

PROTECTION OF TRADE SECRET OWNERSHIP IN COMPANY: SURVEY IN PHAPROS AND LOMBOK GANDARIA FOODS INDUSTRY

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PROTECTION OF TRADE SECRET OWNERSHIP IN COMPANY: SURVEY IN PHAPROS AND LOMBOK GANDARIA FOODS INDUSTRY

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ABSTRACT

Trade secrets representing the R&D, investment, creativity, and initiation of a company's business are a strategic asset of a company and a key factor for the company to maintain and develop its competitive advantage. The obligation to maintain confidentiality should always be pursued by the owner of trade secrets in order for legal protection of trade secret rights to remain. The objective of the study was to analyze the implementation of trade secret protection in Company of PT Phapros and PT Lombok Gandaria Food Industry and its research method was empirical juridical. The results of the research is that the implementation of trade secret protection in company shall be made through an employment agreement between the company and the employee during employee recruiting, for the incumbent personnel and the terminating employees. In addition to the employment agreement, the company also makes procedural policies to protect its trade secrets. The implementation of trade secret safeguards in PT Phapros and PT Lombok Gandaria is conducted through Particular Working Agreements (PKWT) and Non-Specific Time Working Agreements (PKWIT) that bind workers to keep company secrets of the company's trade secrets from the beginning worker's work period until the rest of the life of the worker. The company regulation policy on access restrictions and security facilities are also carried out, but the implementation of the security facilities of PT Lombok is more comprehensive, while PT Phapros work agreement is more detail to regulate the obligations of the parties to keep the information confidential. The employment agreement and company rules are evidence that the trade secret owner has made reasonable efforts and also as evidence in court of the infringement of trade secret rights.

Keywords: Protection, Trade Secrets, Work Agreement, Company.

INTRODUCTION

Intellectual Property Rights are property in the form of someone creation of mind (Thumm, 2013). Its recognition and protection are managed by Trade Related Aspect of Intellectual Property rights (TRIPs) under WTO. Section 7 TRIPs regulates trade secret (Susilowati, 2013). Trade secret is closed information in technology/ business field, confidential and having an economic value (European Commission, 2013; OECD, 2015). Law No. 30/2000 Article 1 defines trade secret as information that is not known publicly concerning technology and business field that has economic value because the information is useful for business activities, and that the secrecy is protected. Trade secret protects information that has economic value and is secretive, meaning that the information is closed/secret, not generally known, not easily accessed and only revealed in order to keep its secrecy, commercial and can increase economic benefit. Thus, to protect the secrecy of the information, the holder has to protect its secrecy (Martini et al., 2017). The holder of trade secret must always make an effort to protect

the secrecy (Bressler & Bressler, 2015; Yerezhpekyzy et al., 2017). It is the obligation of the holder so that legal protection over trade secret still can still be applied (Quinto & Singer, 2009; Ram, 2016).

Protection of trade secret is necessary for a company because it can protect all information of a company which has economic value (Ram, 2016; Prayogo, 2018). Moreover, trade secret representing the result of R&D, investment, creativity, business initiation is a strategic asset for a company and is key factor for a company to maintain and develop its competitive excellence. In practice, any information concerning trade secret attaches in production activity and company operation (Risch, 2007; Passman, 2016). Company activities are run by Directors as Limited liability organization. Directors, in running the activities of the company, are helped by their workers through the granting of power and work agreement. The granting of power includes the power or authority to keep the secrecy of the company. However, in practice, trade secret infringement is committed by the workers (Tunggal & Herjandono, 2000; Roisah, 2013).

A case in 2008 between PT Basuki Pratama Engineering and PT Hitachi Construction Machinery Indonesia is the example of trade secret infringement committed by workers. This case began when some workers who during their employment period were given authority to know and run production and boiler machine selling method by PT Basuki Pratama Engineering resigned then later were hired by PT Hitachi Construction Machinery Indonesia. The formers workers violated PT Basuki's information by revealing it to PT Hitachi. This trade secret violation brought loss for PT Basuki worth for Rp. 127 billion. Another case of trade secret infringement happened between PT Ceres Indonesia and their 2 employees, but this case failed to prove the violation against trade secret.

Based on the previous case aforementioned, this research focuses on the effort of the owner of trade secret right through employment agreement over the workers who accept power under the supervision of directors in a limited liability company. Here are the formula of the problem in this research:

1. What effort is made by the owner of the trade secret to protect trade secret through regulation of limited liability company?
2. How is the implementation of trade secret protection through employment agreement in limited liability company?

The types of information that is considered secret are different from one company to the other, however company's trade secret generally covers: computer programs, client identities, product pricing, manufacturing processes, technical information, technical information, prototypes, company manuals, financial statements, customer lists, vendors, market analysis and strategies, formulas, product testing results (positive and negative), drawings, strategic plans, employee records and salaries, product ingredients (foods, cosmetics, or drugs, etc.) (O'Donnell et al., 2008). This research was conducted in PT Phapros and PT Lombok Gandaria. PT Phapros, Tbk is a national pharmaceutical company producing 137 drug items. 124 among them are non-licensed drugs. Meanwhile, PT Lombok Gandaria is a company producing soy sauce, ketchup, vinegar and syrup with secret recipes and the company own development. These two companies have fulfilled the parameter of limited liability companies which have trade secret and conduct its protection procedure. Therefore, these two companies are qualified to answer questions of the formula of the problems. Thus, the study aims to analyze the protection of trade secret ownership and employment agreement by conducting the survey in two companies in PT Phapros, Tbk and PT Lombok Gandaria.

RESEARCH METHODOLOGY

Research is a scientific activity that tries to solve problems systematically using certain methods and techniques. This research on law, the researcher used research method that has been determined, i.e. empirical juridical research. Juridical empirical is a research on law that is developed and has a concept that is based on a doctrine used by the researcher of this study (Idrus, 2007; Rasjidi & Putra, 1993). The approach method is conceptual and statute approach (Sunggono, 2006; Marzuki, 2006). This research also applied analytical descriptive method which describes the implementation of the owner of trade secret protection through employment agreement analyzing based on legal theory and any regulations concerned (Soekanto & Mamuji, 2011; Wignjosebroto, 2002). The method of data collecting is literature study and questionnaire. Data analysis method is qualitative analysis.

Trade Secret Protection in Limited Liability Company Activities

The assessment of the effort to protect trade secret implemented by the company was conducted by the enactment of company regulation made by directors of the company. James Pooley states that plan to protect trade secret must be based on four principles: the first is inventory principle. Proper inventory of information is the first effort to protect trade secret. The second is simplicity principle. A simple mechanism makes it easier to carry out the protection. The third is responsibility principle. There must be supervision for trade secret protection. Re-examination principle. Based on those four principles, the realization of company regulation can be as follows:

- 1) Training of employees on duty: The training from the company for their employees on the importance of keeping the secrecy of trade secret and the risk that they will face if they violate procedure of company's secrecy, minimizing the possibility of trade secret revelation.
- 2) Protection Facilities
 - a) Manufacture Security: It is aimed at guarding manufacture area.
 - b) Action of Visitor Prevention: It is aimed at watching visitors not to access the place where trade secret is saved.
 - a. Document Security: This is implemented using grouping system and document "secret" and "general" marking.
 - c) E-document Security: Determining physical and electronic security. . Saving using password system, and not freely accessed.

RESULTS

The Implementation of Protection Effort by the Owner of Trade Secret Right

The implementation of Trade secret protection in limited liability company's activities in PT Phapros, Tbk is based on the following James Pooley's principles:

1. Inventory principle, protection of document and e-document security is implemented by labeling "secret" on the cover of the secret document, grouping of the degree of information secrecy and storing those secret documents in any places that are not easily accessed.
2. Simplicity Principle. Simple mechanism to identify visitor is by providing ID card that must be used by visitors when they enter the company area.

3. Responsibility principle. The parties responsible for the implementation of company's trade secret protection are security officers who are responsible for the security of the area, Personalia who are responsible for selecting the workers who can keep secret of the company, division manager who is responsible for making sure that the working area is always in order and well organized.

In the implementation of trade secret protection, according to Article 3 section 1 law No. 30/2000 concerning "*reasonable effort*", PT Phapros conducts a proper effort to protect its trade secret. This effort is done in order to keep the company's right of ownership. If the company does not do this effort to protect its trade secret, the secrecy of the trade secret will be threatened.

The weakness in PT Phapros's effort to protect its trade secret is the lack of work training to improve workers' awareness of the urgency of keeping and maintaining the company's trade secret as regulated in Law No 13 year 2003. It is expected that work training can create a synergy effort to protect trade secret.

The Implementation of Trade Secret Protection

The implementation of Trade Secret Protection during limited liability company's activities in PT Lombok Gandaria based on James Pooley Principle is as follows:

1. Inventory principle. Protection of document security is done by labeling "*secret*" on the cover of secret documents. The protection of electronic document is done through "*legend*", meaning that every emailing activity is monitored by the president director and if the president director notices any violation, he can fire the worker who commits it. This is in accordance to Article 158 section 1 letter (i) Law No. 13/2003.
2. Simplicity Principle in document protection is performed in two ways. First, documents are categorized as secret and general. Second, for electronic document, the protection is performed by email centralization access. The email can only be accessed by managerial level.
3. Responsible Principle, Parties who are responsible for the implementation of the company's trade secret protection are first, personalia, who is responsible for work training to improve workers' understanding and urgency of keeping trade secret secrecy, second, Security officers, who is responsible for the security of the area according to the need and arrangement of PT Lombok.
4. Reexamination Principle. This is performed by PT Lombok by evaluating security system and frequency of violation committed by workers once every six months.

Reasonable effort, as contained in Article 3 section 1 Law No. 30/2000 has been thoroughly performed by PT Lombok Gandaria. This effort is done in order to maintain the ownership of company's trade secret because PT Lombok Gandaria will lose the ownership if they do not do any protection effort. The weakness of the protection effort is that email centralization access weakened the security of the system. In addition, there is also no further arrangement for monitoring access at managerial level.

Comparison of the Implementation of Protection Effort by the Owner of Trade Secret in Limited Liability Company in PT Phapros, TBK and PT Lombok Gandaria.

Both PT Phapros and PT Lombok Gandaria apply two protection mechanisms, namely:

1. The effort to protect the company's area.
2. The effort to protect through inventory.

However, there are some differences in the implementation of protection between PT Phapros, Tbk and PT Lombok Gandaria. The first difference is the categorization of trade secret information which is according to each company's field of business (Table 1). The categorization of information is based on Article 1 and Article 2 Law no. 30/2000, meaning that information

can be categorized as trade secret it brings economic advantage and is known by public. The information covers production method, processing method, selling method, and the other information concerning technology and business field.

The second difference is the development of trade secret. The development of PT Phapros's trade secret is carried out through research conducted by internal and external party. Meanwhile, in PT Lombok, the development is carried out through company research only. This difference appears because the identification whether information is valuable or secret is determined by the concerning company.

The third difference is the party that accesses the trade secret. PT Phapros consists of managerial and operational top management while PT Lombok Gandaria consists only of top management.

No.	Items	Phapros	Lombok Gandaria
1	Categorization of trade secret information.	The information covers production method, processing method and selling method.	The information concerning technology and business field.
2	Development of trade secret.	Carried out through research conducted by internal and external party.	Carried out through company research.
3	Access to trade secret.	Managerial and operational top management.	Top management.
4	Protection for trade secret.	There is no complete information regarding this matter.	Conducted in detail and comprehensive through worker training as well as providing protection facility in the company.

The implementation of protection effort in each company refers to Article 3 section 1 Law No. 30/2000, which is by conveying measurement for fairness, properness and standard procedure in company's internal provision. In general, it can be concluded that in conducting protection for trade secret, PT Lombok Gandaria is far more detail and thorough because this company conducts the protection through worker training as well as providing protection facility in the company. This type of effort is considered very effective in preventing the misappropriation of information either by internal party, in this case the workers, or external party, in this case visitors or third party.

The Implementation of Trade Secret Protection through Employment Agreement in Company

The implementation of trade secret through employment agreement by requiring employees not to reveal company's trade secret is workers' services for the interest of employer based on employment agreement. Agreement not to reveal company's trade secret is a proof that the owner of the secret makes an effort to protect his/her trade secret. The company must also set up a procedure so that the agreement is obeyed.

In general, protection of company's trade secret through employment agreement is performed during employee recruiting, for incumbent personnel and in the end of work period (terminating employees).

The implementation of trade secret rights protection is carried out in PT. Phapros Semarang and PT. Lombok Gandaria.

PT Phapros, Tbk, located in Jl. Simongan No. 131 Semarang is a Pharmaceutical company producing Over the Counter medicine (OTC), Generic Medicine (OGB), ethical medicine as well as Toll-in manufacturing is a subsidiary of PT Rajawali Nusantara Indonesia (RNI) which now holds 56.6% of the company share while the rest of the share is owned by public including their employees. PT Phapros based on the company annual report 2016 records Rp. 87 billion of current earning of the year, growth as much as Rp. 23.99 billion or 38.08% compared to year 2015 as much as Rp. 63.01 billion. The amount of another comprehensive income of current of year of 2016 is as much as Rp. 203.18 billion or 215.13% compared to year 2014 as much as Rp. 64.47 billion.

PT Lombok Gandaria Food Industry which begins as home industry has been established since 1973 and in 1979 it converts into limited liability company. PT Lombok Gandaria, located at Jl. Raya Jaten KM 7, Karanganyar District Central Java, is a leading limited liability company in food and beverages industry. The products are namely; soy sauce, ketchup and vinegar. Sweet soy sauce alone has some variants such as red, green, yellow Lombok Gandaria soy sauce, Semar soy sauce, Bagong soy sauce, Delima soy sauce, and Manggis soy sauce. Lombok Gandaria ketchup is made in 2 variants of flavors, chili and tomato ketchup. Meanwhile, Lombok Gandaria vinegar consists of 2 types, 5% vinegar and 25% vinegar.

The Implementation of Trade Secret Protection through Employment Agreement in PT Phapros

Protection of trade secret through employment agreement carried out by PT. Phapros Tbk is implemented through employees recruitment and termination of employment. Prospective employees who pass the recruitment selection will be hired based on the employment agreement. Phapros has 2 types employment agreements, namely; Fixed-term Employment Agreement, hereinafter referred to as PKWT and Indefinite-term Employment Agreement, hereinafter referred to as PKWTT. The parties involved in both of these agreements are the employee who is the new worker and the employer who is the personalia manager based on letter of attorney No. 020/s.Ks/LE/V/13. Both in PKWT and PKWTT agreement, there are clauses yang describing the obligation of the workers to protect and not to violate any information either secretive or general information for personal or other party interest that will cause losses for the company party and others. PT Phapros' effort to protect trade secret implemented through Incumbent Personnel policy in PKWTT agreement is an agreement which applies for workers who have passed training session and has proper performance according to Phapros's work standard. PKWTT also regulates obligation to protect trade secret and also the obligation to make sure and set work place that it can accommodate the secrecy of the trade secret. This includes giving limitation for workers dealing with the secret to access it. The protection of trade secret during the termination of employment is implemented by PT Phapros Tbk through Exit Review. There is an agreement that requires workers who resign or whose work contract ends to keep the company's information secret, known as "*Clearance Sheet*". Clearance Sheet agreement requires workers to describe the work that they take in charge of since the beginning of the training period to the last

day of the resignation or termination of employment. Then, the workers are also asked to describe cooperation relation among departments in the company during their employment in PT Phapros. After that, the workers are asked to describe any information they have known about the company in detail, including any documents and researches or any projects conducted during their employment in PT Phapros. Then, in the end of the agreement, there is a clause as follows:

“All the parties agree to involve in keeping the trade secret concerning disclosure of information of ownership right and certain secrets (“Trade Secret”). This agreement and the obligation will bind all the parties involved. This agreement is signed by both parties without force from any parties on the day and date written in the beginning of this agreement.”

The Implementation of Trade Secret Protection through Employment Agreement in PT Lombok Gandaria Food Industry

Trade secret protection in PT Lombok Gandaria is implemented for the applicants who pass the selection stage. Employment agreement will bind these applicants. PT Lombok Gandaria classifies employment agreements into 2 types, Fixed-term Employment Agreement, hereinafter referred to as PKWT and Indefinite-term Employment Agreement, hereinafter referred to as PKWTT.

The company requires workers to protect any information obtained since the day they sign the employment agreement. The company binds the workers with the obligation to keep the company's secret as mentioned in one of clauses of the agreement concerning PKWT and PKWTT which are regulated in Article § section 2 letter i. Based on this Article, the obligations of each party are as follows:

“Maintaining and keeping the company's secret, if in the future the SECOND PARTY violates this, the FIRST PARTY has right to cancel this employment agreement (although it has not ended)”.

The company makes no difference between the obligation to keep secret during training period and after training period. In addition, PT Lombok Gandaria also carries out a preventive action over misappropriation of trade secret through establishing working culture that requires all information in a department to only be discussed within that department during work time.

Lombok Gandaria conducts exit interview as the policy of trade secret protection during the termination of employment. This exit interview is done by asking the workers to describe their work performance during the employment as well as explaining information that has been obtained during their employment. Then, Lombok Gandaria party explains that information obtained must be kept secret. It means that although the workers have no longer worked in Lombok Gandaria, they still have the obligation to keep the secrecy of the information in order to avoid misappropriation that can make the company suffer losses.

Similarities and Differences of the Implementation of Trade Secret Protection through Employment Agreement in PT Phapros, TBK and PT Lombok Gandaria

Both PT Phapros and PT Lombok Gandaria Foods Industry have the same procedural policy concerning workers recruiting and terminating employment. This has been a standard action that can be done as the attempt to prevent violation of trade secret by workers or former workers.

The differences between the implementation of trade secret protection in PT Phapros and PT Lombok Gandaria are as follows: First, the granting of power in conducting the employment

agreement. The different mechanism in power granting in limited liability company, according to Article 1792 Civil Code does not influence the strength of the power. The second is the difference in work responsibility during training period after training period. Phapros distinguishes responsibilities in employment agreement while Lombok Gandaria does not. According to Article 3 section (1) Law No.30/2000 this action is one of reasonable efforts to protect trade secret of the company (Table 2).

The third is the regulation of clauses concerning the prohibition to give other parties/to have/to multiply/to copy all information related to company's trade secret, either for personal interest or other party's interest, the ownership of the inventions by the employee belong to the company. PT Phapros regulates clauses concerning this prohibition in their employment agreement while PT Lombok Gandaria does not. According to Article 1320 Civil Code, these clauses are not against the provisions because the clauses convey fairness, appropriateness, and feasibility referring to the provision in Article 3 section (1) Law No.30/2000.

No.	Items	Phapros	Lombok Gandaria
1	Procedural policy.	Both companies have the same procedural policy concerning workers recruiting and terminating employment.	Both companies have the same procedural policy concerning workers recruiting and terminating employment.
2	Granting of power in conducting the employment agreement.	Distinguishes responsibilities in employment agreement.	Do not distinguish responsibilities in employment agreement.
3	Clauses concerning the prohibition of third party rights.	Regulates clauses concerning this prohibition in their employment agreement.	Do not regulate clauses concerning this prohibition in their employment agreement.
4	Mechanism of exit interview.	Written agreement.	Unwritten agreement.

The fourth is the difference in the mechanism of exit interview when the employment is over. PT Phapros does it in written while PT Lombok Gandaria does it in spoken. Legal power of written agreement is stronger than the spoken one so that it makes it easier to implement the provision and sanction/evidence proving when there is breach of contract or tort. In general, it can be concluded that in implementing trade secret protection through employment agreement, PT Phapros implements it in more detail compared to the implementation of trade secret protection in PT Lombok Gandaria.

DISCUSSION

The analysis of trade secret implementation in PT Phapros, Tbk and PT Lombok Gandaria is based on some theories. First, Theories of Ownership by Jhon Locke stating that every human has his/her own self. No one has right over somebody else. Every individual has right over him/herself, including the result of his own work and the creation of his/her hands as well as his/her five senses (John, 2019). This means that every individual naturally has right to

own all potentials that attach in him/herself and all work that he/she makes. Based on this theory, PT Phapros, Tbk and PT Lombok Gandaria as business agents, with all their efforts and intentions, concern and labor, has made information become valuable so that it deserves to get legal protection as “*property*” or ownership right. Efforts performed by the company are labor over the information so that it creates information on technology or business that has economic value. This economic value, which is only known by the company gives, competitive advantage for the company itself. This ownership gives exclusive power over the right of the information that is kept secret by PT Phapros and PT Lombok Gandaria as the owners.

Second, Principles applied in employment agreement in PT Phapros and PT Lombok Gandaria is as follows:

“Principle of freedom of contract is principle that becomes the background for employment agreement. Principle of consensualism is a principle that becomes the basis of employment agreement because there is agreement between the company and the workers”.

The company was represented by Ir. Retno Widiyawati as HR and General Affairs Manager based of Letter of Attorney No. 020/s.Ks/LE/V/13 who is responsible for employees recruitment. Meanwhile, PT Lombok Gandaria was represented by director of personalia based on implicit employment agreement through one of clauses in the agreement between director of personalia and the worker candidates. Principle of legal binding of contract is a principle that becomes the basis for the enactment of agreement provisions as law for the parties concerned. The agreement is between manager and worker not to reveal trade secret/secret information as mentioned in one of clauses in employment agreement, and each party concerned is bound legally to the agreement. Thus, infringement of the right of trade secret is also violation of the agreement (Table 3).

No.	Items	Phapros	Lombok Gandaria
1	Company as business agents.	The company holds the view that all their efforts and intentions, concern and labor, has made information become valuable so that it deserves to get legal protection as “ <i>property</i> ” or ownership right.	The company holds the view that all their efforts and intentions, concern and labor, has made information become valuable so that it deserves to get legal protection as “ <i>property</i> ” or ownership right.
2	Principles of employment agreement.	Principle of freedom of contract, principle of consensualism, principle of legal binding.	Principle of freedom of contract, principle of consensualism, principle of legal binding.
3	Application of employee agreement.	represented by HR and General Affairs Manager.	Director of personalia.
4	Legal agreement for employee recruitment in the context of trade secret.	Letter of Attorney No. 020/s.Ks/LE/V/13.	Implicit employment agreement through one of clauses in the agreement between director of personalia and the worker candidates.
5	Legal protection principle.	Adaptive, flexible, predictive and anticipative.	Adaptive, flexible, predictive and anticipative.

Thirds, Theory of Legal Protection. According to this theory, protection of trade secret owned by PT Phapros and PT Lombok Gandaria is legal protection that is based on Law No.

30 of 2000 that is adaptive and flexible as well as predictive and anticipative toward the possibility of the revelation or misappropriation of trade secret by other parties, particularly by workers. Therefore, PT Phapros and PT Lombok Gandaria have made policy through employment agreement for workers either through PKWT or PKWTT as well as through other procedural policies. The policy is implemented by conducting exit interview and clearance sheet for workers whose work period is over in order to avoid the misappropriation of trade secret. Moreover, according to this theory, PT Phapros and PT Lombok Gandaria's agreement is also intended as preventive legal protection action realized in clauses of employment agreement. These clauses are limiting in order to protect PT Lombok Gandaria's secret information by referring to Article 3 section 1 law No. 30/2000 concerning reasonable effort to protect limited liability company's trade secret.

CONCLUSION

The effort to protect the rights of trade secret by the holder is implemented through the activities of limited liability company consisting of: The first, workers training and work practice. The second is protection facilities covering: manufacture security; visitor preventive action; document security; electronic document security. The implementation of trade secret protection in company activities of PT Lombok Gandaria is better than that of PT Phapros, Tbk because in PT Lombok Gandaria the protection is implemented more thoroughly either through the fulfillment of protection facilities or workers training. The implementation of trade secret protection through employment agreement or work agreement in PT. Phapros and PT Lombok Gandaria is conducted through hiring and ending employment mechanism covering: First, during the hiring through: job application document; job interview; post interview preventive action; restrictive work agreement. The second is during the ending of employment through: exit interviews; post-work ending audit; certificate of termination; preventive action after the last day of employment; company action against the violation of trade secret by a worker. The implementation of trade secret protection through employment agreement in PT Phapros is better than that of in PT Lombok Gandaria because PT Phapros' clauses of employment agreement regulate in more detail the ownership of company's trade secret information; and the mechanism of the ending of employment.

This study proposes some suggestion. The implementation of trade secret protection in a limited liability company's activities must be conducted by HRD department through Standard Labor Selection Procedure and prevention of misappropriation of trade secret by workers. The implementation of trade secret protection through employment agreement needs to be improved particularly by providing the clauses which focus on the provision of information ownership, obligation of worker to keep and protect the company's trade secret during his/her employment and secrecy agreement for each and every worker. Furthermore, a limited liability company must have a standard trade secret misappropriation handling procedure.

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