TO: MARTIN G. WEINBERG

FROM: KIMBERLY HOMAN

RE: DISSEMINATION OF STOLEN DOCUMENTS

DATE: JUNE 2, 2010

There are at least two potential avenues through which JE can seek to obtain return of the stolen book and/or a prohibition against dissemination by Rodriguez (leaving aside the procedural issues present at this stage of the proceedings, after the Magistrate Judge has already ordered Rodriguez to produce the book).

First, courts have often enjoined the dissemination of confidential or private information wrongfully obtained from the employer by a (now) ex-employee during the course of his employment, either through a free-standing action for injunctive relief or in conjunction with a tort action for, among other things, breach of fiduciary duty. *See, e.g.*, *Saini v. International Game Technology*, 434 F.Supp.2d 913, 924 (D.Nev. 2006)(court finds that company had shown likelihood of success in proving breach of implied covenant of good faith and fair dealing where former employee's "decision to distribute internal IGT documents to a party adverse to IGT in litigation demonstrates a deliberate attempt to violate the spirit of his confidentiality agreements with IGT;" injunction issued); *see also In re Zyprexa Injunction*, 474 F.Supp.2d 385, 419 (E.D.N.Y. 2007)(court has power to enjoin dissemination of stolen documents obtained in violation of court's protective order).

Even where the employee is not subject to a formal confidentiality agreement, "an employee may still be enjoined from using confidential information where he or she has obtained such information by wrongful means, such as theft or intentional memorization." *Tactica Intern., Inc. v. Atlantic Horizon Intern., Inc.*, 154 F.Supp.2d 586, 608 (S.D.N.Y. 2001).

> Even in the absence of a contract not to disclose confidential information, an agent has a duty not to use or communicate information given to him in confidence in competition with or to the injury of the principal unless the information is a matter of general knowledge. The agent has a duty after the termination of the agency not to use or to disclose to third persons . . . in competition to the principal or to his injury, trade secrets or other similar confidential matters.

Standard Brands, Inc. v. Zumpe, 264 F.Supp. 254, 262 (D.La. 1967)(internal quotation marks omitted). *See A.H. Emery Co. v. Marcan Products Corp.*, 268 F.Supp. 289 (S.D.N.Y. 1967)("A confidential relationship exists between an employee and his employer. It survives the termination of his employment. It does not depend on any express contract. Disclosure of an employee of a trade secret entrusted to him by his employer in the course of his employment is a classic instance of a disclosure which constitutes a breach of confidence and which is therefore actionable. It is not necessary that the employee expressly agree not to disclose it").

"The elements of a breach of fiduciary duty claim are (1) the existence of a fiduciary duty; (2) the breach of that duty; and (3) damage proximately caused by that breach." *Treco Intern. S.A. v. Kromka*, ___ F.Supp.2d ___, 2010 WL 1403851 at *3 (S.D.Fla. April 7, 2010)(finding breach of fiduciary duty claim sufficiently pleaded where plaintiffs "alleged that they placed Kromka in a position of trust and confidence, that Kromka accepted that position and promised to act in plaintiffs' best interests, and that Kromka failed to do so"). These same elements are required for a breach of fiduciary duty claim under Florida law. *See, e.g., Mitchell Co., Inc. v. Campus*, 672 F.Supp.2d 1217, 1238 (S.D.Ala. 2009); *Cheney v. IPD Analytics, L.L.C.*, 2009 WL 1298405 (S.D.Fla. April 16, 2009). The *Mitchell* Court described Florida law regarding the fiduciary duties owed by officers and directors of a corporation to the corporation:

> Florida law has long recognized that corporate officers and directors owe duties of loyalty and a duty of care to the corporation. Corporate directors and officers owe a fiduciary obligation to the corporation and its shareholders and must act in good faith and in the best interests of the corporation.
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> In Florida, an officer or a director of a corporation will not be permitted to make a private profit from his position or while acting in that capacity, acquire an interest adverse or antagonistic to that of the corporation. Florida courts . . . have explained that a breach of fiduciary duty occurs when the fiduciary through his personal dealings interferes with the business of the corporation, or when the fiduciary does not act with good faith and fairness in his personal dealings with the corporation. Moreover, one who occupies a fiduciary relationship may not acquire, in opposition to the corporation, property in which the corporation has an interest or which is essential to its existence.

Id. at 1238-39 (citations and internal quotation marks omitted). While that description by its express terms applies to officer/director fiduciaries of corporations, there is no reason that comparable requirements would not apply to an employee employed by an individual employer. I have found nothing that distinguishes corporate employers from non-corporate or individual employers. The key is the nature of the employment relationship and not the form of the employer.

> [F]iduciary duties may be may be imputed by the course of conduct between the parties. . . . When a fiduciary relationship is implied in law, it is based on specific facts and circumstances surrounding the transaction and the relationship of the parties. This can arise when confidence is reposed by one party and a trust accepted by the other.

In re Chira, 353 B.R. 693, 730 (S.D.Fla. 2006)(citations and internal quotation marks omitted). However, "evidence that one party placed trust and confidence in the other party does not create a fiduciary relationship in the absence of some recognition, acceptance or undertaking of the duties of a fiduciary on the part of the other party." *Id.* at 731 (internal quotation marks omitted). *See Cheney*, 2009 WL 1298405 at *4.[1]

[1] Note that *Cheney* also says that "for an implied fiduciary relationship to exist there must be substantial evidence showing some dependency by one party and some undertaking by the other party to advise, counsel, and protect the weaker party." *Id.* at *4.

The analysis applicable to whether Rodriguez had a fiduciary relationship with JE will, of course, depend on the precise nature of the relationship: was there a written confidentiality agreement? an oral agreement? did Rodriguez agree to accept the duties of a fiduciary with respect to JE? But even if no fiduciary relationship can be shown, there is still the duty of loyalty and good faith owed by Rodriguez to JE as his trusted employee (the more that could be shown re the trust and confidence either expressly demanded as part of the employment or inherent in the employment relationship the better).