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Shhh...confidentiality agreements should be treated like trade secrets to ensure enforceability

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ANN ARBOR – According to Michael N. Spink, a shareholder in the Ann Arbor office of Brinks Gilson & Lione, one of the largest intellectual property law firms in the U.S., the news this summer that Ford Motor Company was charged with theft of trade secrets by a former software vendor should serve as reminder for businesses to both respect trade secrets and protect their own – even when covered by confidentiality agreements.

"A trade secret can be almost anything that is secret and derives value from its secrecy, such as a proprietary formula or process. When a company maintains information as a trade secret, it should be treated as such, with appropriate restrictions on access," Spink said. "When a court is brought into a trade secret matter, it considers the steps taken, or not taken, to safeguard trade secret information. An established program not only reduces the risk of losing the information, but increases the likelihood that courts will affirm protection of the information if there is a loss."

So what does this have to do with confidentiality agreements? Spink notes that lax treatment of confidential information, even under signed confidentiality agreements, can undermine legal protection.

"This was made clear in *nClosures Inc. v. Block and Company, Inc*. (7th Cir., Oct. 22, 2014), where the Court found that reasonable efforts to preserve confidentiality were required for the confidentiality agreement to be enforceable," Spink said.

In this particular case, Block had an iPad cover design and explored a partnership with nClosures under a confidentiality agreement. nClosures provided Block with product designs, market knowledge, manufacturing set-up, solid models, and assembly drawings. The parties ultimately did not form a venture, and nClosures subsequently asserted Block improperly used its proprietary information when the company released a new iPad cover. Under contract law, most courts will enforce confidentiality agreements only when "the information sought to be protected is actually confidential and reasonable efforts were made to keep it confidential."

The Court sided with Block, and noted that nClosures did not require confidentiality agreements from other companies or individuals who accessed the design files for its proprietary products, did not mark its design drawings with designations such as "CONFIDENTIAL", and did not maintain the design files under lock and key or store them in a computer with restricted access.

"The decision in the *nClosures Inc. v. Block and Company, Inc*. holds a lesson for any company currently engaging in discussions for a potential merger, alliance or co-branding opportunity," Spink said. "Protect your proprietary information. Even with a confidentiality agreement in place, intellectual assets may be free for the taking when companies don't take reasonable measures to protect them."

Brinks Gilson & Lione

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