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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN DIEGO
10 CENTRAL DIVISION

11 ANTHONY JOHNSON, and ROBIN SASSI,
derivatively on behalf of STORIX, INC., a
12 California corporation,

13 Plaintiffs,

14 v.

15 DAVID HUFFMAN, an individual, RICHARD
TURNER, an individual, MANUEL
16 ALTAMIRANO, an individual, DAVID KINNEY,
an individual, DAVID SMILJKOVICH, an
17 individual and DOES 1-20,

18 Defendants.

19
20 AND RELATED CASES.
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Case No. 37-2015-00034545-CU-BT-CTL
(consolidated with Case Nos.
37-2015-00028262-CU-BT-CTL and
37-2016-00030822-CU-MC-CTL)

REPLY MEMORANDUM IN SUPPORT
OF STORIX, INC.'S MOTION FOR
ENTRY OF A PERMANENT
INJUNCTION

IMAGED FILE

Dept: 904
Judge: Hon. Kevin A. Enright

Complaint Filed: August 20, 2015
Trial Date: January 19, 2018

Hearing Date: April 6, 2018
Hearing Time: 11:00 A.M.

1 **I. INTRODUCTION**

2 Storix, Inc. proved at trial that Anthony Johnson breached the fiduciary duty of loyalty that
3 Johnson owed to Storix as a director. Storix now seeks a permanent injunction in order to obtain a
4 meaningful remedy to address that wrong and to prevent Johnson from continuing, repeating and
5 benefiting from his proven disloyalty. Storix’s proposed injunction is narrowly tailored to address
6 Johnson’s disloyal actions and to protect Storix from future harm.

7 Johnson, of course, would prefer that there be no remedy for his wrong, and in his opposition
8 Johnson asks the Court to deny Storix any injunctive relief. He wants to be free to repeat, continue
9 and benefit from his wrongdoing. Such a result would be grossly inequitable, and his arguments do
10 not support such an unjust outcome.

11 First, Johnson mischaracterizes the jury’s verdict and Storix’s claim to try to avoid the
12 imposition of an injunction. Contrary to his arguments, the jury did not exonerate him, and the
13 evidence at trial overwhelmingly supports the imposition of the requested injunction. Johnson’s
14 tortious disloyalty manifested in a variety of ways; the fact that Storix was able to mitigate its
15 damages in some respects does not somehow bless Johnson’s wrongful acts or bar other relief.

16 Second, the entry of a permanent injunction will not impermissibly interfere with Johnson’s
17 First Amendment right to free speech. The requested injunction is content-neutral, and designed to
18 address his proven history of tortious conduct. Moreover, Johnson voluntarily assumed a duty of
19 loyalty to Storix by becoming a director, which necessarily entails putting the company’s interests
20 ahead of his individual rights. For these reasons, the relief sought by Storix is not an improper prior
21 restraint. To the extent it impacts his speech at all, it is a justifiable restriction on commercial speech.

22 Third, Johnson’s unsubstantiated argument that an injunction is unnecessary lacks credibility.
23 The evidence presented during the first phase of trial strongly demonstrates the need for such relief.

24 Fourth, injunctive relief is supported by the finding that Johnson breached his duty of loyalty
25 to Storix. No prior ruling in this court or the federal court negates the need for the relief sought.

26 For the reasons stated below and in Storix’s moving papers, and based on the record in this
27 action, Storix respectfully requests that the Court award the requested injunctive relief.

28

1 **II. ARGUMENT & AUTHORITIES**

2 **A. Johnson’s Opposition is Untimely**

3 The deadline to file an opposition to Storix’s motion for entry of a permanent injunction was
4 Thursday, March 29th. Yet, in complete disregard of the briefing schedule, Johnson did not file and
5 electronically-serve his opposition papers until *after 11:40 p.m. on Friday, March 30th*—a court
6 holiday leading into the Easter holiday weekend. As a result, the opposition was effectively filed
7 Monday, April 2—the due date for the reply brief. The tardiness of Johnson’s opposition alone
8 provides discretionary grounds for the Court to refuse to consider it as it clearly prejudiced Storix’s
9 ability to prepare its reply on time (*see* Cal. R. of Ct. 3.1300(d)), and at a minimum, clarifies
10 Johnson’s continual disregard of rules applicable to him and the need for express court-mandated
11 equitable relief prescribing him from engaging in conduct that is designed to injure Storix.

12 **B. Johnson Mischaracterizes the Scope of Jury’s Verdict and Storix’s Claims**

13 Throughout his opposition, Johnson tries to characterize the jury’s verdict and claims asserted
14 at trial in a manner that disregards the full scope of the result achieved and facts at issue. For instance,
15 Johnson confusingly asserts that “the jury found Johnson liable for \$3,739.15 in damages on the first
16 count, but found no liability for damages on the second and third counts.” *See* Opp. at p. 5. In fact,
17 Storix asserted a cause of action against Johnson for breach of fiduciary duty, and it proved all
18 elements of that claim, as confirmed by the jury verdict. While such a claim could be premised on a
19 breach of the duty of loyalty he owed to Storix as well as a breach of duty of confidentiality, **Storix**
20 **did not assert separate “counts” in support of its breach cause of action, and the jury did not render a**
21 **verdict or award on particular “counts.”** The notion that the jury in any way exonerated Johnson is
22 simply incorrect.

23 Similarly, the jury did not “reject” Storix’s claims based on his efforts in pursuit of Janstor.
24 *See* Opp. p. 11. Johnson’s opposition argues that an injunction with respect to his competitive efforts
25 is unwarranted since Janstor has been dissolved and he poses no imminent threat of competition. In
26 fact, Johnson goes so far as to argue the “jury rejected Storix’s arguments and awarded nothing on”
27 its claim that Johnson breached his fiduciary duty of loyalty by pursuing his Janstor venture. That
28 argument amounts to revisionist history and is highly misleading.

1 Johnson was found to have breached his duty of loyalty to Storix while serving as a director.
2 Storix proved that Johnson's self-interested disloyalty manifested in a number of ways. It was not
3 only the emails he sent to Storix's customers, and employees, but also his efforts to stand up Janstor
4 and other activities. His actions were inextricably intertwined as part of Johnson's plan to undermine
5 Storix's ability to operate and earn revenues, while simultaneously positioning him to resurrect any
6 remaining assets from its ashes once he forced it to fail, all for his sole benefit. *That was his admitted*
7 *purpose for forming Janstor. See Opp. at p. 13.*

8 The fact that Storix tried to mitigate its damages, or that the jury may have awarded monetary
9 relief based on Storix's efforts to salvage customer relationships after Johnson's egregious mass-
10 mailings does not deprive this Court of its equitable power to grant all appropriate injunctive relief
11 based on Johnson's disloyal and tortious scheme and activity. Johnson's entire plan of clearly disloyal
12 conduct was part and parcel of the same effort to destroy Storix for his own benefit. Accordingly,
13 while Storix obtained some damages as a result of the jury trial, it is certainly still entitled to pursue
14 injunctive relief so that it may obtain the full remedy to which it is entitled.

15 The jury did not make any finding that Johnson was not liable for any particular facet of his
16 disloyal conduct, and did not parse out his Janstor-related activities, as Johnson now argues in his
17 opposition. His effort to recast the verdict as some sort of exoneration ignores the overwhelming
18 evidence upon which the jury determined that Johnson breached his duty of loyalty to Storix by
19 acting against its interests while serving as a director. *See Motion, p.8.* All elements of breach of
20 fiduciary duty were established, including damages. The fact that the jury determined the monetary
21 damages to be \$3.739.14, which seems to comport with the estimated employee time spent addressing
22 his disloyalty, does not limit the equitable remedies available.

23 Storix has always sought injunctive relief. Having now proven that Johnson breached his
24 fiduciary duty, it is now for the Court to fashion appropriate injunctive relief.

25 **C. The Requested Injunctive Relief Does Not Impermissibly Restrain on Johnson's**
26 **First Amendment Rights**

27 The main basis on which Johnson attempts to refute the need for injunctive relief is that it will
28 somehow unfairly burden his ability to exercise his First Amendment right to free speech. However,

1 Johnson fails to explain how he will suffer any unlawful restriction on his rights, or provide any
2 reason for the court not to enter the requested injunction.

3 As the California Supreme Court has recognized, “the United States Supreme Court ‘has
4 never held that all injunctions are impermissible.’” *DVD Copy Control Ass'n, Inc. v. Bunner*, 31 Cal.
5 4th 864, 886 (2003), *as modified* (Oct. 15, 2003), *quoting Pittsburgh Press Co. v. Pittsburgh Comm'n*
6 *on Human Relations*, 413 U.S. 376, 390 (1973). Further, “[n]ot all injunctions that may incidentally
7 affect expression ... are ‘prior restraints.’” *Id. quoting Madsen v. Women's Health Center*, 512 U.S.
8 753, 763 (1994). As such, “the United States Supreme Court has declined to apply prior restraint
9 analysis to a permanent injunction ... ‘issued not because of the content of petitioners’ expression ...
10 but because of their prior unlawful conduct.’” *Id.* at 886-887.

11 In *DVD Copy Control Ass'n, Inc. v. Bunner*, the California Supreme Court found the
12 injunction did not constitute a prior restraint, since it was content-neutral and based on defendants’
13 prior unlawful conduct regarding trade secret misappropriation. *Id.* at 887. The prior restraint doctrine
14 did not bar the injunction since it was “not a case of government censorship, but a private plaintiff’s
15 attempt to protect its property rights.” *Id.* (quotation omitted).

16 The requested injunction here is not an unlawful prior restraint since Storix is a private entity
17 seeking to protect its property rights. Johnson has already been determined to have breached his
18 fiduciary duty of loyalty to Storix. The requested injunction terms are content-neutral, based on
19 Johnson’s prior unlawful conduct, and seek to prohibit Johnson from continuing his disloyalty
20 resulting in irreparable harm to the company. Specifically, Storix seeks to prohibit Johnson from
21 communicating with its customers, potential customers, and other related contacts, as well as its
22 employees, unless authorized by Storix’s management. Such narrowly-tailored relief is necessary
23 given Johnson’s repeated history of outrageous conduct expressly designed to impair Storix’s
24 business, goodwill, and relationships with its employees and customers.

25 Johnson cites no convincing authority that such an injunction would unlawfully impair his
26 First Amendment rights given his violation of his fiduciary duty to Storix. Johnson’s reliance on
27 *Balboa Island Vill. Inn, Inc. v. Lemen*, 40 Cal.4th 1141, 1145 (2007), *as modified* (Apr. 26, 2007), is
28 unavailing. That case involved a restaurant’s defamation claim against a disgruntled neighbor. While

1 the California Supreme Court found the trial court's injunction order overbroad in some respects, "a
2 properly limited injunction prohibiting defendant from repeating to third persons statements about the
3 Village Inn that were determined at trial to be defamatory would not violate defendant's right to free
4 speech." *Id.* at 1146. Moreover, that injunction did not constitute an unlawful prior restraint since the
5 conduct was determined to be unlawful by the court. *Id.* at 1148.

6 Notably, this case involves a breach of fiduciary duty by Johnson to Storix, and so does not
7 involve the same First Amendment concerns like that in *Balboa Island Vill. Inn*, where the defendant,
8 a member of the public, did not owe the plaintiff restaurant a fiduciary duty. Given the underlying
9 legal basis of Storix's claim, a broader scope of relief is warranted. By agreeing to be a Storix
10 director, and in fact voting himself onto the board, Johnson assumed duties to Storix, including the
11 duty of loyalty. Such action amounts to a recognition that his personal rights would be limited by the
12 duties he assumed to Storix. For instance, courts recognize that "it is possible to waive even First
13 Amendment free speech rights by contract." *Sanchez v. County of San Bernardino*, 176 Cal.App.4th
14 516, 528 (2009). In fact, a party who signs a confidentiality provision may not breach that agreement
15 in the name of the First Amendment. *See id.* at 519 ["[W]hile the County claims that it had a First
16 Amendment right to make the disclosures, any such right was waived by the confidentiality
17 provision"]. Similarly, a party who agrees to protect a trade secret does not have a constitutional right
18 to divulge that secret. *See DVD Copy Control Assn., Inc. v. Bunner*, 31 Cal.4th 864, 881 (2003) ["The
19 First Amendment does not prohibit courts from incidentally enjoining speech in order to protect a
20 legitimate property right"]. Accordingly, any right to free speech Johnson might claim must be
21 tempered by the express duties he assumed to Storix once he voluntarily became a company direct.
22 Storix's requested relief is narrowly designed to protect its interests, i.e., its goodwill, relationships
23 with its customers or potential customers, and its employees. Thus, the injunctive scope is sufficiently
24 defined and narrow and consistent with a recognition of Johnson's rights given his position vis-à-vis
25 Storix.

26 Johnson does not justify any need to engage in any contact with Storix's customers, potential
27 customers, contacts, or employees. He merely relies on cases involving defamation and an ephemeral
28 claim to the exercise of his First Amendment right to free speech. That is not an adequate justification

1 for the threat posed by his demonstrated pattern of engaging in conduct that contravenes the duty he
2 owes Storix, and certainly provides no reason for the Court to forego enjoining such conduct based on
3 the record developed at trial.

4 In contrast to Johnson, who will suffer no hardship if an injunction issues, Storix will suffer
5 real irreparable harm if the injunction is denied and Johnson is permitted to engage in his ongoing
6 war and to act with impunity. In fact, Johnson has admitted as much.

7 In his October 7, 2015, email to David Kinney, which shortly followed the District Court's
8 denial of Storix's *ex parte* request for a temporary injunction on his threat to send the Announcement
9 Email, Johnson wrote: "My email to you and your buddies at Storix was sent out on 9/26, and the
10 only reply was a motion for a temporary restraining order, which the judge summarily denied.
11 [District Judge Huff] also denied an expedited filing, but allowed them to file a motion to be heard
12 the same day as the MSJ. **This sends the message that I'm unrestricted** unless they should win in
13 the MSJ, which they will not." TX 874 (brackets and emphasis added). Of course, Johnson followed
14 through with his threat and did send the Announcement Email.

15 There is no doubt that if injunctive relief is denied here, particularly after the time and
16 expense associated with Storix proving Johnson's disloyalty during a three-week jury trial, he will
17 once again feel entitled and "unrestricted" in engaging in the same behavior that necessitated such
18 litigation. Storix should not be put in the unfair position of having to continually prove such repeated
19 tortious violations after having done so already if Johnson views the only resulting punishment as a
20 few thousand dollars in damages. *See, e.g., Balboa Island Vill. Inn, Inc. v. Lemen*, 40 Cal.4th at 1158
21 (2007) ["Accepting Lemen's argument that the only remedy for defamation is an action for damages
22 would mean that a defendant harmed by a continuing pattern of defamation would be required to
23 bring a succession of lawsuits if an award of damages was insufficient to deter the defendant from
24 continuing the tortuous behavior. This could occur if the defendant either was so impecunious as to
25 be 'judgment proof,' or so wealthy as to be willing to pay any resulting judgments. Thus, a judgment
26 for money damages will not always give the plaintiff effective relief from a continuing pattern of
27 defamation. [...]. The Inn did not want money from Lemen; it just wanted her to stop."].

1 Johnson's arguments regarding "speech rights" are weak and any such restriction would be
2 well within the realm of permissible restriction based on the record presented at trial. At most, such
3 communications would amount to commercial speech, and "commercial speech receives a lesser
4 degree of constitutional protection than many other forms of expression, and because governments
5 may entirely prohibit commercial speech that is false or misleading." *Kasky v. Nike, Inc.*, 27 Cal. 4th
6 939, 946, *as modified* (May 22, 2002). Even if Johnson could somehow demonstrate a speech right at
7 issue, it's properly within the scope of a court-ordered prohibition, especially in light of his voluntary
8 assumption of duties of loyalty to Storix.

9 **D. The Requested Injunctive Relief Does Not Constitute an Unlawful Taking**

10 Without authority, Johnson argues that any injunction ordering him to relinquish rights in the
11 Janstor domain names or reserved ports is an unauthorized confiscation of his property. Johnson's
12 argument fails. Storix's requested relief merely seeks to remedy the acts Johnson committed in
13 dereliction of his duty of loyalty to Storix. If Johnson does not truly pose a threat of competition to
14 Storix, he should have no reluctance to relinquishing rights in the domains or ports. The fact that he is
15 resistant to such relief suggests that Storix has not heard the last of Janstor, and supports the need for
16 injunctive relief.

17 **E. Johnson Presents No Evidence That an Injunction Is Not Warranted To Prevent
18 Future Misconduct**

19 Johnson argues, without any evidentiary support, that the actions Storix seeks to restrain "are
20 not reasonably likely to recur." *See Opp.* at p. 11. Johnson contends that the "copyright case is now
21 over and there is no reason for Johnson to repeat the statements he made in these emails." *Id.* That is
22 precisely why injunctive relief is warranted.

23 Johnson acknowledges that the copyright suit is over, and this case is now in post-trial
24 proceedings. Without an outlet for Johnson's ranting behavior, namely in the form of court-filed
25 papers or hearings, Johnson is simply left with trying to settle the score in the public sphere. Yet, that
26 is exactly the type of disloyal and breaching conduct that Storix is entitled to have restrained.
27 Johnson's credibility is in tatters. He repeatedly was caught in contradictory testimony as to the
28 extent to which he had acted disloyal. The entire Janstor effort only ceased once he was caught red-
handed, and based on Storix's own investigative efforts and lawsuit. Only once he was sued did he

1 seek to wind up Janstor. His claims now of an (unverified and unenforceable) promise not to again
2 run afoul of his duty to Storix absent entry of a court order is simply not believable. Storix should be
3 awarded a remedy that carries the full force and effect of a judicial decree such that it will not have to
4 start from square one when Johnson next decides to get courageous behind his keyboard.

5 **F. The Requested Injunction is Justified Based on Johnson's Breach of his Duty of**
6 **Loyalty, and Does not Require a Separate Breach of his Duty of Confidentiality**

7 Johnson argues that at least five of the requested elements of Storix's requested injunction are
8 reliant on establishing a breach of Johnson's duty of confidentiality. *See* Opp. at 16. That is not true,
9 and it is not surprising that Johnson cites no authority for his argument that Storix must prove a
10 breach of confidentiality to obtain such relief. Johnson's proven breach of duty of loyalty and his
11 actions demonstrated at trial are sufficient to allow the court to award such injunctive relief.

12 The five challenged aspects of the injunction relate to a demand that Johnson not disclose
13 Storix's property or confidential information, limiting Johnson's inspection rights as a director, return
14 of Storix's customer and contact lists, return of Storix's source code, and verification of the deletion
15 or destruction of same. *See* Opp. at p. 16. Each of these requests directly relates to relief for
16 Johnson's demonstrated disloyalty, even without a finding that Johnson used Storix's confidential
17 information for his own benefit.

18 As proven at trial, Johnson used Storix's customer and contact lists in a disloyal manner.
19 Thus, it is justified in seeking the return of same. Similarly, Johnson pursued Janstor as a competitive
20 vehicle against Storix's interests. As a result, Johnson should be compelled to return to Storix the
21 source code, which indisputably belongs to Storix, which would serve as the basis for pursuing a
22 company in competition with Storix. Finally, Johnson's director inspection rights have already been
23 limited as a result of multiple court orders given his disloyalty. The injunctive request merely seeks to
24 finalize such interim orders. In sum, none of the actions or prohibitions sought by way of the
25 injunction are reliant on a finding of a breach of a duty of confidentiality, and so that is not an
26 adequate basis to deny the requested relief.

27 **G. Federal Court Rulings Do Not Prevent Post-Trial Injunctive Relief in this Case**

28 Johnson argues that because the District Court previously denied without prejudice Storix's
motion for further relief pursuant to 28 U.S.C. § 2202, that this court must not enter permanent post-

1 trial injunctive relief in this case. That disregards the scope of the respective requests.

2 Storix's motion in the federal proceedings sought relief allowed under the Copyright Act,
3 Title 17 of the United States Code, which included stopping Johnson from further copying or
4 distributing its software, permanently deleting such, and preserving evidence. *See* Johnson's RJN, Ex.
5 2, p. 2. The request was premised, in part, on Johnson's emails refuting the results of the trial in that
6 case, and specifically contesting Storix's declared ownership of the software, and Johnson's threat to
7 compete. The federal court at the time noted that "Johnson's email is troublesome, and it directly
8 contradicts the declaratory judgment." *See* Johnson's RJN, Ex. 3, p. 6. Based on the limited record at
9 the time, that court did not find a demonstrated irreparable injury, while also noting that it had since
10 awarded Storix over \$500,000 in costs and attorneys' fees against Johnson. *Id.*, p. 7. That award was
11 largely premised on a deterrence factor.

12 The federal court did not have the benefit of the full scope of evidence admitted at trial in this
13 case. There has now been an express finding by a jury that Johnson has breached his fiduciary duty to
14 Storix, and a mountain of evidence supported that finding. As explained in its moving papers, Storix
15 does not seek by way of the permanent injunction in this case relief specified in the Copyright Act,
16 but simply return of its property to redress Johnson's disloyal acts. Letting Johnson escape once again
17 without fully answering for his wrongs will again encourage him to continue such disloyalty. That
18 result would be the definition of inequity.

19 **III. CONCLUSION**

20 For the reasons stated herein, and in its moving papers, injunctive relief is appropriate and
21 necessary in order to provide Storix with a meaningful remedy to address Johnson's breaches of
22 fiduciary duty and to prevent him from continuing, repeating and benefiting from his proven
23 disloyalty. Such relief is well within the Court's equitable powers and proper on the facts herein.

24 DATED: April 3, 2018

PROCOPIO, CORY, HARGREAVES
& SAVITCH LLP

25
26 By: 

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is PROCOPIO, CORY, HARGREAVES & SAVITCH LLP, 525 "B" Street, Suite 2200, San Diego, California 92101. On April 3, 2018 I served the within documents:

REPLY MEMORANDUM IN SUPPORT OF STORIX, INC.'S MOTION FOR ENTRY OF A PERMANENT INJUNCTION

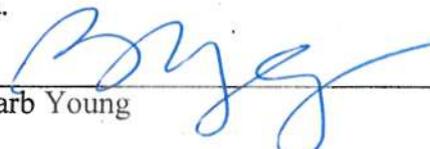
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(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 3, 2018, at San Diego, California.


Barb Young