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Filer Beware! E-Filing Error Can Destroy Trade Secret Status

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First rule of thumb in trade secrets litigation? A trade secret must be kept secret. It is painfully obvious, but modern practitioners must not grow complacent due to the convenience of electronic filing. Although trade secrets law does not command absolute secrecy, a recent e-filing snafu in *HMS Holdings Corp. v. Arendt* offers a cautionary tale from New York on how one botched upload could jeopardize a client's most prized possession.

In August 2014, Plaintiffs HMS Holdings Corp., Health Management Systems, Inc. and HMS Business Services Inc. (collectively "HMS") sued three former employees for misappropriation of trade secrets, and sued one of those employees for breach of his noncompetition and nonsolicitation agreement. HMS is a provider of cost containment solutions for government and commercial healthcare programs; it delivers third party liability services to state Medicaid agencies, with a focus on identifying alternative forms of coverage and recovering payment for healthcare services from third parties. For the purpose of mounting a competing business, former HMS employees Matthew Arendt, Sean Curtin and Danielle Lange ("Defendants") allegedly stole HMS' proprietary methods and strategies, including business tactics, internal audits and detailed financial and customer information. The parties consented to electronic filing and service using the New York State Courts Electronic Filing ("NYSCEF") system.

The recent Order (https://scholar.google.com/scholar_case?case=4930627301443852159&hl=en&as_sdt=6&as_vis=1&oi=scholar) that merits attention addresses HMS' motion for a preliminary injunction to enforce the restrictive covenants and prevent further misappropriation. Following oral argument, Defendants alerted the Court and HMS that HMS had e-filed an unredacted affidavit with more than 1,500 pages of exhibits (the "Affidavit"), containing many of HMS' trade secrets that it sought to safeguard through the litigation. Counsel for HMS had designated the Affidavit "Attorney's Eyes Only" pursuant to a stipulated protective order, but had inadvertently uploaded an unredacted version. The court issued an immediate sealing order, but the unredacted Affidavit had been accessible via NYSCEF from February 25, 2015, until March 20, 2015. Given that HMS had disclosed its trade secrets in its e-filing, Defendants argued that the public filing automatically terminated HMS' trade secret status. Defendants opined it is "a hard and fast rule universally recognized in New York without exception," that "where an alleged trade secret is not secured, left accessible, or inadvertently disclosed, the lack of secrecy vitiates trade secret status (https://scholar.google.com/scholar_case?case=16153497359665198617&q=Woodie+v.+Azteca+Intl.,+2007+april&hl=en&as_sdt=2006&as_vis=1)."

Fortunately for HMS, the Court was not persuaded. The Court reasoned that the cases cited by Defendants, which either did not involve e-filing or predated its widespread adoption, did not compel application of the rigid and formulaic rule for which they advocated. The only case Defendants cited that specifically addressed court filings dealt with far more extreme circumstances, finding a waiver of trade secret status (<http://law.justia.com/cases/new-york/appellate-division-first-department/2007/2007-03365.html>) based upon "multiple, un-rectified publications in court records over a span of several years." Furthermore, the Court posited that while filings via NYSCEF were accessible via the Internet, "it does not follow that the inadvertent e-filing of an unredacted document on NYSCEF necessarily constitutes a posting to the Internet that renders the information generally known." Finally, a *per se* rule declaring that the inadvertent e-filing of trade secrets terminates trade secret protection by operation of law would "frustrate the Judiciary's important objective of promoting a modern, technologically advanced court system."

Don't breathe a sigh of relief just yet! The court preserved HMS' trade secret status only for the purpose of deciding the likelihood of success of its trade secrets claims in the context of its motion for a preliminary injunction, but withheld its final decision on the issue until after the completion of discovery. The Court then laid out the requisite analysis to determine whether an inadvertent e-filing constituted a waiver of trade secret status. The ultimate focus, the Court instructed, is whether the alleged trade secrets have become "generally known or readily ascertainable through proper means." While it is appropriate to consider the six factors set forth in the Restatement § 757 comment (b) (<http://www.lrdc.pitt.edu/ashley/RESTATEM.HTM>), the court set forth new relevant factors such as:

- the means by which access to the filing was available;
- the class of persons who have (or had) access to the information;
- how long the filing remained accessible;
- the extent to which the filing actually was viewed and/or downloaded;
- the extent to which the material was indexed and/or made searchable on the Internet; and
- whether the material remains cached or otherwise available on the Internet.

When the alleged trade secrets have been accessed and downloaded by third parties, it is also proper to consider factors such as:

- the extent of any re-dissemination;
- the likelihood of any future re-dissemination;
- the extent to which recipients already knew the secrets; and
- the extent to which such recipients are obliged to maintain the secrecy of the information.

The Court found the present record was insufficient to assess whether the information in the Affidavit had lost its trade secret status. Defendants only submitted the affidavits of two former HMS vice presidents. The affiants claimed they independently accessed and downloaded the Affidavit from NYSCEF on the same Saturday, a detail which the Court found particularly suspect. HMS countered in sur-reply that these vice presidents already had access to much of the same material during their employment and were still bound by nondisclosure agreements. The Court will evaluate the myriad of factors and determine if HMS inadvertently waived its trade secret protection through its unredacted e-filing upon a fuller factual record.

Notably, whether the flawed filing was a lawyer's innocent mistake was not listed as one of the factors to consider. How can you keep your client's trade secret status intact in the age of e-filing? Stipulations and protective orders are an effective way to maintain trade secrets, but only if litigators become more vigilant in managing their clients' secrets.

Print your final document for review before submitting online; typically, you will catch more errors reading the paper copy than viewing it on a computer screen. Choose a folder location and file name that makes it abundantly clear to the person filing the document which file should be uploaded. Once you've filed, download your submission from the docket and confirm there were no slip-ups. If you discover a document that should have been redacted, demonstrate to the Court that you are serious about safeguarding your client's secrets and immediately move to seal the record. Ultimately, the Golden Rule applies: Treat your client's secrets as you would treat your own.

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