

Independent Directors' Opposition, Earnings Management and the Risk of Stock Price Crash

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Abstract: The purpose of this paper is to analyze the legal practice and theoretical basis of the implied secrecy clause in the United States, and to explore the domestic development of the implied secrecy obligation in our country. Based on this, this article uses the American case and law to establish the standard to judge whether our country's counterpart undertakes the implied confidentiality obligation. First of all, the first part of this article summarizes the existing legal framework of our country on the obligation of implied confidentiality and its challenges in judicial practice, and summarizes the views of the academic community on this issue. By combing the current situation of legislation, analyzing the problems in judicial practice, and studying the opinions of academic circles, this paper proposes that the implied obligation of confidentiality in the field of trade secrets should be affirmed clearly. Secondly, from the comparative law perspective, a comparative analysis of the common law system and the civil law system on the implied provisions of the different theories, so as to provide theoretical support for our country to learn from the experience of the and the United States. Finally, from the legislative basis, judicial practice and practical needs of the three dimensions, demonstrated the application of implied confidentiality obligations of the rationality and necessity, it further strengthens the importance of implied secrecy obligation in legal practice.

Keywords: Trade secret, Duty of confidentiality, Implied duty of confidentiality.

1. Introduction

The 2019 revision of the “Anti-unfair Competition Law” amended the trade secret confidentiality provisions, changing the expression from “Confidentiality agreement” to “Confidentiality obligation”, the aim was to redefine the scope of the obligation to preserve trade secrets and thus to identify more precisely the source of such an obligation. Compared with the 2017 version, the revision is more precise and precise in its wording and aims to strengthen the legal protection of trade secrets. In accordance with Article 10 of the provisions of the Supreme People's court on certain issues relating to the application of the law in civil cases involving the infringement of commercial secrets, even if the obligation of confidentiality is not expressly stipulated in the contract, the court can still find the relative party has the duty of confidentiality through the consideration of the nature of contract, trade custom and the principle of good faith. However, there are differences in academic circles, mainly focusing on whether the other party should undertake the implied obligation of confidentiality. One view was that the amendment was an expression of legislative intent, recognizing that the duty of confidentiality should include an implied obligation; another maintained that the amendment was only more narrowly formulated and did not substantially change the scope of the duty of confidentiality. When the scope of the duty of confidentiality is not clear, the introduction of implied duty of confidentiality will help to enhance the integrity of the protection of trade secrets. The current theoretical research is still insufficient in the aspect of the theoretical basis of the implied duty of confidentiality, and how to determine the implied duty of confidentiality of the opposite party in a specific case, and to define the scope and applicable standards of the duty of confidentiality, it still needs further discussion and clarification. This is not only the key to improve the existing business secret protection system,

but also the urgent need of combining theory with practice. In contrast, our country is relatively deficient in the theoretical research of implied secrecy obligation, and the common law system has a long history in this field, forming a relatively mature and stable conceptual system. By referring to the theory and practice of anglo-n law and combining with the actual needs of our country's legislation and judicature, this paper constructs a social norm with “The duty of confidentiality” as the core and taking into account the interests of all parties in balance, it is very important to realize the validity of implied secrecy obligation in legislation. In this amendment, the regulation of infringement of trade secrets in violation of the implied duty of confidentiality will become the core of its protection mechanism, and at the same time, it will clarify its boundaries and formulate relevant rules, it is of great significance for the overall improvement of the trade secret protection system.

2. The Present Situation and Predicament of the Implied Duty of Confidentiality of Trade Secrets in Our Country

2.1. The Legislation Status Quo and Judicial Dilemma of Implied Secrecy Obligation of Commercial Secrets in Our Country

2.1.1. New Provisions on the Revision and Judicial Interpretation of the Anti-unfair Competition Law

In 2019, the law of the People's Republic of China on anti-unfair competition was amended, in which the expression of trade secrets provisions was changed from “Agreement” to “Obligation”, it shows that the legislature redefines the connotation of the obligation of keeping trade secret, especially the category of implied obligation of keeping secret. Compared to the 2017 version, the source of the trade secret

confidentiality obligation was expanded to include not only legal provisions or contractual agreements, but also implicit duty of confidentiality. This adjustment has led directly to the corresponding revision of the scope of China's trade secret confidentiality obligations. Article 9, paragraph 1, of the anti-unfair Competition Act identifies several situations in which commercial secrets are infringed, including improper acquisition, unlawful use after lawful acquisition and disclosure. The revision, which involved a "Breach of contract" and a "Breach of confidentiality obligation," was replaced with a "Breach of confidentiality obligation," a change that showed lawmakers' recognition that confidentiality obligations are not limited to what is explicitly stipulated in the contract, even in the absence of an explicit requirement or agreement, there may be a *de facto* confidentiality relationship. In view of China's prominent position in the global manufacturing industry, the importance of trade secret protection cannot be ignored, which can provide a significant competitive advantage for companies. In this context, considering the potential impact of trade friction between China and the United States on trade secrets protection, the disclosure of trade secrets will not only cause economic losses, but also produce negative social effects. Therefore, it is urgent and necessary to revise the provisions of laws and regulations related to trade secrets.

In the structured text of "Sino-us economic and Trade Agreement", Section 2, Section 1.4 of Chapter 1 clearly stipulates the scope of acts of infringement of trade secrets. In particular, paragraph 2 of this chapter focuses on the concept of an implied duty of confidentiality, revealing that it is aimed at legitimate acquisition, unlawful exploitation and disclosure in relation to our trade secrets provisions, the legal framework for determining whether such activities constitute unfair competition [1]. Based on the background of the revision, the revision of the Trade Secret Clause in 2019 clearly shows that our country attaches great importance to the protection of trade secrets. From "Agreement" to "Duty of confidentiality", the intention of the legislator is to expand the scope of the duty of confidentiality of trade secrets to include the implied duty of confidentiality, in order to strengthen the legal protection of trade secrets.

The scope of the duty of confidentiality set out in the trade secrets provisions, while giving the courts a certain degree of discretion, also poses challenges for the individuals and businesses that bear the responsibility, especially in the face of secret trade secrets, if the scope of the confidentiality responsibility cannot be clearly defined, it will have a significant impact on the stability and operation of enterprises. According to the interpretation of paragraph 2 of Article 10 of the trade secret provisions, the duty of confidentiality already includes the implied duty of confidentiality. In particular, neither the act nor the above-mentioned provisions explicitly provide for the elements of an implied duty of confidentiality, based solely on the nature of the contract, the purpose of the transaction, trading practices and the principle of good faith, to determine whether the other party should assume the duty of confidentiality, this is the standard for determining the implied duty of confidentiality. Based on the specific provisions of this clause, the application of the implied duty of confidentiality is based on the premise that the parties did not explicitly agree on confidentiality terms in the contract. The term "Contract" is understood to mean a binding written or oral agreement. Accordingly, the above-mentioned provisions of the duty of confidentiality are not limited to the

express terms of confidentiality, but also covers the presumption based on factual circumstances, industry practices and other implied duty of confidentiality.

In addition to the anti-unfair competition law and the trade secret provisions, our civil code also provides a legal basis for the existence of implied confidentiality obligations. Specifically, the second paragraph of Article 509 and Article 558 of the Civil Code clearly stipulate the collateral obligations of the contract. This collateral obligation goes beyond the contract and the law, based on the principle of good faith, one party has the responsibility to safeguard the rights and interests of the other party [2]. In the style of an academic paper, a confidentiality relationship exists between the private party and the obligee during the negotiation stage or after the termination of the contract, even if the obligation of confidentiality is not clearly agreed upon, in which case the private party should perform the duty of confidentiality, even if the information is legally obtained, it cannot be disclosed illegally. As the duty of notice, assistance and confidentiality of a party to a contract based on the principle of good faith, the nature of the contract, the purpose of the contract and the practice of the transaction, the collateral obligation is a legal concept subordinate to the principal obligation of payment. The provisions on collateral obligation in the civil code do not generally require the other party to a contract to undertake the obligation of confidentiality. Since the relevant provisions do not expressly imply the conditions under which the obligation of confidentiality is constituted, such a determination needs to be made by the judge in the light of the specific circumstances of the case, it includes the parties' intention to conclude a contract, the nature of the contract and whether to comply with commercial practices. This shows that the above-mentioned provisions are the principle of good faith elaborated in detail, but not in-depth development, still maintain the principle of the characteristics [3]. Therefore, when deciding a dispute concerning the duty of confidentiality, the judge needs to consider a number of factors in order to determine whether the duty of confidentiality is established. First and foremost, the court should look at the purpose and nature of the contract, which is a technical cooperation agreement involving commercially confidential information and usually foreshadows an obligation of confidentiality. Secondly, as a general code of conduct in commercial activities, commercial practice is very important to the interpretation of contract terms. Finally, the judge should uphold the basic principles such as good faith, good faith as the cornerstone of the law to ensure that the conduct of both parties to the contract reflects fairness, honesty and good faith. Although the duty of confidentiality is very important in commercial contracts, its specific connotation is often difficult to express in terms. In this context, judges should follow the principle of good faith, and combined with the contract objectives, nature and business practices, such as the elements of a comprehensive assessment. However, these two points remain essentially within the ambit of the principle of good faith and can hardly be regarded as the provisions that courts refer to first in deciding such cases.

2.1.2. The Practical Dilemma of the Implied Duty of Confidentiality in Trade Secrets

In the field of judicial practice, the problem of the accuracy and lack of consensus in the identification and confirmation of the implied duty of confidentiality is increasingly prominent, especially when dealing with the case of

infringement of trade secrets. In such cases, the central consideration of the court often focuses on whether the parties have concluded confidentiality agreements or whether confidentiality clauses are included in the contract. In the absence of explicit confidentiality agreements and provisions, the court tends to deny the other party the obligation of confidentiality, thus causing the party with the duty of confidentiality to disclose or exploit the trade secret after it has obtained it unlawfully, not being effectively restrained by the law, thus damaging the rights and interests of enterprises. In addition, some courts indirectly assume that the other party should be bound by confidentiality obligations based on contractual characteristics, business practices, or considerations of specific relationships such as employment and its inherent principles of good faith. From this point of view, the implied duty of confidentiality is lack of a unified legal basis, and in judicial practice has not formed a set of universally applicable standards. In the long run, this situation will adversely affect the owners of trade secrets.

Some courts still do not recognize confidentiality obligations in contracts entered into by parties that contain confidentiality clauses. Because of the vague and wide scope of the confidentiality clauses in the confidentiality agreement or contract, it is difficult for employees to understand their specific confidentiality obligations. Furthermore, given the imbalance between the rights and obligations of enterprises and their employees, the courts tended to take a pro-worker position, which eventually led to questions about the validity of overly general confidentiality agreements. In this view, an inaccurately formulated confidentiality agreement between the parties often results in a disadvantage for the holder of a trade secret, as the court may regard it as a presupposition and negate its legal effect.

For example, in the case of trade secrets disputes, the courts often take a negative attitude towards the provisions of the contract on the duty of confidentiality, viewing them as general clauses that lack legal binding force, and thus exempt from the duty of confidentiality. In another type of case, the court noted that it was difficult for the counterpart to identify what constituted a trade secret from the terms of the labour contract, even though the contract clearly stipulated that the counterpart should not disclose the details of the contract and the information at the negotiation stage, in the end, it ruled that the other party was not liable for confidentiality. When there is a contract between the parties or the validity of the contract is in doubt, it cannot be supported and recognized by the court to solve the problem of trade secret infringement by clearly agreeing on the duty of confidentiality. In this context, the court's decision on whether the other party should undertake the implied obligation of confidentiality directly affects the protection of the rights and interests of the owners of trade secrets. However, at present, there is no consistent standard of application of the implied duty of confidentiality, which is regarded as one of the main reasons leading to different judgments in the same case in judicial practice.

In the absence of specific confidentiality provisions or agreements, the judiciary usually emphasizes the collateral obligations of the contract in cases of infringement of trade secrets, in accordance with Articles 509 and 558 of the Civil Code. This obligation covers the period during which the contract was concluded, the existence of a confidentiality clause but not expressly agreed upon, and the fact that the parties shall continue to perform their obligations of mutual confidentiality even after the termination of the contract.

While there are no obvious gaps in the legal system, the reality runs counter to this. The relevant provisions in contract law do not function effectively in practice, and even if they exist, it is often difficult to find solutions to the practical challenges of implicit confidentiality obligations. Only a handful of cases have cited these two provisions when dealing with trade secret infringement. It is worth noting that the contractual collateral obligations are not limited to the duty of confidentiality, but also include other obligations such as assistance and notification, and that the frequency of reference to these two legal provisions has increased significantly in the context of the obligation to assist, this is in sharp contrast to the situation when dealing with the infringement of trade secrets. This phenomenon reveals that in such cases the courts have failed to take full account of the applicability and practical effect of the relevant provisions of the Civil Code. This directly undermines the protection of trade secrets and thus the legitimate rights of corporations. Therefore, in our judicial practice, the judgment and protection standards of the duty of keeping trade secrets need to be clarified and standardized.

2.2. The Doctrine of Implied Confidentiality Obligation of Trade Secrets in Our Country is Controversial

In the field of judicial practice, there are many opinions on the application of the implied duty of confidentiality, in other words, there are different opinions on the necessity of the implied duty of confidentiality. The purpose of this paper is to discuss and analyze this controversy, and to deepen the understanding of this issue by expounding the positive and negative positions of the implied secrecy obligation of trade secrets.

2.2.1. An Affirmation of the Implied Duty of Confidentiality in A Trade Secret

Article 1.4 of the intellectual property chapter of the U.S.-CHINA economic and trade agreement defines the scope of prohibited acts of infringement of trade secrets. Specifically, paragraph 2 of Article 1.4 makes it clear that, the disclosure or use without permission of trade secrets obtained under a duty of confidentiality or restriction would be considered unfair competition. The purpose of this article is to regulate the illegal use and disclosure of unfair competition in our trade secret provisions. The 2019 revision of the trade secret confidentiality clause reflects our country's high attention to the protection of trade secrets, and the adjustment from "Agreement" to "Obligation", which aims to expand the scope of application of the trade secret confidentiality obligation, to cover implied confidentiality obligations. The article 10 of "Trade Secret Provisions" expounds the concept of "Duty of confidentiality", and clarifies the boundary and connotation of the duty of confidentiality. In the absence of an explicit obligation of confidentiality between the parties, the court may infer the existence of an implied obligation of confidentiality on the basis of the principle of good faith. It is worth noting that our definition of the "Duty of confidentiality" is consistent with international judicial practice. Therefore, this paper probes into the issue of implied duty of confidentiality in our academic circles. Many researchers agree that the protection of trade secrets in our country is not only limited to the explicit duty of confidentiality, but also should cover the implied duty of confidentiality. Huang and his colleagues argue that there is

no theoretical support for the argument that “No confidentiality contract means no confidentiality responsibility” [4]. Scholars have pointed out that it is a fallacy to think that only an explicit contract can establish the confidentiality obligation of the other party; even in the absence of the corresponding confidentiality agreement or clause, it does not mean that the other party is free to disclose or exploit the business secrets of the enterprise. It is necessary to establish the implied duty of confidentiality, especially in the case of the enterprise has not signed a specific agreement with the employees, this way is more conducive to the protection of trade secrets. The implied obligation of confidentiality has been incorporated into the common law system, and its existence can be confirmed by the principle of good faith. In the face of increasingly fierce market competition, the protection of business secrets is becoming more and more critical. However, because of the management, employment model and other factors, the two sides may not sign a non-disclosure agreement and other explicit contracts, employees at the time of entry are regarded as tacit consent to keep trade secrets. This kind of obligation is very important to the enterprise because it can effectively prevent the leakage of trade secrets. Therefore, the implementation of trade secret implied confidentiality obligations become an effective means of protection.

2.2.2. The Negation of the Implied Duty of Confidentiality in Trade Secrets

Although the judicial interpretation of the trade secrets provisions has evolved as a result of the amendments to the anti-unfair Competition Act, in cases where confidentiality clauses are not explicitly included in the contract, courts need to consider multiple dimensions in order to determine the implicit duty of confidentiality. Some scholars point out that both the confidentiality obligation and the legal obligation in the contract require the holder of trade secret to take measures to make the third party realize the commercial attribute of the relevant information. Thus, setting an implicit duty of confidentiality beyond the agreement and legal framework for the other party may introduce risk in the business environment and may lead to an excessive increase in the level of protection of trade secrets to the level of patent protection. The previous version of the act against unfair competition (i.e. up to 2019) did not contain legal provisions on the implied duty of confidentiality, this means that the pre-amended act on unfair competition failed to provide the corresponding provisions in support of the Court's invocation. In view of this, the implicit duty of confidentiality comes from anglo-n law system, and our country lacks native historical experience in the process of system transplantation. Professor Kong Xiangjun pointed out that the revision of the “Agreement” to “Obligations”, aimed to integrate the statutory duty of confidentiality into the scope of the duty of confidentiality. In its view, the term “Obligee” in Article 9 of the anti-unfair competition law indicates that trade secrets are regarded as intangible assets, with reference to property rules, the protection of the business secrets of the Obligee is regarded as a general and fundamental obligation and therefore no additional provision is required for the implied duty of confidentiality.

Scholars who believe that the implied duty of confidentiality of commercial secrets has been fully established in our current legal system are limited to observing that our country has a perfect and sufficient legal framework from the perspective of legislation, therefore, it is

sufficient to protect the rights and interests of the holder of trade secret, and it is not necessary to adopt the system of implied secrecy obligation in common law system. This part of the view that the introduction of a system incompatible with the national conditions may lead to the legal system disorder. However, such views fail to fully understand the difference between the completeness of legislation and the effectiveness of actual protection. In practice, when the court decides whether the duty of confidentiality exists or not in the case of infringement of trade secret, it often does not directly rely on the relevant legal provisions and reveals the limitations of legal regulations limited to the contractual and legal duty of confidentiality. Therefore, the implied duty of confidentiality is designed to provide more comprehensive and effective legal protection for trade secrets and make up for the shortcomings of the existing system.

3. An Analysis of the Rationality and Necessity of Applying the Implied Duty of Confidentiality

When considering the protection of trade secret, we should design a reasonable system to balance the conflict of interest. The flexibility of implied secrecy obligation makes it play an important role in the determination of trade secret infringement. In view of the special nature of trade secrets, compared with other intellectual property rights, the implied obligation of confidentiality is more necessary.

3.1. The Legal Basis for Applying the Implied Duty of Confidentiality

3.1.1. The Basic Principles Clause

Articles 6 and 7 of the Civil Code, as well as the core principled provisions of Article 3 of the Labour Code and Article 3 of the Labour contract law of the People's Republic of China, form the legal basis for the application of the implied obligation of confidentiality. In the field of civil procedure, the principle of good faith is stated according to Article 7 of the Civil Code, which is often cited by the court. In fact, the implied duty of confidentiality is derived from the principle of good faith. However, such provisions are rarely used directly as the basis for a judgment and are more reflected in the court argumentation process. In the absence of a confidentiality agreement between the parties, the above provision may be regarded as an additional clarification, not only to help identify and fill legal gaps, but also to promote fairness and balance in the adjudication process. Failure to interpret this provision properly may violate the principles of fairness and justice. Accordingly, the court may supplement cases involving an implied duty of confidentiality with a view to striking a balance between the interests of the parties, in accordance with the guidelines on the principle of fairness set out in Article 6 of the Civil Code.

When discussing the adjustment of implied confidentiality obligation in the context of special relationship, taking the typical employment relationship as an example, we should pay special attention to the revision of legal norms. In the judicial practice of China, when faced with judging whether an employee has assumed the implied duty of confidentiality, the courts usually rely on Article 3 of the labour law and Article 3 of the People's Republic of China's labour contract law. However, when applying principles-oriented provisions, judges may be concerned about deviations from general rules or lack of legal pluralism based solely on principles. Most

courts do not adopt this approach, although there have been cases. On the one hand, in order to avoid infringing upon the autonomy and abuse of power of the parties, the court tends to apply such principled clauses cautiously; on the other hand, in view of the gradual improvement of China's legal system, most cases can be concluded directly through specific provisions. However, this does not completely negate the applicability of principled provisions in the Chinese legal system. Therefore, such principled provisions still constitute an important cornerstone of Chinese law-making.

3.1.2. The Anti-unfair Competition Law Provides a New Approach to the Application of Implied Confidentiality Obligations

In the 2019 revision of the anti-unfair competition law, legislators changed the expression of trade secret clauses from “Confidentiality agreement” to “Duty of confidentiality”. A subsequent judicial interpretation of the new trade secret issued by the Supreme People's Court further expanded the scope of application of the “Duty of confidentiality” to cover both clearly defined and implied obligations. This revision is intended to explicitly recognize and include the notion of an implicit duty of confidentiality. The analysis reveals that “Agreement” means to restrict the behavior of both parties by contract, and to ensure that one or both parties fulfill the duty of keeping trade secrets during the validity of the contract. On the other hand, the duty of confidentiality defines the nature of tort based on whether the party concerned is liable. Generally speaking, the duty of confidentiality is divided into two parts: one is the explicit duty of confidentiality, that is, there is a confidentiality agreement between the holder of trade secret and the other party, the relevant contract terms or a clear confidentiality requirement for the other party; Second, the existence of implicit confidentiality obligation does not require explicit agreement, but is based on legal presumption, industry practices or reasonable expectations and other principles. The implied obligation of confidentiality means that, although it is not stipulated in the contract, it can be inferred from relevant laws, customs, facts, environment and conditions [5]. It is not difficult to see that this formulation would include the breach of an implied obligation of confidentiality in the breach of commercial secrets.

Although the breach of confidentiality requirement is not included in the scope of confidentiality obligation in the legal text, the innovative development of this system opens a brand-new way for our country's judicial practice. With the amendment of the law against unfair competition, the legal basis for dealing with trade secret disputes has become more solid. In the case before the court, the adjudicator is able to base the decision on such factors as the act against unfair competition, the relevant provisions of the contract law, industry practices and business practices, it is of great value and guiding significance to determine the existence of confidentiality relationship and the duty of confidentiality for the practical judicial adjudication.

Under the provisions of the anti-unfair Competition Act and the Civil Code as amended in 2019, courts are able to invoke relevant legal provisions as the basis for their decisions in tort cases involving an implied duty of confidentiality. It should be noted that the scope of application of Article 9 of the Act is broader, and its amendment has expanded the application of the implied duty of confidentiality. In contrast, the provisions of the Civil Code on obligations incidental to a contract are limited to the conditions of the existence of the contract, which limits the

ability of the civil code to provide a legal basis for an implied obligation of confidentiality. On the other hand, the anti-unfair competition law has a wider scope of application and can provide a legal basis for the confidentiality obligations of the other party. In addition, parties can choose the basis for their claims based on their actual needs.

The revised anti-unfair Competition Act significantly enhanced the enforcement mechanism for implied confidentiality obligations. This provision may be regarded as an additional basis for application to the implied duty of confidentiality, as explicitly guided by paragraph 2 of Article 10 of the trade secrets provisions. In the context of actual business operations, in the face of legal conflicts between the Civil Code and the anti-unfair competition law, the parties concerned have the right to choose the applicable legal provisions according to their own needs, to ensure the effective protection and maintenance of trade secrets. To sum up, the relevant revised provisions not only provide a solid legal basis for the application and enforcement of the implied obligation of confidentiality, but also open up a more convenient path for its implementation, it also plays a positive role in promoting the protection and maintenance of trade secrets.

3.2. Practical Experience in the Application of Implied Clauses in the Infringement of Trade Secrets

3.2.1. Judicial Practice in the United States

For a long time, the protection of implied clauses in American legal practice has formed a unique institutional framework, which provides the industry with a large number of examples of the application of the law in the case of infringement of implied confidentiality clauses. Among them, Peabody V. Norfolk case is a classic case about the implied duty of confidentiality in the trade secrets law of the United States, the legal protection of trade secrets has far-reaching implications. The case delves into the legal issues of trade secrets, employment agreements and non-competition.

Peabody accused Norfolk, a former employee, of breaching the non-compete clause in his employment contract, allegedly giving away Peabody's trade secrets to a rival company. Peabody asked the court for an injunction to stop Norfolk and its affiliates from continuing to exploit Peabody's trade secrets. During the trial, the court found Norfolk liable for Peabody's trade secrets on the basis of established jurisprudence. Although Norfolk's employment agreement does not specify a duty of confidentiality, given its position as Peabody's senior vice president, this particular rank implies a duty of confidentiality with respect to the company's trade secrets. The final ruling barred Norfolk from continuing to disclose Peabody's trade secrets and confirmed its breach of contract. This case is regarded as one of the important precedents of the concept of implicit confidentiality obligation in the field of American commercial law.

In *Smith v. Dravo, Cowan*, a representative of Smith, negotiated with Dravo employees regarding the purchase of containers, during which the parties exchanged key information on price and design. Smith subsequently became aware that Dravo had made a similar product and claimed that Dravo had illegally obtained and used its trade secrets. However, the court ruled that the presentation of the product design by the plaintiff at the negotiation stage was intended to assess its performance and that the defendant should have been aware of the purpose of the conduct. This case shows

that the court did not deny the plaintiff's claim on the basis that trade secrets were considered to be property rights, but rather found that the defendant was subject to an implied duty of confidentiality on the basis that the consultation was aimed at reaching a contract.

Hyde Corporation V. James Donle Huffines case, as a typical case of establishing the principle that the court presumes the other party to undertake the implied confidentiality obligation, highlights the value and importance of trade secrets. During the trial, the court found that the parties were partners, and based on this special relationship, it was assumed that there was a duty of confidentiality between the parties, so the defendant should bear the implied duty of confidentiality. Although there is no specific confidentiality clause in the license agreement, by considering the specific background when the agreement was signed, the nature and content of the information disclosed, and other factors, the court ultimately found that the defendant had breached the confidentiality obligation. Similarly, Lamb v. Evans also provides the basic legal framework for an implied obligation of confidentiality. The case occurred in the 19th century when Lamb, the plaintiff, had a partnership with the defendant, Evans. Lamb later withdrew from the partnership and soon found that Evans continued to exploit trade secrets developed by the two men. Lamb went to court, accusing Evans of violating the trade secrets and seeking compensation. The court ruled that even if the trade secret could not be protected under patent law, it should be considered a property interest of Lamb, given the amount of time and effort Lamb had invested in its creation and development. Further, the court noted that in the absence of an explicit confidentiality agreement, an implied obligation of confidentiality may also be established if the information provider reasonably expects that its information will not be disclosed. Ultimately, the court ruled that Evans' actions constituted a tort and awarded damages to Lamb.

By examining the above-mentioned cases, it can be clearly observed that the court in determining the implicit duty of confidentiality, mainly based on its discretion. However, in most cases, both British and American judicial practice tend to recognize the existence of a special relationship between the parties, so that the existence of a duty of confidentiality between the parties. It is worth noting that there are voices in the academic community that point out that such a confidential relationship based on a presumption by the court may be contrary to the actual intention of the parties. According to this view, these supposedly existing contracts are described by some scholars as "Contracts conceived by judges".

3.2.2. Our Judicial Practice

In view of the above-mentioned, our judicial practice involving the obligation attached to the contract case is quite scarce, however, the legal practice has not therefore stagnated. For example, in 2009, Junde Tongchuang innovatively revealed the functional mechanism of guanidineacetic acid in animal nutrition and its value in feed applications, and successfully developed a manufacturing process for guanidineacetic acid. Then, in 2010, the company signed a cooperation agreement and a processing agreement with Zexing, which clearly states that the company has independent intellectual property rights, including but not limited to patents and new product rights. According to the agreement, Zexing Company is responsible for the production of guanidylacetic acid in accordance with the process provided

by Junde Tongchuang company, and assume the corresponding confidentiality obligations. It is worth noting that, despite the confidentiality period and the duration of the cooperation specified in the cooperation agreement and the processing agreement, that is, the duration of the cooperation shall be three years, and that both parties have agreed that the duration of the cooperation may be extended through written consultations, however, the terms of use of technical confidentiality are not specified in the agreement. The agreement only stipulates that during the cooperation period and within three years after the end of the cooperation, Zexing Company shall keep confidential the sales data, technical information and other information obtained during the cooperation with Junde Tongchuang Company, it is forbidden to disclose any relevant information to third parties. Accordingly, the date of termination of the cooperation between the two sides was set as June 2014, and therefore, the confidentiality period should expire on June 30, 2017.

In the second half of 2016, Junde Tongchuang became aware that the market was flooded with products based on the generic feed additive guanidylacetic acid, which originated in Dayao. It is observed that the core team members of Dayao Company are mostly former employees during the period when Junde Tongchuang Company commissioned Zexing company to produce guanidylacetic acid. Dayao claims that its production process is the result of research and development by Junde Tongchuang. Since the second half of 2016, Dayao has launched a large-scale marketing and sales activities to promote guanidylacetic acid products. By April 2017, Dayao participated in the feed industry exhibition held in China, where it conducted extensive publicity and distributed samples of GCA. Junde Tongchuang Company accused Zexing Company and Dayao Company of jointly violating their relevant intellectual property rights and technical secrets of guanidylacetic acid, and illegally using the technical secrets of Junde Tongchuang Company to produce, the company's aggressive marketing and marketing activities constituted an infringement of its trade secrets and the court was thus sued.

According to the judgment of the Supreme People's court, first of all, it is not clearly stipulated in the contract that after the confidentiality period ends, the company has the right to permit others to use or disclose trade secrets. As a result, the action of revealing the technical secrets involved in the case to Dayao lacked a contractual basis. Second, the technology licensing agreement sets a confidentiality period, which is only intended to define the confidentiality responsibilities of both parties during that period. Upon the expiration of the confidentiality period, the obligations of confidentiality stipulated in the contract shall be lifted, but the licensee shall still be responsible for the performance of the legal obligations of confidentiality. This statutory duty of confidentiality covers the obligation of negative omission under tort law, as well as the duty of confidentiality to be observed before, during and after a contract based on the principle of good faith. In accordance with Article 92 of the contract law of the People's Republic of China, the parties shall not disclose or improperly use trade secrets obtained in the course of contracting, regardless of whether the contract is valid or not. If such acts cause damage to the other party, it shall be liable for damages. After the termination of the contract, the obligation of confidentiality still exists, and those who fail to fulfill their duty of confidentiality shall be liable for compensation to the other party.

Through the analysis of this case, we can make clear the logical path of our judicial practice, that is, first of all, whether there is a confidentiality agreement between the parties or whether the agreement contains a confidentiality clause. In the absence of a confidentiality agreement and its relevant provisions, the court further considered that, given that the agreement in this case only specified the period of cooperation and the period of confidentiality, and did not clearly define the right of zexing company to use the technical secrets involved in the case, it is presumed that the defendant should bear the implied duty of confidentiality in order to protect the plaintiff's trade secrets from being revealed. This case provides a practical basis for our country to deal with the legal issues concerning the implicit secrecy responsibility, and strengthens the legal support of the rationality of the implicit secrecy responsibility.

There is no direct provision in our legal system that, when dealing with trade secret infringement disputes, in the absence of clear contract terms or confidentiality agreements, whether the court can deduce that the other party has an implied duty of confidentiality based on the special relationship between the parties. However, there are some cases in judicial practice which infer that employees should bear the duty of confidentiality on the basis of their duty of loyalty to their employers. Specifically, on 5 May 2012, a plaintiff company entered into a five-year labour contract with the defendant's employees, the contract specifies the employee's job responsibilities, remuneration, and obligations to protect the company's trade secrets and intellectual property rights. After the contract came into effect, the defendant served in his post for two months. By 2015, the defendant filed for termination and separation. Then, in 2016, the plaintiffs' company found that the defendant had used business information and technical secrets obtained through his position without permission for improper benefit, and filed a lawsuit. After the hearing, the court found that during the term of the labor contract, the worker violated the principle of loyalty and carried out business activities on his own that were in competition with the employer, in view of the obligation of loyalty that a worker should bear during the existence of labor relations, this obligation naturally covers the obligation of confidentiality and avoidance of competition. In particular, the parties specifically agreed not to engage in competitive activities while in office should be seen as a specific clarification of the above-mentioned obligations.

Through an analysis of individual cases, we note that although the Chinese legal system does not in practice establish confidentiality agreements directly on the basis of the specific relationship between the parties, in particular with regard to the determination of the duty of confidentiality in employment relations, compared with American judicial practice, Chinese judicial precedent also reveals the possibility of presuming the duty of confidentiality through the duty of loyalty. This shows that in China's judicial environment, the importance of collateral obligation has been recognized to a certain extent. In view of this, China should pay more attention to the definition and application of collateral obligation in judicial practice. The duty to protect trade secrets of an enterprise always exists, whether or not the term of confidentiality and the term of contract are clearly stipulated in the contract. In the framework of labor contract, the protection of trade secrets is based on the obligations of the parties based on the legal relationship, which is not limited to the written provisions, but also includes the legal

presumption of liability. Therefore, it is very important to strengthen the identification and enforcement of collateral obligations for maintaining the security of trade secrets and promoting the establishment of a level playing field. However, in the absence of a confidentiality agreement, this interpretation lacks a legal basis. Some scholars think that the duty of confidentiality belongs to the labor contract, the collateral obligation of the contract, is a post-contractual obligation [6]. Post-contractual obligations, as clearly defined in the legal framework, remain the responsibility of the employee to fulfil even if they are not directly mentioned in the employment contract between the owner of the trade secret and the employee. Whether it is based on an explicit provision of the contract terms, the requirement of an accompanying obligation, or an implied duty of confidentiality in the absence of an explicit written provision, the worker must continue to assume the duty of confidentiality after the termination of the labour relationship. This requirement comes from the nature of trade secret, and its creation and existence depend on the employment relationship, which itself constitutes the basis of the implied confidentiality obligation. If the employee divulges the trade secret, it will bring great loss to the employer. Therefore, in the process of enterprise operation, the staff must abide by the principle of good faith, carry out strict protection to the business secrets of the enterprise, in order to protect the rights and interests of the enterprise from being infringed, and to avoid the illegal acquisition and use of business secrets. Only in this way can we effectively promote the sustainable development of enterprises, maintain their core competitiveness, and protect the legitimate rights and interests of employees.

3.3. There is a Practical Need to Apply the Implied Obligation of Confidentiality

3.3.1. Closing Contractual Loopholes

When the holder of a trade secret enters into a contract with the other party with a confidentiality clause, not all jurisdictions hold that the contracting party must bear the duty of confidentiality. From the perspective of employment relationship, the confidentiality clauses in confidentiality agreements or contracts are often ambiguous, which makes it difficult for employees to clarify their obligations of confidentiality, thus questioning the legal validity of agreements or clauses. In addition, because of the unequal power between employers and employees, the judiciary tends to protect workers' rights and interests, and this tendency often results in overly broad ndas being ineffective. From this point of view, the lack of a specific definition of the confidentiality agreement or terms, may lead to the holder of trade secrets in a disadvantageous position, the court may regard it as a standard clause, and then deny its legal effect.

In view of this, although non-disclosure agreement is regarded as one of the key means to prevent the leakage of trade secrets, its application in practice is often limited by a variety of factors. Companies are generally wary of explicitly entering into confidential contracts with their employees, which limits the popularity of the method and its intended effect. Furthermore, with the development of specific business practices and the prominence of employees' personal characteristics and capabilities, companies may be inclined to avoid overly stringent confidentiality measures, to avoid potential negative impacts on employee performance. This kind of tendency choice may cause the staff's work efficiency

to decline, and then has the disadvantageous influence to the enterprise operation and the growth. Therefore, when seeking to balance the protection of trade secrets and the motivation of employees' enthusiasm for innovation, enterprises may choose to abandon the adoption of non-disclosure agreements as the main strategy.

In the absence of an explicit confidentiality agreement, it is possible to determine a party's implicit duty of confidentiality by analyzing the specific circumstances of a case and considering all relevant factors. This strategy aims to complement and improve the established contract provisions to bridge the potential gaps in the contract. Recognizing that the implicit duty of confidentiality, for both parties to the contract, contributes to a more conscious exercise of their duty of confidentiality and thus ensures the smooth conduct of the transaction, which is in keeping with the needs of society as a whole, it is also in line with the evolution of the modern legal system. The implicit duty of confidentiality is not intended to impose a mandatory constraint on the conduct of the parties, but to balance the rights and responsibilities of the parties by adopting generally accepted commercial norms and practices and combining the principle of good faith, in order to maximize the protection of the interests of the parties, and ultimately achieve the efficient achievement of the purpose of the contract.

3.3.2. Maintain Competitive Advantage

When discussing the determination of the implied confidentiality liability, we should go beyond relying on the principle of good faith and take into account the trade practices and habits that permeate the business transactions. Such practices and customs have a profound and binding impact on the trading activities of both sides. Their function is to guide and regulate market behavior to meet the needs of fair competition. Through the use of implied terms to guide and regulate transactions, aimed at promoting the fairness and rationality of the market. From this point of view, the existence of implicit confidentiality liability, in essence, contains the core value of fair competition.

As a necessary supplement to express confidentiality obligations, implied confidentiality obligations play a key role in the protection system of trade secrets, especially in maintaining the core value of intellectual property rights—that is, the creation of economic benefits. To ensure that the trade secret protection strategy is in line with the principle of maximizing economic benefits is the necessary way to effectively implement the intellectual property protection system. From the perspective of law and economics, the analysis of cost-benefit balance shows that the introduction of implied secrecy obligation can significantly enhance the stability of trade secrets and enhance the market competitiveness of enterprises. When the trade secret right holder discloses the trade secret to the opposite party, the absence of implied confidentiality obligation may cause the insider to disclose or use the secret information improperly, the resulting private costs may far exceed the benefits of trade secret exploitation. In view of this, the implied duty of confidentiality, as a supplementary provision, is of great value for protecting the security of trade secrets, restricting the behavior of insiders, and preventing leaks and infringement. However, it is not an efficient strategy to limit information dissemination to reduce the risk of leakage, which not only hinders the maximization of the interests of the right holders, but also limits the promotion of the overall interests of society. Therefore, it is of great significance to design the implied duty

of confidentiality reasonably in order to achieve the optimal balance of cost and benefit for effectively protecting trade secrets and promoting the virtuous circle of knowledge innovation and economic development.

The application of an implied duty of confidentiality would also reduce the social costs of investing resources to prevent the disclosure of Secrets and hindering innovation. In addition, it is of great significance to stipulate the implied duty of confidentiality for promoting the production and circulation of trade secrets and improving the private benefits and social benefits of trade secrets [7]. This has greatly increased the competitiveness of enterprises.

4. Conclusion

As to the difference between trade secret protection and patent system, the owners of trade secret should keep their information private for a long time in order to enhance their competitiveness. In this context, it is important to strengthen the relevant legal system to ensure that the information of the right to trade secrets from infringement. In view of this, our country to the implied confidentiality obligation of the application of the existence of a real demand, it should be recognized the necessity of its existence. The law against unfair competition and the amendment of the trade secret clause in its judicial interpretation provide the legal basis for our country to extend the scope of the duty of confidentiality to the existing provisions including the implied obligation. In view of the lack of domestic research on this issue and the urgent need for practice, reference to the common law system for the understanding of implied confidentiality obligations and system construction, combined with existing legislation, it is very important to construct a set of standards for our country to judge the applicability of implied secrecy obligation. In the absence of a specific confidentiality agreement, the court should take into account such factors as the principle of good faith, the purpose of the contract, the practice and the special relationship between the two parties (such as employment, joint venture, etc.). However, there are limits to the application of the implied duty of confidentiality, which the court needs to exercise with care to avoid abuse of its discretion and should not presume that an implied clause contradicts an express clause in order to preserve the autonomy of the parties, at the same time, the loopholes in the contract should be properly filled. In view of the nature of Trade Secret as an intangible asset, the holder of trade secret should take clear measures of confidentiality before deciding whether it has an implied obligation of confidentiality. Unlike intellectual property rights such as patents or copyrights, trade secrets are not public, so it is necessary to have sufficient evidence to balance the interests of both parties.

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