**23.16 Trade Secret—Defined (18 U.S.C. § 1839(3))**

The term “trade secret” means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing, if:

First, the information is actually secret because it is not generally known to or readily ascertainable through proper means by another person who can obtain economic value from the disclosure or use of the information;

Second, the owner thereof has taken reasonable measures to keep such information secret; and

Third, the information derives independent economic value, actual or potential, from being secret.

In addition, facts and information acquired by an employee, whether by memorization or some other means, in the course of his or her employment may potentially be trade secrets, but only if they meet the definition of a trade secret set forth above. However, the personal skills, talents or abilities that an employee develops at his place of employment are not trade secrets.

The term “trade secret” can include compilations of public information when combined or compiled in a novel way, even if a portion or every individual portion of that compilation is generally known. Combinations or compilations of public information from a variety of different sources, when combined or compiled in a novel way, can be a trade secret. In such a case, if a portion of the trade secret is generally known or even if every individual portion of the trade secret is generally known, the compilation or combination of information may still qualify as a trade secret if it meets the definition of a trade secret set forth above.

**Comment**

The three elements of the definition of “trade secret” were set forth in *United States v. Chung*, 659 F.3d 815, 824-25 (9th Cir. 2011). After *Chun*g, 18 U.S.C. § 1839(3) was amended to change the language from “the public” to the current “another person who can obtain economic value from the disclosure or use of the information.” *United States v. Liew*, 856 F.3d 585, 597 (9th Cir. 2017).

To establish the second element, the government must prove that the trade secret owner took “reasonable measures to guard” the secret. The government is not required to “prove a negative” that the trade secret was never disclosed. *Id*. at 601.

“[A]n employee’s personal skills, talents or abilities . . . are not trade secrets . . . [F]acts and information acquired during employment can only be trade secrets if they meet the given definition.” *Id*. at 594 (cleaned up). “[I]ndividuals can independently develop technology through proper means and [an employee] is free to leave an employer and use non-trade secret information and skills gained through that employment.” *Id*. at 599.

The term “owner,” with respect to a trade secret, means the person or entity in whom or in which rightful legal or equitable title to, or license in, the trade secret is reposed. 18 U.S.C. § 1839(4).

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