

## 4404 Reasonable Efforts to Protect Secrecy

To establish that the [*select short term to describe, e.g., information*] [is/are] [a] trade secret[s], [*name of plaintiff*] must prove that [he/she/*nonbinary pronoun*/it] made reasonable efforts under the circumstances to keep it secret. “Reasonable efforts” are the efforts that would be made by a reasonable [person/business] in the same situation and having the same knowledge and resources as [*name of plaintiff*], exercising due care to protect important information of the same kind. [This requirement applies separately to each item that [*name of plaintiff*] claims to be a trade secret.]

In determining whether or not [*name of plaintiff*] made reasonable efforts to keep the [*e.g., information*] secret, you should consider all of the facts and circumstances. Among the factors you may consider are the following:

- [a. Whether documents or computer files containing the [*e.g., information*] were marked with confidentiality warnings;]
- [b. Whether [*name of plaintiff*] instructed [his/her/*nonbinary pronoun*/its] employees to treat the [*e.g., information*] as confidential;]
- [c. Whether [*name of plaintiff*] restricted access to the [*e.g., information*] to persons who had a business reason to know the information;]
- [d. Whether [*name of plaintiff*] kept the [*e.g., information*] in a restricted or secured area;]
- [e. Whether [*name of plaintiff*] required employees or others with access to the [*e.g., information*] to sign confidentiality or nondisclosure agreements;]
- [f. Whether [*name of plaintiff*] took any action to protect the specific [*e.g., information*], or whether it relied on general measures taken to protect its business information or assets;]
- [g. The extent to which any general measures taken by [*name of plaintiff*] would prevent the unauthorized disclosure of the [*e.g., information*];]
- [h. Whether there were other reasonable measures available to [*name of plaintiff*] that [he/she/*nonbinary pronoun*/it] did not take;]
- [i. *Specify other factor(s).*]

The presence or absence of any one or more of these factors is not necessarily determinative.

### Directions for Use

Give this instruction with CACI No. 4402, “Trade Secret” Defined, to guide the jury with regard to element 3 of that instruction, that the plaintiff made reasonable efforts to keep the information secret. Read only the factors supported by the evidence in the case. Use factor i to present additional factors.

### Sources and Authority

- “Reasonable efforts to maintain secrecy have been held to include advising employees of the existence of a trade secret, limiting access to a trade secret on ‘need to know basis,’ and controlling plant access. [¶] ... Requiring employees to sign confidentiality agreements is a reasonable step to ensure secrecy.” (Whyte v. Schlage Lock Co. (2002) 101 Cal.App.4th 1443, 1454 [125 Cal.Rptr.2d 277, internal citations omitted].)
- “A person or entity claiming a trade secret is also required to make ‘efforts that are reasonable under the circumstances to maintain its secrecy.’ A leading treatise has collected the cases of successful and unsuccessful claims of secrecy protection; among the factors repeatedly noted are restricting access and physical segregation of the information, confidentiality agreements with employees, and marking documents with warnings or reminders of confidentiality.” (In re Providian Credit Card Cases (2002) 96 Cal.App.4th 292, 304 [116 Cal.Rptr.2d 833], referring to Trade Secrets Practice in California (Cont.Ed.Bar 2d ed.) §§ 4.9–4.10.)

- “In addition to possessing actual or potential economic value, the other part of the definition of a trade secret is that the information must have been protected by ‘efforts that are reasonable under the circumstances to maintain its secrecy.’ [W]hether a party claiming a trade secret undertook reasonable efforts to maintain secrecy is a question of fact, and it may be implicit in a determination that the information does not qualify as a trade secret, also a question of fact.” (*In re Providian Credit Card Cases*, *supra*, 96 Cal.App.4th at p. 306, internal citations omitted.)

### ***Secondary Sources***

Advising California Employers and Employees (Cont.Ed.Bar) Ch. 11, Reasonable Effort to Maintain Secrecy, § 11.6

Trade Secrets Practice in California (Cont.Ed.Bar 2d ed.) §§ 4.9–4.10

1 Milgrim on Trade Secrets, Ch. 1, *Definitional Aspects*, §§ 1.03–1.05 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.52 (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) § 1.03(4)

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