognize that the employer’s interest in such information may have to yield to the countervailing interests of contracting employees in their mobility, as well as the public interest in an open and competitive marketplace.

The final category of NDA enforcement cases, to which the discussion now turns, does a better job at balancing businesses’ interests in information protection with the integrity of economic competition and employee mobility.

4. Close-Look Reasonableness

Like Light-Touch Reasonableness, Close-Look Reasonableness recognizes CBI as a protectable category of business information

law, CBI “is generally defined by the parties, and not by achieving trade-secret status, so long as it does not encompass publicly available information or an employee’s general knowledge or skills.” *Orthofix*, 630 F. App’x at 574. The court distinguished NDAs that protect CBI from those that prevent employees from using general skills and knowledge, which are “more properly characterized” as noncompetes. *Id.* at 573.

After Hunter resigned from Orthofix, he took his employee playbook with him because “Orthofix had no protocol in place for departing employees to return or destroy” it. *Id.* at 570. One might reasonably question the value of information that a business makes so little effort to protect. If the playbook was truly so important to Orthofix, how was Hunter able to leave the company without returning it? See *Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 947 (7th Cir. 1994) (arguing that, if a business did not “expend resources” to “prevent lawful appropriation” of a “protectable interest,” “this is evidence that it is not an especially valuable interest”). Furthermore, enforcement of the nondisclosure provisions in *Orthofix* had anticompetitive effects: Hunter had left Orthofix to poach Orthofix clients at his new employer. 630 F. App’x at 570. Because it is not clear that the information in the playbook was actually valuable to Orthofix, the burden the Sixth Circuit’s decision placed on Hunter is difficult to justify.

¹³³ *AssuredPartners, Inc. v. Schmitt*, 44 N.E.3d 463, 476 (Ill. App. Ct. 2015).

¹³⁴ This example is adapted from *Orthofix, Inc. v. Hunter*. See *supra* note 132.

independent from trade secrets. However, while Light-Touch Reasonableness generally only requires that information under a CBI NDA not be publicly available, Close-Look Reasonableness mandates a more searching inquiry—a “closer look”—regarding the nature of the information to be protected. While contractual provenance is a necessary predicate to protection of information under this view, it is not sufficient. The information to be protected must meet other substantive requirements, which can vary from court to court.¹³⁵

The Seventh Circuit applied Close-Look Reasonableness in *Tax Track Systems Corp. v. New Investor World, Inc.*¹³⁶ In that case, Tax Track, an insurance company, had developed a “unique spin” on leveraged life insurance policies.¹³⁷ Tax Track recorded its idea in a memorandum disseminated to “600 or 700 people,” but it only required at most 190 to sign an NDA.¹³⁸ Tax Track then teamed up with New Investor World to sell the insurance and required New Investor World to sign an NDA.¹³⁹ The court found the NDA, as applied to Tax Track’s memorandum, was unenforceable because Tax Track had not implemented “reasonable efforts” to keep the memorandum confidential.¹⁴⁰

Three features of *Tax Track* are important to understanding the Close-Look Reasonableness approach. First, Close-Look Reasonableness courts will not protect business information under a CBI NDA solely because the information is confidential.¹⁴¹ The *Tax Track* court did not determine that Tax Track’s widespread distribution of the memorandum had turned the memorandum into publicly available information. Though the memorandum was distributed to many people, there is no indication that its existence was generally known.¹⁴² But this alone was not enough to protect the memorandum with the NDA. Rather, the *Tax Track* court focused on Tax Track’s treatment of the memorandum. According to the court, Tax Track’s lax security measures (requiring at most one-third of people who saw the memorandum to sign an NDA) indicated the memorandum was not

¹³⁵ See *infra* note 149; see also Montville, *supra* note 30, at 1177 (listing various substantive requirements courts may impose on business information protected by noncompetes).

¹³⁶ See 478 F.3d 783, 787–88 (7th Cir. 2007).

¹³⁷ *Id.* at 785.

¹³⁸ *Id.* at 788.

¹³⁹ See *id.* at 785–86. The NDA protected “material developed over the course of this Agreement to facilitate the concept of Leveraged Life Insurance.” *Id.* at 786.

¹⁴⁰ *Id.* at 788.

¹⁴¹ See *id.* at 787 (holding that, under Illinois law, NDAs will only be enforced “when the information sought to be protected is actually confidential *and* reasonable efforts were made to keep it confidential” (emphasis added)).

¹⁴² See *id.* at 788.

particularly valuable.¹⁴³ That the information was “not an especially valuable interest” weakened Tax Track’s case for enforcement, even though the information itself was apparently not widespread public knowledge.¹⁴⁴

Second, courts applying Close-Look Reasonableness may impose substantive protectability requirements on CBI mirroring those of trade secret law. Tax Track’s failure to put forth “reasonable efforts” to keep the memorandum confidential doomed its case.¹⁴⁵ Similarly, trade secrets must be the subject of reasonable efforts “to maintain [their] secrecy.”¹⁴⁶ As a result, NDA plaintiffs in a Close-Look Reasonableness court may have difficulty if the information they seek to protect does not qualify as a trade secret. At the same time, however, Close-Look Reasonableness courts do not ascribe to the Coextensivity approach’s view that trade secrets and CBI are the same. Note that the court in *Tax Track* did not perform a full-dress trade secret analysis; indeed, the court expressly stated that “Tax Track need not show its information rises to the level of a trade secret.”¹⁴⁷ Rather, the court focused on one aspect of the information to be protected that is important in trade secret law as well.

Third, Close-Look Reasonableness courts require both that the information to be protected meets protectability requirements *and* that it falls within the terms of the CBI NDA. For instance, in *Tax Track*, the court focused on the memorandum because it was “the only material even conceivably falling within” the NDA.¹⁴⁸ Parties cannot protect information not covered by an NDA, even if it would meet substantive protectability requirements.¹⁴⁹

The main deficit of the Close-Look Reasonableness approach is the burden it can impose on contracting parties. Under the approach, careful

¹⁴³ *Id.* at 787–88 (“If the party seeking to protect its information ‘did not think enough of it to expend resources on trying to prevent lawful appropriation of it, this is evidence that it is not an especially valuable interest.’” (quoting *Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 947 (7th Cir. 1994))).

¹⁴⁴ *Id.* (quoting *Curtis 1000*, 24 F.3d at 947).

¹⁴⁵ *See id.* at 788.

¹⁴⁶ UNIF. TRADE SECRETS ACT § 1(4)(ii) (NAT’L CONF. COMM’RS ON UNIF. STATE L. 1985).

¹⁴⁷ 478 F.3d at 787.

¹⁴⁸ *Id.*

¹⁴⁹ The “reasonable efforts” requirement is not the only requirement Close-Look Reasonableness courts may impose on NDAs and the information protected thereunder. Other courts have required that NDAs be narrowly tailored. In *AssuredPartners, Inc. v. Schmitt*, for instance, the court encountered an NDA prohibiting an executive from disclosing “information . . . obtained by [the] Executive during the course of [the] Executive’s employment.” 44 N.E.3d 463, 468 (Ill. App. Ct. 2015). But the NDA excluded from its scope information that “becomes generally known.” *Id.* The executive was sued after he resigned and began contacting his former employer’s customers off a list “that he had serviced during his employment.” *Id.* at 469. The court rejected the plaintiffs’ argument that the “generally known” clause saved the NDA, reasoning that not all information, even if confidential, “merits protection under a confidentiality provision.” *Id.* at 476.

drafting may not save an NDA; even NDAs that exclude publicly available information may still be invalidated if the information does not meet substantive criteria for protection.¹⁵⁰ But the Close-Look Reasonableness rule, as seen in *Tax Track*, does the best job at balancing businesses' interests in protecting CBI with countervailing public policy considerations, including employee mobility and the free, open exchange of business information. By comparison, the Light-Touch Reasonableness rule tilts too strongly in favor of businesses by holding that mere confidentiality-in-fact overrides all interests against enforcement of a CBI NDA. The Close-Look Reasonableness rule goes further, requiring that protection of CBI actually be substantively reasonable, given the value of the CBI to be protected or some other consideration.

Up until now, this Part has addressed Substantive Enforceability, that is, the types of information that are properly the subject of a CBI NDA. The discussion will now turn to the Scope of Enforceability, asking whether CBI NDAs should be treated as noncompetes and, if so, what limitations should be placed upon their scope.

B. Scope of Enforceability: How Far May a CBI NDA Extend?

After examining what types of business information courts will protect, Montville asked when, and to what extent, courts will protect that information.¹⁵¹ In other words, may an NDA prohibit an employee from using any protectable CBI in any respect for the rest of her life, or must some limitations on enforcement exist? In this respect, Montville examines how courts treat NDAs in relation to employee noncompete agreements. Montville finds that some courts apply the same reasonableness tests to cases regarding both NDAs and noncompetes, other courts apply noncompete rules to NDAs in a less stringent form, and some do not apply the rules of noncompetes to NDAs at all.¹⁵²

The relation between CBI NDAs and noncompetes is important because many courts require that noncompetes be limited in their temporal and geographical scope or be otherwise reasonable.¹⁵³ Thus, understanding the

¹⁵⁰ See *supra* note 149 (discussing *AssuredPartners*).

¹⁵¹ Montville, *supra* note 30, at 1169.

¹⁵² *Id.* at 1180–83.

¹⁵³ See, e.g., *OsteoStrong Franchising, LLC v. Richter*, No. 1:18-CV-1184-KWR-JFR, 2020 WL 4584007, at *8 (D.N.M. Aug. 10, 2020) (noting that New Mexico law requires “Reasonable Geographic and Temporal Limitations” for a noncompete to be enforceable); *Milliken & Co. v. Morin*, 731 S.E.2d 288, 293 (S.C. 2012) (stating that noncompete agreements in South Carolina are “subject to judicial review for reasonableness”); *Disher v. Fulgoni*, 464 N.E.2d 639, 643 (Ill. App. Ct. 1984) (“Illinois public policy requires that [noncompetes’] chronological and geographical limitations, as well as the business

relationship between CBI NDAs and noncompetes is critical to understanding the Scope of Enforceability a court will give a CBI NDA. CBI NDAs that are treated like noncompetes may be subject to reasonableness limitations that confine the scope of their applicability, regardless of the types of information those CBI NDAs are read to protect.¹⁵⁴ In other words, the Scope of Enforceability a court will give a CBI NDA entails a fundamentally different inquiry from that of Substantive Enforceability; the latter focuses on what types of information the CBI NDA can validly apply to, while the former focuses on when and where that CBI NDA can be applied. Of course, the inquiries, though distinct, may still intertwine: as will be seen below, courts' differing views about the types of CBI that are properly the subject of an NDA may also inform their views regarding when a CBI NDA should be treated as a noncompete.

The following Sections build on Montville's analysis, discussing four types of relationships between CBI NDAs and noncompetes advanced by courts. Courts may (1) treat CBI NDAs and noncompetes as identical (the "Identity Rule");¹⁵⁵ (2) not subject CBI NDAs to any limitations placed on noncompetes (the "Separation Rule");¹⁵⁶ (3) impose reasonableness criteria for noncompetes on CBI NDAs only in some cases (the "Conditional Rule"); and (4) weigh CBI NDAs' compliance with noncompete rules as a factor, but not a decisive one, in determining whether CBI NDAs are reasonable (the "Factor Rule"). While some of these categories are plainly analogous to categories described by Montville, this Note's analysis adds nuance to his categorization, particularly in the discussion of the Conditional and Factor Rules.

1. *The Identity Rule*

Some courts categorically identify CBI NDAs, like noncompete agreements, as contracts that restrain trade and apply the same rules of reasonableness to both. As one court notes, "cases discussing the validity of nondisclosure or confidentiality provisions are far fewer in number" than cases determining the enforceability of noncompete agreements; indeed, NDAs are often examined "in conjunction" with noncompetes.¹⁵⁷ Thus, one

interests they seek to protect, be carefully scrutinized by the courts."); *Scott v. Gen. Iron & Welding Co.*, 368 A.2d 111, 115 (Conn. 1976) ("The general rule [in Connecticut] is that the application of a restrictive covenant will be confined to a geographical area which is reasonable in view of the particular situation.").

¹⁵⁴ See, e.g., *Fulgoni*, 464 N.E.2d at 643 (holding that NDAs and noncompetes are subject to the same reasonableness criteria under Illinois law).

¹⁵⁵ Montville, *supra* note 30, at 1180–81. Montville does not use the term "Identity Rule."

¹⁵⁶ *Id.* at 1183. Montville likewise does not use the term "Separation Rule."

¹⁵⁷ *McGough v. Nalco Co.*, 496 F. Supp. 2d 729, 744 (N.D. W. Va. 2007). *McGough* itself does not apply the Identity Rule, but this quotation provides one argument for its application.

practical justification for treating CBI NDAs and noncompetes the same is that courts handle noncompete cases more frequently, and therefore, the criteria for determining noncompetes' reasonableness may be more robust and easier to follow. Additionally, employers may use both CBI NDAs and noncompetes to "maintain[] competitive advantage."¹⁵⁸ In both instances, according to courts that follow the Identity Rule, businesses' interests in their competitive advantage can be furthered only to the extent they do not unduly burden employees in their ability to change jobs and remain competitive in the marketplace.¹⁵⁹

The Illinois Appellate Court applied the Identity Rule in *Disher v. Fulgoni*.¹⁶⁰ In that case, an employee had signed a CBI NDA preventing him from revealing his employer's "client lists, marketing and business plans, computer programs and systems," and other information.¹⁶¹ The court noted that CBI NDAs and noncompetes, even if formally distinct, often have the same practical effects. Per *Fulgoni*, both CBI NDAs and noncompetes are potentially harmful because they restrict "the flow of information necessary for competition among businesses."¹⁶² The court held that, in enforcing either CBI NDAs or noncompetes, courts are obliged to consider whether such contracts would cause an employee "undue hardship" and whether the restraints imposed were "greater than is necessary to protect the proprietary interests of the employer."¹⁶³ The court thus required that the NDA be subjected to the same durational and geographic limitations as those that Illinois places on noncompetes in order to be enforceable.¹⁶⁴

As seen in *Fulgoni*, Identity Rule courts treat formal distinctions between CBI NDAs and noncompetes as unimportant. For these courts, the primary consideration is not the contractual form but the purposes and foreseeable effects of the contracts themselves. Furthermore, the Identity Rule recognizes that CBI NDAs can impose real hardship on both employees and on the competitiveness of the marketplace by preventing the free and open exchange of information by employees and between competing entities. Indeed, the mere existence of an NDA "may deter a prospective employer from hiring a prospective employee."¹⁶⁵ Rather than ignoring these external

¹⁵⁸ *Id.* at 756.

¹⁵⁹ See *Fulgoni*, 464 N.E.2d at 643 (stating that NDAs and noncompetes must be interpreted so as to "ensure that the restraint imposed will not cause undue hardship to the employee, and that it will not be greater than is necessary to protect the proprietary interests of the employer").

¹⁶⁰ See *id.*

¹⁶¹ *Id.* at 641.

¹⁶² *Id.* at 643.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Bast, *supra* note 14, at 642.

impacts, Identity Rule courts build them into the reasonableness analysis, asking whether a restraint in a CBI NDA furthers employers' legitimate interests or whether it imposes an unnecessary cost on employee mobility.¹⁶⁶

However, the Identity Rule does suffer from deficiencies, and chief among them is its excessive rigidity. Not all CBI NDAs necessarily have the same anticompetitive effects as noncompetes. Consider, for instance, the CBI NDA in *Coady v. Harpo, Inc.*, which, in part, prevented employees of Oprah Winfrey's production company from disclosing personal information about Ms. Winfrey to others.¹⁶⁷ This nondisclosure provision¹⁶⁸ is narrowly and appropriately tailored to the purpose of protecting sensitive personal information about a famous employer from unwanted disclosure. It is unlikely that this restriction would hinder an employee of Harpo from leaving the company and securing a new job elsewhere (unless a potential employer had an unusual interest in Ms. Winfrey's personal life). Consider also the temporal and geographic limitations many Identity Rule courts place on CBI NDAs. These limitations may be unreasonable in cases involving truly sensitive confidential information. As several courts have remarked, information cannot be effectively contained in temporal or geographic boundaries once it is disclosed.¹⁶⁹ For instance, it would make no sense to subject a contract like the one in *Coady* to temporal limitations because Ms. Winfrey's interest in the confidentiality of potentially embarrassing personal information would extend indefinitely—or at least until the information becomes public.¹⁷⁰ The Identity Rule, in defining all CBI NDAs as identical to noncompetes, ignores the fact that reasonableness limitations placed on noncompetes occasionally lead to unjust or silly results when applied to CBI NDAs.

¹⁶⁶ See *Fulgoni*, 464 N.E.2d at 643.

¹⁶⁷ 719 N.E.2d 244, 246 (Ill. App. Ct. 1999).

¹⁶⁸ The language of the NDA relevant to the case is as follows: employees were required to safeguard information regarding “Ms. Winfrey and/or her business or private life” and “the business activities, dealings or interests of Harpo and/or its officers.” *Id.* at 247; see also Maura Irene Strassberg, *An Ethical Rabbit Hole: Model Rule 4.4, Intentional Interference with Former Employee Non-Disclosure Agreements and the Threat of Disqualification, Part II*, 90 NEB. L. REV. 141, 172 (2011) (“In *Coady*, the information at stake was likely gossip or tidbits of information about an individual who has made a commercially valuable empire around her personality and life.”).

¹⁶⁹ See, e.g., *Bernier v. Merrill Air Eng'rs*, 770 A.2d 97, 104 (Me. 2001) (explaining that “confidentiality knows no temporal or geographical boundaries”); *Coady*, 719 N.E.2d at 250–51 (“[I]nterest in a celebrity figure and his or her attendant business and personal ventures somehow seems to continue endlessly, even long after death, and often, as in the present case, extends over an international domain.”); *Zep Mfg. Co. v. Harthcock*, 824 S.W.2d 654, 663 (Tex. Ct. App. 1992) (impliedly endorsing this argument in stating that businesses “would be unable to protect their trade secrets or confidential information” if NDAs came with temporal or geographic limitations).

¹⁷⁰ 719 N.E.2d at 250–51.

2. *The Separation Rule*

At the opposite end of the spectrum from the Identity Rule is the Separation Rule, which treats CBI NDAs as “entirely unburdened” by restrictions on noncompetes.¹⁷¹ The clearest example of this doctrine is *ChemiMetals*, in which a chemicals distributor was contractually forbidden from manufacturing certain products.¹⁷² Though there was no clear showing that either the products in *ChemiMetals* or their method of manufacture was confidential,¹⁷³ the court found that the contract protecting that information was an enforceable NDA and therefore did not require the contract to comply with North Carolina’s restrictions on noncompetes.¹⁷⁴ In short, the court emphasized form over substance, enforcing as a CBI NDA a contract that had all the trade-restraining impact of a noncompete.¹⁷⁵

The Tenth Circuit also applied the Separation Rule in *Harvey Barnett, Inc. v. Shidler*.¹⁷⁶ This case concerned Dr. Harvey Barnett, an expert in teaching infants to swim.¹⁷⁷ Dr. Barnett’s employees signed a CBI NDA prohibiting them from disclosing “any information concerning any matters affecting or relating to the business and trade secrets” of Dr. Barnett’s business.¹⁷⁸ The Tenth Circuit enforced the CBI NDA, despite an argument from the district court that the NDA was a “disguised restrictive covenant” (in other words, a disguised noncompete).¹⁷⁹ The Tenth Circuit argued that CBI NDAs and restrictive covenants (like noncompetes) “serve entirely different purposes” and that CBI NDAs leave employees “free to work for whomever they wish.”¹⁸⁰ As to the specific CBI NDA at issue, the court found that it did not prevent the defendants from “using widely known techniques” to teach swimming in competition with Dr. Barnett.¹⁸¹ Echoing the sentiments expressed in *Shidler*, another court later stated that the

¹⁷¹ Montville, *supra* note 30, at 1183. Montville does not use the term “Separation Rule.”

¹⁷² *ChemiMetals Processing, Inc. v. McEneny*, 476 S.E.2d 374, 375 (N.C. Ct. App. 1996); *see also supra* notes 98–101 and accompanying text.

¹⁷³ Ehrlich & Garbarino, *supra* note 17, at 300; *see also supra* note 101 and accompanying text.

¹⁷⁴ *See supra* notes 98–101 and accompanying text.

¹⁷⁵ Ehrlich & Garbarino, *supra* note 17, at 300.

¹⁷⁶ 338 F.3d 1125, 1134 (10th Cir. 2003). Montville discusses *Shidler* himself. *See* Montville, *supra* note 30, at 1183.

¹⁷⁷ *Shidler*, 338 F.3d at 1127.

¹⁷⁸ *Id.* at 1133 (citation omitted).

¹⁷⁹ *Id.* at 1134.

¹⁸⁰ *Id.* (quoting *MAI Basic Four, Inc. v. Basis, Inc.*, 880 F.2d 286, 288 (10th Cir. 1989)).

¹⁸¹ *Id.*

temporal and geographic restrictions applied to noncompete agreements “would frequently be unreasonable” when applied to NDAs.¹⁸²

The chief merit of the Separation Rule is that, unlike the Identity Rule, it acknowledges that CBI NDAs do not always restrain trade or an employee’s ability to secure gainful employment. Indeed, in some cases in which CBI NDAs are appropriately and narrowly drafted, it makes little sense to subject the CBI NDAs to the reasonableness tests applied to noncompetes.¹⁸³

However, the Separation Rule suffers from serious problems as well. At its worst, as seen in *ChemiMetals*, this view simply ignores the real anticompetitive impacts that some nominal “NDAs” can have. Businesses should not be able to obtain the more deferential review given to CBI NDAs in many jurisdictions (as compared to noncompetes) by cleverly drafting a noncompete to look like a CBI NDA.¹⁸⁴ Although the result in *ChemiMetals* is particularly egregious, other cases adhering to the Separation Rule produce anticompetitive results as well. Consider again the CBI NDA in *Shidler*, which prevented the disclosure of “any information concerning any matters affecting or relating to [Dr. Barnett’s] business [and trade secrets].”¹⁸⁵ This provision is extraordinarily broad, and the Tenth Circuit’s holding that it did not prevent defendants from using “widely known techniques” to teach swimming¹⁸⁶ strains credulity. Even widely known swimming techniques are arguably “related to” Dr. Barnett’s business of teaching infants how to swim. An employee subject to such a broad CBI NDA would have cause for doubt about her ability to compete with her employer. Such CBI NDAs, when not effectively managed by the courts, thus may chill the formation of competitive enterprises. Colorado law, which the court applied in *Shidler*, holds that noncompetes are void except in “limited circumstances.”¹⁸⁷ Yet despite the potential anticompetitive effects of the *Shidler* NDA, the court

¹⁸² *Papa John’s Int’l, Inc. v. Pizza Magia Int’l, LLC*, No. CIV.A. 3:00CV-548-H, 2001 WL 1789379, at *3 (W.D. Ky. May 10, 2001). The precise quotation from *Papa John’s* is as follows: “Time and geographic restrictions which would be reasonable, under any standard, for nondisclosure agreements would frequently be unreasonable when applied to a noncompete agreement.” *Id.* Given the context of the court’s holding and its citation to *Zep Manufacturing Co. v. Harthcock*, however, this quotation appears to be an error, with the court having inadvertently transposed “nondisclosure agreements” and “noncompete agreement[s].” *See id.* The court states in the same paragraph that “nondisclosure agreements implicate far fewer public policy concerns [than noncompetes] and should receive more deferential review.” *Id.*

¹⁸³ *See supra* Section III.B.1.

¹⁸⁴ *See Montville, supra* note 30, at 1183 (reasoning that “substantively identical” noncompetes and NDAs will be treated differently under this view).

¹⁸⁵ 338 F.3d at 1131 (citation omitted) (emphasis added).

¹⁸⁶ *Id.* at 1134.

¹⁸⁷ *Id.* at 1133.

enforced it, allowing it to bypass the typical restrictions state law placed on noncompetes.¹⁸⁸

Separation Rule courts are correct that, in some cases, it makes little sense to attach to CBI NDAs the temporal and geographic limitations often applied to noncompetes. But these courts hold a narrow view of the purposes of such limitations. It is a common refrain that temporal and geographical limitations cannot be applied to CBI NDAs because the disclosure of business information cannot be contained within such limitations.¹⁸⁹ But such limitations are imposed on noncompetes, at least in part, to protect employees' interests in their own mobility and marketability.¹⁹⁰ By holding that such limitations are irrelevant to CBI NDAs in all cases, Separation Rule courts tend to grant employers maximum protection of their information while giving minimal consideration to employee interests.

Finally, Separation Rule courts' insistence that CBI NDAs and noncompetes are entirely different may be untenable in light of *PepsiCo, Inc. v. Redmond's* "inevitable disclosure doctrine." In that case, the Seventh Circuit held that, in some circumstances, a CBI NDA may be used to restrain an employee from leaving his employer for a competitor, under the theory that the new position would inevitably require the employee to use confidential information protected by a CBI NDA.¹⁹¹ *Redmond* has been justly criticized because it converts a CBI NDA into a noncompete after the fact "and therefore alters the employment relationship without the employee's consent."¹⁹² Nevertheless, some courts have continued applying the doctrine.¹⁹³ The fact that CBI NDAs can be converted into noncompetes in jurisdictions applying the inevitable disclosure doctrine only casts further doubt on the Separation Rule's theory that the two types of contracts should be analyzed separately.

3. "Middle Ground" Rules: The Conditional Rule and the Factor Rule

While Identity Rule and Separation Rule courts find that CBI NDAs are either just like or completely dissimilar from noncompetes, some courts take

¹⁸⁸ *Id.* at 1134 (rejecting the district court's assertion that the NDA was a "disguised" noncompete).

¹⁸⁹ *See supra* note 169 (listing cases).

¹⁹⁰ *See Disher v. Fulgoni*, 464 N.E.2d 639, 643 (Ill. App. Ct. 1984) (reasoning that public policy limitations such as temporal and geographical restrictions are imposed on NDAs and noncompetes to protect against "undue hardship" to employees).

¹⁹¹ 54 F.3d 1262, 1271–72 (7th Cir. 1995).

¹⁹² *Whyte v. Schlage Lock Co.*, 125 Cal. Rptr. 2d 277, 293 (Ct. App. 2002).

¹⁹³ *See, e.g., Allied Waste Servs. of N. Am., LLC v. Tibble*, 177 F. Supp. 3d 1103, 1112 (N.D. Ill. 2016) (using the inevitable disclosure doctrine in declining to dismiss a trade secret misappropriation action).

more moderate approaches. This Section will discuss two “middle-ground” views courts may take in evaluating the relationship between CBI NDAs and noncompetes. These views will be discussed together because they are not mutually exclusive. The Conditional Rule holds that CBI NDAs will be treated as noncompetes *if* they cover publicly available information and/or general skills and knowledge. The Factor Rule finds that the reasonableness criteria imposed on noncompetes are relevant, but not dispositive, in determining whether a CBI NDA is enforceable—the CBI NDA’s adherence to such criteria is merely a “factor” in determining its reasonableness.

The Sixth Circuit described the Conditional Rule in *Orthofix*: “[NDA] prohibiting employees from using general knowledge, skill, and experience acquired in their former employment is more properly characterized as a non-compete agreement.”¹⁹⁴ This quotation implicitly provides a two-step analytical framework. Under the Conditional Rule, courts must first consider whether a CBI NDA protects publicly available information or general skills and knowledge. Secondly, if the CBI NDA does cover such information, it should be analyzed for reasonableness as a noncompete.¹⁹⁵ While the Conditional Rule is correct that CBI NDAs restricting access to publicly available information should be treated as noncompetes, even more limited CBI NDAs could still have anticompetitive impacts.¹⁹⁶

The second middle-ground rule, the Factor Rule, is illustrated by *Revere Transducers, Inc. v. Deere & Co.*¹⁹⁷ In that case, the court found that courts should apply the same tests to assess the reasonableness of CBI NDAs and noncompete agreements but that “the absence of restrictions concerning time or geographic location [(which are required of noncompetes under applicable Iowa law)] do not render a[n] [NDA] presumptively unenforceable.”¹⁹⁸ In other words, while the court in *Revere* found that CBI NDAs and noncompetes should be analyzed similarly, it declined to go so far as to hold that CBI NDAs must have the same temporal and geographic limits as

¹⁹⁴ *Orthofix, Inc. v. Hunter*, 630 F. App’x 566, 573 (6th Cir. 2015). For a discussion of the facts of *Orthofix*, see *supra* note 132.

¹⁹⁵ *Service Centers of Chicago, Inc. v. Minogue* provides a strong example of the Conditional Rule in action. In that case, an employee signed an NDA prohibiting him from disclosing “information . . . concerning or in any way relating to” his employer’s business. 535 N.E.2d 1132, 1135 (Ill. App. Ct. 1989). The court first found that this provision was “overbroad” and that the employer had failed to establish that the information sought to be protected was not generally known. *Id.* at 1136–37. The court concluded that, due to the NDA’s breadth, it was “in effect” a noncompete. *Id.* at 1137. It found the NDA unenforceable because it did not have the temporal or geographical limitations Illinois requires of noncompetes. *Id.*

¹⁹⁶ See *infra* notes 305–306 and accompanying text.

¹⁹⁷ See 595 N.W.2d 751, 761–62 (Iowa 1999).

¹⁹⁸ *Id.*

noncompetes. But the court suggests that such limits are still relevant in analyzing NDAs, reasoning that “the breadth of the [NDA’s] restrictions regarding disclosure” goes to whether the NDA “unreasonably restricts the employee’s rights.”¹⁹⁹ As Montville said, the court’s analysis “creates an awkward middle ground, utilizing two different standards [for NDAs and noncompetes] that turn on the contractual form rather than the contract’s effects.”²⁰⁰ If a CBI NDA has the effects of a noncompete, then it should not be able to avoid the strict judicial scrutiny of noncompetes merely by labeling itself as a CBI NDA.²⁰¹

The Factor Rule and Conditional Rule could together provide a way for courts to analyze a CBI NDA’s Scope of Enforceability. First, courts should apply the Conditional Rule; if they determine that the CBI NDA is in substance a noncompete (because it protects public information or general skills, or is otherwise significantly anticompetitive), they should *require* the CBI NDA to comply with the jurisdiction’s criteria for reasonableness for noncompetes. But when courts determine that a CBI NDA is not in substance a noncompete, they should *not* require the CBI NDA to satisfy the jurisdiction’s limitations on noncompetes but rather may simply consider these limitations as a *factor* in determining whether the CBI NDA should be enforced.

This Part has provided an overview of courts’ varying approaches to the enforceability of CBI NDAs. In terms of the types of information a CBI NDA is permitted to protect (Substantive Enforceability), some courts opt for total enforcement of the contract as written, others categorically refuse to protect information other than trade secrets, and still others work to ensure that CBI protected by a CBI NDA meets some substantive requirements for protectability, including those found in trade secret law. In terms of a CBI NDA’s Scope of Enforceability, there are three approaches taken by courts: Some courts have found that CBI NDAs must be subject to the same limitations that the relevant jurisdiction places on noncompete agreements. Others have held that CBI NDAs and noncompetes are different sorts of contracts entirely. And still others have found that CBI NDAs will be treated as noncompetes only in some instances, or that CBI NDAs’ compliance with noncompete rules is a nondispositive factor to use in evaluating a CBI NDA’s reasonableness. The next Part will expand the scope of this inquiry and examine how courts have weighed the reasonableness of NDAs in other public policy contexts.

¹⁹⁹ *Id.* at 762.

²⁰⁰ Montville, *supra* note 30, at 1182.

²⁰¹ *See id.* at 1183.

IV. PUBLIC POLICY AND NDA ENFORCEABILITY IN OTHER CONTEXTS

The discussion will now turn toward judicial treatment of NDAs in other contexts not normally implicated in CBI NDA cases, such as cases in which NDAs are interposed to prevent disclosure of frauds on the government, crimes, and other information potentially in the public interest. The use of NDAs in such instances has been a matter of scholarly interest.²⁰² Courts faced with NDA-enforcement actions in these contexts must balance the interest in faithful enforcement of private agreements with the public interest in disclosure of the information at issue. Studying the application of NDAs in these special cases, in which considerations of public policy play a major role, will aid in discerning the considerations and methods of analysis courts should use when evaluating CBI NDAs in the business world. In other words, this Part attempts to get a handle on the open-ended nature of public policy by studying the manner in which that defense has been applied to NDAs in contexts beyond CBI.

Commentators have expressed interest in the problems posed by the legal liability of whistleblowers for breach of NDAs. Multiple scholars have suggested that public policy may render NDAs unenforceable against whistleblowers in some instances.²⁰³ Professor Carol Bast, for instance, argues that the public benefit of a whistleblower's disclosure of information "must be weighed against the employer's loss of protection for trade secrets and proprietary information."²⁰⁴ Professor Bast proposes a six-factor test for determining whether or not an NDA should be enforced against a whistleblower.²⁰⁵ Professor Bast argues that because "public policy is

²⁰² See, e.g., Garfield, *supra* note 64, at 264 (discussing *60 Minutes*' cancellation of an interview with a former tobacco executive for fear of liability for interference with an NDA); Bast, *supra* note 14, at 628 ("[A]n umbrella confidentiality agreement may very well safeguard information crucial to public health or safety."); Loune-Djenja Askew, *Confidentiality Agreements: The Florida Sunshine in Litigation Act, the #MeToo Movement, and Signing Away the Right to Speak*, 10 U. MIA. RACE & SOC. JUST. L. REV. 61, 64–65 (2019) (arguing that a Florida statute should be used to render unenforceable NDAs that prevent the disclosure of sexual assault and harassment).

²⁰³ See, e.g., Garfield, *supra* note 64, at 297 n.188 ("[C]ourts could construe whistleblower statutes, which prevent employers from retaliating against employees who report regulatory violations, to preclude enforcement of contracts of silence in which employees promised not to make such a report."); Bast, *supra* note 14, at 707–08 (creating a public policy test to determine whether an NDA should be enforced against a whistleblower).

²⁰⁴ Bast, *supra* note 14, at 701.

²⁰⁵ *Id.* at 708. The six factors are as follows:

1. what information the parties reasonably expected to be protected under the confidentiality agreement (reasonable expectations);
2. any loss to the employer that would result if enforcement were denied (loss to employer);

difficult to determine,”²⁰⁶ courts should look to other sources of law to decide whether an NDA should be enforced against a whistleblower. For instance, Professor Bast encourages judges to examine any “exception to the employment at will doctrine” in their jurisdictions.²⁰⁷ Per Professor Bast, “if a former employee is able to sue and collect damages for termination in violation of public policy [under a whistleblower-based exception to the employment-at-will doctrine],” then whistleblowers should also be able to assert a public policy defense to the enforcement of NDAs in that jurisdiction.²⁰⁸

Courts have also applied public policy to NDA counterclaims in False Claims Act (FCA) cases. The FCA²⁰⁹ is a Civil War Era statute that creates liability “for any person who knowingly submits a false claim to the government.”²¹⁰ The FCA permits private citizens, known as “relator[s],” to file “qui tam” actions on behalf of the government against violators and to recover a portion of the proceeds.²¹¹ In many FCA cases, employer-defendants bring counterclaims against employee-relators for breach of their employment NDAs. Some courts have refused to enforce NDAs in the context of these counterclaims, finding that such counterclaims contravene the purpose of the FCA by discouraging relators from suing their employers. Courts have treated the conduct of relators as important in evaluating the enforceability of NDAs: the more extensive an employee’s appropriation of

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3. the extent to which the information is protectable as a trade secret or proprietary information (protectability);
 4. any substantial adverse effect enforcement of the term would have on third parties (substantial adverse effect on third parties);
 5. the likelihood that a refusal to enforce the term will contribute to the effect (exacerbation of adverse effect); and
 6. whether limited disclosure would guard against the effect while still protecting employer’s information (limited disclosure).

Id. at 709.

²⁰⁶ *Id.* at 705.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 706. The defense of public policy in these cases may be particularly important because the related defense of unconscionability would be more difficult to apply. Because “[u]nconscionability focuses on the parties to the contract and asks whether one party has imposed a particularly oppressive term on another,” NDAs preventing whistleblowing are unlikely to be found unconscionable because “the public, and not [the whistleblower],” suffers when NDAs are enforced in such cases. Garfield, *supra* note 64, at 286.

²⁰⁹ 31 U.S.C. §§ 3729–3733.

²¹⁰ *The False Claims Act: A Primer*, U.S. DEP’T OF JUST. (Jan. 1, 2021), https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf [<https://perma.cc/2L8R-W5RC>].

²¹¹ *Id.*

an employer's confidential information, the less likely that appropriation is to be protected by public policy.²¹²

Consideration of some courts' approach to FCA cases²¹³ yields important insights about how courts might evaluate the enforceability of an NDA under a public policy defense. For one, courts do not approach the public policy question using abstract principles but rather tie their justifications for a public policy exception to the FCA's purpose itself. This pattern reflects the tendency of courts, discussed above, to ground public policy arguments in legislative enactments or regulations rather than more general principles.²¹⁴ For another, courts do not adopt a bright-line rule applied inflexibly to every case. In other words, some courts have found that NDA counterclaims to FCA actions are not per se barred by public policy. Rather, courts may refuse to grant public policy protection from NDA counterclaims to an FCA relator if the relator appropriated more information than necessary to bring the action.²¹⁵

The principles applied by courts in FCA cases have been reflected in similar contexts. For instance, *Erhart v. Bofl Holding, Inc.* concerned

²¹² For instance, in *Siebert v. Gene Security Network, Inc.*, Siebert, an employee of a biotechnology company, had signed an NDA obliging him to avoid disclosing CBI "for any purpose outside of the scope of his employment." No. 11-cv-01987-JST, 2013 WL 5645309, at *2 (N.D. Cal. Oct. 16, 2013). Siebert later left the company and signed a separation agreement providing that he had returned all company property and that he continued to be bound by the NDA. *Id.* After Siebert filed an action against the company under the FCA, the company counterclaimed that Siebert had breached the NDA by retaining and disclosing CBI. *Id.* at *6. In response, Siebert insisted that the NDA was unenforceable for purposes of the counterclaim under public policy. *Id.*

While the court noted that the FCA does not explicitly address relator liability for breach of an NDA, the court found this lack of express language immaterial, instead finding that the NDA could be unenforceable "if a 'substantial public interest would be impaired'" by its enforcement. *Id.* at *7 (quoting *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 962 (9th Cir. 1995)). The court cited several cases limiting the enforceability of NDAs in FCA cases as a matter of public policy, *id.* (first citing *United States ex rel. Ruhe v. Masimo Corp.*, 929 F. Supp. 2d 1033, 1039 (C.D. Cal. 2012); then citing *United States v. Cancer Treatment Ctrs. of Am.*, 350 F. Supp. 2d 765, 773 (N.D. Ill. 2004); and then citing *United States ex rel. Head v. Kane Co.*, 668 F. Supp. 2d 146, 152 (D.D.C. 2009)), and argued that allowing the counterclaim against Siebert to proceed would "frustrate Congress' purpose in enacting the [FCA]—namely, the public policy in favor of providing incentives for whistleblowers to come forward"—but stopped short of dismissing the counterclaim entirely, reasoning that Siebert may also have misappropriated confidential documents "that bore no relation" to his FCA action, *id.* at *8. To justify this proposition, the court cited *United States ex rel. Cafasso v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1052, 1062 (9th Cir. 2011), in which an employee downloaded nearly eleven gigabytes of company data for use in an FCA action. *Siebert*, 2013 WL 5645309, at *7. In *Cafasso*, the Ninth Circuit sustained the lower court's grant of summary judgment for the employer against the employee on the employer's NDA-breach counterclaim, holding that, even if a public policy defense for FCA relators existed, it could not apply to relators such as Cafasso who engage in "vast and indiscriminate appropriation" of information. 637 F.3d at 1062.

²¹³ See *supra* note 212 for various examples.

²¹⁴ See *supra* note 77.

²¹⁵ See *supra* note 212.

Charles Erhart, an internal auditor at a bank who reported “wrongful” conduct to the government.²¹⁶ Erhart sued the bank, alleging it retaliated against him for this reporting, and the bank counterclaimed, alleging that Erhart had breached his NDA, which prohibited him from revealing “proprietary and confidential” information.²¹⁷ The court engaged in an unusually thorough analysis of the public policy defense to determine if the counterclaim should proceed, specifically identifying and weighing the interests for and against enforcement of the NDA. First, the court contended, interests in freedom of contract favored the enforcement of the NDA.²¹⁸ The court next argued that enforcing the NDA would serve the fundamental purposes of trade secret law, including “promoting the sharing of knowledge, incentivizing innovation, and maintaining commercial ethics.”²¹⁹ However, the court also found public interests counseling against enforcement. For instance, the court noted that California law prohibits retaliation in some instances against whistleblowing employees.²²⁰

The court also considered the fact that Erhart had engaged in several courses of conduct allegedly violative of the NDA, including reporting information to the government, taking the bank’s files, and sending some of the files to his mother and placing them on his girlfriend’s computer.²²¹ The court separately evaluated the enforceability of the NDA with respect to these discrete actions, finding that the NDA was clearly unenforceable with respect to Erhart’s report to the government but may have been enforceable to prevent Erhart from transferring the information to his mother and using his girlfriend’s computer if Erhart’s motivation in doing so was not to protect information.²²² The *Erhart* court’s thorough and lucid public policy analysis provides an excellent example of how the defense works in practice when applied to NDAs. The court drew from a wide body of law to determine what substantive interests counseled for and against enforcement of the NDA and, like the courts in the FCA cases, considered Erhart’s specific conduct to determine whether it was worthy of public policy protection.²²³

²¹⁶ No. 15-cv-02287-BAS-NLS, 2017 WL 588390, at *1 (S.D. Cal. Feb. 14, 2017).

²¹⁷ *Id.* at *1–3.

²¹⁸ *Id.* at *8.

²¹⁹ *Id.*

²²⁰ *Id.* at *9.

²²¹ *Id.* at *10.

²²² *Id.* at *15.

²²³ *Id.* at *8–17 (discussing California’s public policy favoring freedom of contract, the policies of trade secret law, federal law illustrating an interest in protecting “nonpublic personal information,” California and federal law protecting whistleblowers, and other legal factors in determining the enforceability of the NDA, and considering Erhart’s conduct, including reporting information to the government and transmission of information to his mother, as relevant in determining the balance of public policy).

Occasionally, NDA defendants allege that an NDA should not be enforceable because it is being used to conceal crimes or restrain the defendant's freedom of speech. The defendant made these arguments, for instance, in *National Abortion Federation v. Center for Medical Progress*.²²⁴ In that case, the Center for Medical Progress (CMP), an organization that opposes abortion, infiltrated a meeting of the National Abortion Federation (NAF).²²⁵ CMP personnel signed NDAs upon arriving at the meeting that prevented them from disclosing information learned at the meeting and provided for injunctive relief in the case of a breach.²²⁶ The group surreptitiously recorded conversations with the event's attendees and claimed that some of these conversations referenced illegal sales of fetal body tissue.²²⁷ When NAF sought to prevent the public release of these recordings, CMP insisted that the NDAs were contrary to public policy and that injunctive relief would constitute "an unconstitutional prior restraint" on its freedom of expression.²²⁸ The court rejected CMP's arguments, deciding that the recordings did not evidence any criminal wrongdoing.²²⁹ The court went on to balance several factors bearing on the NDA's enforceability. For instance, the court concluded that NAF had a strong interest in the enforcement of its NDAs because abortion providers are frequently subject to threats and violence.²³⁰ The court also found that CMP had voluntarily waived its First Amendment rights²³¹ and also discussed the public's interest in the information CMP had collected. CMP claimed that its recordings demonstrated "a remarkable de-sensitization in the attitudes of [abortion] industry participants" and that the public had an interest in such information.²³² The court rejected this argument, holding that "[t]he sort of information [CMP had collected] is already fully part of the public debate over abortion."²³³ But the court noted that public policy could support "the release of a small subset of records . . . that defendants believe show criminal wrongdoing . . . to law enforcement agencies."²³⁴

NAF is a persuasive application of public policy to an NDA. The court properly considered NAF's interest in enforcing its agreement and weighed

²²⁴ No. 15-cv-03522-WHO, 2016 WL 454082, at *3 (N.D. Cal. Feb. 5, 2016).

²²⁵ *Id.* at *3.

²²⁶ *Id.* at *4–5.

²²⁷ *Id.* at *1.

²²⁸ *Id.* at *1–2, *19.

²²⁹ *Id.* at *19.

²³⁰ *Id.* at *20.

²³¹ *Id.* at *17–18.

²³² *Id.* at *19.

²³³ *Id.*

²³⁴ *Id.* at *20.

that interest against CMP's constitutional and public interest arguments. The court also conducted a detailed inquiry into the nature of the information recorded to determine if its release was in the public interest.²³⁵ Furthermore, the court considered CMP's planned conduct as relevant in determining the balance of public policy. The court did not permit CMP to do what it probably really wanted to (release the recordings), but it did suggest (though did not clearly decide) that limited disclosures to law enforcement might be permitted.²³⁶

Upon careful observation, one may notice some common threads running through the public policy analyses in *NAF* and the other cases in this Part. Most perform at least some balancing between the parties' interest in enforcing the NDA and the public interest in disclosure. Many also find the disclosing parties' conduct relevant in determining whether their actions are worth protecting. Several of the cases predicate their public policy decisions on the purpose and language of constitutional and statutory provisions. Also relevant, as demonstrated in *NAF*, is the character of the information at issue and the strength of the public's interest in its disclosure.

The next Part will discuss the factors courts should consider in determining whether a CBI NDA is enforceable as a matter of public policy, drawing upon issues raised in the cases examined thus far.

V. CBI NDAs: A PROPOSED PUBLIC POLICY APPROACH

This final Part will explore how courts should evaluate the enforceability of CBI NDAs by using the public policy defense. It will propose a judicial framework for courts to use in addressing the enforceability of CBI NDAs and will apply the elements of that framework to the *Tesla* case discussed in the Introduction. In determining whether a CBI NDA should be enforced as a matter of public policy, courts should consider:

- (1) the strength of the interest in favor of enforcing the CBI NDA, measured by:
 - (a) the extent to which the CBI NDA was freely negotiated between equally competent parties; and
 - (b) the extent to which enforcing the CBI NDA would further the policies of trade secret law; and
- (2) the strength of the interest against enforcing the CBI NDA, measured by:
 - (a) the extent to which the CBI NDA resembles a noncompete agreement in purpose or effect;

²³⁵ *Id.* at *19–20.

²³⁶ *Id.* at *20.

- (b) the CBI NDA's compliance with rules of reasonableness applied to noncompetes in the jurisdiction; and
- (c) the CBI NDA's predictable adverse impact on other public interests.

A. *Interests Favoring Enforcement of a CBI NDA*

1. *The Extent to Which the CBI NDA Was Freely Negotiated Between Equally Competent Parties*

There is a consistently recognized public policy interest in the ability of contracting parties to order their own affairs as they see fit.²³⁷ But this interest is not uniformly strong in all cases. The doctrine of unconscionability, and particularly procedural unconscionability, recognizes that the public interest in enforcing an agreement diminishes when that agreement was the product of unfair negotiations between parties of disparate sophistication and resources.²³⁸ The concern that contracts are the product of inequitable bargaining is particularly powerful in cases involving business NDAs. Many business NDA cases concern a business entity and a former employee of that entity.²³⁹ CBI NDAs signed by employees “are often more broadly worded [than business-to-business NDAs] and less likely to include express exceptions for non-secret information.”²⁴⁰ Employees who “generally lack negotiating power or legal advice” are powerless in the face of these take-it-or-leave-it CBI NDAs.²⁴¹ These types of agreements have become “so widespread in certain industries [that] employees frequently have little choice but to accept” them.²⁴² Thus, while freedom of contract is a public policy supporting contractual enforcement, the strength of that policy may be diminished in the context of employee-signed CBI NDAs, in which the choice to accept the terms of the contract may not be truly free.²⁴³

²³⁷ See *supra* note 64 and accompanying text.

²³⁸ See *supra* note 77 (noting unconscionability's application to unduly one-sided bargains).

²³⁹ Many NDA cases discussed thus far fit this description. See *supra* Part III.

²⁴⁰ Charles Tait Graves, *Trade Secrecy and Common Law Confidentiality: The Problem of Multiple Regimes*, in *THE LAW AND THEORY OF TRADE SECRECY: A HANDBOOK OF CONTEMPORARY RESEARCH* 77, 88 (Rochelle C. Dreyfuss & Katherine J. Strandburg eds., 2011).

²⁴¹ *Id.*

²⁴² Montville, *supra* note 30, at 1188.

²⁴³ Courts do not appear to routinely refer to the procedural unconscionability of CBI NDAs in public policy analyses. This Note proposes that courts consider this factor in the public policy analyses because procedural unconscionability is arguably a common feature of employee NDAs, as discussed in this paragraph. However, it would not be entirely novel to refer to procedural unconscionability as the basis for a public policy defense. See, e.g., *Kincaid v. Com. Credit Corp.*, No. CIV.A 2:98-0842, 1999 WL 33510175 (S.D. W. Va. Nov. 16, 1999). In *Kincaid*, the plaintiff entered into a contract that included an arbitration provision. *Id.* at *2. The plaintiff contended the arbitration agreement was void on a number

In other words, courts ought to determine if a CBI NDA is procedurally unconscionable when determining whether to enforce it. Procedural unconscionability “refers to relative unfairness in the negotiating process.”²⁴⁴ The “key elements” of procedural unconscionability are oppression, or “an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice,” and surprise, which “involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms.”²⁴⁵

It may be argued that this part of the test immediately stacks the deck against employers because, many, if not most, employee CBI NDAs suffer from at least some degree of procedural unconscionability.²⁴⁶ Perhaps so, but this fact indicates a potential infirmity in corporate culture generally rather than a problem with the test itself. The entire point of procedural unconscionability is that one-sided contracts deserve particular scrutiny. If employee CBI NDAs are systematically one-sided, then systemic change is needed, unless we are to do away with procedural unconscionability altogether for employment contracts. Businesses could adopt multiple strategies to mitigate the one-sided nature of their CBI NDAs and other employment contracts, including drafting them in simple, plain English; offering prospective employees opportunities to negotiate or at the very least seek clarification regarding contract terms; and affording prospective employees an opportunity to seek counsel at reduced or no cost to assist them in understanding the agreements.²⁴⁷ Furthermore, the procedural unconscionability of the CBI NDA is just one factor for courts to consider under this test; this alone would not sink a CBI NDA plaintiff’s case (except, perhaps, in extreme cases). Additionally, there are situations, as seen below, in which high-level executives and other employees experienced in contract

of grounds, including public policy. *Id.* at *5. The sole basis for the public policy defense was that the contract was procedurally unconscionable. *Id.* at *5 n.2. The court denied the defendant’s motion to compel arbitration, holding it was “premature” in light of the plaintiff’s multiple arguments against enforceability. *Id.* at *6.

²⁴⁴ Mark A. Glick, Darren Bush & Jonathan Q. Hafen, *The Law and Economics of Post-Employment Covenants: A Unified Framework*, 11 GEO. MASON L. REV. 357, 389 (2002).

²⁴⁵ *Id.* at 389–90 (second and third quotations quoting *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 122 (Ct. App. 1982)).

²⁴⁶ See *supra* notes 239–243 and accompanying text.

²⁴⁷ See *Frank’s Maint. & Eng’g, Inc. v. C. A. Roberts Co.*, 408 N.E.2d 403, 410 (Ill. App. Ct. 1980) (“Factors to be considered [in determining whether a contract is procedurally unconscionable] are all the circumstances surrounding the transaction including the manner in which the contract was entered into, whether each party had a reasonable opportunity to understand the terms of the contract, and whether important terms were hidden in a maze of fine print; both the conspicuousness of the clause and the negotiations relating to it are important, albeit not conclusive factors in determining the issue of unconscionability.”).

negotiations will have a tougher time arguing their CBI NDAs are procedurally unconscionable.

Furthermore, this Note does not argue that CBI NDAs should be subject to a full-dress unconscionability analysis. As pointed out above, courts have as of late applied unconscionability quite rigidly, rendering it difficult to apply to all contracts that threaten social values.²⁴⁸ The test offered here focuses specifically on the prong of procedural unconscionability. Procedural unconscionability evidences a public policy preferring freely negotiated contracts between equal parties to adhesive bargains between unequal parties. Procedural unconscionability, in other words, is evidence that the public interest in contractual enforcement is comparatively diminished when a court encounters a contract in which one side did not have a real opportunity to influence its terms.

One case applying procedural unconscionability in significant detail is *Farrar v. Direct Commerce, Inc.*²⁴⁹ In that case, Wilson Farrar, a high-level executive, had negotiated and entered into an employment contract with Direct Commerce.²⁵⁰ The contract included a confidentiality provision that Farrar insisted she had not had an opportunity to negotiate.²⁵¹ The court first identified several factors that militated against a finding of procedural unconscionability, noting that Farrar was an experienced businesswoman, negotiating for a high-level position, who “held herself out as being experienced in contract negotiations.”²⁵² These factors made it more likely that the CBI NDA had been formed between parties of equal bargaining power, unlike agreements between business entities and low-level employees.²⁵³ The court, however, did not end the analysis there. It further explained that there was evidence Farrar had not been permitted to negotiate the agreement’s confidentiality provision, which all other employees at the company were also required to sign.²⁵⁴ Based on these facts, the court found that there was *some* degree of procedural unconscionability in Farrar’s confidentiality provision.²⁵⁵

Other courts have not taken *Farrar*’s approach. For instance, the court in *Ryan v. Dan’s Foods Stores* refused to find unconscionable a preprinted, nonnegotiable, employer-drafted agreement, concluding that virtually “all

²⁴⁸ See *supra* note 77.

²⁴⁹ See 215 Cal. Rptr. 3d 785, 789–93 (Ct. App. 2017).

²⁵⁰ *Id.* at 788.

²⁵¹ *Id.* at 789.

²⁵² *Id.* at 792.

²⁵³ *Id.*

²⁵⁴ *Id.* at 793.

²⁵⁵ *Id.* The court, however, did not seem to think this degree was very significant. *Id.* at 794–95.

employment contracts are drafted by the employer,” and that “standard forms . . . are common for employment contracts.”²⁵⁶ The court further found that “if the employee is unhappy with the terms offered by the employer the employee can either refuse to accept or quit employment and find a job with more favorable terms.”²⁵⁷

The *Ryan* court’s arguments are unpersuasive. The fact that employer-drafted contracts are common does not somehow make them less one-sided. If anything, these contracts’ ubiquity provides courts with all the more reason to scrutinize them for procedural fairness. Similarly, the *Ryan* court’s insistence that employees who are unsatisfied with their contracts just find a different job is blind to the reality that, as discussed above, restrictive employment agreements may practically be a prerequisite to working in certain industries.²⁵⁸ Courts evaluating the procedural fairness of CBI NDAs should follow *Farrar*, asking how sophisticated the particular employee entering the contract was, whether the employee had experience in contract negotiations, whether the contract was standard-form and binding on all employees, and whether there was an opportunity for the employee to negotiate the contract.²⁵⁹ There is a weaker public policy interest in enforcing contracts that are procedurally unconscionable under this analysis.

To illustrate these principles, recall the *Tesla* case discussed at the beginning of this Note. All Tesla employees are required to “sign the Tesla, Inc. Employee Nondisclosure And Inventions Assignment Agreement.”²⁶⁰ This standard-form agreement is a dense document filled with terms that likely would not be fully understood by someone without legal training.²⁶¹

²⁵⁶ Glick et al., *supra* note 244, at 395–96 (alteration in original) (quoting *Ryan v. Dan’s Foods Stores*, 972 P.2d 395, 404 (Utah 1998)).

²⁵⁷ *Id.* at 396.

²⁵⁸ See *supra* note 104 and accompanying text.

²⁵⁹ See *supra* notes 249–255 and accompanying text.

²⁶⁰ Complaint, *supra* note 2, at 5.

²⁶¹ Tesla’s CBI NDA, for example, provided:

Notwithstanding the foregoing, Proprietary Information excludes any information that is or lawfully becomes part of the public domain. I agree that, in any dispute related to this agreement, I will bear the burden of proving by clear and convincing evidence the applicability of this exclusion. This Agreement is intended to supplement, and not to supersede, any rights the Company may have in law or equity with respect to the protection of trade secrets or confidential or proprietary information.

....

I have been notified and understand that the provisions of Section 2.6 of this Agreement do not apply to any Company Invention (defined below) that qualifies fully as a nonassignable invention under the provisions of Section 2870 of the California Labor Code

....

There is no indication that any of the former Tesla employees in the case are particularly experienced in contract negotiations; indeed, there is no evidence that the defendants received any opportunity to negotiate the NDA. In sum, because the NDA is a difficult-to-understand standard-form contract presented on a take-it-or-leave-it basis to (likely) inexperienced employees, it is at least somewhat procedurally unconscionable, which weakens the public policy interest in its enforcement.

2. *The Extent to Which Enforcing the CBI NDA Would Further the Purposes of Trade Secret Law*

The next factor asks courts to analyze the strength of the parties' interest in protecting CBI, using the public policy of trade secret law. A business's interest in enforcing its CBI NDA will be more clearly supported by public policy if the information protected resembles a trade secret—meaning it satisfies one or more UTSA requirements for trade secret protection²⁶²—while the pro-enforcement interest will be lessened if the information is unlike a trade secret. Although trade secret law does not directly govern contractual actions, it is useful in identifying varieties of business information that public policy has deemed worthy of protection. Because public policy is an open-ended defense that allows courts to identify relevant policies beyond directly controlling law,²⁶³ it is legitimate for courts to look to trade secret law to determine the protectability of CBI under a CBI NDA. After all, as the Sixth Circuit has said, trade secret law is “relevant in analyzing the reasonableness and enforceability of [NDAs] because, in order to justify the contractual restraint, information subject to [NDAs] must share at least some characteristics with information protected by trade secret statutes.”²⁶⁴

However, one may argue courts should *not* look to trade secret law when enforcing CBI NDAs. Some may contend that the law of trade secrets is irrelevant in CBI NDA cases because the foundation of contractual liability in such cases is the CBI NDA itself, while trade secret law concentrates instead on the nature of the *information* to be protected.²⁶⁵ It

I acknowledge and agree that violation of this Agreement by me may cause the Company irreparable harm and that the Company shall therefore have the right to . . . specific performance, or other equitable relief, without bond and without prejudice to any other rights and remedies . . .

See id. Ex. A, at 1, 3.

²⁶² *See supra* Section III.A.2 (noting the three UTSA requirements of secrecy, economic value, and reasonable efforts to maintain secrecy in order to qualify for trade secret protection).

²⁶³ *See supra* Part II.

²⁶⁴ *Orthofix, Inc. v. Hunter*, 630 F. App'x 566, 568 (6th Cir. 2015).

²⁶⁵ For an articulation of a similar view from the Eleventh Circuit, see *supra* note 62 and accompanying text.

could also be said that subjecting CBI NDAs to trade secret law would defeat the purpose of CBI NDAs, which may be *intended* to provide businesses with legal protection broader than that they would receive under trade secret law.²⁶⁶ Finally, those who oppose applying the law of trade secrets to CBI NDAs may point to the UTSA's nonpreemption of contract actions, which may indicate a lack of intent to disturb the scope or enforceability of CBI NDAs.²⁶⁷

These arguments are not without force. The fact that the UTSA does not preempt contractual actions, for instance, makes it difficult to argue that CBI NDAs can only protect trade secrets (though, as discussed above, some courts have tried).²⁶⁸ But this Note does not argue that all information under a CBI NDA must be a trade secret; rather, it contends that CBI's resemblance to trade secrets is a factor courts should consider in determining if a CBI NDA is supported by public policy. Furthermore, while a bargain between parties is an essential prerequisite to contractual liability, contractual liability is not unlimited. The entire point of the public policy defense is that some contractual relationships will not be recognized because doing so would significantly harm some public interest. The reason courts should consider trade secret law when presented with a CBI NDA is to gauge the strength of the parties' interest in the enforcement of their private bargain. The UTSA effectively articulates a public policy that information bearing certain characteristics is worthy of legal protection. This public policy would be furthered by protecting CBI that has some or all of those characteristics, while CBI not bearing any of those characteristics is less clearly valuable. Finally, the UTSA "did not take a stand one way or the other on *interpretation* of confidentiality contracts."²⁶⁹ Indeed, "it is unclear whether the statute's drafters . . . believed that such contracts would be interpreted in line with official trade secret law."²⁷⁰ While the UTSA does not preempt contract actions, the statute does not say that its provisions are wholly irrelevant in interpreting a CBI NDA and determining its appropriate scope. Nothing in the UTSA's text prevents courts from considering the requirements of trade secret law as a source of public policy when evaluating contractual actions to protect information that often resembles trade secrets.

The remainder of this Section discusses the policies of trade secret law that courts should consider in evaluating CBI NDAs' enforceability. One

²⁶⁶ See *supra* note 58 and accompanying text.

²⁶⁷ UNIF. TRADE SECRETS ACT § 7(b)(1) (NAT'L CONF. COMM'RS ON UNIF. STATE L. 1985).

²⁶⁸ See *supra* Section III.A.2.

²⁶⁹ Graves, *supra* note 240, at 91 (emphasis added).

²⁷⁰ *Id.*

purpose of trade secret law is promoting commercial morality.²⁷¹ Sanctioning trade secret misappropriation disincentivizes businesses from engaging in undesirable strategies to obtain business information.²⁷² The UTSA's drafters distinguished proper means of appropriation of trade secrets from wrongful misappropriation.²⁷³ In light of this strong policy, courts should consider the particular conduct that was alleged to violate a CBI NDA's provisions and how seriously that conduct conflicts with standards of commercial morality. For example, courts have less reason to punish minor or unintentional misappropriation of CBI, as opposed to widespread, indiscriminate, or malicious misappropriation.²⁷⁴

Another critical policy underlying trade secret law is uniformity. The UTSA's drafters bemoaned the "uneven" development of trade secret law and the "undue uncertainty" in American courts "concerning the parameters of trade secret protection."²⁷⁵ Uniformity is desirable in business information law because we live in an increasingly "national and global economy"²⁷⁶ and it would therefore be beneficial for businesses to be able to develop confidentiality strategies with the assurance that the law will be applied similarly in all the jurisdictions in which they do business. Uniformity can pose a significant issue in CBI NDA cases; as discussed above, courts in different jurisdictions approach these actions very differently, with attitudes ranging from complete enforcement of CBI NDAs as written to absolute denial of contractual protection to CBI.²⁷⁷ Courts should attempt to remedy this widespread uncertainty in the law of CBI NDAs to bring it closer in line with the goals of trade secret law.

The next several paragraphs will examine the UTSA's various elements of the definition of a trade secret. Recall that the UTSA defines a "trade secret" as

information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value

²⁷¹ See Unikel, *supra* note 48, at 845 & n.22; see also *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481 (1974) ("The maintenance of standards of commercial ethics and the encouragement of invention are the broadly stated policies behind trade secret law.").

²⁷² See Unikel, *supra* note 48, at 846.

²⁷³ See UNIF. TRADE SECRETS ACT § 1 cmt. (NAT'L CONF. COMM'RS ON UNIF. STATE L. 1985).

²⁷⁴ For an application of this argument in the context of an NDA counterclaim to an FCA action, see *supra* note 212 and accompanying text, which discusses *Cafasso v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1062 (9th Cir. 2011).

²⁷⁵ UNIF. TRADE SECRETS ACT, Prefatory Note at 1.

²⁷⁶ See H.R. REP. NO. 114-529, at 4 (2016) (discussing the federal Defend Trade Secrets Act of 2016).

²⁷⁷ See *supra* Part III for a full discussion of the differing approaches courts have taken.

from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.²⁷⁸

Courts evaluating a CBI NDA's enforceability may focus on some, but not all, requirements of trade secret law. For instance, in denying enforcement of an NDA in *Tax Track*, the Seventh Circuit focused on the fact that the plaintiff had not put forth "reasonable efforts" to maintain the relevant information's confidentiality.²⁷⁹ However, courts should take a more holistic approach, evaluating how closely CBI resembles a trade secret with reference to *all* of the elements of the UTSA's definition while recognizing that CBI need not meet all, or even any, of the elements to be protected. Trade secret law is evidence of a public policy interest in protecting information with certain characteristics. There is less likely to be a public policy problem with a CBI NDA if it protects CBI that has all or most of these characteristics. But even CBI that is entirely unlike a trade secret could still be worthy of protection if some other interest justifies the contractual restraint. In other words, CBI's similarity to a trade secret is merely one factor among many for courts to consider in the public policy analysis. It is not determinative by itself, though it will certainly be more *difficult* to argue that information that is valueless, publicly available, or not subject to reasonable protective efforts should be protected.

Consider first the requirement that trade secrets may not be generally known. As noted above, secrecy may be the most essential attribute of a trade secret.²⁸⁰ Secrecy should be almost as important in the context of CBI NDAs. "If the term 'confidential business information' is to be given its plain meaning, the information must in fact be 'confidential.'"²⁸¹ Courts should regard with intense suspicion any CBI NDA prohibiting the disclosure of publicly available information or general skills and knowledge. Such agreements should rarely be enforceable, at least not to their full extent.

Next, consider the requirement that trade secrets cannot be readily ascertainable. In other words, trade secrets cannot be easily accessible in publicly available materials or "easily gleaned from products that are on the market" or through reverse engineering.²⁸² The fact that information is readily ascertainable indicates that a business's economic interest in that information is limited and defeasible. However, not all courts have followed

²⁷⁸ UNIF. TRADE SECRETS ACT § 1(4).

²⁷⁹ See *Tax Track Sys. Corp. v. New Inv. World*, 478 F.3d 783, 788 (7th Cir. 2007).

²⁸⁰ See *supra* note 42 and accompanying text.

²⁸¹ Ehrlich & Garbarino, *supra* note 17, at 297.

²⁸² See Sandeen, *A Contract by Any Other Name*, *supra* note 41, at 135.

this logic,²⁸³ and Robert Unikel has urged that the “not . . . ‘readily ascertainable by proper means’” requirement should be discarded, arguing that it unreasonably rewards defendants who improperly acquire information that “theoretically” could have been obtained properly.²⁸⁴

However, there is good reason to think that readily ascertainable information should be less presumptively protectable than other information. The fact that information can be ascertained through public channels suggests either that the business seeking to protect the information did not develop it or that it put forth insufficient efforts to protect it from disclosure. Protecting such information would confer marginal private benefits at best, while risking the adverse public impacts that have been discussed throughout this piece.²⁸⁵ Furthermore, when deciding whether to protect information under a CBI NDA, courts could consider *both* whether the information could have been obtained by proper means and whether the defendants actually obtained the information by proper means.

Finally, courts should ask whether CBI NDA plaintiffs undertook reasonable efforts to maintain the confidentiality of the information to be protected.²⁸⁶ This requirement gets at not only the secrecy of CBI but also at its value: even if information is actually confidential and there is no evidence it has been widely disclosed, a court may rightly ask how valuable it is if the business has not tried to protect it.²⁸⁷ In the context of trade secret actions, some courts have held that the act of requiring employees to sign NDAs is by itself enough to establish that a business has undertaken such reasonable efforts.²⁸⁸ This is an odd position that will not be followed here. Simply assuming that employees will abide by an NDA they may not have read or

²⁸³ For instance, in *H. J. Sherwood, Inc. v. Fibeco, Inc.*, three defendants left their employer to start their own business and produced a ceramic core “very close in composition, manufacture and use” to that made by their former employer. 234 N.E.2d 531, 531–32 (Ohio C.P. 1967). As a defense to the employer’s NDA breach action, the defendants insisted that the core’s manufacturing method was publicly available “and that anyone could go to various libraries” and learn the process for themselves. *Id.* at 532. The court, however, rejected this defense. *See id.* at 533.

²⁸⁴ Unikel, *supra* note 48, at 876.

²⁸⁵ *See Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 947 (7th Cir. 1994) (“If the firm claiming a protectable interest did not think enough of it to expend resources on trying to prevent lawful appropriation of it, this is evidence that it is not an especially valuable interest . . .”).

²⁸⁶ As to the public policy of the trade secret requirement that businesses be able to derive value from the information at issue, UNIFORM TRADE SECRETS ACT § 1(4) (NAT’L CONF. COMM’RS ON UNIF. STATE L. 1985), courts should prefer the enforcement of NDAs that protect information directly related to the moneymaking power of a business.

²⁸⁷ *See supra* Section III.A.4 (discussing *Tax Track*); *see also Curtis 1000*, 24 F.3d at 947 (“If the firm claiming a protectable interest did not think enough of it to expend resources on trying to prevent lawful appropriation of it, this is evidence that it is not an especially valuable interest . . .”).

²⁸⁸ Tracey, *supra* note 36, at 66.

understood²⁸⁹ without taking further actions to secure important information from unwanted disclosure hardly appears to be a “reasonable effort” to maintain confidentiality. Contrast, for instance, this “NDA-only” approach with Tesla’s more comprehensive information-security measures, including security guards, cameras, and a requirement that Tesla employees accompany outside visitors to Tesla facilities.²⁹⁰ Furthermore, finding that CBI NDAs alone evidence reasonable efforts to maintain confidentiality would render the reasonable-efforts requirement meaningless in the context of this public policy test, as all CBI NDA plaintiffs could show that they engaged in such reasonable efforts simply by pointing to the CBI NDA signed by the defendant.

With these considerations for the interest in favor of enforcing the CBI NDA based on trade secret law policies in mind, one may turn again to the *Tesla* case for an example of their application. The first question is whether enforcing the CBI NDA in this case would further trade secret law’s interest in protecting commercial morality. On one hand, Tesla did not allege in its initial complaint that any of the former employees in the case sent Rivian information; all that it alleged is that the employees took some documents with them upon leaving the company.²⁹¹ On the other hand, Tesla suggests that the employees took information at Rivian personnel’s request.²⁹² Enforcing the CBI NDA against the former employees would thus seem to

²⁸⁹ A counterargument here might be that employers are entitled to assume that employees who have signed an NDA have read and understood its terms and will abide by them; that, after all, is the entire point of a contract. This argument might have a certain legalistic appeal, but it is out of step with commonsense knowledge about human behavior. It is a matter of common knowledge that humans routinely enter into contracts that they have not read and would have no hope of understanding without the assistance of a lawyer. Consider, for instance, if you read and understood the terms and conditions of the last website you visited. A business that did nothing to protect its secrets but had employees sign a boilerplate contract would have no reasonable expectation that their CBI and trade secrets have been effectively protected from unwanted disclosure. Courts therefore have reason to assume that employers who do no more than require employees to sign an NDA are not terribly concerned about unwanted disclosure of company information.

²⁹⁰ See *infra* note 300 and accompanying text.

²⁹¹ See *Demurrer*, *supra* note 8, at 8–10 (“Tesla strains to plead misappropriation despite having to concede that each of these employees cooperated with Tesla to delete every one of the documents Tesla contends belongs to it, and that they did so . . . before joining Rivian, and without sending the documents to any Rivian email address or copying any of the documents onto any Rivian system.”). Tesla’s third amended complaint does contain allegations that Rivian has actually acquired Tesla information, but these allegations are, in the main, highly conclusory. See, e.g., Third Amended Complaint, *supra* note 7, at 9 (“Rivian has acquired the Tesla confidential information taken by Wong. Wong has begun work at Rivian and, on information and belief, has used the Tesla confidential information for Rivian’s benefit and on Rivian’s systems.”).

²⁹² See, e.g., Complaint, *supra* note 2, at 6 (“Before [Kim] Wong left Tesla, [Rivian employee Vince] Duran instructed her that Rivian did not have the recruiting templates, structures, formulas, or documents that would be needed for Rivian’s recruitment efforts.” (emphasis omitted)).

have some impact on commercial morality (thwarting Rivian's alleged misappropriation campaign against Tesla); however, there is not a great deal of evidence that this misconduct caused actual harm if no documents have actually made their way to Rivian.²⁹³ Next, consider the policy of uniformity. The CBI NDA in this case is incredibly broad, purporting to protect "all information" accessible by Tesla employees, subject to a narrow exception for "information that is or lawfully becomes part of the public domain" (the employee must prove this exception applies by clear and convincing evidence).²⁹⁴ Few jurisdictions would enforce such a broad CBI NDA as written,²⁹⁵ so those few jurisdictions enforcing it would create a lack of uniformity in the law of business information.

Next, one may ask whether the information protected by the CBI NDA satisfies UTSA requirements. Tesla's CBI NDA likely applies to information that is readily ascertainable by proper means; as stated, it purports to cover nearly all information Tesla employees learned at the company.²⁹⁶ For the same reason, the CBI NDA likely covers information of no economic value to Tesla. Though the CBI NDA claims it does not apply to information that "is or lawfully becomes part of the public domain," employees must prove the applicability of this exception with "clear and convincing evidence."²⁹⁷ Moreover, according to Rivian, some of the information Tesla alleges was misappropriated is publicly available online.²⁹⁸ Other information in the case, however, such as manufacturing information,²⁹⁹ is less likely to be publicly available and therefore may be worthier of protection. With respect to the "reasonable efforts" requirement, Tesla states that it uses security measures, including guards and cameras, at its facilities and that visitors must be accompanied by Tesla employees.³⁰⁰ While these efforts appear to be reasonable insofar as Tesla seeks to protect genuine CBI, the CBI NDA is so broad that it encompasses information likely not the subject of reasonable security efforts. In short, Tesla's CBI NDA is so broad that it likely includes

²⁹³ See *supra* note 272 and accompanying text (noting trade secret law's objective of preventing businesses from using morally unsavory strategies to acquire business information).

²⁹⁴ Complaint, *supra* note 2, Ex. A.

²⁹⁵ See Ehrlich & Garbarino, *supra* note 17, at 298 (stating that only two jurisdictions "take a pure freedom of contract approach to CBI NDAs"). Such an approach is analogous to the Enforcement-as-Written approach discussed *supra* Section III.A.1.

²⁹⁶ See Demurrer, *supra* note 8, at 9 & n.2 (arguing and providing citations suggesting that recruiting information Tesla sought to protect is publicly available).

²⁹⁷ Complaint, *supra* note 2, Ex. A.

²⁹⁸ See Demurrer, *supra* note 8, at 9 & n.2.

²⁹⁹ Complaint, *supra* note 2, at 9.

³⁰⁰ *Id.* at 5.

information with little resemblance to trade secrets. The court should view the CBI NDA's breadth suspiciously.

B. Public Interests Against Enforcement of a CBI NDA

On the other side of the balancing test, courts must weigh factors that indicate the strength of the public's interest against enforcement of a CBI NDA. These factors include the extent to which the CBI NDA resembles a noncompete agreement, the CBI NDA's compliance with the rules of reasonableness applied to noncompetes in the jurisdiction, and the CBI NDA's predictable adverse impact on other public interests.

1. The Extent to Which the CBI NDA Resembles a Noncompete

CBI NDAs can inhibit an employee's ability to gain another job in the same profession or otherwise to compete with her employer.³⁰¹ As discussed at length above, the distinction between noncompetes and CBI NDAs can be thin, or even illusory, in many cases. CBI NDAs can be and often are used to punish employees for leaving their employers and seeking alternative employment.³⁰² Such CBI NDAs likely harm employee mobility and stifle economic competition. The more anticompetitive a CBI NDA is, the greater the public interest against enforcing the agreement.³⁰³

The most clearly anticompetitive CBI NDAs are those that prevent an employee from using her general skills and knowledge for other employers. Such agreements are "more properly characterized" as noncompetes than as true NDAs.³⁰⁴ But even CBI NDAs more properly limited to information that is actually confidential or proprietary may still limit employee mobility. The mere existence of a CBI NDA "may deter a prospective employer from hiring a prospective employee," particularly when "the employee would inevitably reveal the former employer's confidential information" and when "the former employer has a reputation for strictly enforcing its contracts through litigation."³⁰⁵ When evaluating the enforceability of a CBI NDA, courts should ask whether a former employee has taken a job that would inevitably require her to use confidential information learned at her former job. If the answer is yes, the CBI NDA is potentially injurious to economic competition and employee mobility, and it should be subject to heightened

³⁰¹ See *supra* Section III.B; *infra* note 305 and accompanying text.

³⁰² See *supra* Part III for examples of CBI NDA actions involving employees who left their employers to seek employment elsewhere.

³⁰³ See *supra* note 18 and accompanying text (noting that noncompetes are judicially disfavored as contracts in restraint of trade).

³⁰⁴ *Orthofix, Inc. v. Hunter*, 630 F. App'x 566, 573 (6th Cir. 2015).

³⁰⁵ *Bast*, *supra* note 14, at 642–43.

scrutiny.³⁰⁶ This is true even if the jurisdiction that provides the substantive law of the NDA rejects the inevitable disclosure doctrine, and thus the NDA could not be enforced on the basis of such “inevitable disclosure.” The threat to competition and employee mobility in such cases comes not only from the actual potential for enforcement but also from the employee’s subjective fear of legal liability: logically, an employee who has signed a broadly worded NDA (one that includes information the employee would “inevitably” use in subsequent employment) would have cause for concern that the NDA would be used against her if she took the same job for a different employer.³⁰⁷ Furthermore, CBI NDAs drafted by businesses that persistently enforce the contracts through litigation may be more problematic from a public policy perspective because they may dissuade employees of those businesses from seeking employment elsewhere and competing employers from hiring those employees. If employees have reason to fear litigation arising from the mere act of changing jobs, they may feel compelled to remain in their current positions.³⁰⁸ This potential “intimidation factor” may increase in cases in which the CBI NDA at issue contains broad, nonspecific definitions of CBI. It would be more difficult for employees subject to such CBI NDAs to ensure they will not face liability if they attempt to change jobs.

There is cause for concern that Tesla’s CBI NDA is substantially anticompetitive.³⁰⁹ To begin, Tesla’s CBI NDA aggressively defines CBI as “all information . . . to which [employees] have access by virtue of” their employment at Tesla.³¹⁰ This potentially includes Tesla employees’ general skills and knowledge. Again, although the CBI NDA purports to exclude

³⁰⁶ One might contend that the opposite of this position is true: namely, that employers have a *heightened* interest in enforcing NDAs when they know employees will inevitably use confidential information at a subsequent job. However, one should consider whether the “confidential” information is actually confidential if its use in future employment would be “inevitable.” Employers should not be able to use the doctrine of inevitable disclosure to force contracts that are in substance noncompetes on employees, under the guise of NDAs. See the discussion of *PepsiCo*, *supra* notes 191–193 and accompanying text. In other words, the fact that employees will inevitably use “confidential” information at their next jobs could be a sign that the confidential information is in fact part of the employee’s general skills and knowledge. Moreover, one cannot forget the other side of the equation: while employers certainly have an interest in protecting confidential information, employees also have a compelling interest in their own mobility and ensuring that they can transfer skills that they have learned to other jobs. It is an open question that would likely have to be determined on a case-by-case basis whether an employer’s interest in preserving particular CBI could equitably justify restricting an employee from pursuing the career of her choice.

³⁰⁷ For a similar argument, see *supra* notes 176–181 and accompanying text (discussing *Harvey Barnett, Inc. v. Shidler*, 338 F.3d 1125 (10th Cir. 2003)).

³⁰⁸ Demurrer, *supra* note 8, at 8 (arguing Tesla sued Rivian to “scare employees thinking about leaving Tesla”).

³⁰⁹ Rivian itself has raised the specter of the anticompetitive potential of Tesla’s NDA litigation. See *supra* Introduction.

³¹⁰ Complaint, *supra* note 2, Ex. A, at 1.

publicly available information, the contract puts the onus on employees to prove that this exclusion applies by clear and convincing evidence.³¹¹ Therefore, if read literally, there is not much distinguishing Tesla's CBI NDA from a noncompete agreement, as an employee cannot shed her past experiences when changing jobs. For the same reason, the CBI NDA raises concerns that employees subject to it would inevitably breach the CBI NDA if they attempted to change jobs. Consider, for instance, the plight of Kim Wong, a former Tesla recruiter.³¹² Tesla alleges that Ms. Wong took with her documents about Tesla's recruiting processes after she was hired by Rivian.³¹³ But Ms. Wong may have inevitably used such information for Rivian if the documents informed her general skills or strategies as a recruiter.³¹⁴ Furthermore, Tesla actively and aggressively participates in confidentiality litigation, raising concerns that its attempted enforcement of the CBI NDA could be anticompetitive.³¹⁵ Tesla's suit against Rivian, a small

³¹¹ See *supra* note 297 and accompanying text.

³¹² Complaint, *supra* note 2, Ex. A, at 6–7.

³¹³ *Id.* at 7.

³¹⁴ True, Tesla itself probably would not be able to make a strong inevitable disclosure argument, since California courts, at least for now, have rejected the inevitable disclosure doctrine. *Whyte v. Schlage Lock Co.*, 125 Cal. Rptr. 2d 277, 293 (Ct. App. 2002). But this could always change, and the California supreme court does not appear to have spoken directly on the issue. Moreover, Tesla has employees across the nation and globe; it is not clear how many of those employees are made to sign NDAs or what substantive law governs those NDAs. See Tim Levin, *Tesla Grew Its Workforce by Nearly 50% During Its Monumental 2020*, INSIDER (Feb. 9, 2021, 2:36 PM), <https://www.businessinsider.com/tesla-expansion-grew-workforce-47-percent-last-year-2021-2> [<https://perma.cc/886P-TJ7Y>]. Moreover, even if Tesla would not be able to make an inevitable disclosure argument in California state court, it is important to consider the chilling effect of the NDA from an employee's perspective. An employee faced with an NDA as broadly worded as Tesla's may fear that changing jobs would incur liability under the NDA. See *supra* Section III.B.2 (discussing *Harvey Barnett, Inc. v. Shidler*).

³¹⁵ See, e.g., Jeremy Korzeniewski, *Tesla Files Suit Against Fisker Automotive*, AUTOBLOG (Apr. 15, 2008, 10:28 AM), https://www.autoblog.com/2008/04/15/tesla-files-suit-against-fisker-automotive/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLnNvbS8&guce_referrer_sig=AQAA-AJSvixJOVsATBMhaE3H-Z9nVLfW3CJtmfXg9t10oosWI7Eryk0TPpFSXquH5zaviVZSWyjGvYIDSdi3lAoo0klg9knFa2FHBvebpcALQk-PlxBGWJK4smYJSAWQd8JCU9TVtqr_iDaoOTZ6x43qNYk-rV6_Nl5_Pd3mN6hYFp9R [<https://perma.cc/K4SN-4U4E>] (reporting the Tesla lawsuit alleging former employees “stole design ideas and confidential information related to the design of hybrid and electric cars” and seeking to prevent the use of “any design ideas garnered from [their] relationship with Tesla”); Greg Sandoval, *Tesla Suit Alleges New Hire Made Off With Valuable Trade Secrets*, LAW.COM: THE RECORDER (Jan. 22, 2021, 5:06 PM), <https://www.law.com/therecorder/2021/01/22/tesla-suit-alleges-new-hire-made-off-with-valuable-trade-secrets/> [<https://perma.cc/MV3H-VJBJ>] (reporting lawsuit “accus[ing] a former employee of pilfering trade secrets related to the technology that powers many of [Tesla's] automated processes”); Jonathan Stempel, *Judge Narrows Tesla Lawsuit Against Former Employee, Dismisses Defamation Counterclaim*, REUTERS (Sept. 18, 2020, 1:31 AM), <https://www.reuters.com/article/us-tesla-court-tripp-idUKKBN2690TD> [<https://perma.cc/6H8A-J4YM>] (reporting suit alleging hacking and the leaking of confidential information); Kirsten Korosec, *Tesla Sues Former Employees, Zoox for Alleged Trade Secret Theft*, TECHCRUNCH (Mar. 21, 2019, 1:05 PM), <https://techcrunch.com/2019/03/21/tesla-sues-former-employees-zoox-for-alleged-trade-secret-theft/> [<https://perma.cc/T5DY-SK4X>] (reporting suits alleging stealing of trade secrets).

automotive business, may cause other competitors to think twice before hiring Tesla employees in the future. In sum of these considerations—the Tesla CBI NDA’s breadth, its susceptibility to “inevitable disclosure,” and Tesla’s role as a confidentiality litigant—a court would have ample reason to believe that the CBI NDA harms economic competition and employee mobility.

2. *The Extent to Which the CBI NDA Complies with Limitations on Noncompetes*

Next, courts should consider the extent to which the CBI NDA complies with limitations the relevant jurisdiction places on noncompetes, such as temporal or geographic limitations.³¹⁶ This consideration interacts with the questions discussed in the previous Section. If a CBI NDA is unlike a noncompete in purpose or effect, then the fact that the CBI NDA does not comply with legal limitations placed on noncompete agreements in the jurisdiction may not be of great concern. By contrast, if a CBI NDA prevents an employee from using her general skills and knowledge—or if other major warning signs of anticompetitiveness exist—and the CBI NDA is completely unlimited by the jurisdiction’s typical restrictions on noncompetes, a court should not enforce the CBI NDA except in extraordinary circumstances. In other words, courts should apply a combination of the Conditional Rule and Factor Rule, as discussed above. Under the Conditional Rule, if an NDA purports to prohibit an employee from using her general skills and knowledge, or is otherwise significantly anticompetitive, courts should rather strictly apply the reasonableness criteria of noncompetes to the NDA. Under the Factor Rule, however, even more properly limited NDAs might not be reasonable if they are completely free of the typical restrictions the relevant jurisdiction places on noncompetes.³¹⁷

Some may argue that this analysis would unduly burden freedom of contract if it were used to prevent enforcement of agreements that were not drafted or intended as noncompetes and indeed may have been drafted to avoid the application of state noncompete laws. But this Section attempts to establish the distinction between CBI NDAs and noncompetes as one of substance, rather than mere form. If a CBI NDA is genuinely not anticompetitive in purpose and effect, then there is little reason to strictly apply the law of noncompetes to determine its validity. But employers should not be able to benefit from the law’s relaxed treatment of CBI NDAs (relative to noncompetes) by dressing up a plainly anticompetitive contract as an information-protection provision.

³¹⁶ See *supra* note 153 and accompanying text.

³¹⁷ See *supra* Section III.B.3.

Return to *Tesla* for an example. The sheer breadth of Tesla's CBI NDA, combined with other factors indicating the potential for anticompetitive results, cause the CBI NDA to strongly resemble a noncompete. California generally prohibits the enforcement of employee noncompetes.³¹⁸ Thus, there is nothing Tesla can do to mitigate the CBI NDA's anticompetitive effects to a degree that is satisfactory by the standards of California public policy. In short, California's public policy against the enforcement of noncompete agreements evidences a strong policy in favor of competition and employee mobility³¹⁹ and weighs heavily against the enforcement of Tesla's CBI NDA.

3. *The NDA's Predictable Adverse Impact on Other Public Interests*

CBI NDAs may be contrary to public policy for reasons other than those discussed above. Courts ought to evaluate enforceability on a case-by-case basis, using the open-ended nature of the public policy defense to identify potential concerns throwing the enforceability of a CBI NDA into doubt. Some of these concerns have arisen in actions to enforce NDAs beyond the context of business information.³²⁰ In short, because public policy is not entirely dependent on legal reasoning, courts should be willing to consider a broad variety of arguments against enforceability, even if those arguments are not strictly "legal" in nature.³²¹ Courts should not interpret public policy narrowly: even legal principles that do not directly control the case at hand can be sources of public policy. However, general appeals to public policy may be less persuasive than sources of public policy encoded in statutes or regulations.

Of course, one may argue that public policy should not be interpreted so expansively and that this approach could be used by judges to hunt for reasons to find for sympathetic employee-defendants in CBI NDA cases. Some may even argue that, to prevent such a cherry-picking approach to public policy, the defense should generally be limited to policies that are firmly entrenched in statutes, regulations, and common law precedents. But there is good reason to think the public policy defense should not be so limited. As discussed above, public policy by its very nature seeks to preserve human and social values as a part of contract law.³²² And while potential threats to judicial impartiality are always of concern, this risk would be mitigated if judges simply considered both sides of the argument: if a judge identifies public policies against the enforcement of a particular CBI

³¹⁸ See *supra* note 24 and accompanying text.

³¹⁹ Demurrer, *supra* note 8, at 10.

³²⁰ See *supra* Part IV.

³²¹ See *supra* note 77 and accompanying text.

³²² See *supra* Part II.

NDA, she should attempt to see if those policies are counterbalanced by public interests favoring enforcement.

CONCLUSION

Much commentary on NDAs, especially of late, has been devoted to debates on whether, and to what extent, NDAs should be enforceable when they prevent individuals from speaking out on sexual assault or against political leaders,³²³ or even from blowing the whistle on corporate misconduct.³²⁴ As this Note has demonstrated, these discussions share a common thread: a belief that the nondisclosure mandated by NDAs could harm public interests, even as they confer private benefits. This Note has examined this common thread in the context of CBI NDAs. Though less studied, this Note has shown that CBI NDAs can present public hazards, as do NDAs in other contexts.

Courts face a significant problem when attempting to enforce business NDAs that protect information other than trade secrets. As this Note has demonstrated, courts assessing the enforceability of these NDAs must balance a business's interest in protecting valuable CBI with the potential anticompetitive impacts of broad NDAs. The public policy defense to contract enforcement provides a useful framework for courts to use in balancing these interests.

This Note has provided an overview of extant case law surrounding the enforceability of CBI NDAs, and it has proposed a structure, based on the public policy defense, for courts to use in analyzing these claims. In brief, on the private interest side, courts faced with an NDA protecting CBI should first consider if the CBI NDA was formed and negotiated fairly between equally competent parties—which, as discussed, will not be the case for many CBI NDAs between employees and their employers. Courts should also consider whether enforcing the CBI NDA would further or frustrate the policies of trade secret law. On the public interest side, courts should consider whether a CBI NDA is intended to be, or is actually, anticompetitive and whether any anticompetitive impact is mitigated by the CBI NDA's compliance with the jurisdiction's limitations on noncompete agreements. Courts need not stop there; because public policy is an open-ended defense, courts may identify other legal, political, or moral principles bearing on the CBI NDA's enforceability. This test would allow courts to protect CBI in which businesses have a legitimate interest while at the same time safeguarding employees' mobility and an open, competitive marketplace.

³²³ See *supra* notes 26–28 and accompanying text.

³²⁴ See *supra* notes 203–208 and accompanying text.