Studies in Social Science Research
ISSN 2690-0793 (Print) ISSN 2690-0785 (Online)
Vol. 4, No. 3, 2023
www.scholink.org/ojs/index.php/sssr

Original Paper

Judicial Determination of Confidentiality in Trade Secrets

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Received: July 27, 2023 Accepted: August 21, 2023 Online Published: August 25, 2023

doi:10.22158/sssr.v4n3p234 URL: http://dx.doi.org/10.22158/sssr.v4n3p234

Abstract

Trade secrets as one of the core competitiveness of enterprises, related to the survival of enterprises. In the commercial competition, trade secrets is undoubtedly the right person's wealth code, how the right person to take effective measures to protect trade secrets from being stolen is a matter of concern. In recent years, the practice of trade secret disputes have increased year by year, in the protection of trade secrets dispute cases, the right and the defendant on the identification of trade secrets, especially on the identification of confidentiality has always been the focus of controversy. Even though more and more enterprises on trade secret protection awareness is increasing. But from the many relevant judicial cases, can be seen: trade secrets in practice for trade secrets protection measures still have great loopholes, specifically manifested as: the right to protect the meaning of trade secrets is not clear, the protection of the object is not specific, the duty of confidentiality can not be confidential subject to know or limitations; confidentiality measures and the value of trade secrets are not adaptive; confidentiality measures can not be recognized and so on. This paper combines the recent judicial practice cases, to explore in practice to achieve the "corresponding confidentiality measures" of the core conditions, and in this way for the enterprise to establish trade secret protection system to provide reference.

Keywords

Trade secrets, Confidentiality, Confidentiality measures, Judicial cases

1. The Current Status and Research Significance of Trade Secret Confidentiality Research

At present, the most developed country in the world for the legal protection of trade secrets is the United States. The United States of America on trade secret protection scope is very broad, accumulated a large number of jurisprudence. These cases have established the protection system of trade secrets, and become the main basis for the court to decide on trade secret disputes. At present, the United States has established a case law as a precursor to the Restatement of Torts as the intermediary of the law, to the federal Uniform Trade Secrets Act promulgated and more than half of the state's

adoption of the sign, the three complement each other, together constitute the United States of America's trade secret legal protection system. However, the law is mainly from the perspective of civil law, on the infringement of other people's trade secrets, as for the infringement of trade secrets of criminal sanctions, the law is not involved, but left to the states to provide for their own. The U.S. federal court constantly has a large number of investigation reports will be trade secrets as a strategic management objectives, the University of Florida Levin College of Law Professor Elizabeth Rowe and Hamline University School of Law Professor Sharon Sandeen are internationally renowned experts in trade secret law, co-authored the "Trade Secret Law in a Nutshell" (2013). The two professors have also co-authored a monograph in the field of international protection of trade secrets, "Trade Secrecy in International Transactions" (2014).

From the point of view of the current state of domestic legislation, China's current legislation in the field of trade secrets is relatively decentralized, and there is no centralized and unified law on the protection of trade secrets. The protection of trade secrets is basically based on the "People's Republic of China Anti-Unfair Competition Law" as the leading, contract law, criminal law and other complementary, and the relevant judicial interpretations as a supplement to improve the protection system. From the current domestic research status, trade secrets is always a hot topic. Performance in the emergence of a large number of academic achievements in the field of trade secret protection. As of November 11, 2022, the author in the "China Knowledge Network" search, a total of 1,299 to "infringement of trade secrets" as the "key words" of the journal articles. The actual number of research results related to the protection of trade secrets will be more. But for the confidentiality of trade secrets in the study is relatively less, the confidentiality of trade secrets from China's "Unfair Competition Law," Article IX, namely: confidentiality that is, "to take corresponding confidentiality measures". The content of confidentiality measures in the Supreme People's Court on the trial of civil cases of unfair competition on the application of the law of the interpretation of Article 11 of the detailed guidance. At present, many scholars on the confidentiality of trade secrets research focus is not the same, Feng Shuqin will be the focus of confidentiality on the confidentiality of trade secrets of the subjective and objective consistency of the intention of the right holder, that is, subjectively with the protection of trade secrets, and objectively take the appropriate confidentiality activities to comply with the conditions of confidentiality (2009). Jiang Zhao is advocating: trade secrets subjective intention of confidentiality needs to see the objective confidentiality behavior, that is, emphasize the right to have objective confidentiality behavior (2010). Zhu Weihua that confidentiality measures should be comprehensive consideration, first of all, the subjective confidentiality of the confidentiality of the person's willingness to confidentiality, followed by confidentiality measures should have recognizable, and then confidentiality measures should have a certain degree of effectiveness, from a variety of aspects of the comprehensive consideration (2014). Zhou Mingchuan believes that confidentiality measures can be taken as long as a reasonable behavior, and it is unreasonable to require the right holder to bear the obligation too high (2014). Zhou Mingchuan this view in our judicial precedent is

also reflected, especially the "Shanghai huaran commercial firm and Shanghai art dance clothing limited company infringement of trade secrets dispute appeal case" in the second instance judgment and the first instance judgment between the identification of trade secrets, confidentiality measures between the identification of the second instance judgment of the case has a wonderful analysis. In addition, there are GuChengBo also support the "cost - benefit" theory, confidentiality measures do not need to be absolutely can not be obtained, as long as others do not take improper means to obtain the information can be recognized (2020).

This paper in the light of the previous research results based on, will try to start from the perspective of judicial cases, analysis of judicial practice on the confidentiality of trade secrets of the determination of the standard, will be a trade secret "confidentiality" of the determination of the standard to further refinement, perfection. Favorable to help trade secret right holder of trade secrets to take effective means of confidentiality, and thus protect its interests.

2. Judicial Status of Trade Secret Protection in China

2.1 Judicial Recognition of Trade Secrets

According to the Civil Code, trade secrets are recognized as one of the objects of intellectual property rights. According to the provisions of our country's "unfair competition law", the meaning of trade secrets is: not known to the public, with commercial value and the right to take corresponding measures of confidentiality, such as technical information, business information and other commercial information, that is, with the secret, commercial, confidential information. Accordingly, we can learn the three basic elements of trade secrets.

Generally speaking, commercial information that meets the three elements of secrecy, value and confidentiality can constitute a trade secret. However, in practice, the determination of trade secrets this activity needs to be clear enough specific content of trade secrets. In the case of trade secret disputes, the right holder needs to clarify the specific content of their own trade secrets, in order to prove that they actually have the right to trade secrets.

2.2 Points of Contention in Jurisprudence

In judicial practice, the determination of trade secrets is usually the focus of dispute in a trade secret case. Among them, the trade secret "secret" dispute and "confidentiality" dispute, and a large number of cases related to trade secrets are involved in the appeal, retrial and so on. Many trade secret dispute cases need to solve the core problem is these two issues, this paper focuses on the judicial precedent of "confidentiality". To meet the "confidentiality" requirements, the trade secret rights in order to keep secret information taken by the behavior is only the information to meet the objective conditions of confidentiality. According to the relevant provisions: confidentiality measures are taken by the right to prevent the leakage of information for the purpose, and its commercial value and other specific circumstances appropriate protection measures (Note 1). Among them, what degree to meet the requirements of "compatible" is the focus and difficult to determine in practice, but also common

differences and disputes. In this regard, the judicial interpretation clearly stipulates that the court in determining whether the right holder to take “corresponding confidentiality measures”, usually consider the following factors: the nature of the trade secret and its carrier, the commercial value of the trade secret, confidentiality measures can be identified, confidentiality measures and the degree of correspondence with the trade secret, as well as the right holder’s willingness to keep secret (Note 2). In practice, many enterprises are greedy for convenience, only through the internal confidentiality provisions or sign confidentiality agreements with employees as confidentiality measures, these confidentiality measures in judicial practice can be considered “appropriate”? Whether sufficient to meet the elements of trade secrets?

I learned from a large number of practice cases, the right to the confidentiality of trade secrets cognitive bias there are a variety of possibilities, in the daily business activities on trade secrets to take confidentiality measures there are a variety of negligence, resulting in the infringement of the right to the trade secrets, its “confidentiality” conditions are difficult to meet the judicial practice of reasonable and proper Objective requirements, and ultimately lost the case. To further understand the right to confidentiality measures what is “reasonable”, “appropriate”, this paper can start from a few typical cases.

Ltd. and Chongqing Sanyou Machine Manufacturing Co., Ltd. and Lin Xinhong, the plaintiffs Kunshan and Quasi-Testing Company Limited (hereinafter referred to as and Quasi-Testing Company) and Fuji and Machinery Industry (Kunshan) Co. Ltd. (hereinafter referred to as Fuji) and Fuji and Machinery Industry (Kunshan) Co., Ltd. (hereinafter referred to as Fuji) jointly v. Defendants Lin Xinhong and Chongqing Sanyou Machine Manufacturing Co. In order to facilitate a quick understanding of the case, this article is a simple comb of the case, the case is as follows:

Defendant Lin Xinhong joined six and joint stock company in 2005 (in this case is an outsider), and signed the relevant confidentiality agreement, and in 2015 jumped to join and quasi-testing company, and left again in the same year; this case, the plaintiffs and quasi-testing company and fuji and the company is successive acquisition of six and joint stock company related commercial technology, in the course of the lawsuit, put forward the defendant common compensation for economic loss 9.9 million yuan and other litigation claims. And submit the only piece of evidence used to prove that the technical information in question by the right holder to take confidentiality measures: six and joint stock company and Lin Xinhong signed the six and machinery limited company employees agreement.

The result of the first trial was that the plaintiff and the quasi-testing company and Fujiwa were dismissed in their entirety. The plaintiff appealed, and the judgment of the second trial dismissed the appeal and affirmed the original judgment.

In this case, the plaintiff company is the successor to obtain the outsider six and the company’s relevant commercial technology, claiming that the defendant Lin Xinhong illegal disclosure of relevant commercial technology, Chongqing Sanyou illegal access to technical secrets. However, in the submission of relevant evidence, about the commercial technology, the plaintiff has and only one six

and the joint stock company and Lin Xinhong signed the six and the machinery company limited staff agreement. The reasons for dismissing the plaintiff's claim given in the first instance judgment result are as follows:

(1)The subject of confidentiality measures should be the trade secret right holder, in order to reflect the right holder's confidentiality will. In this case, the two plaintiffs of commercial technology is successive acquisition, but did not submit evidence of measures, can not reflect the right holder of commercial technology with confidentiality will, the two plaintiffs can not meet the confidentiality of trade secrets. The confidentiality agreement between the company and the defendant provided by the company belongs to the agreement between the outsider company and the defendant, and cannot rightfully be applied directly between the successor of the right and the defendant.

(2) In this case, the confidentiality agreement between the outsider, Liuhe, and the defendant itself is not sufficient to be recognized as "confidentiality measures" as stipulated in Article 10(3) of the Anti-Unfair Competition Law. Six and the company and Lin Xinhong signed the "six and machinery limited company staff agreement" although there is "to ensure that based on the duties of the confidentiality of the knowledge (including the company's operation of the confidentiality of the company's confidentiality of the agreement on other companies)" confidentiality clauses, but due to the terms of the Lin Xinhong confidentiality obligations of the information is not clearly However, as the clause does not have a clear direction for the information that Lin Xinhong is obliged to keep confidential, it cannot form a corresponding relationship with the technical information involved in the case, which makes it difficult for Lin Xinhong to know the specific content and scope of the technical information that needs to be kept confidential. Therefore, under normal circumstances, the confidentiality clause is not sufficient to prevent the leakage of confidential information, i.e., it does not meet the requirements of Article 11 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law to the Trial of Civil Cases of Unfair Competition. It can be seen that even the signing of a confidentiality agreement does not ipso facto imply that the reasonable requirements of confidentiality have been met. For example, the agreement on the obligation of confidentiality for a clear point, clear confidentiality technology specific content and scope, and ultimately make the obligation of confidentiality of the confidentiality of the obligation of confidentiality of the obligor is clear, the scope of confidentiality to determine. Is to judge the confidentiality agreement itself whether to achieve confidentiality "reasonable" "appropriate" important conditions.

By coincidence, in the "Hundred Flowers Company Lesson Plans Trade Secret Infringement Dispute" heard by the Shanghai Pudong Court, the right holder, Hundred Flowers Company, claimed that the lesson plans in question were protected as trade secrets, but some of the contents of the lesson plans had already been publicized by Hundred Flowers Company as a promotional video in the free trial lesson and published books, and Hundred Flowers Company did not take confidentiality measures corresponding to the trade secrets it had claimed, so that the contents of the lesson plans lost their

secrecy. Hundred Flowers did not protect its trade secrets with corresponding confidentiality measures, so that the contents of the lesson plans lost their secrecy. And the teaching methods and teaching materials claimed by Hundred Flowers are not commercial secrets, and put forward with the parents of the students signed an enrollment agreement to assume the obligation of confidentiality and other relevant evidence, but the confidentiality of the terms of the agreement is too broad, and did not take special confidentiality measures, requiring the parents of the students to assume the obligation of confidentiality of the information obtained on a regular basis is also not reasonable. The broad confidentiality agreement is not a means for the right holder to claim that it has taken reasonable confidentiality measures, nor can it help the right holder to win a judicial decision. It is imperative for right holders to meet the standard of reasonable and appropriate confidentiality measures in practice in judicial decisions.

3. What Constitutes Confidentiality in Judicial Practice

3.1 Subjective Element of Confidentiality: Intention of the Trade Secret Owner to Maintain Confidentiality

Confidentiality measures are indispensable for the determination of trade secrets, but when the right holder adopts confidentiality measures without clear meaning of confidentiality, it is likely to lead to the loss of the lawsuit, and even no legal basis for the protection of the information. For example, in Jinan Sike Test Technology Co., Ltd., Jinan Langguang Mechanical and Electrical Technology Co., Ltd. Dispute (Note 3), the plaintiff Sike company in its GTR-7001 gas permeability tester in a specific location with a label, but the label contained “Danger! Private Warranty Void! “SYSTESTER QUALITY GUARANTEE VOID FOR RIPPING”, etc. However, it is worth noting that all of the above labels and reminders are only safety reminders and product maintenance warranty reminders, and do not reflect the company’s intention to keep its products and technology confidential, and these measures cannot fall into the category of confidentiality measures. Similarly, in the case of Zhang Peiyao, Huideyue, Jiangsu Funing County Dust Collecting Equipment Factory and Suzhou Nanshine Cement Co., Ltd. (Note 3), because the agreement contained the patent right “LZ-2 type vertical kiln wet dust collector is a patented product in China” and the agreement stated that it was a “patented product in China”, and the agreement stated that it was a “patented product in China”, and the agreement stated that it was a “patented product in China”, and the agreement stated that it was a “patented product in China”. “Chinese patented product”, the agreement stipulated that “the product still belongs to Party B (i.e., Funing Dust Collecting Plant)” and that the dust collector was actually managed and controlled by Funing Dust Collecting Plant during the performance of the agreement. Such a general provision does not have a clear confidentiality intention, and it is impossible to require the confidentiality obligor to be aware of its confidentiality responsibility and the scope of confidentiality through the above means and thus to fulfill its confidentiality obligation with respect to the commercial technology.

It is worth noting that, in judicial practice, the implementation of the confidentiality measures of the right holder of the confidentiality of the determination of the will should be based on the right holder's active and positive meaning, constitute "corresponding confidentiality measures" requires that the measure is the right holder to take the initiative to take measures, reflecting the right holder's desire to keep confidentiality of the active will, as a contractual obligation does not meet the requirements of the contract only this requirement**.** Similarly, in the case of Foshan City Shangquan Consulting Service Co. v. Foshan City Guowei Intellectual Property Agency Co., Ltd, Huang Weijia, Deng Yuzhen, Li Baohua, the plaintiff Foshan City Shangquan Consulting Service Co. Defendants Huang Weijia, Deng Yuzhen, Li Baohua and others utilized the customer information they came into contact with during their employment with Shangquan to illegally utilize it in their new company, infringing on Shangquan's trade secrets and constituting unlawful competition. The QQ record evidence of the materials adduced by Commercial Rights Company showed that the employees of Guowei Company negotiated trademark agency business with a trading company. Provide the "agreement", "receipts" evidence shows that: commercial rights company and a number of customer companies to establish long-term stable business relations and other information. This evidence is sufficient to prove that the company has a stable trading relationship with the client company, and the company's fees, etc., the information content for many years of trading experience and the results of the cut business, with the secret of the trade secret, and stable trading customer list for the company to bring the expected benefits of the company, with the value of the value. However, in all the evidence submitted by Shangquan, no evidence was adduced to prove that Shangquan had taken effective and reasonable measures to protect the secrets of its information in the management of the company. Therefore, the evidence submitted by Shangquan in support of its claim of confidentiality of the company's customer information failed to form an effective chain of evidence to support its claim.

In addition, even if a measure is taken for the ultimate purpose of protecting trade secrets, if the measure itself does not reflect the clear intention of the right holder to keep the secret, it is still not a "corresponding confidentiality measure" under the Unfair Competition Law. The most common example is non-competition. In practice, enterprises often protect their trade secrets by signing non-competition agreements with their employees, i.e., by restricting workers from engaging in competing businesses and preventing them from disclosing and using their trade secrets to a certain extent. However, it should be noted that a simple non-competition agreement may not constitute a confidentiality measure because it does not clearly reflect the subjective desire of the right holder to keep the secrets.

3.2 Objective Elements of Confidentiality: Acts Taken by the Owner of a Trade Secret to Preserve Secret Information - confidentiality Measures

Determine that a commercial information ultimately belongs to the trade secret, and its judicial protection, in addition to the need to meet the subjective conditions described above, the objectivity of the confidentiality of commercial information on the determination of "appropriate" and "reasonable"

standards, this paper will analyze the judicial cases and combined with relevant laws and judicial interpretations and other relevant provisions of judicial practice to achieve relatively perfect requirements. This paper will analyze the judicial cases and combined with the relevant laws and judicial interpretations and other relevant provisions, the judicial practice to achieve relatively perfect requirements.

Specific requirements for confidentiality, at present, China's legislation on trade secrets system is relatively decentralized, trade secret protection is mainly dispersed in the anti-unfair competition law, contract law, criminal law, etc., and supplemented by the relevant judicial interpretations to improve the protection system. At present, the most pertinent provisions on commercial secrets is the "Supreme People's Court on the trial of unfair competition civil cases on the application of law a number of issues in the interpretation", not only contains on the elements of commercial secrets and commercial secrets to obtain the use of behavior and other specific considerations for the explanation, which Article 11 on "confidentiality" of the specific Article 11 of the "confidentiality" of the specific provisions for: with one of the following circumstances, under normal circumstances is sufficient to prevent the leakage of confidential information, shall be recognized that the right holder has taken measures of confidentiality:

(1) Limit the scope of knowledge of classified information and inform only those who must know of its content;

(2) Preventive measures such as locking of classified information carriers;

(3) Marking the carrier of classified information with the symbol of confidentiality;

(4) The use of passwords or codes for classified information;

(5) Signing of confidentiality agreements;

(6) Restrictions on visitors or requests for confidentiality in respect of classified machinery, plants, workshops and other places;

(7) Other reasonable measures to ensure the confidentiality of information.

The more detailed summary of the article summarizes the judicial practice of trade secret confidentiality measures to determine the conditions of the more dispersed provisions of the law to improve the more detailed and comprehensive, but with the progress and rapid development of society, the practice of the new situation is always emerging, only rely on the above standard is not enough to deal with the judicial practice of the identification of the problems encountered. Want to further improve the protection standard of trade secrets, need to learn from a large number of judicial practice experience, this paper in reference to the relevant literature based on experience, through a large number of judicial cases comparative analysis, mainly from: (1) confidentiality measures and specific trade secret object whether correspondence, (2) confidentiality measures can be identified (3) confidentiality measures and the value of the trade secret is compatible (4) confidentiality measures whether to consider the trade secret and its carrier Whether the confidentiality measures take into account the nature of the trade secret and its carrier and other perspectives to analyze, focusing on the confidentiality of trade secrets to improve the conditions.

3.2.1 Whether the Confidentiality Measures Correspond to the Specific Trade Secret Object

Confidentiality measures and confidentiality object specific corresponds to the practice of winning the judicial decision of the important conditions, on the contrary, the right to take only broad, general protection of trade secrets can not be beneficial to protect the legitimate interests of the right holder. For example, in the above case Jinan Sike Test Technology Co., Ltd. said in the contract "the product still belongs to party B (i.e., Funing dust removal plant) all" and the agreement "fulfillment of the dust collector is actually by the Funing dust removal plant to send people to manage, control". The confidentiality agreement refers to the object is too broad, the confidentiality of the object of the dust collector in the nozzle material, size, effect or for the entire dust removal device, there is no way to know. The confidential object is not specific, leading to the judicial staff can not clearly determine the scope of trade secrets, especially for the defendant argued that the plaintiff's dust collector is a patented product, and the patented product involves patented technology has long been open to the public, the plaintiff claimed that the trade secrets have long been no "secrecy" can be said. Moreover, the plaintiff until the dispute did not take other appropriate measures to keep the relevant technical information is not the appellant or disclosure. Finally, the court ruled against the plaintiff, on the grounds that the measures taken by the plaintiff on the claimed "trade secrets" are not confidential measures, and the loss of novelty of some of the information claimed by the plaintiff does not constitute a "trade secret".

The result is different from the case of Jin Yiying infringement of trade secrets, Wenzhou Mingfa Optical Technology Co., Ltd. developed a Fresnel magnifier ("Fresnel magnifier" is the generic name of a kind of ultra-thin magnifier products) mass production production of production methods, the Mingfa company constantly adjusted the specifications and functions of the rubber plate, template, hydraulic press, and constantly changed the requirements of the suppliers. Supplier requirements, after long-term cooperation, three suppliers can provide matching products and equipment. Defendant Jin Yiying successively served as a salesman, sales manager, deputy general manager, Fresnel ultra-thin magnifying glass production methods have a certain understanding, and master equipment supply and marketing channels, customer lists and other information. And signed a confidentiality agreement with Mingfa. After Jin Yiying left the company, he set up a new company "Fresnel Company" in the name of his brother-in-law and engaged in the same business as Mingfa Company. The public prosecutor then prosecuted Jin Yiying and made appraisals through the relevant appraisal experts on the similarity of the products involved and the channels for obtaining the technology for manufacturing the products involved, etc., and the results of the appraisals were unfavorable to the defendant. The results were unfavorable to the defendant. The defendant in one of the defense about the plaintiff Mingfa company confidentiality measures to make confidentiality measures general, only principle requirements, etc. Make a defense: confidentiality agreement only on the confidentiality of the content of the principle of the provisions of the confidentiality of the agreement is not operational, confidentiality agreement confidentiality allowance, but Mingfa company did not according to the agreement to the defendant JinYiYing issued confidentiality allowance. The public prosecutor submitted Jin Yiying and Mingfa

company signed a confidentiality agreement, the agreement agreed to bear the obligation of confidentiality of information, including: (1) technical information, including product design, product drawings, production molds, manufacturing process, manufacturing technology, technical data, patented technology, scientific research results, etc.; (2) business information, including commodity production, supply, sales channels, customer lists, intention to buy and sell, the price of the transaction or negotiations (iii) the performance, quality, quantity and delivery date of the goods. It is also agreed that during the term of the employment contract, within two years after the termination of the employment contract, and during the period when the above confidential contents are not known to the public, the above confidential contents shall not be disclosed to third parties. Witness testimony, statement of the right holder and the confidentiality agreement that the confidentiality allowance is paid at the same time as the monthly salary can confirm that Mingfa paid the confidentiality fee. The confidentiality agreement agreement is clear, the defendant Jin Yiying should know that he has a confidentiality obligation to the technical information and business information. The collegial court on the public prosecution opinion to be adopted. Defendant Jin Yiying lost the case in the judicial judgment.

3.2.2 Whether the Confidentiality Measures can be Recognized by the Subject of the Obligation

The reason why trade secrets have the value of property attributes, in addition to the relevant information itself can bring expectable benefits for the right holder, another important reason is that the secret nature of the trade secret decided to be able to access the relevant information is relatively small, the right holder usually take various measures to protect the trade secret layers, so that the information is not known to the public. This means that the trade secret right for every possible understanding of the object of knowledge of trade secrets should take confidentiality measures, regardless of the object is the enterprise employees, and the right to have close contact with the business partners, or other third party may come into contact with the trade secrets. In practice, some of the right to take confidentiality measures, but in the trial, the defendant is often not the subject of confidentiality measures, and no way to know that they have the duty of confidentiality. In Tangshan Yulian Industrial Co., Ltd., Yutian County Ke Lian Industrial Co., Ltd. infringement of trade secrets dispute retrial review and trial supervision of civil cases, Yulian company claimed that through the formulation of “on the confidentiality of several provisions”, “on the management of technical secrets and other confidentiality system,” “sales management system” and Yu Baoqui signed a “labor contract agreement,” “marketing service responsibility” and other ways of trade secrets to take confidentiality measures. Confidentiality measures have been taken for business secrets. First of all, the “Several Provisions on Confidentiality” only has four articles, and its content only requires in principle that all employees keep the enterprise sales, operation and production technology secrets, and during the period in the factory and within two years after leaving the factory, they shall not utilize the technology they have mastered to produce or to produce for other people the products that compete with the Company and provide technical services, and the aforesaid provisions can not make the object of this

provision, i.e., all the employees, know that the Yulian Company has adopted confidentiality measures to protect trade secrets, i.e., the scope of information protected by trade secrets. The scope of the information protected by trade secrets, i.e., the object of confidentiality, only this is not a practical measure to prevent the leakage of technical secrets, and in reality can not play a role in the effect of confidentiality. Moreover, in this case, even if the Yulian company in the confidentiality system in a clear and specific object of trade secrets, Yulian company has not made with its business customers about confidentiality measures, that is, Yulian company’s customers can be the second sale of trade secrets, such as machinery and equipment, there is no treaty provisions. Even if the customer later generates infringement behavior, it can also claim that it does not know that it has the duty of confidentiality and other reasons to fight against Yulian, and there is a high probability of obtaining the support of the court.

3.2.3 Compatibility of Confidentiality Measures with the Value of Trade Secrets

In practice, generally speaking, the higher the value of the trade secret, the higher the measures required of the right holder. To determine whether the protection measures taken are “corresponding confidentiality measures”, it is necessary to balance the cost of protection and commercial value of the information concerned. On the one hand, it is necessary to take some measures to protect, not zero measures, nor can we take too arbitrary measures; It is worth noting that, on the other hand, many cases in judicial practice have also made case law interpretation of “appropriate” and “proper” confidentiality measures. Helps the trade secret right holder and confidentiality obligations between the clear boundaries of their rights and obligations, to prevent the obligee does not travel confidentiality obligations at the same time, but also to prevent the trade secret right holder to impose excessive confidentiality obligations to the confidentiality obligations. Typical judicial precedents also provide case reference for a large number of similar judicial cases. Shanghai Hualan firm and the Shanghai art dance dress Co., Ltd. infringement of trade secrets dispute appeal case, for example, the plaintiff Hualan firm business scope of “clothing, textiles, flowers, gifts, daily necessities” belongs to the micro-enterprise, put forward the allegation that Xu Moumou, art dance company theft of its property, infringement of Hualan firm copyright, false propaganda, infringement of trade secrets, commercial defamation, and the right to confidentiality. The Court of First Instance dismissed the case. The court of first instance rejected Hualan Commercial Bank’s litigation request, and held that the customer list information claimed by Hualan Commercial Bank did not belong to commercial secrets, because the content of the customer list claimed by Hualan Commercial Bank was limited to the name of the enterprise, the specific contact person and contact information, which were simple and lacked business information such as trading habits, product requirements, specifications, models, prices, etc., and could not constitute a special customer information that was differentiated from the relevant publicly available information, which could be obtained from publicly available information. The information can be known from the public domain (e.g. internet, telephone yellow page directory, advertisements, friends’ referrals, etc.). Secondly, the Court of First Instance held that the confidentiality measures

taken by Hualan Commercial Bank had not been reasonable and appropriate, and that only in the Labor Discipline of Shanghai Hualan Commercial Bank formulated by Hualan Commercial Bank, which stipulated in Article 11 that, “No disclosure of commercial secrets, process technology and other information of the enterprise shall be permitted, no stealing of technical documents of the enterprise shall be permitted. It is not allowed to steal the technical documents of the enterprise”; the Labor Contract signed with Xu Moumou briefly mentioned that during the working period, there was an obligation to comply with the Labor Discipline of Shanghai Hualan Commercial Bank, and these confidentiality measures were only for the protection in principle, and the protection measures were too simple and broad, and the Court of the First Instance ruled that the confidentiality measures of Hualan Commercial Bank did not reach the determination standard. The plaintiff Hualan Commercial Bank appealed against the judgment of the first instance. It is worth mentioning that in this case, the judgment of the second instance overturned the original judgment and Hualan Commercial Bank won the case. The most noteworthy part of the second trial judgment was the re-determination of trade secrets and the re-interpretation of Hualan’s confidentiality measures. Hualan Commercial Bank put forward its claim that there were more than 300-500 customer lists, and claimed that 12 customers including Zhongsheng Dance Troupe, Yangpu Children’s Palace, Dongfang Children’s Palace, South Downtown Children’s Palace, Hongkou District Children’s Palace, Cao Yang Baicun Kindergarten, Shanxi Middle School, Laoshan West Road Elementary School, Railway Kindergarten, Ying Changqi School, Changfeng Community, Huayang Four Primary Schools and so on, belonged to the specific customers of the long term and stable transaction relationship, and the other customers were the customers of the long-term and stable transaction relationship with the Airport The specific transaction information between the Airport School, Zhongsheng Dance Company and Railway Kindergarten belonged to its trade secrets. Although the Court of Second Instance did not fully agree that all of the information in the customer list claimed by Hualan Commercial Bank was a trade secret (which did not include part of the content known to the public), it recognized that part of the information in the customer list was a trade secret. Regarding Hualan Commercial Bank’s argument that it had taken reasonable confidentiality measures, the Court of Second Instance held that Hualan Commercial Bank and Xu Moumou had agreed in the Employment Contract that the labor discipline should be implemented in accordance with the Labor Discipline Regulations of Shanghai Hualan Commercial Bank, and Article 11 of the Labor Discipline Regulations of Shanghai Hualan Commercial Bank stipulated that the employees were not allowed to disclose the enterprise’s commercial secrets, process technology, and other information, and were not allowed to steal the enterprise’s technical documents. Combined with the enterprise scale and business content of Hualan Commercial Bank, it can be regarded that Hualan Commercial Bank has taken reasonable confidentiality measures for its commercial secrets. The judgment of the second instance was legal and reasonable, and the materials of the case were refined and recognized separately, which was conducive to the reasonable protection of the rights of the parties concerned. In addition, the court of the second instance did not copy the

relevant provisions of Article 11 of the Interpretation of the Supreme People's Court on the Application of Laws to the Trial of Civil Cases of Unfair Competition, and it took into account the scale and value of the business secrets of Hualan Commercial Bank, and found that the business secrets were of reasonable value. The author believes that the judgment of the second instance of the case has achieved the unity of the situation and the law, and has a very good demonstration and reference function.

3.2.4 Whether Confidentiality Measures Take into Account the Nature of Trade Secrets and Their Carriers

In practice cases, the trade secret right holder's trade secret information is often a variety of kinds of information, some is the customer list information, some is the enterprise after years of testing and improving the technology, some may be the exclusive formula of a certain product technology and so on. The carrier of different trade secrets is also very different, for example, the customer list information may be four electronic data form, may also be in the form of paper manuscripts exist. For the existence of different carriers of trade secrets, to take with the first adaptation of confidentiality measures can better help trade secrets to achieve the purpose of confidentiality. For example, for the physical carrier of information, can consider the use of physical confidentiality measures, through the physical device set up to prevent and block others from contacting the carrier of trade secrets, such as, the confidential plant, workshop and other production and business places to limit the visitors or differentiated management, set up a confidential box, confidential room, and by the person who keeps the key and so on. For the electronic form of information, it is generally used to set password key, prohibit or limit the login, access, storage, copy and other technical measures for protection. For the internal carrier always under the control of the trade secret right holder, such as technical drawings, formula documents, etc., can be used unilateral notification (such as the constitution, training, rules and regulations, written notification, etc.) or both sides of the agreement (such as the signing of confidentiality clauses) of the measures. With regard to externalized carriers, carriers that are about to reach the market, a distinction can be made on the basis of whether the circulation is restricted or not. For information on carriers with restricted circulation, such as large-scale engineering facilities that are usually unable to circulate freely in the market, protective measures such as signing a confidentiality agreement or agreeing on confidentiality obligations in a contract are generally adopted. However, if the carrier is able to circulate freely, as mentioned above, due to the relativity of the agreement, it is not possible to bind a third party, and therefore it is necessary to take technical measures to protect the carrier itself.

4. Enlightenment of Improving Confidentiality Measures for Trade Secrets

Trade secret as an important intangible asset of enterprises, in the process of enterprise production and operatio4n and market development plays a key role. Combined with many judicial cases involving trade secrets, the focus of controversy in the case is often in the determination of trade secrets, including the "secret", "confidentiality" determination of trade secrets. Among the case is often

difficult to trade secret right to take measures to meet the confidentiality of the requirements. Evidence, the prosecution and defense parties disagree, and the case of the parties do not accept the first instance judgment, appeal cases, the case is difficult to proofread the larger. In view of this, this paper combines many judicial cases in the failure and success of the experience, give the author on the enterprise confidentiality measures to improve the views of trade secrets. Such confidentiality measures should be considered with the content of trade secrets and their carrier correspondence and appropriateness, do not advocate trade secrets rely solely on confidentiality agreement or company confidentiality management system for general protection of confidential objects. Enterprises need to consider the actual situation of its business from the internal and external aspects around trade secrets to establish a more comprehensive and complete protection system, to take reasonable, specific and effective protection measures to protect its trade secrets. In view of this, combined with recent practice cases, the author gives the following suggestions:

(1) the trade secret right holder regularly on the business secrets of combing. Trade secret right holder first of all should be clear about the scope of trade secrets, content and regular comprehensive combing of trade secrets, immediately update the content of trade secrets. Different carriers of trade secrets to take targeted confidentiality measures. The emergence of new trade secrets to immediate protection, such as the enterprise new purchase of a trade secret, in addition to clear the original trade secret owner of the trade secret to take reasonable and appropriate measures to ensure that the trade secret can not be known to the public in addition to the successor to obtain the right to trade secrets should also step to take confidentiality measures to ensure that their own interest in the trade secret.

(2) the adoption of targeted trade secret protection measures. On the basis of identifying trade secret information, according to the value of trade secrets, carrier to take corresponding protection measures, and the confidentiality measures should be matched with the value of trade secrets.

(3) The establishment of a comprehensive technical means, management measures and legal texts of trade secret protection system. The possibility of trade secret infringement appears in every possible contact with trade secrets, know the link. Whether it is the senior management within the enterprise, technical staff, or with the enterprise has close contact with the customer, and even other third party may lead to the enterprise business secrets are leaked, to the trade secrets of the right to bring huge economic losses. Therefore, the enterprise to take a multi-faceted means of confidentiality, is the most hit degree to achieve the protection of trade secrets of the way. For example, the enterprise for the internal staff, you can sign a specific confidentiality agreement on the confidentiality of the content of the confidentiality of the business secrets of the employees may be in contact with the signing of confidentiality agreements, non-compete agreement, etc.; the content of the trade secrets itself to set up contact barriers, including but not limited to the physical isolation, the authority granted, the password settings, signs, etc.; and for the enterprise has a close relationship with the enterprise can be in contact with the enterprise related commercial secrets of the customer, sign a confidentiality agreement, involving trade secrets of the customers. For customers who have close dealings with the enterprise and

have access to the relevant trade secrets of the enterprise, the relevant confidentiality agreement should be signed to restrict the secondary transfer of the sales products involving trade secrets and to make provisions for leasing. Finally, regular training for the company's internal staff to carry out relevant legal knowledge, enhance the understanding of the protection of trade secrets can also effectively avoid the jumping workers intentionally divulge enterprise commercial secrets. Enterprises from a variety of perspectives to build a perfect system of business secrets protection mechanisms

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Notes

Note 1. Article 32 of the Anti-Unfair Competition Law.

Note 2. Judicial Interpretation of Trade Secrets.

Note 3. Case source: Poly legal Cases.