

**MEMO**

**DONAHOE & ASSOCIATES**  
**Boston, Massachusetts**

**To: Diana R. Donahoe**  
**From: Section 7 Associate**  
**Date: October 31, 2021**  
**Re: Client: Jenna Hunterson/Non-Competition Agreement**

**QUESTION PRESENTED**

Under Colorado law, are any or all of Ms. Hunterson's pie recipes secret when she modifies traditional recipes or invents originals and makes efforts to limit knowledge of them only to one other employee within her business?

**BRIEF ANSWER**

Yes, some recipes are secret. Hunterson's flagship "Pie Special" recipes are not well known outside the business since they are unique to her bakery. Although Hunterson's "Regulars" pies tweak known traditional recipes, evidence is lacking that these modifications are unique from competitor bakeries. Internally, the pie recipes are limited to Hunterson and Jemison on a "need-to-know" basis. Hunterson has taken reasonable precautions to protect recipes by locking them in a safe and diversifying her supply chain.

## **STATEMENT OF FACTS**

Jenna Hunterson opened Lulu's Pies (Lulu's) bakery in 2016. Lulu's pies include four "Regulars" that modify traditional recipes, for instance by adding zest to the filling and crust. Lulu's also sells a monthly changing "Pie Special," inspired by Hunterson's life events and tested through experimentation. Hunterson keeps all hand-written recipes in a safe with a simple combination. Only one of Hunterson's employees, Dawn Jemison, assists with the end-to-end pie baking process and signed a Non-Competition Agreement. Other employees partake in discrete processes and Hunterson displays confidentiality signs around the bakery. Food bloggers have attempted unsuccessfully to "reverse engineer" the "Pie Specials." Only one recipe was ever revealed, in a charity auction. Hunterson purchases ingredients from various suppliers who are not required to sign a confidentiality agreement. This memo is prompted by the development that Jemison intends to open another bakery in Colorado.

## **DISCUSSION**

Colorado state law voids non-compete covenants, except a "contract for the protection of trade secrets." Colo. Rev. Stat. Ann. § 8-2-113(2) (West 2021). "Factors to be considered in recognizing [the secret aspect] of a trade secret are: (1) the extent to which the information is known outside the business, (2) the extent to which it is known to those inside the business, *i.e.*, by the employees, (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information." E.g. Porter Indus., Inc. v. Higgins, 680 P.2d 1339, 1341 (Colo. App. 1984); Saturn Sys. v. Militare, 252 P.3d 516, 522 (Colo. App. 2011).

# **1. Known outside the business**

Knowledge of trade secret information must be limited outside the business. A trade secret may consist of publicly known components combined in a unified process, design, or operation that is unique or difficult to obtain. See Harvey Barnett, Inc. v. Shidler, 338 F.3d 1125, 1129 (10th Cir. 2003); see also Hawg Tools, LLC v. Newsco Int'l Energy Servs., 411 P.3d 1126, 1130-1132 (Colo. App. 2016); Colorado Supply Co. v. Stewart, 797 P.2d 1303, 1307 (Colo. App. 1990).

First, although Hunterson's recipes combine publicly and non-publicly known ingredients and techniques into unified processes, they vary in uniqueness between "Regulars" and "Pie Specials." In Harvey Barnett, Inc., 338 F.3d at 1129, a swimming instruction program was secret because well-known components were combined in a uniquely unified process. Hawg Tools, LLC, 411 P.3d at 1130-1132 also developed an industry standard test for uniqueness, finding designs non-secret when they lacked differentiating elements from competitors. As in Harvey Barnett, Inc., Hunterson's "Regulars" combine well-known traditional recipes with additional ingredients to create new unified processes. However, to pass the industry standard test used in Hawg Tools, LLC, Hunterson's recipe modifications must differ from other bakeries. Such evidence lacks. Lulu's popularity is not enough to demonstrate uniqueness of "Regulars," as Hunterson has excellent marketing and a cult-following for the monthly experimental "Pie Specials." It is highly unlikely that competitors sell comparable specialty pies. Thus, "Pie Specials" are most likely unique, while "Regulars" require more evidence to determine this.

Second, Hunterson's recipes show varying degrees of difficulty to obtain. In Colorado Supply Co., 797 P.2d at 1307, customer lists were not secret because they could easily be reverse engineered by customers or competitors with a phone book. Hunterson's "Pie Specials" recipes have not been successfully reverse engineered by food bloggers and cannot be looked up. One exception is the recipe Hunterson donated, which is now available to the hospice staff, at minimum. Alternatively, there are no known attempts to reverse engineer any "Regulars" recipes. Thus, while "Pie Specials" are difficult to obtain, additional evidence is again required to prove the same for "Regulars."

In summary, all "Pie Specials" recipes are sufficiently limited outside the business to be considered secret, except for the pie Hunterson donated to charity. Additional evidence is needed to show that "Regulars" are both unique and difficult to obtain by competitors and customers.

## **2. Known inside the business**

Knowledge of secret information must be limited to those inside the business, *i.e.* by the employees. E.g. Porter Indus., Inc. v. Higgins, 680 P.2d 1339, 1341 (Colo. App. 1984). Information within a business should be limited to employees on a "need-to-know" basis. See, e.g. Saturn Sys. v. Militare, 252 P.3d 516, 522 (Colo. App. 2011); Colorado Supply Co. v. Stewart, 797 P.2d 1303, 1307 (Colo. App. 1990). Similarly, in Port-A-Pour, Inc. secret information about the concrete mixing process was sufficiently limited when just two employees had access to locked and secured designs. Port-A-Pour, Inc. v. Peak Innovations, 49 F.Supp.3d 841, 867 (D. Colo. 2014). As in both Saturn Systems and Port-A-Pour, Hunterson limited knowledge of the pie recipes to just two employees on a "need-to-know" basis for baking: herself and Jemison. Other employees

were intentionally excluded. Perhaps because “Regulars” tweak common recipes, other employees may deduce recipes easily, even given Hunterson’s limited distribution. Yet this counterargument’s stronger application of the uniqueness rule does not follow from case law. Therefore, Hunterson’s recipes are sufficiently limited inside the business.

### **3. Precautions taken**

Precautions must be taken “by the holder of the trade secret to guard the secrecy of the information.” Porter Indus., Inc. v. Higgins, 680 P.2d 1339, 1341 (Colo. App. 1984). Precautions taken by the information holder should be reasonable in context, including investing time and money into a system of protection and utilizing methods to hide, secure, or encrypt information. See Saturn Sys. v. Militare, 252 P.3d 516, 522 (Colo. App. 2011); see also Hertz vs. Luzenac Grp., 576 F.3d 1103, 1108-1120 (10th Cir. 2009).

First, Hunterson invested a reasonable amount of time and money developing a system to protect her pie recipes. In Hertz, reasonable precautions for a manufacturing company included posting confidentiality signs in the office, confidentiality agreements, and restricting access to physical spaces. Hertz vs. Luzenac Grp., 576 F.3d 1103, 1108-1120 (10th Cir. 2009); see also Network Telecomms., Inc. v. Boor-Crepeau, 790 P.2d at 902 (collecting and shredding secret customer lists each week was sufficient precaution). Similarly, Hunterson protected her pie recipes by requiring a Non-Compete Agreement for Jemison and posting signs around the bakery. Going beyond Hertz, Hunterson’s supply chain diversification suggests a conscious effort to limit vendors’ knowledge of her ingredients. For a small bakery, Hunterson spent a reasonable amount of time and money building a system to protect her recipes.

Second, Hunterson's precautions included keeping the hand-written recipes physically hidden and secured in a safe. Analogously, in Saturn Systems a user and password-protected software platform was developed to limit information to relevant clients and employees. Saturn Systems v. Militare, 252 P.3d 516, 522 (Colo. App. 2011). Ms. Hunterson admittedly could have enhanced information security by digitally encrypting or changing the combination routinely. However, under the reasonability standard, Hunterson need not take every possible precaution. See Hertz vs. Luzenac Grp., 576 F.3d 1103, 1108-1120 (10th Cir. 2009). Hunterson's effort to secure information physically is sufficient for secret information.

## **CONCLUSION**

Only Hunterson's "Pie Specials" recipes are secret under Colorado Law, except for the recipe she auctioned to charity. First, Hunterson's recipes are unified processes combining well-known recipes with inventive approaches. "Pie Specials" recipes are inherently unique and difficult to obtain, as Hunterson invents monthly recipes that have never been successfully reverse engineered. However, additional evidence would be required to prove the uniqueness and difficulty to obtain the "Regulars." Second, Hunterson limited knowledge of all her recipes within the business on a "need-to-know" basis, only to herself and Jemison. Lastly, Hunterson took reasonable precautions to protect her recipes both by investing time and money into a system of confidentiality and supply chain diversification, as well as by physically securing her information.