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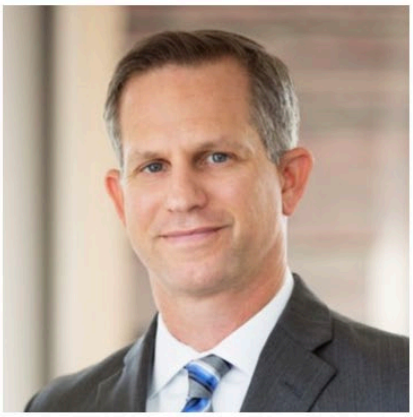
2021 Trade Secret Litigation Report

Join Lex Machina for this on-demand webcast releasing our 2021 Trade Secret Litigation Report. Be among the first to hear about the latest trends and insights for trade secret litigation in federal court. Hear from Gloria Huang, content associate, and co-author of the report, and our guest speakers, as they discuss the following topics:

- Case filing trends for various types of claims
- A review of the top jurisdictions by case filings
- Most active law firms and parties
- Case Timing to Key Milestones
- Case Resolutions and Findings
- Damages awards by year and judgment type

Speakers:



Seth Gerber
Partner
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Gloria Huang (00:00):

Good morning. My name is Gloria Huang, and I'm the legal content associate at Lex Machina. I'd like to welcome everyone to today's webcast on the 2021 Trade Secret Litigation Report. Today, we're going to be discussing the report and insights into trade secret litigation over the past few years to present. I'm joined by two fantastic guest speakers who I'll introduce in a moment, but before I introduce our speakers for today, I'd like to quickly address the webcast format. This will be a 30-minute discussion with our guest speakers, and if there's time remaining at the end, we'll take a few questions from the attendees. You can submit questions into the Q&A window at any time during the webcast, and if we don't have time to get to your question during the webcast, we'll reach out to you afterwards. A little bit about Lex Machina. We're a legal analytics company that helps our clients win in the practice and business of law.

Gloria Huang (00:50):

Everything you see during this webcast or in the report is available on our platform. We count over three quarters of the [inaudible 00:00:57] as our clients, so it's important to know the advantages that using Lex Machina can gain for organizations like yours. Now, I'm excited to introduce our guest speakers for today. We're lucky to be joined by Seth Gerber, partner at Morgan Lewis, and Dawn Mertineit, partner at Seyfarth Shaw. Before we dive into the legal analytics, perhaps you could each take a moment to tell us a little about yourselves, your practice, and how you use Lex Machina in your practice. Seth, let's start with you.

Seth Gerber (01:23):

Thank you, Dawn. My name is Seth Gerber. I'm a partner of Morgan Lewis. I am a trade secret non-compete litigator. I tend to use Lex Machina to stay abreast of the cases and opinions as they come in. I follow the damages awards, and often use it to pull up orders, as well as on occasion I'll take a look at people's briefing to see the arguments that they made.

Gloria Huang (01:51):

Thanks so much, Seth. Dawn?

Dawn Mertineit (01:54):

Thank you, Gloria. I am a trade secret and non-compete litigator. I'm based in Boston, but I do this work throughout the country, and in addition to the things that Seth mentioned, I also like to use Lex Machina to just get some good data points. For example, if you have a client who was going to be a plaintiff in a trade secret case, and you're trying to choose which jurisdiction to file suit in, if there are multiple places that it would be appropriate, you can get a lot of good data as to which jurisdiction might be preferable. And you'll see some of that, I think, today in some of the analytics that we're going to look at.

Gloria Huang (02:31):

Definitely. That's great, thank you. Well, welcome, and it's great to have you both with us today. Let's get straight into the data. Our first graph charts the overall trend in federal trade secret cases filed each year from 2011 to 2020. We can see that case filings were steady until an increase from 2015 to 2017, after which point they remained steady again through 2020. Now, two things to note is that first, the Defend Trade Secrets Act went into effect May of 2016, which is a likely related factor to the rise in trade secret case filings around that time. Second, that trade secret case filings remained steady through 2020, despite the pandemic and related shutdowns. Now, I was surprised that trade secret case filings remain steady through the pandemic. Dawn, is that consistent with what you've experienced in your practice?

Dawn Mertineit (03:18):

So I agree with you, I was initially surprised when I first saw this, because just in my own experience, in my own anecdotal evidence, I had a lot of clients who otherwise would have litigated, I think, but the matter hit right as the pandemic hit, so everyone was skittish about what was going to happen with their company finances and a lot of courts were shut down, and there wasn't a whole lot that people felt comfortable doing. So things screeched to a halt, initially. I do think that part of why it didn't take a huge dip is because where so many people were working remotely, there was perhaps increased opportunity to misappropriate trade secrets. So I suspect that if you looked at month-over-month data, you may see that at the end of the year, there were more filings, or mid-year to the end of the year, which sort of balanced it out a little bit. But I was surprised that it was as high as it was this year, and I'm curious to see what happens for the 2021 year.

Gloria Huang (04:17):

Right, that makes sense. Seth, what are your thoughts?

Seth Gerber (04:21):

Well, I think you've seen a 30% rise since May 11th 2016, when the DTSA became effective, and that will likely continue to rise with respect to the federal court filings. I agree with Dawn that the remote working environment has created situations which tend to lend to more trade secret filings, just because people may be emailing documents to personal email addresses, circumventing computer systems so they can work remotely, print at home, and things like that. And if they leave the company, you may find more lawsuits where people are accused of stealing information, when they were simply working remotely. I think as the courts and particularly the federal courts get through their backlog of trials in the coming year or so, and as more employees transition from one company to another, you might see another increase in trade secret filings.

Gloria Huang (05:22):

That's great, thank you. And your observation about DTSA case filings segues nicely into our next slide, which focuses on DTSA case filings. Now, one way that Lex Machina allows you to refine our data is by filtering for subsets of cases. We use machine learning and review by our attorneys to add text to cases which then enables users to filter or exclude in order to drill down to the specific case that they're interested in. In this figure, we're looking at the numbers of trade secret cases that involve the DTSA claim that were filed from 2016 to 2020, and we can see that the numbers of these cases increased sharply between 2000 and 2017 before plateauing and then decreasing slightly between 2019 and 2020. There were slightly fewer trade secret cases overall, but slightly more had DTSA claims, with 72.9% of trade secret cases having a DTSA claim in 2020. Seth, looking at this data, do you see this as approaching a new normal for trade secret cases involving DTSA claims?

Seth Gerber (06:19):

I do. I think it's pretty common now to see both this estate version of the UTSA claim filed along with the DTSA claim, and I think as you continue to see an increase in cross-border litigation to address misappropriation overseas, you might see even more DTSA filings.

Gloria Huang (06:42):

That's interesting. Dawn, my question for you is a large percentage of trade secret cases have DTSA claims, and we're seeing both DTSA and state law claims. Could you speak to the litigation strategy of including both?

Dawn Mertineit (06:56):

Sure. So in my experience, if there's an opportunity to have more than one claim, even if it's more or less based on the same set of facts and circumstances, clients typically want us to allege as much as we can. So a DTSA claim is great, and can provide a hook into federal court jurisdiction which is great, but oftentimes, clients still want us to have the state law version. Now, whether it actually makes a difference is unclear to me. When the DTSA was first passed, I think everyone thought that it was going to create uniformity. Even though all states except New York right now have some form of the Uniform Trade Secret Act, each state interprets it a little bit differently. But what I have found is that even with the supposed uniform DTSA, we're seeing different courts analyze them along the same lines as the state court counterparts. So I'm not sure that it makes a huge difference to have both the DTSA claim and the state court UTSA claim, but that seems to-

Dawn Mertineit (08:03):

... the DTSA claim and the state court UTSA claim, but that seems to be what we're seeing still.

Gloria Huang (08:06):

It makes sense.

Seth Gerber (08:07):

If I can just comment on that for a second, Gloria. I think if you're looking at discovery between states who are trying to get in front of federal jury, the DTSA claim gives you that subject matter jurisdiction in federal court. So there's a lot of factors that you have to analyze on where you want to file your claim. Look at the differences between the state version of the UTSA and the DTSA and decide whether you want to go state or federal, whether you include the DTSA claim in state court or not. To me, the analysis really comes down to where you want to file. Do you want to proceed in federal court or state court? And the DTSA obviously gives you that subject matter jurisdiction.

Gloria Huang (08:51):

Interesting. That's great. Thank you. Moving on to the next slide, on a slightly different dataset. We have two tables. Now on the left, we have the most active districts, and on the right, the most active judges, both from the five-year period of 2016 to 2020. For each district and before each judge, you can see the total number of cases filed in 2020 and filed in total for the five-year time period. The fourth column lists the total proportion of overall trade secret cases filed in each specific district.

Gloria Huang (09:23):

We can see from the data that the top three districts are the Central District of California, the Northern District of Illinois and the Southern District of New York. And the top three judges are Judge Mazzant in the Eastern District of Texas, Judge Pitman in the Western District of Texas and Judge Barrett in the Southern District of Ohio. Dawn, looking at this data, is there anything in these tables that surprises or jumps out at you?

Dawn Mertineit (09:44):

So, not surprising. But the thing that jumps out at me is that when you're looking at the districts where the most cases are filed with these sorts of claims, a lot of them are in large population centers, which makes sense because oftentimes these cases are brought when an employee misappropriate trade secrets. And so you would expect that in an area where there are more employees like Central District of California, or in

Chicago area, in New York, you'd see more of those cases. That's not surprising, but I think that explains why you're seeing some of those jurisdictions having the highest numbers of filings.

Gloria Huang (10:26):

Great. Thanks, Dawn. How about you, Seth? Do you have any thoughts on this data?

Seth Gerber (10:30):

Sure. I agree with Dawn's point. I mean, California doesn't surprise me. As a California based litigator, it's one of the largest economies in the world as a state by itself and obviously with high technology in the state. So there's a lot of opportunity for either external actors or insiders to misappropriate trade secrets. California also bans covenants of not to compete generally. And so you tend to see litigation being focused on the theft of confidential or trade secret information, as opposed to stopping competition through a covenant of not to compete.

Seth Gerber (11:06):

New York doesn't have the UTSA. They still rely on the common law. And I believe under the common law, they don't allow on Justin Richmond. So if you're seeking that kind of remedy, filing a DTSA claim can provide you with that hook. And Illinois being the birthplace of the inevitable disclosure doctrine, I'm not surprised you see a lot of filings there as well.

Gloria Huang (11:30):

That's great. That makes sense. Moving on from most active districts and judges to most active law firms. On the next slide we have two tables that show the most active law firms in the same five-year period from 2016 to 2020. On the left you see the top plaintiff's law firms and on the right are the top defendant's law firms. You can also see how many districts each law firm was active in. I would also note that Seyfarth Shaw appears high on the list of top plaintiff's firms, so congratulations, Dawn. Seth, I'm seeing a lot of employment firms on these lists and several firms that appear on both lists for both plaintiffs and defendants. Would you say that, in your experience, that's unusual or common?

Seth Gerber (12:08):

I think that's common. The insider threat employees that you've trusted with information who walk out the door with it is a very common fact scenario. So you see typically either employment firms litigating these types of matters or intellectual property firms that might focus on the more hard trade secret cases in the sense of like soft trade secret cases maybe the customer lists, customer information type trade secrets. But when you're talking about a sophisticated technology, you might see more IP firms getting involved.

Gloria Huang (12:44):

Makes sense. Thank you. Dawn, what do you think? What are your thoughts on these tables?

Dawn Mertineit (12:49):

Yeah, no, I agree with what Seth said. I think it's pretty common to have employment firms handling these sorts of cases, because, again, oftentimes it's an employee who is misappropriating information. So whether it's the labor and employment group who's handling this or someone else, I think a lot of clients often go to their employment counsel because it seems like a natural fit. It's an employment related claim for a lot of these cases.

Dawn Mertineit (13:20):

In Seyfarth case, our trade secret group is actually housed in the litigation group as opposed to the labor and employment group, but still a lot of our work comes that way through the labor and employment council who have clients who say, we need to get a trade secret litigator ASAP. This list doesn't surprise me at all. And it is interesting to see that there are a lot of same names on either side on the plaintiffs and the defendants side. But I do note, Seth, that Seyfarth we're on the plaintiff's firm at the top 10 and Morgan Lewis is on defendant's firm for top 10. I don't think either one is on the other list. So I think that's interesting.

Gloria Huang (13:57):

That's true. I apologize. I was remiss to mention Morgan Lewis. All right. Moving to the next slide. This figure presents the grant and denial rates of permanent injunctions, preliminary injunctions and temporary restraining orders for cases terminated from the same five-year period, 2016 to 2020. The data split between the grant and denial rates on the merits on default judgment and on consent judgment. Looking at this data, Dawn, are you surprised by any of this data or is it consistent with what you would expect?

Dawn Mertineit (14:31):

I'm not terribly surprised by it. When you look at the slight difference in percentages, the TRO stage being higher than the preliminary injunction stage, 65% grant rate to 54% grant rate, that doesn't surprise me because in my experience, judges, I think are more willing to grant TROs because it's usually a very short period of time, 10 days or so. Maybe it'll get extended, but judges don't want to extend it much beyond that. Whereas for preliminary injunction, that's going to last for the life of the case, and I think a lot of courts are hesitant to grant preliminary injunctions.

Dawn Mertineit (15:09):

That part doesn't surprise me. In a way, I'm a little surprised that the TRO percentage is not higher because I think oftentimes if you're going through the trouble of getting a case like this into court, it can be very expensive and time consuming to do so. So oftentimes I think that if we're going to do that, we have a lot of evidence that something bad has happened. I think I'm a little surprised that it's just 65%, although that does seem like a pretty high percentage anyways.

Gloria Huang (15:41):

Right. That's interesting. Seth, what do you think?

Seth Gerber (15:44):

Well I agree with Dawn that I think it is a little surprising you don't see a higher percentage with the TRO stage. In my experience, judges tend to want to maintain the status quo and allow expedited discovery to go forward and have a full evidentiary hearing for-

Seth Gerber (16:03):

... have a full evidentiary hearing in it for a preliminary injunction. I think it's also notable that we're not seeing, and you don't see a column here for ex party seizure orders under the DTSA. There've been very few of those cases. And so, you're still seeing the traditional approach of a pre-law student investigation, forensic analysis coming in on a TRO and then expedited discovery and a PI. And you're not seeing a flood of ex party seizure order cases under the DTSA.

Gloria Huang (16:31):

That's interesting. Thank you. Moving on to the next slide on case resolutions, we see a breakdown of the case resolutions for cases terminated in the five-year period from 2016 to 2020. On the right, we see that 67% of cases likely resolved in the settlement, while 16% resolved on procedural grounds. On the left, we saw that claimants won over four times as often as claim defendants, but a closer look shows us that this is largely due to the high number of consent judgements in this practice area. Looking at the merits, claimants won four times as often in cases that resolved at trial. Now, Seth, is this consistent with what you've experienced in your practice?

Seth Gerber (17:14):

Yes. I think not many cases in federal report under the DTSA tend to go to trial or they haven't yet. Obviously, there's been a big backlog in the last year in federal court, but most of these cases, you take two years of litigation or 18 months of litigation and compress it down to two to three months. And there's a lot of work that goes in before you filed a lawsuit and seek the TRO expedited discovery. Sometimes you can get 20 depositions in two weeks. Sometimes you get four or none, but usually everything gets compressed down and by the time you've gone through an evidentiary hearing for preliminary injunction, the parties have a pretty good sense of what the evidence will show and how the judge feels about the case. And then often, the cases will resolve thereafter through mediation or just by the parties. So I think given the expedited nature of these type of cases, that results in a lot of resolutions early on.

Gloria Huang (18:19):

That makes sense. Dawn, do you have any insights on this data?

Dawn Mertineit (18:24):

I would just agree with Seth. If anything, I think the 67% settlement seems a little low because I agree, oftentimes we work these cases up very quickly for the TRO and PI stage. And then that really informs not only if you actually get the injunction or not, but as Seth pointed out, the discovery that you get, you probably get 90% to 95% of the important discovery you want in a very short period of time. So all of the parties have a pretty good view of what the case is going to be. And so, it often makes sense to settle at that point and find reasonable parameters rather than risk a poor outcome in front of the judge.

Dawn Mertineit (19:09):

So 67% settlement, if anything, I think seems kind of low compared to my experience. I also think it's interesting if you look at the trial data that so many claimants win versus defendants, but one thing we had talked about in the lead up to this presentation was that for cases where you have worked up all of the important discovery early on, and you still proceed, you don't settle. That usually means that the claimant feels pretty strongly about their case and they have a lot of really good evidence. So perhaps it's unsurprising that at the time you get to trial, if you haven't settled, you have a much likelier chance of winning at trial than if you were the defendant.

Gloria Huang (20:00):

Right. That makes sense. Great. Thank you. Moving on to the next slide, on this slide, this findings chart displays a selection of the trade secret findings you will find in the report and on our platform. Findings are manually added by our attorney legal editors at different procedural events and litigation, such as summary judgment and trial. Here, we can see that courts found no state law trade secret misappropriation most frequently on summary judgment in cases that terminated between 2016 to 2020. And the second highest

finding was state law trade secret misappropriation on default judgment. Lex Machina annotates ways that ownership or validity claims fail with failure to identify trade grid being the most popular reason. You can see here, most often found at summary judgment. Dawn, is this data relevant to your own experience and practice?

Dawn Mertineit (20:55):

It is, and just that last figure that you pointed out, the failure to identify a trade secret. That is often a critical component of litigation, and it often comes relatively early, as you can see right next to the red box there. It occasionally happens on judgment on the pleadings. That's still a relatively high number there, 39. But if by summary judgment, you have not figured out how to identify your trade secret and prove to the court that what it is you're fighting over really is a trade secret, it's going to be difficult if not impossible to advance. The other thing that is really relevant for me, earlier you saw that Seyfarth does a lot of plaintiff's side litigation. So when it comes to this sort of work, we look at the willfulness and the malicious behavior because under the DTSA, you can get exemplary damages if you prove willful or malicious misappropriation. So I found this figure to be really surprising because at trial here it shows that 20 findings of willfulness have been made, which I think is pretty high and promising for someone who is in the plaintiff's seat more often than not.

Gloria Huang (22:06):

Right? So a bit of good news. Seth, how about you?

Seth Gerber (22:11):

I think they're the major battleground in my experience nowadays is over the identification of trade secrets and particularly in situations where you have a very sophisticated technology that reflects improvements on prior art. And so those battles have been going on and quite often now. If in federal court, you're seeing more motions to strike being filed, if there has been an order to identify trade secrets with greater specificity and a failure to do so, you tend to see the defense then moving to strike certain allegations, in addition to an option of going for a summary judgment later on.

Seth Gerber (22:55):

On the new state law, trade secret misappropriation, I think that just comes down to people trying to get past the factual disputes that may arise over whether something is or is not a trade secret, and really focusing on the fact that there may have not been any improper acquisition use or disclosure of the information, and that can result in summary judgment. I hope to see an increase in litigation over the secrecy element. I think courts may turn to that like they have on identification and given the many ways in which bad actors can misappropriate information with technology. You may see courts increasing their focus on whether companies have exercised reasonable measures under the circumstances to prevent theft of electronically stored information.

Dawn Mertineit (23:47):

I think that will [inaudible 00:23:49] really interesting. Sorry to interrupt, but just to hop on that, I think that will be particularly interesting to see as we start to see more and more cases that involve misappropriation during remote work in the pandemic, because I think-

Dawn Mertineit (24:03):

... during remote work in the pandemic, because I think, under the DTSA, you need to take reasonable measures. Well, what is reasonable? It depends on the circumstances. And I think we may see, okay, in a

pandemic, when you have people working from home, you're going to need different measures for us to consider that reasonable. So I'm curious to see what's going to happen in the next few years with that.

Gloria Huang (24:21):

Definitely. It sounds like it'll be interesting. Thank you. Moving on to damages. The full Trade Secret Report has more information on damages, but we can see on this slide the Total Trade Secret Damages from 2016 to 2020 categorized by type. We've listed the type of damage, the number of cases reporting that category of damages, and the total amount awarded in all of those cases. The top three line items are the three types of damages that Lex Machina annotates specifically for trade secret cases. So actual damages/lost profits, punitive/willfulness damages, and reasonable royalty. Other/mixed damages is our largest category because judges tend to lump in trade secret damages with contracts damages, torts damages, and other IP damages. It's important to know whether your judge has done this in the past. Seth, looking at this data. Do you have any insights into the information on damages presented here?

Seth Gerber (25:14):

Well, trade secret theft is a huge problem, obviously, in the United States and it's costing billions of dollars to our economy and many, many American jobs. These numbers reflect to me still a small fraction of the overall amount of trade secret theft that's going on in the United States, so I would expect to see larger awards in the future as you see more and more trade secret litigation going on, particularly in federal court and involving cross border [inaudible 00:25:50]. So I still think DTSA is a new statute, May 11th, 2016. Courts are becoming more familiar with it and you'll see more trials happen in the future, I believe, and increased damages. These will eventually be big cases because it's a multi-billion dollar problem.

Gloria Huang (26:13):

Interesting. How about you, Dawn? Any thoughts?

Dawn Mertineit (26:16):

Yeah, I agree. I think even though the statute is now five years old, that's still relatively new, so a lot of cases, even that were brought in the first few years, could still be winding their way through summary judgment and getting geared up now for trial. For example, I have a trial later in this year that the case has been going on for several years. So I think we'll start to see those numbers tick up a bit as it catches up with the new filings post-DTSA. So I agree with Seth that these are big numbers but compared to the cost to the American economy, they could be a lot bigger and I think they will start to increase over the next few years.

Gloria Huang (26:57):

That's great. Now, looking at our time, and we're nearing the end of our allotted time today and I want to be respectful of everyone's time, but first I want to thank you both so much for joining me today. It's been great to hear your thoughts on this data and how it relates to your experiences in trade secret litigation. If I could trespass a little bit longer, I see a few questions have come through and I think we have time to squeeze in one of them. The question is for both of you, and the question is, what do you think is coming up for trade secret litigation in the next few years? I know that you both touched on this a little bit already in some of your comments, but do either of you have any additional thoughts on this?

Dawn Mertineit (27:35):

I mean, I do think, just to reiterate some of what we've already talked about, I think we'll start to see more and more filings, especially as folks start to get more comfortable with the idea of federal judges becoming familiar

with the DTSA. I do think given the pandemic we're going to start to see more filings based on employees who may have taken something while at home, whether intentionally or otherwise, especially as people start to get back into the workplace and employers start to learn a little bit more about what happened when their employees were at home, and as you said, with individuals moving from one employer to another.

Gloria Huang (28:17):

Right, that makes sense.

Seth Gerber (28:19):

I think you'll see more multi-dimensional aspects to litigating trade secret cases where you look at things not just from a state or federal court action, but you're also analyzing potential ITC claims, listing entity, regulatory solutions. You might be proceeding with criminal prosecutions to the extent the trade secrets might involve high technology or military products or aerospace in that nature. So I think practitioners in this area will have to look at their avenues in a multi-dimensional way and not just focus simply on a civil action in state or federal court. And you'll see more international litigation, which was certainly one of the reasons the DTSA was passed, to address foreign governments and foreign actors who are misappropriating American technology.

Gloria Huang (29:19):

That's great. Thank you. I see a few more questions will come in. I'm going to impose a little bit more and squeeze in one more quick question. The question is, have you seen any trends in which trade secret litigation is more or less often filed against individuals or employees versus companies or both? Do either of you have any thoughts on those kinds of trends?

Dawn Mertineit (29:40):

So, in my experience, there aren't necessarily trends. It's really case specific and whether you really want to bring the company in, and you've got the hook there where the company is now a named defendant, or if you want to see the company will leave their new employee out to dry. So I don't know that there are trends, in my experience, but I do think it's just a strategic decision based on the specific facts of the case.

Gloria Huang (30:11):

Right.

Seth Gerber (30:11):

I agree with Dawn. I think it's really facts specific. There are many companies, obviously, that take measures to ensure that when onboarding employees they don't want to contaminate their systems with another competitor's information and they discourage new employees from taking or using any of their former employer's information. But I think it's really fact specific. You have to analyze what that company was doing in onboarding and then as well as what the individual actor may have done on their own.

Gloria Huang (30:42):

That makes sense. Great. Those are great questions, thank you. And thank you for your responses. If we didn't get to yours, my apologies. We'll definitely reach out to you after the webcast. I want to, again, thank everyone for joining us today. As we've mentioned, the highlights we've covered today are only a small selection of the insights in the report. So definitely make sure to check out the full report. Everyone will receive an email that explains how to get the report. And if you're already a customer, the report will be

available in the Help Center later today. If you have any additional questions, please feel free to reach out to anyone on the Lex Machina team. Take care. Be well.