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**Editor In chief – Assistant professor Dr. Taru Mishra**

**Publisher & Founder – Vaibhav Sangam Mishra**

**Frequency – Quarterly ( 4 Issue Per year )**

**ISSN : 2583-6323 (Online)**

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**Non-Disclosure Agreement Protecting Trade Secrets.**

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**ABSTRACT:**

The year 2020-22 did not go well for the whole world but it provided researchers to enhance research simultaneously in the field of trade secrets as we looked at various chemist companies and labs sprinting to develop Covid19 vaccine like Pfizer (USA) Serum Institute (India) etc. Later companies got Patents on those vaccines but due to government pressure and the need of the world, these companies signed NON- a DISCLOSURE AGREEMENT (NDA) with a collaborative company to don't share the formulas.

**NON –DISCLOSURE AGREEMENT (NDA):**

A Non- Disclosure Agreement is an agreement between the parties/Among the parties which protects from revealing the material secrets of business or etc. A Non-Disclosure agreement prohibits the parties' ability to disclose or use the information which has been protected by NDA. We can say that NDA defines the boundary for the parties who entered into the agreement and crossing the boundary is an infringement which justifiable by the courts.

NDA, which seems to restrain trade, may be deemed void. A restraint of trade means parties' future liberty to carry business or trade with other parties which are not part of this agreement 19 (1F) of the Indian constitution gives rights to do trade even Indian Contract Act 1872 also prohibits restraint of trade, therefore, any agreement which restraint the trade prima facie void unless and until it proves that restraint is reasonable. Even though The Indian constitution does not provide absolute rights to do trade there are also some reasonable restrictions. Hence, it is a legally binding contract. It is, therefore, enforceable before a court of law.

The non-disclosure agreement (NDA) is also known as a confidential agreement. This means that the party or parties that sign the agreement legally agree that any sensitive information they may get will not be disclosed to any person who is not covered by the contract.

- **TIME PERIOD FOR NDA:**

There is no steal-plated time frame for NDA it totally depends on the clauses of the contract. Parties have the liberty to sign an NDA for a specific time period it may be long for a day or month or year. However, the courts of the USA raised a concern about the NDAs where specific time for the protection of trade secrets. The District Court of Massachusetts held that the infinite restriction on trade is unreasonable restraint.

- **Significance to sign NDA:**

Businesses often maintain valuable information which would be better for businesses to

keep confidential. NDA can be looked at as a privacy agreement. (A Privacy Agreement is an agreement in which parties protect valuable information.) Present Time is the era of technology where everyday people log in on different websites, Social Media platforms, Online marketing, etc. and all these portals demand at least basic information from the users if the user ignored they deny him to log in.

Illustration: A famous social site Facebook when you log in to this website you need to fill out a form in which Facebook demand your basic information if there is no privacy agreement or Non-Disclosure Agreement then Facebook has full authority to use your data as they want.

Similarly, In the era of startups where small budget groups state their companies if they did not sign a Non-Disclosure agreement with the collaborative Company, employees, and persons associated with the company because these persons or collaborative companies are involved in the day-to-day affairs of the company and they know the valuable information and if that information came into knowledge of the competitor that company can be insolvent or could be dead without birth.

Eg: Company A works on a project to develop a formula for medicine, a manufacturing process, sales plan. A list of this information is known as a trade secret if these vital information is disclosed to competitors company then it will impact badly on company A. It might be possible that can be closed.

- **History of NDA:**

#### **THERE'S NO CLEAR ORIGIN STORY:**

No claim is made by Edison or Franklin to the nondisclosure agreement in the story. However, a study of media databases reveals that references to such agreements in the context of maritime law started to appear in the 1940s. Later, they started to show up more frequently in emerging IT companies like IBM. NDAs are rather understandable in that setting. Tech companies have proprietary algorithms they wish to keep to themselves as well as trade secrets they need to safeguard. Business hazards from dishonest employees' leaks are quite significant.<sup>1</sup>

By the 1970s, NDAs had begun to appear in unexpected and novel locations. For instance, The Washington Post reported that consultants hired by the committee were required to sign an NDA prohibiting them from "indicate, divulge or acknowledging" that they even worked on the investigation while it was ongoing during the late 1970s investigation into the Kennedy and King assassinations. Additionally, it requested that these consultants tell the House of any attempts made by journalists to learn more about the probe. Even still, several detractors appeared to think the concealment was excessive.<sup>2</sup>

"You must subject this information to a different viewpoint. One person replied, "The press has had to air it. These concepts seem to have been regarded as vital for maintaining national security. After all, the Central Intelligence Agency itself was one of the organisations the

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<sup>1</sup>Columbia Journalism Review/ [www.cjr.org/special\\_report/nda-agreement.php/](http://www.cjr.org/special_report/nda-agreement.php/) Last Visited 01/01/23/

<sup>2</sup>Supra 1

committee looked into.<sup>3</sup>

The idea of non-disclosure only started to appear in all kinds of contracts in the 1980s. It became a standard clause in employment contracts for a particular category of white-collar work. And probably most importantly, it started to appear frequently in settlement agreements for court disputes. This is when journalists started to truly struggle with these "contracts of silence," as one law review article referred to the full range of NDA/non-disparagement/confidentiality terms. Some of the most prominent cases of corporate misbehaviour were blocked by them. The most well-known instance of an NDA being invoked was when, in the fall of 1995, 60 Minutes interviewed tobacco industry whistleblower Jeffrey Wigand, whose revelations about health risks dominated the news for weeks in the 1990s (and later served as the inspiration for the Michael Mann film *The Insider*).<sup>4</sup>

After being let go in March 1993, Wigand, a former vice president of research and development at Brown & William son, agreed to sign a confidentiality agreement as a condition of receiving severance pay. But he soon started collaborating with 60 Minutes on its reporting on the industry's attempts to hide research conducted on the detrimental consequences of smoking by Wigand and others. Due to the nature of Wigand's work on the show, which was compensated in part with a consultant fee by CBS, and in light of an acquisition by the Westinghouse Electric Corporation, CBS also agreed to defend him from many future legal action brought by Wigand's employers. The network might be sued for "tortious interference" with his NDA, CBS' in-house attorney warned.

#### Types of NDA:



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- Unilateral NDA: Only one of the two parties, who are involved, discloses particular information to the other while also expecting no further exposure of that information.
- Bilateral NDA: It includes two parties, of which only one gives specific information

<sup>3</sup>Supra 1

<sup>4</sup>Supra 1

<sup>5</sup> Picture credit LegalDocs.co.in

to the other and anticipates that it will be kept from being disclosed further.

- **Multilateral NDA:** There are three or more parties involved in the agreement, and one of the parties shares information with the others while requesting that the other parties not share the information going forward. Additionally, the need for separate unilateral or bilateral NDAs is eliminated by these NDAs.

### **NEED TO NON-DISCLOSURE AGREEMENT:**

NDA may modify for any situation. There are mainly six major elements which consider essential for Non-Disclosure Agreement.

#### 1. Bodies to NDA:

If an NDA is signed between the corporation Every NDA specifically needs to specify who will be covered under the agreement either every employee of the corporation or some specific person or persons.

#### 2. With Partners of the corporation.

#### 3. With employees of the companies.

#### 4. Some specific person of the other company who owing to other contracts is involved in the day-to-day affairs of the business.

### **Laws Govern NDA in India:**

Under the laws of India, NDAs will be governed by the Indian Contract Act, of 1872. These agreements have been held to be not “restrictive agreements” as under Section 27 of the Act, and are hence, valid. [See 2008 (2) BomCR 446; 2006 (32) PTC 609 (Del.); 1995 (35) DRJ335]. To identify confidential information or trade secrets which are capable of protection in an industrial or trade setting, four elements are deduced in Thomas Marshall (Exports) Ltd. v. Guinle[(1978) 3 ALLER 193, 209-210]:<sup>6</sup>

1. The information must be something that, if made public, the owner feels will be hurtful to him or advantageous to his competitors or others;
2. The owner must have a reasonable basis for believing that the material in question is either confidential or secret, which would imply that it is not currently in the public domain;
3. The proprietor's convictions under the two prior headings must be plausible;
4. The material must be valued in light of the standards and procedures of their relevant business or profession.

The **fundamental principles** of the law of confidence are set out in Copinger and Skone, James on James on James on Copyright, as follows:“...There is abroad and developing equitable doctrine that he who has received information in confidence shall not take

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<sup>6</sup>HG.org/ What Are Non-Disclosure Agreements in India?/ www.hg.org/legal-articles/what-are-non-disclosure-agreements-in-india-55516/ last visited 01/01/24/

unfair advantage of it or profit from the wrongful use or publication of it. He must not make any use of it to the prejudice of him who gave it, without obtaining his consent or, at any rate, without paying him for it..." [Copinger and Skone, James on Copyright (12th Edn., Sweet and Maxwell, London) para 711; Fraser, (1983) 2 ALLER 101].<sup>7</sup>

### Trade Secret:

Trade secrets are a sort of intellectual property (IP) right that is attached to sensitive information and may either be licenced or sold.

#### 1. What qualifies as a trade secret?

In general, to qualify as a trade secret, the information must be: Commercially valuable due to its confidentiality,

- Be known only to a limited group of persons, and
- Be subject to reasonable measures taken by the owner of the information to protect it, including the

use of confidentiality agreements with clients and employees. It is considered an unfair business practice and a violation of trade secret protection when someone else improperly obtains, uses, or discloses such confidential knowledge in a way that is at odds with honest commercial practices.<sup>8</sup>

### Role of NDA to protect trade secret :

I. Because it can encompass private and non-public information that does not match the definition of a trade secret, a non-disclosure agreement (NDA) may give more protection than the laws that govern trade secrets. "However, the phrases "confidential information" and "property information" are defined by the contract, not the legislation. Trade secrets are defined by the statute. As a result, if a defendant discloses private information that does not qualify as a trade secret, this may constitute a breach of contract on the defendant's

part." *Albert's Organics, Inc. v. Holzman*, 445 F. Supp. 3d 463, 476 (N.D. Cal. 2020)<sup>9</sup>

#### II. Stop an employee (or former employee) from disclosing trade secrets.

State trade secret laws impose an automatic duty of confidentiality on workers, prohibiting them from inappropriately disclosing their employer's trade secrets (even without signing a non-disclosure agreement) As an illustration, Nike sued three ex-designers in 2014, claiming they had stolen

<sup>7</sup>Supra 6

<sup>8</sup>WIPO \ <https://www.wipo.int/trademarks/en/> Last Visited 02\01\23

<sup>9</sup>*Albert's Organics, Inc. v. Holzman*, 445 F. Supp. 3d 463, 476 (N.D. Cal. 2020) \ Holland & Knight \ <https://www.hklaw.com/en/insights/publications/2021/11/nondisclosure-agreements-and-trade-secrets-12-points-to-consider/> Last Visited 2021-11-27T05:25:31.053\

trade secrets to create work for Adidas. Specific designs, such as prototypes for team uniforms and products for the 2016 European Championships, plans for athletes sponsored by Nike, as well as unreleased financial data and projections pertaining to the company's business and details about Nike's upcoming product launches in the market, were allegedly taken as trade secrets.<sup>10</sup>

**III.** Stop a trade secret thief. Anyone who gets a trade secret by unethical means, such as theft, industrial espionage, or bribery, may be prohibited from utilizing the data moving forward and may even be charged with a crime. For instance, in 2018 a driverless vehicle trade secret was purportedly obtained from Apple papers, leading to the detention of an engineer as he sought to board a flight to China.<sup>11</sup>

➤ **Exceptions to NDA:**

➤ **What cannot be protected as Trade Secrets**

- **Independent Discovery /Reverse Engineering:** Whoever legally and independently discovers a secret, that is, without using criminal means or breaching agreements, is allowed to use the knowledge without permission. This implies that they can sell it, use it, or do whatever else they want with it. The process of disassembling and analysing (also known as "reverse engineering") a product in order to find its trade secret is not considered a violation of any laws pertaining to trade secrets.
- For example, A designer could utilise a cad application to reverse engineer a toy design. However, some vendor contracts may ban reverse engineering of their products.<sup>12</sup>
- **Public domain.** A piece of information is said to be in the public domain if it has been published, shown in a public place, or is widely used by a certain business. A business will not be able to effectively protect its trade secret rights if the information is already in the public domain, not even with a signed non-disclosure agreement. As an illustration, a tool-focused corporation recruited a designer to develop a sealed bearing pack that would be utilised in a motor. The tool maker sued the designer for theft of trade secrets when the designer produced a comparable gadget for a competitor's business. The designer was ultimately paid \$1.3 million as part of the settlement. On the other side, the Colorado Court of Appeals reversed the conviction in 2017, clearing the designer of any culpability in the event. As a consequence of the design's long history of usage in the industry, the court came to the judgment that it was in the public domain.
- The disclosing party shall not consent to any provision that allows the receiving

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<sup>10</sup>AIGA/Trade Secrets and Nondisclosure Agreements/ by Richard Stim/

Url:[https://www.aiga.org/sites/default/files/2021-02/trade\\_secrets.pdf](https://www.aiga.org/sites/default/files/2021-02/trade_secrets.pdf)/ 2021-11-09T15:35:25.023/

<sup>11</sup> Supra 11

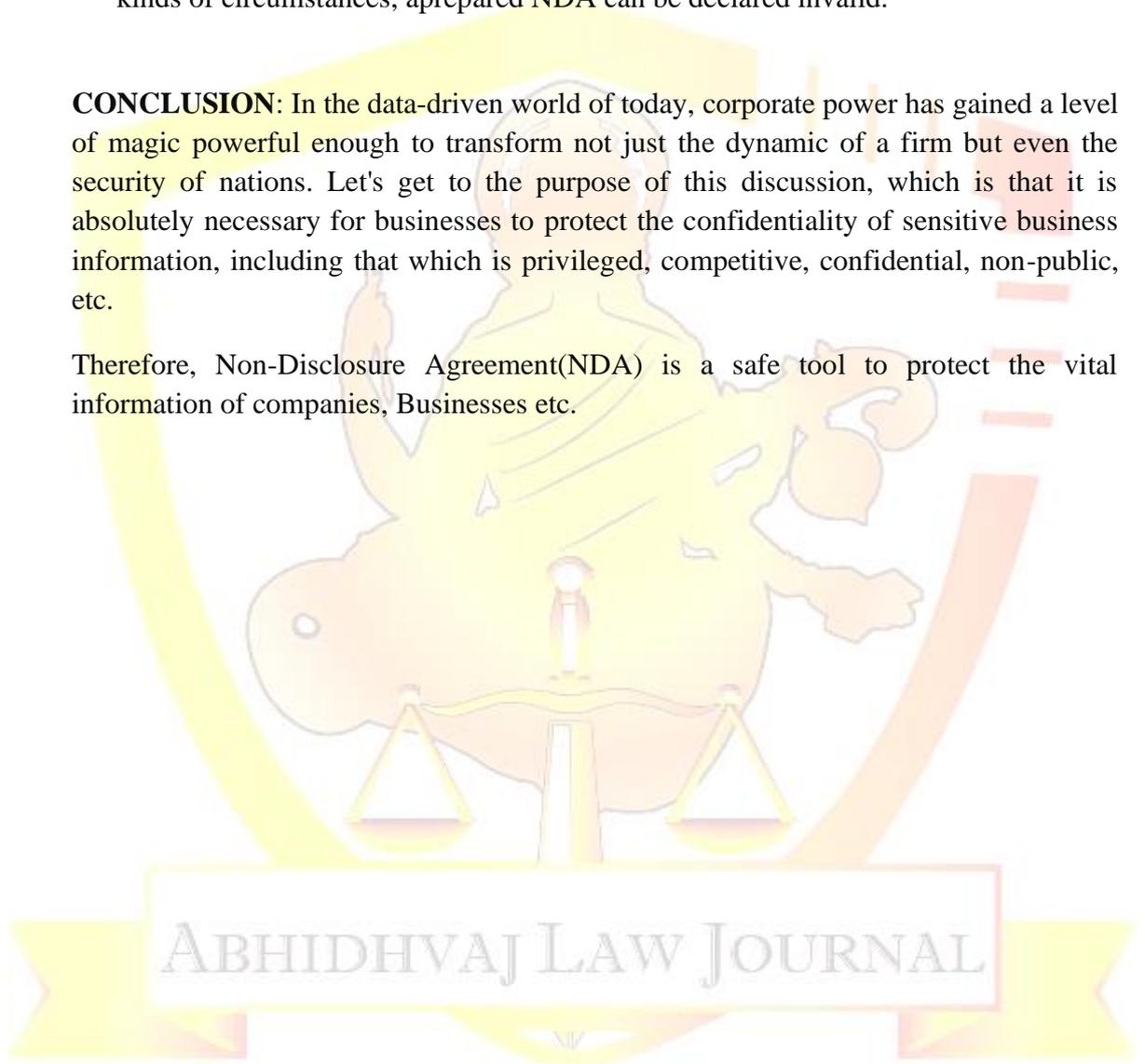
<sup>12</sup>Supra 9

party to utilise unmarked information. "Confidential" despite the fact that it is regarded as non-confidential and consequently unprotected.

- Failing to offer enough direction in the event of compelled disclosure is a fundamental oversight in contract drafting.
- Information that was supplied by the third party to the receiving party, in cases where the receiving party obtained the information not through the disclosure process but rather through the engagement of an independent third party or a supplier. In these kinds of circumstances, a prepared NDA can be declared invalid.

**CONCLUSION:** In the data-driven world of today, corporate power has gained a level of magic powerful enough to transform not just the dynamic of a firm but even the security of nations. Let's get to the purpose of this discussion, which is that it is absolutely necessary for businesses to protect the confidentiality of sensitive business information, including that which is privileged, competitive, confidential, non-public, etc.

Therefore, Non-Disclosure Agreement(NDA) is a safe tool to protect the vital information of companies, Businesses etc.



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