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12

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN JOSE DIVISION
16

17 OOO BRUNSWICK RAIL MANAGEMENT,
18 a Russian limited liability company, and
BRUNSWICK RAIL GROUP LIMITED, a
19 Bermuda company,

20 Plaintiffs,

21 v.

22 RICHARD SULTANOV and PAUL
OSTLING, individuals,

23 Defendants.
24
25

Case No. 5:17-CV-00017-EJD

**PLAINTIFFS' REPLY BRIEF ISO
MOTION FOR TRO**

Date: January 20, 2017
Time: 10:00 a.m.
Dept: Court Room 4
Judge: Hon. Edward J. Davila

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27 **REDACTED VERSION OF DOCUMENT(S) SOUGHT TO BE SEALED**
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1 **I. INTRODUCTION**

2 Plaintiffs have established a likelihood of succeeding on its claims against Defendants. In
3 their Response to the Order to Show Cause (“Response”), Defendants do not dispute that the
4 information and documents they took from Brunswick are confidential, proprietary, and trade
5 secrets. In fact, Defendants admit that they selectively disclosed Brunswick’s confidential
6 information and trade secrets to third parties outside of Brunswick, including creditors,
7 shareholders, stakeholders, and other former employees. In short, Defendants do not dispute the
8 facts underlying Brunswick’s claims for trade secret misappropriation, breach of fiduciary duty,
9 breach of contract, and unfair competition. Defendants offer as a justification that they were
10 purportedly acting consistent with their fiduciary duties when they selectively disclosed
11 information to their close third-party allies against the decisions and advice of the company’s
12 Board of Directors, Management and legal and restructuring advisors. Defendants’ positions are
13 completely disingenuous and without basis.

14 As detailed below, Defendants’ after-the-fact, biased, unreasonable and incorrect
15 purported justification that they acted on their own authority to provide their third-party allies
16 with benefits not made available to others creditors or shareholders, does not in any way excuse
17 their unilateral decision to disclose Brunswick’s trade secrets and confidential information to
18 third parties. [REDACTED]

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED] In so doing, he and Defendant Richard Sultanov (“Sultanov”) do not even dispute
23 that they have usurped the decision-making authority of Brunswick and its advisors. Unless
24 Defendants are enjoined in a preliminary injunction from disclosing Brunswick’s confidential
25 information and trade secrets, and Plaintiffs are able to learn the scope of disclosure and to
26 mitigate that injury, Defendants will continue to illegally use this information to support their
27 efforts to control the future of Brunswick.
28

1 **II. THE COURT HAS PERSONAL JURISDICTION OVER DEFENDANTS TO**
2 **ISSUE A PRELIMINARY INJUNCTION**

3 When a plaintiff asserts an intentional tort claim such as trade secret misappropriation and
4 unfair competition, purposeful avilment of the privilege of conducting activities in the forum
5 state can be met by the purposeful direction of an act having effect in the forum state. *CE*
6 *Distribution, LLC v. New Sensor Corp.*, 380 F.3d 1107, 1111 (9th Cir. 2004) (citation omitted).
7 This so-called “effects test” rationale for specific personal jurisdiction is satisfied if the defendant
8 (1) commits an intentional act expressly aimed at the forum state, (2) causing harm in the state
9 that the defendant knew was likely to be suffered in that state. *Id.* (citing *Calder v. Jones*, 465
10 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984)).

11 At the preliminary injunction stage, submitted on the papers and even prior to filing of any
12 motion to dismiss, it is well-established that a plaintiff “need only make a prima facie showing of
13 jurisdictional facts to withstand the motion to dismiss That is, the plaintiff need only
14 demonstrate facts that if true would support jurisdiction over the defendant.” *Ballard v. Savage*,
15 65 F.3d 1495, 1498 (9th Cir. 1995) (citations omitted); *see also AT&T v. Compagnie Bruxelles*
16 *Lambert*, 94 F.3d 586, 588 (9th Cir. 1996) (holding that where the trial court rules on
17 jurisdictional issue based on affidavits and without holding an evidentiary hearing, the plaintiff
18 need only make a prima facie showing); *Nissan Motor Co. v. Nissan Computer Corp.*, 89 F. Supp.
19 2d 1154, 1161 (C.D. Cal. 2000); (preliminary injunction involves only prima facie showing);
20 *Mont. Silversmiths, Inc. v. Taylor Brands, LLC*, 850 F. Supp. 2d 1172, 1182 (D. Mont. 2012)
21 (same). Where the facts are not directly controverted, plaintiff’s version of the facts is taken as
22 true. *See AT&T*, 94 F.3d at 588. Likewise, conflicts between the facts contained in the parties’
23 affidavits must be resolved in a plaintiff’s favor for purposes of deciding whether a prima facie
24 case for personal jurisdiction exists. *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001);
25 *Groupion, LLC v. Groupon, Inc.*, 2012 U.S. Dist. LEXIS 78048, 4-5 (N.D. Cal. June 5, 2012)
26 (same). Plaintiffs have made a clear and uncontroverted showing that Defendants have
27 purposefully directed their activities to California and their acts meet the “effects” test
28 establishing specific jurisdiction. *See Calder v. Jones*, 465 U.S. 783 (1984).

1 Both Defendants have committed intentional acts that they expressly aimed at the forum
2 state (California) and that form the direct factual bases of Brunswick's claims. Sultanov very
3 clearly carried out the intentional acts of transferring Brunswick's trade secrets and confidential
4 and privileged information specifically and intentionally to his Gmail account in California. His
5 conduct was not incidental or random. It was a specific set of repeated acts that he intentionally
6 aimed at this specific body of California resources. These acts, the transfer of data to the Gmail
7 account, are the key, specific acts underlying the claims and are the acts that are causing the
8 injury in this case. The point was to avoid scrutiny by the company and to hide the
9 misappropriation beyond the jurisdiction of the Russian Federation. This could not be clearer
10 from the fact that Sultanov scrubbed his work email account's "sent" folder of all such forwarded
11 emails, in his attempt to cover up the fact that he had intentionally directed that data to his Gmail
12 account in California. Similarly, Ostling has specifically directed his acts of unfair competition
13 and breach of fiduciary duties at Gmail. In particular, Ostling's attempts to avoid scrutiny by the
14 company regarding his efforts to encourage the company's advisors and employees to support
15 him, and to undermine the current Board and Management, was specifically and intentionally
16 carried out using Gmail. Ostling's intentional and express aiming of these efforts at Gmail in
17 California was made entirely clear, when he stated to Brunswick's CFO that he was "intentionally
18 sending this to your gmail." *See* Dkt. No. 20, Mashchenkov Decl., Ex. 1. Moreover, Ostling's
19 receipt of trade secrets of the company and his forwarding of those confidential materials to a
20 third-party creditor representative, Mr. Mosolov, via his Rackspace email account, is a similar
21 specifically directed and intentional use of California facilities. *United States Chess Fedn., Inc. v.*
22 *Polgar*, 2009 U.S. Dist. LEXIS 96007, *26-27 (N.D. Cal., Oct. 14, 2009) (intentional use of
23 another party's Yahoo! email account established specific jurisdiction in the forum in which
24 Yahoo! was located).

25 Moreover, the injurious effects in California were entirely known and foreseeable.
26 Neither Ostling nor Sultanov deny that they knew that Google's facilities are located in
27 California. To the contrary, Sultanov went to high school in the Northern District of California,
28 lived here for much of his life and went to school at the University of California, throughout the

1 2000's. Response at 3; Panasar Decl., Ex. 2. He certainly would be aware that Google is based
2 in California and that his intentional use of Gmail would have effects in California. Similarly,
3 Ostling admits that he works in the technology industry, consummating major deals in Silicon
4 Valley with companies such as Oracle, and travels here to work with his current startup effort.
5 Response at p. 3. Thus, Ostling, too, would certainly be aware that Google is based in California
6 and that his intentional use of Gmail would have effects in California.

7 Furthermore, the fact that the Gmail terms of service very clearly include a choice of
8 forum and consent to personal jurisdiction in California and this District is strong evidence
9 advertent to the fact that Defendants would be aware that their activities would foreseeably
10 impact an interest in California and this District. Indeed, contrary to Defendants' assertions
11 (Response at 17), use of Gmail involves availing oneself of California law. This is particularly
12 true as to Sultanov, who used his own email account including these terms, in order to carry out
13 the conduct underlying the claims. It is also true as to Ostling, who intentionally went out of his
14 way to use "Gmail." This is further evidence of the fact that Defendants were carrying out
15 activities with impact and interest in California and this judicial district. *United States Chess*
16 *Fedn., Inc.*, 2009 U.S. Dist. LEXIS 96007 at *26-27 (intentional use of another party's Yahoo!
17 email account, with California choice of forum, was evidence that the party carrying out activities
18 through that account purposefully availed themselves of California and caused impacts in
19 California); *Facebook, Inc. v. ConnectU LLC*, 2007 U.S. Dist. LEXIS 61962 (N.D. Cal. Aug. 13,
20 2007) (personal jurisdiction over out-of-state parties who accessed the Facebook website because
21 they specifically directed actions towards the website, even if those parties did not know
22 Facebook's physical location: "Here, there is no dispute that [defendants] were fully aware that
23 Facebook existed, and that they specifically targeted their conduct against Facebook. That they
24 were able to do so while remaining ignorant of Facebook's precise location may render this case
25 factually distinct from prior precedents finding jurisdiction for acts of express aiming, but not in
26 a manner that warrants a different result.")

27 Additionally, Defendants' intentional, specific use of Gmail accounts to misappropriate
28 intellectual property and carry out tortious conduct causes harm in California, both to Plaintiffs

1 and to the public interest in California. Plaintiffs are harmed because the only way that Plaintiffs
2 can be made whole and mitigate the injury, is through control and visibility regarding the data and
3 communications directed at and available through the California email accounts. That is truly an
4 economic harm, and the future viability of the company turns on it. Indeed, the Ninth Circuit has
5 held that “harm [to a corporation] could be thought to have been suffered where the bad acts
6 occurred”; “We need not choose one criterion as the predominant indicator of where a corporate
7 plaintiff suffers economic injury. Nor do we need to choose a single forum, for jurisdictionally
8 sufficient harm may be suffered in multiple forums.” *Dole Food Co. v. Watts*, 303 F.3d 1104,
9 1113 (9th Cir. Cal. 2002); *Dinar Corp. v. Sterling Currency Group, LLC*, 2014 U.S. Dist. LEXIS
10 114528 (D. Nev. Aug. 15, 2014) (“place of incorporation is not necessarily the location of a
11 corporation's harm”). Indeed, Defendants point to no other mechanism, forum, law or judicial
12 process other than the expedited injunctive relief and discovery in this Court that could contain
13 the injury, evidencing the nexus between the harm and this particular forum. California’s public
14 interest is injured by Defendants’ conduct, because users of Gmail agree not to “misuse” Gmail
15 and that they will use that service “only as permitted by law.” Ramsey Decl., Ex. 1.

16 Accordingly, the exercise of jurisdiction over Defendants in California is entirely
17 reasonable and Plaintiffs have certainly made a prima facie showing, sufficient for the court to
18 issue a preliminary injunction and associated discovery. Here, the extent of Defendants’
19 purposeful injection of activities was substantial and, as noted there is a strong interest in
20 preventing this type of abuse in the forum. *See NetApp, Inc. v. Nimble Storage*, 41 F. Supp. 3d
21 816, 828 (N.D. Cal. 2014) (Australian defendant’s intentional and unlawful use of computer
22 systems in California was found to be a proper and reasonable basis for the exercise of
23 jurisdiction and California had an interest in adjudicating any harm that occurred here; no
24 evidence defendant had visited California). Defendants have placed the stolen Brunswick trade
25 secrets and confidential information in California and directed activities here, thus there is no
26 conflict with any foreign jurisdiction. Indeed, the exercise of jurisdiction is particularly
27 reasonable, given that Sultanov spent most of his life in the Northern District of California,
28 admits that he continues to maintain a mailing address in the district and has returned to

1 California in recent years. Response at 3-4. Similarly, the fact that Ostling admits that he travels
2 here for significant business, repeatedly, and intends to do so in the future further accentuates that
3 the exercise of jurisdiction is reasonable. Response at 3, 17.

4 It is factually uncontested that the relevant Gmail facilities and data are, in fact, present,
5 available and controlled in California. Brunswick served the Court's preservation order on both
6 Google's and Rackspace's physical locations in California (Mountain View and San Francisco,
7 respectively), as well as each company's agent for service of process, also in California. This
8 actually resulted in exercise of control over and preservation of the data and intellectual property
9 underlying the claims, through Google's and Rackspace's technical facilities and human
10 resources in California. *See e.g.* Dkt. 28, 28-1 (Notice of Compliance, received from Google's
11 Mountain View facility and personnel). Thus, there is direct, decisive and uncontroverted
12 evidence in the record that the data and intellectual property at issue is and was located at,
13 managed by and available through these companies' California facilities and that Defendants'
14 tortious acts may be mitigated through those California facilities. The location and nexus of the
15 misappropriated intellectual property with California is undisputed. This fact alone establishes
16 jurisdiction. Notably, Defendants do not and cannot contend that the misappropriated intellectual
17 property was located in and through any facilities in Russia, Bermuda, Connecticut or anywhere
18 else. At most, Defendants attempt to assert that Google and Rackspace have servers elsewhere in
19 the U.S. Response at 19-20. But, Defendants fail entirely to show that any of those servers have
20 anything to do with the emails or accounts at issue. *Id.* They do not even attempt to do so. Thus,
21 those assertions are irrelevant and fail to contravene the undisputed fact that the data underlying
22 the claims has already been shown to be actually within the possession and control of the third-
23 parties Google and Rackspace, at their California facilities.

24 Defendants also attempt to argue that specific jurisdiction only applies when one of the
25 parties is physically located in California. Response at 19 and n.7. That is not the law. There are
26 numerous cases where neither party was located in a forum, but Defendants' acts in the forum
27 established jurisdiction. *See e.g. Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 772-73 (U.S.
28 1984) (New York plaintiff sued Ohio defendant in New Hampshire; no question that respondent's

1 contacts with the forum state were sufficient to support jurisdiction where petitioner's claim arose
2 out of those contacts; holding that there was personal jurisdiction despite petitioner suffering only
3 “a small proportion of her total claimed injury” within the forum state); *SolarBridge Techs., Inc.*
4 *v. Ozkaynak*, 2012 U.S. Dist. LEXIS 81403, *9-10 (N.D. Cal. June 12, 2012) (defendant residing
5 in Turkey misappropriated trade secrets of Delaware company, located in Texas, by emailing
6 them to a competitor via an anonymous Yahoo! account; “because the email message sent by
7 Defendant was associated with the company, Yahoo, located in San Jose, California — the Court
8 has personal jurisdiction over Defendant.”). Further, as discussed, Defendants are incorrect that
9 their acts were not directed at any party in California. Indeed, here the injury to Brunswick is
10 precisely the misappropriated and data available solely on and through California email facilities,
11 thus as discussed California is where injury to Brunswick has actually occurred.

12 Defendants attempt to rely on irrelevant cases where the electronic contacts with a state
13 had nothing to do with the cause of action asserted. For example, Defendants cite *NuboNau, Inc.*
14 *v. NB Labs, Ltd.*, 2012 WL 843503 (S.D. Cal. Mar. 9, 2012), involving paid use of Google Ads.
15 Response at 19. But, there, the plaintiff did not establish any connection at all between the
16 Google Ads facility and the facts or circumstances underlying the claims. *NuboNau, Inc.*, 2012
17 WL 843503 at *5-6 (rejecting defendants argument noting that “[s]pecific jurisdiction is ‘tethered
18 to a relationship between the forum and the claim,’ not simply the forum and the defendant.”)
19 (internal citation omitted). By contrast, here, Defendants’ transfer of intellectual property to and
20 tortious conduct directed at Gmail and Rackspace is the core basis of the claims.

21 Defendants also cite numerous inapposite cases involving situations where defendants
22 operated websites outside of the forum state, which may or may not have been made available to
23 third-parties (for example customers) within the forum state. *See e.g.* Response, p. 18-19, citing
24 *High Tech Pet Prods., Inc. v. Shenzhen Jianfeng Elec. Pet Prod. Co.*, 2014 WL 897002 (E.D. Cal.
25 Mar. 6, 2014); *NuboNau, Inc.*, 2012 WL 843503. Those situations have no bearing here. Indeed,
26 this case involves the opposite situation, where Sultanov and Ostling intentionally and
27 specifically directed misappropriated intellectual property and tortious acts to and through
28 technical facilities located in the forum state—California, as part and parcel of the illegal scheme.

1 The exercise of specific jurisdiction is entirely appropriate here.

2 Finally, Ostling and Sultanov do not contest that they were working in concert, in
3 furtherance of a common plan to disclose information to creditors and others and to interfere with
4 and usurp the activities of Brunswick's management, all through the intentional and specific use
5 of the California email accounts discussed above. Nor do they contest that specific jurisdiction is
6 available over each of the Defendants, based on the acts of the other, as a co-conspirator. *See*
7 *Underwager v. Channel 9 Austl.*, 69 F.3d 361, 364 (9th Cir. 1995); *Mandelkorn v. Patrick*, 359 F.
8 Supp. 692, 694-97 (D.D.C. 1973) (finding jurisdiction over individuals who conspired to "de-
9 program" cult member); *Gemini Enters., Inc. v. WFMV Television Corp.*, 470 F. Supp. 559, 564
10 (M.D.N.C. 1979) (personal jurisdiction "where substantial acts in furtherance of the conspiracy
11 were performed in the forum state and the co-conspirator knew or should have known that the
12 acts would be performed in the forum state."). Therefore, exercise of jurisdiction over
13 Defendants is proper.

14 **III. BRUNSWICK HAS ESTABLISHED A LIKELIHOOD OF SUCCEEDING ON**
15 **THE MERITS OF ITS CLAIMS**

16 Brunswick established in its Application for TRO a likelihood of succeeding on its claims
17 against Defendants, including its claims for trade secret misappropriation, breach of fiduciary
18 duty to Brunswick, breach of contract against Sultanov, unfair competition. *See* Dkt. Nos. 4-5,
19 17, 19-20 (incorporated herein); *see also* Dkt. No. 15. Brunswick presented evidence that
20 Defendants took Brunswick's trade secrets and confidential information, including: material
21 intended solely for Brunswick's board; minutes of board meetings; legal counsels' opinions,
22 confidential letters from counsel; internal decision-making and strategy concerning Brunswick's
23 arbitration against its former CEO, Alex Genin ("Genin"); valuations reports by consultants;
24 internal emails regarding the ongoing negotiations with clients; and documents regarding
25 Brunswick's internal employment matters. *Id.* Brunswick also demonstrated that Defendants
26 shared this material with at least certain third parties, including Mr. Mosolov. *Id.*

27 Defendants do not dispute that the Brunswick information and documents are confidential,
28 proprietary, and trade secrets. Moreover, Defendants admit that they disclosed Brunswick's

1 confidential information and trade secrets to third parties, including creditors, shareholders, and
2 stakeholders in the Brunswick restructuring. *See* Response at p. 4-8. Rather than deny their
3 misappropriation of Brunswick’s trade secrets, they offer a series of excuses and afterthoughts—
4 masquerading as purported justifications—for their wrongful conduct. And as an apparent
5 backup plan, Defendants attempt to undermine the Court’s authority to issue interim injunctive
6 relief. As discussed below, all of these arguments are without basis.

7 **A. The Whistleblower Immunity Does Not Protect Ostling and Sultanov’s**
8 **Selective Disclosures To Advantage Certain Creditors**

9 Defendants argue that the whistleblower provisions of the Defend Trade Secrets Act
10 (“DTSA”) and California’s Uniform Trade Secrets Act (“California UTSA”) immunize their
11 disclosures of Brunswick’s confidential information and trade secrets to third parties such as
12 Brunswick’s creditors, shareholders, and other stakeholders in the Brunswick restructuring. But
13 this argument is completely disingenuous: The whistleblower immunities do not apply to Ostling
14 and Sultanov for the disclosure of trade secrets to Brunswick’s creditors, shareholders, or other
15 stakeholders in the restructuring and arbitration.

16 The DTSA provides a narrow immunity for whistleblowers who disclose trade secrets “in
17 confidence” and “to a Federal, State, or local government office, either directly or indirectly, to an
18 attorney; and solely for the purpose of reporting or investigating a suspected violation of law.” 18
19 U.S.C. § 1833(b). Defendants’ disclosures to Brunswick’s creditors, shareholders, and
20 stakeholders clearly fall outside the boundaries of the DTSA’s whistleblower immunity. First,
21 Brunswick’s creditors, shareholders, and stakeholders are not “Federal, State, or local government
22 office....” For this reason alone, Defendants’ disclosure are ineligible for immunity.

23 Second, Defendants’ disclosures were undoubtedly not motivated solely for the purpose of
24 reporting or investigating a suspected violation of law. This is readily apparent from Defendants’
25 own conduct. Sultanov, for example, took steps to conceal his theft of Brunswick’s trade secrets
26 by—among other things—scrubbing his Brunswick email account of the emails he forwarded to
27 his personal Gmail account, by deleting his “sent” emails. *See* Dkt. No. 5 ¶ 24. Moreover, during
28 his December 2016 interview with Brunswick’s general counsel, Sultanov *lied* about his

1 communications with third party creditors. *Id.* ¶ 26. If Sultanov had a genuine concern about
 2 purported wrongdoing, this interview would have provided a reasonable opportunity for him to
 3 voice those concerns to Brunswick’s general counsel. He did not, and instead stormed out of the
 4 interview and refused to return his Brunswick-issued cellphone and laptop. *Id.* ¶¶ 26-27.¹

5 Likewise, Ostling’s disclosures of Brunswick’s trade secrets and confidential information
 6 are far from altruistic. From the entirety of the facts, it is evident that Ostling is motivated by a
 7 desire to be Chairman of the company, have his favored plan and third-party allies take control of
 8 the company, and is unilaterally attempting to provide such an advantage to at least one creditor
 9 (likely in order to engineer a sale of the company to parties with which he is aligned). *See* Dkt.
 10 No. 19-2; Dkt. No. 22-4. [REDACTED]

11 [REDACTED]
 12 [REDACTED] *See* Declaration of Elena Naumova in support of Brunswick’s Reply to
 13 Defendants’ Response (“Naumova Decl. ISO Reply”) ¶ 3 (submitted herewith). Ostling’s
 14 political, self-interested motivations are not for reporting and investigating purported wrongdoing
 15 at all. Rather, his acts are motivated to orchestrate a coup and benefit himself and Sultanov.

16 Defendants rely on the *In re JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp. 2d 1127, 1130,
 17 1135-36 (N.D. Cal. 2002) and *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850 (10th
 18 Cir. 1972) decisions to argue that they are excused from their obligations not to disclose
 19 Brunswick’s confidential information and trade secrets. Response at p. 21. Defendants’ reliance
 20 is misplaced. First, *In re JDS Uniphase Corp.* is distinguishable from the facts there. That case
 21 involved an ongoing securities fraud class action lawsuit against a company. *In re JDS Uniphase*
 22 *Corp.*, 238 F. Supp. 2d at 1130. The plaintiffs sought to narrow the scope of the defendant’s
 23 confidentiality provision with its former employees so that former employees could speak with
 24

25 ¹ For these reasons, Sultanov’s assertions in his declaration cannot be credited. He is clearly
 26 motivated and willing to make misstatements, in support of his and Ostling’s scheme. For
 27 example, Sultanov makes false and unsubstantiated suggestions that he was purportedly asked to
 28 engage in wrongdoing regarding accounting matters. Sultanov Decl., ¶¶ 27-28. Brunswick
 categorically denies these false allegations. Indeed, Sultanov is wrong and he, himself, admits
 that he had nothing more than an unsubstantiated belief. *Id.* The allegations are baseless and, for
 the reasons stated herein, irrelevant to the issues before the Court.

1 the plaintiffs' investigators. *Id.* The plaintiffs made clear made clear they had "***no interest in any***
2 ***information that could be construed as a trade secret***" and were "***willing to discuss reasonable***
3 ***measures to accommodate any legitimate concerns***" of the defendants. *Id.* at 1134 (emphasis
4 added). Under these circumstances, the court agreed to narrow the confidentiality requirements.
5 *Id.* at 1137. However, in so doing, the court acknowledged that the defendant "***unquestionably***
6 ***has a legitimate interest in preventing dissemination of trade secrets and confidential business***
7 ***information....***" *Id.* (emphasis added).

8 Those facts are obviously distinguishable from the case here. First, there is no pending
9 securities investigation and no interviews at issue that warrant disclosing Brunswick's
10 confidential information and trade secrets. Equally important, the plaintiffs in *In re JDS*
11 *Uniphase Corp.* sought the court's intervention to narrow the confidentiality. Defendants, by
12 contrast, engaged in what can only be described as self-interested self-help, unilaterally deciding
13 what trade secrets and confidential information to disclose and to whom. Further, the plaintiffs
14 and the court in *In re JDS Uniphase Corp.* recognized the defendant's legitimate interest in
15 protecting from disclosure the defendant's trade secrets and confidential information. Ostling and
16 Sultanov completely ignore any legitimate interest Brunswick has in maintaining the secrecy of
17 its confidential information and trade secrets.

18 Defendants' reliance on *Lachman* is also misplaced. Critically, in that case there had
19 already been a full trial to determine that there was conduct that would amount to unlawful
20 activity. *See Lachman*, 457 F.2d at 851 and 853. That is entirely different than the situation here,
21 where Defendants put forth mere unsupported, after-the-fact allegations, which were only
22 asserted once Defendants learned that the company had learned about and was investigating their
23 misappropriation. Here, there has been no adjudication of any alleged wrongdoing by Brunswick,
24 ***at all.*** Defendants' baseless assertions are designed to cover up their plan to undermine the
25 company's Board and Management, and Ostling is retaliating because he was required to leave
26 the Board.

27 Defendants' whistleblowing story is a transparent afterthought intended to justify their
28 misappropriation of Brunswick's trade secrets. If Defendants were really concerned with

1 reporting and investigating a purported violation of law, they would have narrowed their
 2 disclosure to the appropriate government agencies or Brunswick's attorneys. In fact, they did the
 3 opposite, providing broad but selective disclosures to third-parties with whom Brunswick was
 4 negotiating *first*, and *then* once their acts were discovered, hurriedly filing purported complaints
 5 with the SEC and FCA. Accordingly, there is no basis for immunity under the DTSA or
 6 California's UTSA.

7 **B. Defendants Unreasonable Belief They Were Correct To Disclose Brunswick's**
 8 **Trade Secrets Does Not Excuse Their Disclosure**

9 As yet another supposed "justification" for disclosing Brunswick's trade secrets and
 10 confidential information, Defendants, relying on Delaware law, argue that they "correctly"
 11 concluded they owed a fiduciary duty to disclose Brunswick's trade secrets and confidential
 12 information. This argument is baseless. First, Defendants assume that Delaware law applies.
 13 But Brunswick is not incorporated in Delaware (*see* Dkt. No. 5 ¶ 3) and Defendants provide no
 14 legal basis why Delaware law should otherwise apply. [REDACTED]

15 [REDACTED]
 16 [REDACTED] *See* Naumova Decl. ISO Reply ¶ 4 (submitted herewith).

17 Third, even if Brunswick is insolvent—which it is not—Defendants assume that
 18 Brunswick failed to fulfill its fiduciary obligations to its shareholders and creditors. Defendants'
 19 claims are false. Throughout the restructuring, Brunswick has met its fiduciary duties to its
 20 shareholders and creditors. *See* Dkt. Nos. 5 ¶¶ 31-33 and 22-4 ¶¶ 27-37. Rather, Defendants'
 21 *selective* disclosure of certain trade secrets and confidential information that undermines
 22 restructuring by disadvantaging certain stakeholders over others. *Id.*

23 More disturbing is Defendant's refusal to accept that they are not the sole arbiter of
 24 allegedly wrongful conduct. Defendants do not dispute that by disclosing Brunswick's
 25 confidential information and trade secrets, they have completely usurped the decision-making
 26 authority of Brunswick management, the duly-appointed Board of Directors, and disregarded the
 27 advice of at least three major international law firms—Cleary Gottlieb Steen & Hamilton LLP,
 28 Akin Gump Strauss Hauer & Feld LLP and Clifford Chance LLP—and several investment banks

1 and restructuring consultants advising the company. Defendants' obligation to hold in confidence
2 Brunswick's confidential information and trade secrets does not end with *their unreasonable and*
3 *biased belief* that they are correct. If this were the standard, anyone could avoid liability by
4 claiming compliance with their fiduciary duty and this would set a dangerous and untenable
5 precedent. But, this is not the standard. See *Value Prop. Tr. v. Zim Co.* (in Re Mortg. & Realty
6 Tr.), 195 B.R. 740, 750 (Bankr. C.D. Cal. 1996) ("The general rule is that a fiduciary who
7 receives confidential information as a result of the fiduciary relationship is prohibited from
8 disclosing the information, except in the furtherance of the interests of the beneficiary of the
9 fiduciary relationship"); *Nazif v. Computer Scis. Corp.*, 2015 U.S. Dist. LEXIS 78673 (N.D. Cal.
10 June 17, 2015) (rejecting objectively unreasonable whistleblowing claim); *Wolfes v. Burlington*
11 *Ins. Co.*, 2010 U.S. Dist. LEXIS 21753, 17-19 (N.D. Cal. Mar. 10, 2010) (officer was "interfering
12 with a decision the shareholders and directors of [company] had made" when they "the acts for
13 which [fiduciary] was being sued by [company] consisted of trying to get third parties to
14 undermine the sale of business assets which the shareholders and directors of the corporation had
15 voted to sell."). Equally disturbing is Defendants' belief that they somehow owe only a *selective*
16 group of shareholders and creditors a fiduciary duty (notably, the group of creditors with which
17 Ostling is aligned). Defendants admit they only made selective disclosures of Brunswick's
18 confidential information and trade secrets to just certain shareholders and creditors (*see* Response
19 at p. 4-8) but offer no justification as to how they decided certain parties (their favored allies)
20 should receive Brunswick's confidential information and trade secrets. Defendants' naked
21 assertion that they had a fiduciary duty to disclose is unsubstantiated, unreasonable and a
22 transparent attempt to cobble together an excuse. It is, ultimately, a red herring.

23 C. **Brunswick Has Sufficiently Alleged That Ostling Misappropriated Trade**
24 **Secrets, Breached His Fiduciary Duty, And Engaged In Unfair Competition**

25 Ostling argues that Brunswick cannot establish a likelihood of success on trade secret
26 misappropriation as to Ostling because Brunswick's allegations are purportedly too vague. In
27 particular, Ostling argues that the information regarding Sultanov's suspension and Brunswick's
28 internal investigation regarding Defendants' conduct was not a secret and did not "cause any

1 compensable harm.” Ostling’s argument is baseless. Brunswick has alleged with sufficient
2 specificity, the time, place, and manner of Ostling’s disclosure of Brunswick’s confidential
3 information regarding Sultanov’s investigation. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct.
4 1937, 173 L. Ed. 2d 868 (2009) (holding that a claim is plausible on its face “when the plaintiff
5 pleads factual content that allows the court to draw the reasonable inference that the defendant is
6 liable for the misconduct alleged); *see also SolarBridge Techs., Inc. v. Ozkaynak*, No. C 10-cv-
7 03769-EJD, 2012 U.S. Dist. LEXIS 81403, at *20 (N.D. Cal. June 12, 2012) (finding “more than
8 enough facts to state a claim(s) for the purposes of sufficiency of the Complaint” when plaintiffs
9 alleged that Defendant had taken Plaintiff’s trade secrets and disclosed such secrets to others
10 without consent of his former employer).

11 Ostling’s assertion that the investigation is “not a secret and never was” is merely wishful
12 thinking on his part. Brunswick intended to keep Sultanov’s suspension confidential in order to
13 protect the integrity of investigation. Dkt. 5 ¶ 29. Also wishful thinking is that Ostling’s
14 disclosure did not harm Brunswick. On the contrary, Ostling’s continued meddling into
15 Brunswick’s internal and confidential affairs threatens Brunswick’s ability to handle truly internal
16 matters itself without interference from former directors and employees.

17 Ostling argues that his interactions with Aaron Rubin—a board member representing one
18 of the shareholders—did not constitute unlawful conduct because he had a duty to disclose what
19 he believed to be wrongdoing. As discussed above, there is no evidence of any wrongdoing or
20 that Ostling’s motivation was to report a wrongdoing. Ostling’s own unreasonable belief does not
21 justify his disclosure. Indeed, Ostling’s interactions with Rubin are simply another data point,
22 where Ostling is breaching his duty and unfairly competing, by attempting to interfere with
23 parties to the restructuring, to gather support for his allies, and undermine the company’s actions
24 and decisions.

25 Ostling seems to ignore Brunswick’s other claims against him for breach of fiduciary duty
26 and unfair competition, and the substantial evidence supporting those claims. Indeed, those stand
27 un rebutted. Most telling is Ostling’s disclosure of information regarding Brunswick’s internal
28 investigation of Sultanov to certain creditors, the text messages to Brunswick’s outside counsel,

1 and the email to Brunswick's CFO, that—like his interactions with Rubin—reflect continued
2 interference with Brunswick's business and disclosure of Brunswick's confidential information
3 and trade secrets. Disclosing internal confidential information, including internal employment
4 information, to a third party is a breach of a fiduciary duty. *See Thomas Weisel Partners LLC v.*
5 *BNP Paribas*, 2010 U.S. Dist. LEXIS 32332 (N.D. Cal. Mar. 31, 2010). Also a breach of
6 fiduciary duty is interfering with a company's internal investigation of wrongdoing by one of its
7 employees. Simply put, Ostling's conduct goes well beyond the realm of trade secret
8 misappropriation. Brunswick has not only alleged with sufficient specificity Ostling's wrongful
9 conduct, it has presented *prima facie* evidence of the same. Other than self-serving assertions,
10 Ostling has not provided any evidence that undermines Brunswick's evidence.

11 **D. The Arbitration Provision in Ostling's Employment Agreement Does Not**
12 **Prevent The Court From Issuing A Preliminary Injunction**

13 Ostling argues that Brunswick is unlikely to succeed on the merits because the arbitration
14 provision bars Brunswick's complaint against him. Ostling is incorrect. As a preliminary matter,
15 whether the arbitration clause in Ostling's Employment Agreement warrants the arbitration of
16 Brunswick's intentional tort claims is not properly before the Court as Defendants have not
17 moved to dismiss Brunswick's complaint or moved to compel arbitration. In any event, the
18 existence of an arbitration clause does not absolve a court of its obligations to consider the merits
19 of preliminary injunctive relief. It is well-settled in the Ninth Circuit that a district court can
20 grant injunctive relief in an arbitrable dispute pending arbitration, provided that the prerequisites
21 for injunctive relief are satisfied. *See Toyo Tire Holdings of Americas Inc. v. Continental Tire*
22 *North America, Inc.*, 609 F.3d 975, 979 (9th Cir. 1995) (holding a district court may issue interim
23 injunctive relief on arbitrable claims if interim relief is necessary to preserve the status quo and
24 the meaningfulness of the arbitration process); *PMS Distrib. Co., Inc. v. Huber & Suhner AG*, 863
25 F. 2d 639, 641 (9th Cir. 1988) (same); *2Die4Kourt v. Hillair Capital Mgmt, LLC*, 2016 WL
26 4487895 *1, *4 (C.D. Cal. Aug. 23, 2016) (granting a preliminary injunction, notwithstanding an
27 order granting arbitration). Accordingly, the *possibility* of an arbitrable claim here does not strip
28 or absolve the Court of its ability to decide whether preliminary injunctive relief is necessary to

1 maintain the status quo and to issue preliminary relief. Indeed, assuming an arbitrable claim for
 2 purposes of argument, Defendants' scheme would destroy the company rendering any theoretical
 3 arbitration fruitless. Accordingly, the Court can still issue injunctive relief, even if the dispute is
 4 arbitrable and under the circumstances should do so, to prevent irreparable harm.

5 **E. The Federal DTSA And California Law Applies To Defendants' Wrongful**
 6 **Conduct Here**

7 Defendants argue that Brunswick has not established a likelihood of success because it has
 8 not shown why California or any State law applies given its lack of presence in the United States.
 9 This argument is also without merit. First, the DTSA undoubtedly applies here. The DTSA
 10 applies to conduct outside of the United States if (1) "the offender is a natural person who is a
 11 citizen or permanent resident alien of the United States" or (2) an act in furtherance of the
 12 offenses was committed in the United States. 18 U.S.C. § 1837. Ostling and Sultanov are both
 13 citizens of the United States. This alone is an independent basis for applying the DTSA.
 14 Moreover, the acts in furtherance of the offenses—*i.e.*, the disclosure of Brunswick's confidential
 15 information and trade secrets using Google's Gmail services—occurred in the United States,
 16 specifically California.

17 Second, California law undoubtedly applies because Defendants directed their conduct at
 18 California. *See Paulsen v. CNF Inc.*, 559 F.3d 1061, 1080-1081 (9th Cir. Cal. 2009) (holding
 19 under California choice of law rules, California applies its own rule of decision); *see also Via*
 20 *Techs., Inc. v. Asus Comput. Int'l*, No. 14-cv-03586-BLF, 2015 U.S. Dist. LEXIS 80124, at *11
 21 (N.D. Cal. June 18, 2015) (finding Defendants' arguments "unpersuasive" that CUTSA does not
 22 reach conduct that occurs outside the United States).

23 **IV. BRUNSWICK HAS ESTABLISHED A LIKELIHOOD OF FUTURE**
 24 **IRREPARABLE HARM**

25 **A. Plaintiffs Have Established A Likelihood Of Future Irreparable Harm**

26 Defendants argue that Brunswick cannot establish a likelihood of future harm because
 27 Brunswick has not shown that money damages are not adequate. Brunswick has already
 28 established that monetary damages are insufficient. The imminent use of trade secrets and the
 inability of the company to fully understand and mitigate the disclosures, due to Defendants'

1 concealment of their activities, constitutes irreparable harm. *See* Dkt. No. 4 at p. 10-12; 5 at p.
2 12-14; 22-4 at p. 9-13. Defendants’ disclosure of Brunswick’s trade secrets and confidential
3 information is not only imminent; it is ongoing. Defendants concede they have disclosed
4 Brunswick’s trade secrets and confidential information to at least certain creditors and
5 shareholders. Plaintiffs must be able to understand the scope of the situation, in order to level the
6 playing field, mitigate prior acts and prevent ongoing misappropriation and breaches of the law.

7 As a practical matter, monetary damages cannot adequately remedy the harm Defendants
8 have caused Brunswick. Defendants’ disclosure of confidential information and trade secrets to a
9 select group of creditors and shareholders has jeopardized the restructuring. Brunswick’s
10 continued business rests in part on the success of this restructuring. *Id.* Likewise, the disclosure
11 of Brunswick’s privileged information regarding the arbitration also poses an irreparable harm.
12 *Id.* Once potential witnesses and other parties interested in the Genin arbitration obtain
13 Brunswick’s confidential and privilege and information, there is no monetary remedy that can
14 undo the harm of tainted witnesses or the disclosure of Brunswick’s litigation strategy. *See*
15 *Versaterm Inc. v. City of Seattle*, No. C16-1217JLR, 2016 U.S. Dist. LEXIS 111010, at *9 (W.D.
16 Wash. Aug. 18, 2016) (extending TRO because applicant would suffer “catastrophic and
17 irreparable injury should the TRO not be extended because any harm resulting from disclosure
18 could not be undone at a later time”).

19 Defendants also argue a preliminary injunction is unwarranted because the future injury to
20 Brunswick is too speculative. Brunswick has established a significant threat of irreparable injury
21 that is far from speculative. *See* Dkt. No. 4 at p. 10-12; 5 at p. 12-14; 22-4 at p. 9-13. A
22 successful restructuring hinges in part on Brunswick’s ability to negotiate a viable restructuring.
23 *Id.* By disclosing Brunswick’s trade secrets and confidential information, Defendants undermine
24 Brunswick’s negotiation position. *Id.* This is not theoretical injury but one that is ongoing. At
25 the same time Defendants disclosed Brunswick’s confidential information and trade secrets to
26 certain creditors, those same creditors sent coordinated letters to Brunswick. *Id.* Contrary to
27 Defendants’ assertions, these are not “mere assertions” or “platitudes” but rather, facts supported
28 by evidence set forth in multiple declarations. *See* Dkt. No. 4 at p. 10-12; 5 at p. 12-14; 22-4 at p.

1 9-13. Defendants offer no evidence to the contrary. According, Brunswick has shown a
2 likelihood of immediate irreparable harm.

3 **B. Brunswick Met Its Burden Of Showing That The Balance Of Hardships Tip**
4 **Sharply In Favor Of An Injunction**

5 Defendants argue that Brunswick did not make its burden of showing the hardships tip in
6 favor of a preliminary injunction because Brunswick purportedly did not balance the hardships
7 Defendants would face. Specifically, Defendants claim Brunswick “ignored ... the damage to
8 Defendants’ business reputations because it appear from preliminary injunction that “Defendants
9 may have done something improper.” Defendants’ claims are baseless. Contrary to Defendants’
10 assertion, Brunswick did balance the equities. *See* Dkt. No. 4 at p. 4; *see also* Dkt. 24.
11 Defendants, however, have no legitimate interest in disclosing Brunswick’s confidential
12 information and trade secrets. *Id.* The point of the disclosure was to aid Ostling’s and Sultanov’s
13 allies. Even crediting their assertions that a fiduciary in the business community may believe
14 unreasonably that their company has done something improper, contrary to the decisions of the
15 Board, shareholders and multiple legal counsel and business advisors, is not a legitimate concern
16 that warrants denying a preliminary injunction. Indeed, Defendants have not identified any
17 burden to them if a preliminary injunction issues requiring them to comply with the law, cease
18 interfering with the business and provide information necessary for the company to mitigate.
19 Accordingly, the equities tip in favor of granting a preliminary injunction.

20 **C. There Is A Strong Public Interest In Protecting Trade Secrets And**
21 **Confidential Information**

22 Defendants argue that Brunswick has not shown the proposed injunction is in the public
23 interest. It is well settled, however, that there is a strong public interest in protecting confidential
24 information and trade secrets. *Hunter Consulting v. Beas*, 2012 U.S. Dist. LEXIS 176317, *12-
25 13 (C.D. Cal. Dec. 10, 2012) (granting preliminary injunction and finding “there is a strong
26 public interest in favor of protecting trade secrets”), *citing Kewanee Oil Co. v. Bicron Corp.*, 416
27 U.S. 470, 483 (1974). The Court undoubtedly understood this public interest was present here
28 when issuing the TRO.

1 **D. The Court Should Issue A Preliminary Injunction Consistent With Its TRO**

2 Defendants do not object to Paragraphs 4a, 4b, and 4c of the Court’s temporary restraining
3 order (“TRO”) that prohibit Defendants from accessing or modifying the Brunswick-issued
4 cellphone and laptop, require Sultanov to return the Brunswick-issued devices, and that enjoins
5 Defendants and those in concert with them from destroying evidence. *See Opp.* at p. 30.
6 Therefore, the Court should issue a preliminary injunction consistent with these unopposed
7 provisions of its TRO.

8 Defendants argue that the Paragraph 4d of the Court’s TRO that enjoins Defendants from
9 further disclosure of Brunswick’s confidential information and trade secrets is overly broad—and
10 in fact illegal—to the extent Brunswick’s would prohibit Defendants from cooperating further
11 with the SEC or other similar agencies. This argument is a strawman. Brunswick has not
12 prevented Defendants from filing whatever purported grievances they may have with the SEC nor
13 do they intend to obstruct that process. Likewise, the Court’s temporary restraining order—and
14 its preliminary injunction—does not prevent Defendants from many any lawful complaints or
15 complying with the any lawful SEC investigations. To the extent this is somehow ambiguous—
16 which it is not—the Court could modify the TRO to permit Defendants’ lawful disclosures to
17 government agencies—regardless how misguided and disingenuous those assertions are.

18 Defendants also argue Paragraph 4d is overly broad because they *believe* they have a duty
19 to disclose this information to the creditors, shareholders, and stakeholders outside of Brunswick.
20 This is absurd. As discussed above Defendants’ unreasonable belief that there may be
21 wrongdoing and their belief that they correctly have a duty to disclose Brunswick’s confidential
22 information and trade secrets is not the standard. Given their personal interests and the absence
23 of any evidence that their “beliefs” are justified, Defendants—both former employees—should
24 not be allowed to determine the fate of Brunswick’s confidential information and trade secrets.
25 Accordingly, the Court should issue a preliminary injunction consistent with its TRO that enjoins
26 Defendants from disclosing Brunswick trade secrets and confidential information.

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V. CONCLUSION

For the foregoing reasons, Brunswick respectfully request that the Court issue a preliminary injunction consistent with its January 6, 2017 TRO.

Dated: January 19, 2017

Respectfully submitted,

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