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Are You Doing Business Internationally? Guarding Your Secret Sauce Has Never Been More Important

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As competition within the global marketplace continues to intensify, there has never been a time when protecting your company's trade secrets has been more important. Recent legal developments underscore that point.

U.S. Indicts Chinese, Taiwan Firms for Targeting Micron's Trade Secrets

Just last month, the U.S. Department of Justice indicted a Taiwanese company, a Chinese company, and three of the Chinese company's employees, accusing all five defendants of having stolen trade secrets from U.S.-based Micron Technology. Micron is among the few companies worldwide—and the only American company—that makes dynamic random access memory (DRAM) chips. DRAM is present in nearly all computerized gadgets.

In 2013, Micron formed a company in Taiwan called Micron Memory Taiwan (MMT) and named Stephen Chen as its president. According to DOJ, Chen quit MMT and moved to another Taiwanese company, United Microelectronics Corporation (UMT), where he set up a joint venture between UMT and a Chinese-government-owned company called Fujian Jinhua Integrated Circuit (Jinhua). DOJ claims that Chen later hired away two other employees from MMT, who started providing Micron trade secrets to the UMT-Jinhua joint venture in or around 2016.

Until Jinhua started producing DRAM, the technology had not been produced by any Chinese company, though China had previously tagged DRAM development as a priority in the government's most recent Five Year Plan. One commentator has characterized that plan as an invitation to Chinese companies to obtain that technology by whatever means necessary.

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As with most technology companies, Micron's trade secrets are what separates it from its competition. As one Micron representative stated, "Micron has invested billions of dollars over decades to develop its intellectual property." Without question, Micron's trade secrets are the lifeblood of its business. If the DOJ's allegations turn out to be true, the amount of harm that Micron will suffer (and possibly already has suffered) due to the disclosure of its trade secrets to its competitors is beyond measure and presents a true nightmare scenario for Micron.

What Can You Do To Protect Your Trade Secrets?

1. **Identify your TRUE trade secrets.** Be they devices, formulas, methods, patterns, programs, processes, techniques, or something else, it is important to identify all of your trade secrets, i.e., anything from which your company derives independent economic value, which is not commonly-known, and which your company takes reasonable measures to prevent from disclosure. Schedule and perform company-wide trade secret audits for this purpose.
2. **Keep them confidential.** Based on the specific nature of each of your trade secrets, understand what you must do in the way of protection to preserve their trade secret status. For example, in the eyes of the law, protecting a proprietary manufacturing process requires a markedly different approach than protecting, say, a secret written formula. Although there usually is more than one way to adequately protect a trade secret, it helps to know what kinds of protective measures a court might look for in the event that you find yourself seeking relief for a claimed trade secret violation.
3. **Have a trade secret attorney review and draft your employment agreements.** A company's trade secret and confidential information should be spelled out in all employment agreements with employees who work with or have access to such information. The agreements should contain well-drafted provisions that set out the employees' confidentiality obligations to the company. The agreements should maximize those confidentiality obligations to the extent possible under the prevailing law. In appropriate circumstances, the agreements should also contain properly-tailored non-competition and non-solicitation provisions aimed at further protecting your company from undue competitive harm.
4. **Educate your employees.** Schedule and conduct the necessary training to ensure that your employees can identify your trade secrets, know what they must do to protect them, and understand their obligations not to disclose them. Appoint one person from each department to record all trade secrets that pertain to that department, to make sure that the right employees are aware of those trade secrets and their respective obligations, and to perform scheduled audits to ensure that proper protocol is being followed to maximize preservation of trade secret status.
5. **Choose your trading partners carefully.** Take care in selecting your customers, suppliers, and other business partners. Ultimately, a company cannot do business without incurring some risk. Micron took a risk when it formed a business entity in Taiwan, presumably to position itself for better access to Asia. Whether assuming that risk backfired on Micron has yet to be established, though it appears likely based on what is known to date. In each business transaction, understand which trade secrets will be disclosed (under an NDA), note how valuable those trade secrets are to your company, evaluate the potential for their wrongful disclosure during or in connection with the

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transaction, consider the impact of such wrongful disclosure on your company, and decide whether the overall business case ultimately favors or disfavors the transaction. You should assume that an NDA may not provide adequate protection against theft of your trade secrets in certain foreign markets, including in China. Is that something you are prepared for and willing to accept the risk on? Proceed only with your eyes wide open.

6. **Enforce your rights.** Stay on guard for any misappropriation or potential misappropriation of your trade secrets. Act fast in the event of an actual or suspected violation. Whether it means sending a cease-and-desist letter in the face of a suspected violation, or filing a lawsuit to address a known violation, or any other enforcement measure, a company must enforce its rights aggressively to protect any trade secrets it cares to preserve. If a foreign entity is the culprit, watch for instances in which its employees who may be involved are traveling to and/or working in the United States, and use that fact to your advantage in terms of filing and serving a lawsuit or subpoena (if necessary). A company's failure to detect a trade secret violation, like any undue delay in enforcing its rights, may result in the loss of trade secret status and prevent the company from obtaining relief through the courts.

Along with the above, we encourage companies to work with experienced and specialized attorneys in developing the documents, practices, and procedures necessary to provide optimal trade secret protection. Butzel Long has decades of experience advising clients on how to protect their trade secrets, and has counseled and/or represented clients in thousands of trade secret cases, on behalf of both plaintiffs and defendants, in state and federal courts across the country. We stand ready to assist you and your company in this vital area of your business.

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