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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

JOSEPH MENDEZ, Plaintiff, Cross-Defendant and Respondent, v. JANE I. PIPER et al., Defendants, Cross-Complainant and Appellants.	H041122 (Monterey County Super. Ct. No. M113943)
JOSEPH MENDEZ, Plaintiff, Cross-Defendant and Respondent, v. JANE I. PIPER Defendant and Appellant; PIPER, ENVIRONMENTAL GROUP, INC., Defendant, Cross-Complainant and Appellant.	H041681 (Monterey County Super. Ct. No. M113943)

I. INTRODUCTION

At the heart of this appeal is whether an employer conclusively proved that a terminated employee copied the employer's data and not just the employee's personal information from a hard drive owned by the employer. After a six-day court trial, the court concluded that the employer failed to carry its burden of proof and that "[t]he data kept by [the employee] was his own."

Plaintiff John Mendez filed this action because his former employer, defendant Piper Environmental Group, Inc. (PEG) and its chief executive officer, defendant Jane Piper, his former wife, (collectively "appellants") had warned two prospective employers that he was prohibited from divulging PEG's trade secrets and that he was barred from competing with PEG under his marital settlement agreement (MSA) with Piper. He requested declaratory relief, damages, and an injunction. PEG cross-complained, alleging that Mendez had breached a fiduciary duty and violated the Uniform Trade Secrets Act, Penal Code section 502,[1] and a confidentiality agreement with PEG by copying, using, and altering PEG's confidential information and computer data stored on PEG computer equipment.

In a nine-page statement of decision, the trial court concluded that Mendez had failed to prove that appellants had breached the confidentiality agreement or damaged him by sending the warning letters, and he had failed to prove a breach of payment requirements in the MSA. However, he was entitled to a declaration that a noncompetition provision in the MSA was "vague, against public policy and therefore void." Alternatively, if it was valid, its purpose was fulfilled. Piper's MSA payment obligations are not dependent on that clause.

As to PEG's cross-complaint, the trial court found that PEG had failed to carry its burden of proving: (1) it had trade secrets that Mendez had wrongfully acquired, used, or

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[1] Unspecified section references are to the Penal Code. Unspecified subdivision references are to section 502.

disclosed; (2) it was damaged by misuse of trade secrets; (3) Mendez had violated section 502 by accessing and copying, using, or altering PEG data without permission; and Mendez had violated either (4) the confidentiality agreement or (5) any fiduciary duty to PEG. Appellants filed a notice of appeal from the final statement of decision, which included a "Judgment." By leave of this court, appellants later filed a notice of appeal from the actual judgment.[2]

Appellants did not defend the noncompetition provision in the trial court, arguing instead that if it was invalid, "the associated monetary consideration evaporates." On appeal, they do not challenge the trial court's conclusions about the invalidity of the noncompetition provision, the independence of Piper's MSA payment obligations, or the absence of evidence that Mendez misused trade secrets of PEG.[3] PEG does challenge the remainder of the trial court's findings about PEG's failure to prove its other causes of action, contending that a judgment in its favor was compelled by weighty and undisputed evidence that Mendez violated section 502 and breached his fiduciary duty and a confidentiality agreement. Both appellants challenge the trial court's finding that Mendez was the prevailing party. They also have filed a notice of appeal (in appeal H041681) from a post-judgment order awarding Mendez attorney fees and costs as the prevailing party, contending they should prevail.

For the reasons stated below, we will conclude that PEG has not carried its heavy burden on appeal of establishing that it presented compelling and undisputed evidence that Mendez copied or took any data other than his own or that he acted without

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[2] The judgment was purportedly signed and filed on August 16, 2014, but it contains a handwritten notation of the filing of the final statement of decision one day later on August 17. Printed e-mails in the record of H041681 indicate that the judgment may have already been entered as of May 13, 2014, although it may not have been served on the parties at that time.

[3] Though PEG has abandoned its trial secrets claim, Mendez's brief devotes significant attention to establishing that PEG had no trade secrets, he did not take any of PEG's trade secrets, and he did not provide them to a competitor of PEG.

permission. The failure to conclusively establish these facts defeats PEG's related claims that he violated a fiduciary duty or the confidentiality agreement. We will affirm the judgment and the award.

II. THE FACTS

A. FACTUAL BACKGROUND

John Mendez met Jane Piper in the mid-1980's while Mendez was working as a facilities engineer. They reunited in California about five years later and were married in February 1989.

During their marriage, in 1993 Piper began a business called Piper Environmental Group, which she later incorporated in 1994 or 1995, becoming its president and chief executive officer. PEG rented, sold, and serviced ozone generators and generator systems, which are often used in remediating wastewater.

In 1995, Mendez became a PEG employee, providing engineering services and maintaining their computers. Over time, he was given the position of chief technologist. He designed, engineered, and managed projects and provided technical customer support.

In August 2006, Piper and Mendez separated. On June 17, 2008, they entered a MSA that included a noncompetition provision.[4] A judgment of dissolution was entered in December 2008.

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[4] Among other provisions, the MSA included a mutual waiver of spousal support, awarded and assigned to Piper "all shares of stock" in PEG, and acknowledged "that the division of assets and debts is substantially unequal even after taking into consideration the $300,000 equalization payment" Piper undertook to make on or before July 7, 2018.

The MSA also included the following noncompetition provision. "When Wife sells the business, [PEG], she shall pay to Husband the minimum sum of $100,000 as and for his share of the business. Said sum may be paid at any time before the sale of the business at Wife's option. The parties agree that said payment is for Husband's share of the business, and in exchange for this amount, Husband agrees not to go into competition with Wife and any aspect of [PEG]'s business revenue stream if for any reason he is not employed by [PEG] in the future."

(Continued)

Mendez continued to work for PEG for two years after signing the MSA. On February 25, 2010, he signed an agreement with PEG titled "EMPLOYEE CONFIDENTIAL INFORMATION, ASSIGNMENT OF INVENTIONS, AND ARBITRATION AGREEMENT" (sometimes "confidentiality agreement"), what PEG calls the "Employment Agreement."[5] Paragraph 2(a) of the confidentiality agreement provided for nondisclosure of confidential information, which included not only trade secrets but also PEG proprietary information, to any outside person or entity without written authorization from a PEG officer.[6] Paragraph 5 provided for return of "documents and tangible materials that I receive" from PEG upon termination of

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The court found in its final statement of decision, "Mendez testified that he requested that this clause be removed and he thought there was an agreement to remove the language. However, he signed the MSA and initialed each page, including the page with the 'no competition' language."

[5] At trial Mendez conceded signing the agreement on February 25, 2010, even though his signature on page 6 is clearly dated "3/25/2010" and Piper testified it was signed on March 25.

[6] Paragraph 2(a) stated in part: "At all times during the term of my employment and thereafter, I agree to hold Confidential Information in the strictest confidence, to use such Confidential Information only to perform my duties as an employee of [PEG], and not to disclose such Confidential Information to any person outside of [PEG] or to any entity without written authorization from an officer of [PEG]. 'Confidential Information' means Trade Secrets and any [PEG] proprietary information, know-how, and technical data that is not publicly known. 'Trade Secrets' means information that derives independent economic value, actual or potential, from not being generally known to the public or other persons who can obtain economic value from its disclosure or use, and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. For example, Confidential Information may include (but is not limited to) research, product plans, products, services, customer lists, customers (including, but not limited to, customers of [PEG] on whom I called or with whom I became acquainted during the term of my employment), markets, software, developments, inventions, processes, formulas, technology, designs, drawings, engineering, hardware configuration information, marketing plans, financial information, and other business information disclosed to me by [PEG] either directly or indirectly and by any means, including in writing, orally, by drawings, or by observation of parts or equipment."

employment with PEG.[7] Paragraph 7 prohibited using PEG's "Trade Secrets" either to solicit or recruit PEG employees and consultants to work for a PEG competitor or to solicit business from any person or entity.[8]

PEG terminated Mendez's employment on August 6, 2010. A letter of termination from Piper to Mendez bearing the same date stated in part, "Any company property remaining in your possession should be returned immediately via UPS. This includes, but is not limited to, the company's desktop computer, documents, client correspondence, and all other company property." "You are reminded of your covenants to refrain from disclosing intellectual property and trade secrets, as well as avoiding competition with [PEG]. Be advised that any breach of your agreements will be met with legal action intended to cure such breach, including damages."

B. THE COMPLAINTS

1. Complaint by Mendez

On August 30, 2011, Mendez initiated this action with a 23-page verified complaint that recited many of the facts above and attached and incorporated parts of the MSA and the confidentiality agreement. He alleged that after the end of his employment by PEG, he had notified colleagues in the industry of his availability and attempted to go into the business of providing ozone consulting services. In November 2010 he was engaged to help Ozone Water Systems, Inc. (Ozone Water), remove and ship some very large ozone equipment. In February 2011, H2O Engineering Inc. (H2O) contacted Mendez for assistance. On March 10, 2011, PEG's counsel sent cease and desist letters to H2O and Mendez alleging that Mendez was violating the confidentiality agreement and the noncompetition clause in the MSA. In April 2011, PEG's counsel sent a similar

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[7] We quote paragraph 5 below in part IV.C.2 (beginning on p. 27, *post*).

[8] As there is no issue on appeal about misuse of trade secrets, we do not quote paragraph 7.

groundless letter to Ozone Water. The letters effectively prevented Mendez from finding gainful employment.

Mendez's first cause of action alleged that Piper had breached MSA provisions requiring her to pay him money and that Piper and PEG had breached the confidentiality agreement. His second cause of action requested declarations that the noncompetition covenant and the confidentiality agreement are unenforceable because each violates statutes and public policy and is vague and ambiguous. A purported third cause of action requested an injunction against future contract breaches.

2. Cross-complaint by PEG

On October 12, 2011, PEG filed an unverified cross-complaint alleging that Mendez had: (1) breached the confidentiality agreement by soliciting customers and competitors of PEG and by using PEG's confidential information; (2) breached "a fiduciary duty of loyalty and care"; (3) misappropriated and misused trade secrets in violation of the Uniform Trade Secrets Act while employed by PEG and after his termination by providing H2O with confidential pricing and bidding information; and (4) violated section 502 by accessing, copying, using, altering, or deleting PEG's computer data.

C. *TRIAL EVIDENCE*

To address appellants' contentions, we will focus on the circumstances of Mendez's possession and return of PEG computer equipment and computer data. We will present the trial court's findings and additional evidence where relevant to our analysis of appellants' contentions.

1. Mendez's employment by PEG

Mendez testified that one of his functions as a PEG employee was to set up and maintain the computer system in the PEG facility in Castroville, serving as the de facto computer system administrator. It was a peer-to-peer network that connected all the office computers through a router without a server. When a computer was added to the network, a password was used, but once the computer was on the network, no password was required. Commercial software for managing a customer and contact database called

Act! was kept on a Buffalo network storage device. Once the database was opened by a password, it stayed open. PEG employees routinely kept both business and personal contact information in Act!.

Piper acknowledged that company information was stored on company laptops that employees were authorized to use while traveling and visiting clients.

One of Mendez's responsibilities was emergency preparedness. He proposed to Piper that PEG should have some form of off-site backup storage and she had no problem with his proposal. Mendez acquired a USB 320 gigabyte external hard drive (the external drive) for PEG in the fall of 2007, about the same time he purchased two XP desktop computers. One of the two computers was primarily for personal use in his residence ("the XP computer" or "the XP") and the other was for Piper's separate residence. Piper acknowledged using the other desktop computer at her residence.

Mendez set up the external drive in his residence and attached it to the XP computer. He sporadically backed up the network storage onto a company laptop, brought it home, and copied the data to the external drive. From the network storage, Mendez backed up close to 200,000 work files in 53 folders PEG had listed in Exhibit 18. Among the 53 folders were those titled "ACT," "Chairman's View," "Engineering," "Joe's Files," and "Tool Manuals." The backup included all files, including some files Mendez considered personal, such as an Excel spreadsheet he had created, and music and videos, some of them gifts from Piper. Mendez last backed up the network drive in July 2010.[9]

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[9] The appellate briefs for both sides state that Mendez last backed up the network drive in May 2010. They have overlooked that, while that was his initial testimony, he corrected himself later when he recalled making a backup before a July 2010 business trip. The trial court made no finding on this point. Exhibit M was evidence of a February 2010 backup Mendez had performed before leaving for an emergency business trip.

Piper testified she was unaware that Mendez had the external drive until after his termination. She was unaware of who created the list of 53 folders in Exhibit 18, but she believed that some of the listed folders contained trade secrets and others contained confidential information.[10] Piper acknowledged that some of the files were information that PEG had downloaded from the Internet and other files were what she had collected at trade show conferences. She would "like that to be kept confidential." Piper believed that publicly available manufacturer's manuals for tools acquired by PEG became confidential when loaded into PEG's computer system.

2. Mendez's termination

In February 2010, when PEG had six employees, Piper hired Gary Nelson as its chief financial officer. Nelson testified that Piper "made it very clear on several occasions that she no longer wanted Mr. Mendez there and that it was my responsibility to find out about as much of the IT infrastructure so that the company could have continued IT services and support following Mr. Mendez's departure by one means or another."

In Nelson's opinion, the existing computer security was inadequate. There were no encrypted drives. "Files were open. You had access to the peer-to-peer network. Very simple and easy to gain access to the files there. [¶] The peer-to-peer network, through both Mr. Mendez and Miss Piper's, they had their own computers on the peer-to-peer network. They had various file-sharing programs, such as music-sharing programs."

Piper gave Nelson "two directives. One was that Mr. Mendez would report to me, because he had a temper tant—temper issue and was too frustrating for Miss Piper to work with, and he seemed to like me. So I would be his boss for day to day and resources issues. [¶] The second directive was Miss Piper wanted him out of the

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[10] The trial court found that "PEG had difficulty identifying its trade secrets, other than a vague description: a 'secret sauce'."

company, but wanted him to leave of his own volition. So I was given a directive to step up and keep the pressure up until he left of his own terms versus being terminated."[11]

Nelson was involved in drafting PEG's confidentiality agreement. When Piper told Nelson she wanted Mendez to sign a confidentiality agreement, Nelson responded that everyone should sign one because she could not single out one employee. It was one step in getting Mendez out of the company.

The pressure applied by Nelson provoked an outburst by Mendez on August 6, 2010. The day before, Nelson kept asking Mendez for information for a client proposal, and Nelson admitted he was "on him" the next morning. When Nelson told Mendez he was also needed that morning at an emergency meeting Piper had called, Mendez yelled and cursed at Nelson. When Piper came in and yelled at Mendez, he "just went crazy," grabbed a company flat-screen monitor from his desk, and threw it at a service truck. Realizing he had crossed the line, Mendez told Nelson to send his check to his house, returned to his office to pack up his personal belongings, and left. Mendez was terminated that day, August 6.

3. Mendez's post-termination computer activities

Piper testified that her termination letter dated August 6, 2010 was actually mailed several days later. Mendez testified that he received the letter on August 11, 2010. On August 19, 2010, Mendez complied with her demand to return company property by sending the external drive, a phone, a credit card, and a key to PEG via UPS.

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[11] In its statement of decision, the trial court found: "This trial was characterized by an unusual degree of animosity. While animosity is common in divorce proceedings, the ill-will held by [Piper] continues to the present. The testimony demonstrated Piper's deep dislike for Mendez. For example, one former employee testified that Piper instructed him to embark upon a campaign to provoke and antagonize Mendez. The employee testified that because Mendez was known to have a hot temper with a hair trigger, provoking him would create a rationale for termination. (Mendez' hair-trigger temper was evident at trial. Defendant's [*sic*] counsel used it very effectively during cross-examination.)"

Before sending PEG the external drive, Mendez testified that he selectively copied from the drive onto the XP computer his personal files, including engineering calculations, contact information, music, and videos.[12] He did not duplicate all the data on the drive. He grabbed files that contained personal information and later picked out the personal information he wanted. He exported the Act! database as a csv file, opened it with other software, and then deleted the contact information except for friends and family, resulting in a contact list.[13] Some of his friends are individuals he met through work. The folder named "Joe's Files" contained a mix of personal and company items, such as time sheets.[14]

Before turning in the external drive, Mendez deleted from it his personal information, including movies, music, and photos. That action had no impact on the contents of the data stored on PEG's computer network, as the external drive simply contained a copy of the network storage.

On January 11, 2011, Mendez encountered PEG's attorney at a hearing concerning Mendez's entitlement to unemployment benefits. The attorney asked him to give PEG the XP computer. Mendez replied that he would do so if PEG could prove Piper had purchased it.

Until this request, Mendez had intended to donate what he considered his XP computer to a computer recycling business, as it was no longer operational and randomly rebooted. Around February 10, 2011, Mendez acquired a new HP desktop computer and

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[12] A forensic examination of the external drive by Peter Hale, an expert witness for PEG, indicated that Mendez had copied files from it between August 11 and 14, 2010.

[13] There was evidence at trial that Mendez had created an EPIM file of personal contacts on July 8, 2010. He testified that he updated that file in August because he "wanted the latest information that I could get on my personal contacts." Mistakenly assuming the last backup was in May, appellants contend that this testimony was "[i]nherently improbable or implausible."

[14] Mendez gave more detailed information about some of the files he copied that we will set out in part IV.C.1 below (beginning on p. 26, *post*).

did a bulk transfer of files from the XP to the HP. In anticipation of donating the XP computer, on February 11, 2011, Mendez "wiped" his personal data from its hard drive to prevent retrieval of the files, leaving only the operating system.[15]

Until March 7, 2011, when Nelson sent Mendez a copy of a receipt showing the XP computer had been purchased with a company credit card, Mendez believed he had purchased the two computers in August 2007 with his personal credit card. Upon seeing the receipt, Mendez replied that PEG could retrieve the computer any time, and Nelson picked it up on March 10, 2011.

III. STANDARD OF REVIEW

The burden of proof in a civil trial is ordinarily a preponderance of the evidence. (Evid. Code, § 115.) Once a fact-finder concludes that a party has not carried this burden at trial, that party's evidentiary burden is heavier on appeal. This court has repeatedly explained the applicable standard of appellate review. "When the trier of fact has expressly or implicitly concluded that the party with Shaw the burden of proof failed to carry that burden and that party appeals, it is somewhat misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment. This is because such a characterization is conceptually one that allows an attack on (1) the evidence supporting the party who had no burden of proof, and (2) the trier of fact's unassailable conclusion that the party with the burden did not prove one or more elements of the case. (*Oldenburg v. Sears, Roebuck & Co.* (1957) 152 Cal.App.2d 733, 742 [trier of fact is exclusive judge of the credibility of the evidence and can reject evidence as unworthy of credence]; *Hicks v. Reis* (1943) 21 Cal.2d 654, 659-660 [trial court is entitled to reject in toto the testimony of a witness, even if that testimony is

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[15] Mendez explained that when files are apparently deleted by Windows, ordinarily what is deleted are locational markers and not the file itself. "When you wipe a system, the program—and, in this particular case, was CCleaner—what it does is it overwrites the hard disk and puts ones in it." Forensic evidence indicated that he used software called Disk Scrubber before he used CCleaner.

uncontradicted].) Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570-571; [citation].) Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' (*Roesch v. De Mota, supra*, 24 Cal.2d at p. 571.)" (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 279; cf. *Sonic Mfg. Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 466.)

Appellants contend that we should review their appeal under the de novo standard because all the important facts were "undisputed" at trial. However, appellants recognize that under this court's precedent, they must demonstrate that the trial court was compelled to find in their favor because their evidence was not only weighty, but uncontradicted.

IV. DID PEG PROVE VIOLATIONS OF SECTION 502?

A. ALLEGED VIOLATIONS OF THE STATUTE

Section 502 is a multifarious statute, creating both criminal and civil liability. This court has explained that "the statute describes a number of computer crimes in somewhat overlapping language and also creates several exemptions from prosecution." (*People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1440 (*Hawkins*).) In 2010, when Mendez was terminated, nine subsections of section 502, subdivision (c) prohibited different kinds of conduct as public offenses, some offenses amounting to felonies, others wobblers, others misdemeanors, and yet others infractions as specified in subdivision (d).[16] (Stats. 2010, 3rd Ex. Sess. 2009-2010, ch. 28, § 26, 3 West's 2009 Session Laws, pp. 4403-4407.)

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[16] Since 2010, five more subsections have been added to section 502, subdivision (c).

Section 502 also establishes that the prohibited conduct can be the basis for a civil cause of action, stating: "(e)(1) In addition to any other civil remedy available, the owner or lessee of the computer, computer system, computer network, computer program, or data who suffers damage or loss by reason of a violation of any of the provisions of subdivision (c) may bring a civil action against the violator for compensatory damages and injunctive relief or other equitable relief. Compensatory damages shall include any expenditure reasonably and necessarily incurred by the owner or lessee to verify that a computer system, computer network, computer program, or data was or was not altered, damaged, or deleted by the access. . . . [¶] (2) In any action brought pursuant to this subdivision the court may award reasonable attorney's fees."

In this case PEG has kept changing its position about which of the nine subsections of section 502, subdivision (c) Mendez has violated. Their unverified cross-complaint alleged violations of subsections (1), (2), and (3), which stated:

"(1) Knowingly accesses and without permission alters, damages, deletes, destroys, or otherwise uses any data, computer, computer system, or computer network in order to either (A) devise or execute any scheme or artifice to defraud, deceive, or extort, or (B) wrongfully control or obtain money, property, or data.

"(2) Knowingly accesses and without permission takes, copies, or makes use of any data from a computer, computer system, or computer network, or takes or copies any supporting documentation, whether existing or residing internal or external to a computer, computer system, or computer network.

"(3) Knowingly and without permission uses or causes to be used computer services."

Appellants' closing brief after trial asserted violations of subsections (2), (4), (7), and (8), apparently abandoning claims that (1) and (3) were violated. The newly added subsections stated:

"(4) Knowingly accesses and without permission adds, alters, damages, deletes, or destroys any data, computer software, or computer programs which reside or exist internal or external to a computer, computer system, or computer network."

"(7) Knowingly and without permission accesses or causes to be accessed any computer, computer system, or computer network.

"(8) Knowingly introduces any computer contaminant into any computer, computer system, or computer network."

Appellants' opening brief on appeal has abandoned the claimed violation of subsection (8), repeated their closing brief's claims about (2), (4), and (7), resurrected the cross-complaint's claimed violations of (1) and (3), and added an entirely new alleged violation of (5), which stated, "(5) Knowingly and without permission disrupts or causes the disruption of computer services or denies or causes the denial of computer services to an authorized user of a computer, computer system, or computer network."[17] Mendez

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[17] The 2010 definitions of statutory terms appeared in section 502, subdivision (b).

"(1) 'Access' means to gain entry to, instruct, cause input to, cause output from, cause data processing with, or communicate with, the logical, arithmetical, or memory function resources of a computer, computer system, or computer network.

"(2) 'Computer network' means any system that provides communications between one or more computer systems and input/output devices, including, but not limited to, display terminals and printers connected by telecommunication facilities.

"(3) 'Computer program or software' means a set of instructions or statements, and related data, that when executed in actual or modified form, cause a computer, computer system, or computer network to perform specified functions.

"(4) 'Computer services' includes, but is not limited to, computer time, data processing, or storage functions, or other uses of a computer, computer system, or computer network.

"(5) 'Computer system' means a device or collection of devices, including support devices and excluding calculators that are not programmable and capable of being used in conjunction with external files, one or more of which contain computer programs, electronic instructions, input data, and output data, that performs functions, including, but not limited to, logic, arithmetic, data storage and retrieval, communication, and control.

" . . . [¶]

"(8) 'Data' means a representation of information, knowledge, facts, concepts, computer software, or computer programs or instructions. Data may be in any form, in

(Continued)

notes that appellants have cited almost every subsection of subdivision (c), but he has limited his response to arguing that he did not violate subsection (1).

We observe that "without permission" is an element of every violation appellants currently allege, namely subsections (1), (2), (3), (4), (5), and (7). Contrary to appellants' reply brief, suffering damage or loss is also an element of any civil cause of action predicated on a violation of section 502. (§ 502, subd. (e)(1).)

We also observe that section 502 contained the following exemptions for employees. "(h)(1) Subdivision (c) does not apply to punish any acts which are committed by a person within the scope of his or her lawful employment. For purposes of this section, a person acts within the scope of his or her employment when he or she performs acts which are reasonably necessary to the performance of his or her work assignment.

"(2) Paragraph (3) of subdivision (c) does not apply to penalize any acts committed by a person acting outside of his or her lawful employment, provided that the employee's activities do not cause an injury, as defined in paragraph (8) of subdivision (b), to the employer or another, or provided that the value of supplies or computer

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storage media, or as stored in the memory of the computer or in transit or presented on a display device.

" . . . [¶]

"(10) 'Injury' means any alteration, deletion, damage, or destruction of a computer system, computer network, computer program, or data caused by the access, or the denial of access to legitimate users of a computer system, network, or program.

"(11) "Victim expenditure" means any expenditure reasonably and necessarily incurred by the owner or lessee to verify that a computer system, computer network, computer program, or data was or was not altered, deleted, damaged, or destroyed by the access. " (Stats. 2010, 3rd Ex. Sess. 2009-2010, ch. 28, § 26, *supra*, p. 4404.)

We omit the lengthy definition of "computer contaminant" in section 502, subdivision (b)(12) because PEG has abandoned its claim of a violation of subdivision (c)(8).

services which are used does not exceed an accumulated total of two hundred fifty dollars ($250).

"(i) No activity exempted from prosecution under paragraph (2) of subdivision (h) which incidentally violates paragraph (2), (4), or (7) of subdivision (c) shall be prosecuted under those paragraphs." (Stats. 2010, 3rd Ex. Sess. 2009-2010, ch. 28, § 26, *supra*, pp. 4406-4407.)

This court has explained that in subdivision (h)(2), "the Legislature deemed some violations of subdivision (c)(3) to be so trivial or de minimis as not to warrant criminal treatment, namely computer use, though outside the scope of employment, that either does not injure the employer or does not use [$250] worth of supplies or services. Possible examples of this would be an employee who 'surfs' the Internet when he or she has been told not to, or, as the prosecutor suggested, an employee who plays a computer game." (*Hawkins*, *supra*, 98 Cal.App.4th 1428, 1442.)

B. TRIAL COURT'S FINDINGS

The trial court in its statement of decision made the following findings regarding PEG's cause of action for violating section 502. "After Mendez sued Defendants to remove the 'no compete' clause, PEG sued Mendez for alleging [*sic*] copying and using data from a PEG hard drive. The alleged copying of this data had occurred over a year earlier.

"PEG did not meet its burden of proving that Mendez violated Penal Code Section 502. Mendez did not knowingly access and without permission, take, copy, alter or make use of any PEG data.

"The PEG data was located on a USB hard drive, connected to a computer kept at Mendez' [*sic*] home. Mendez was able to use his home computer to access PEG's database. This was all done at PEG's direction. This was the back-up security system. The hard drive contained both PEG business and Mendez' personal information; this was done with PEG's permission. PEG went to great lengths to attempt to prove that Mendez accessed this information after he was terminated. The credible evidence is that Mendez accessed the hard drive in order to retrieve his personal information (which was properly

on the computer). He copied his personal data onto his computer, leaving the hard drive intact. The data kept by Mendez was his own. It consisted of music given to him by his ex-wife, videos, and a file called Joe's documents. This file included his tax documents and calculation templates. He deleted any access to the PEG information. PEG complains that this method of retrieving Plaintiff's personal information violates different laws. Cross-complainant asks the court to ignore the context of these actions: Mendez had a significant stake in the success of the corporation; he was the senior engineer, trusted with the back-up security system located at his home; and is now the ex-husband, and ex-employee, trying to remove his personal documents from the hard drive.

"PEG did not meet its burden of proving that Mendez violated Penal Code Section 502. Mendez did not knowingly access and without permission, take, copy, alter or make use of any PEG data. (Piper's attempt to impose Penal Code Section 502 on these actions is misguided. Again, it is important to recognize the context in which these actions arose: a marriage, a divorce, and a tortured business relationship. It is unlikely that the legislators enacting Penal Code Section 502 anticipated that it would be used as a sword in a marital dispute.)"

C. THE EVIDENCE OF SECTION 502 VIOLATIONS

While appellants assert that Mendez "engaged in multiple violations of this law" by making "multiple copies of the PEG data on multiple devices for his continued storage and use," there is no claim that subsequent copies to different computer devices involved any PEG data other than the data involved in the initial copying from the external drive to the XP computer in August 2010. So we will focus on whether the initial copying violated section 502.

1. PEG Failed to Prove that Mendez Copied Data that was not Personal

All parties have a duty to accurately reflect the record. Here appellants fail in that task in several ways.[18] For example, their opening brief asserts seven times that Mendez engaged in "bulk" transfers of PEG "Workfiles," both when he copied data from the external drive to the XP computer in August 2010 and when he copied data from the XP computer to his new HP computer in February 2011. However, that was not Mendez's testimony nor what the trial court found. Contrary to appellant's contentions, Mendez did not admit "knowingly and deliberately cop[ying] PEG's entire Workfiles" and the trial court did not rule that "an individual is free to take or copy entire Workfiles of his former employer."

Mendez acknowledged that part of his job as de facto computer system administrator was to back up PEG work files to the external drive which he kept at his residence. He testified that he selectively copied his personal information from the external drive to the XP computer before sending PEG the external drive. He did also testify that he completed a "bulk move" or "bulk transfer" of the data on the XP computer to his new HP computer, when he believed the XP computer was destined for recycling and before PEG had presented evidence that it had paid for the XP. But that was a bulk move of previously winnowed files.

In response to a question on direct examination whether Mendez had duplicated the data on the external drive to the XP computer, he answered, "No. I moved certain files to the XP. I moved the Act! [d]atabase. I moved it as a comma separator [*sic*] value flat file, and, at the same time, I moved some of the engineering and some of the [']Joe's documents[']. Okay[?] Because they had personal stuff in it. [¶] It's a lot easier, when

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[18] It is only fair to observe that Mendez's brief is one-third the length of the 60-page opening brief because it does not attempt to address all of appellants' contentions. We find no discussion of whether he breached a fiduciary duty or the confidentiality agreement and the discussion about section 502, subdivision (c) is limited to subsection (1). Instead he asserts that key provisions of the confidentiality agreement are unenforceable.

moving—when you move the whole thing and then delete as opposed to sit, hunt, and peck what you're going to move." He imported the contact information .csv file into a program called EssentialPIM and then removed all contacts who were not family and friends. On cross-examination, he reiterated, "What I copied was my personal data that was in there." "I have, time and time again, have said that I accessed the Act! to remove and to get my own personal data. I have—time and time again, have said that I have moved certain files, 'cause it was easier to move the entire file and then delete the rest. Now, I don't know how many times you want me to say that." "I have already testified that it was much easier to move things in bulk and delete afterwards and keep what was left what I wanted to keep."[19]

In addition to the personal contact information, Mendez copied "music and video[] that had been given by Miss Piper to me," "also [']Joe's file[']documents, whatever it's called. And there were also some Excel spreadsheets that I had developed for myself that I also brought down. . . . Nobody else used them in the company." One of the spreadsheets he created was a pressure drop calculator that helped him identify the kind of valve needed to handle a given pressure drop. "I took this specific file, because I

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[19] We recognize that the trial court was required to reconcile some conflicting statements by Mendez. PEG's cross-examination of Mendez on the final day of trial elicited a variety of equivocal statements about whether he had copied any PEG data either to the XP computer or to his HP computer. "I acknowledge taking PEG data that I thought belonged to me." He moved "personal data. Mostly personal" to the HP. Whether it would be false to say that he only took non-PEG data after termination "is based on how you interpret PEG data." Because he did a bulk transfer from the XP to the HP, "[w]hatever residual [PEG data] was there would have been moved."

Mendez answered "Yes" to a general question whether he acknowledged making duplicate copies of PEG data after his termination. This passage is quoted or cited eight times in appellants' briefs. We note that his next statement was, "I did not consider that data to be PEG." The trial court apparently reconciled any contradictions in Mendez's testimony by concluding that "[t]he data kept by Mendez was his own."

created it for my own personal use." That spreadsheet was in the engineering folder.[20] Included in "Joe's Files" were copies of his time cards.

Appellants contend that Mendez copied much more than personal files and data. Footnote 5 of their opening brief states: "(See e.g., 1RT 143:18-144:9 [wherein Mendez admits copying PEG's Excel spread sheets from PEG's USB hard drive after his termination]; Exhibit 33 at p. 1, lines 3 and 6 [wherein Mendez takes from PEG's USB hard drive PEG's 'Future business lines' and 'New business opportunities' among other PEG data]; 3 RT 751:15-18; Exhibit TT at p. 7 ['Engineering folder containing designs, sizing calculations' taken by Mendez]; 1 RT 51:1-2, 55:11; 5 RT 1257:16-1259:18; 7 RT 1875:3-1876:4; and Exhibit XX [Mendez emailing sizing calculations to H2O Engineering].) PEG data taken by Mendez also included detail on the BP Paulsboro Sovereign project itself. (See Exhibit M at p. 11, line 3 ['Sovereign Consulting.NJ.SM/Deal Management Plan SOVEREIGN 2008.doc'] and 5 RT 1264:21-1265:23.)"

Appellants' characterizations are not supported by a close examination of the record. As one example of many, Exhibit M was a list of files that Mendez backed up on February 5, 2010, while he was acting as PEG's computer system administrator. As the trial court found, Mendez had Piper's implicit permission to make backup copies of the network storage for security purposes. Exhibit M was not a list of individual files found on the XP computer or his HP computer.

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[20] Based on this testimony about the location of the Excel spreadsheet, appellants' reply brief asserts, "There is no evidence to have allowed the trial court to find that 'a file called Joe's documents' contained the calculation templates . . . ." While the court did find that "calculation templates" were in the "Joe's Files" folder, the meaning of that finding is ambiguous. No witness at trial used the phrase "calculation templates." Appellants' request for a statement of decision did not identify the location of the Excel spreadsheet as one of the principal controverted issues and their objections to the final statement of decision did not seek clarification of this finding. (Code Civ. Proc., § 634.)

Exhibit XX was a pressure drop calculation and valve recommendation by Mendez in March 2011, seven months after his termination, in order to assist H2O in bidding on a BP Paulsboro project. This calculation involved using a spreadsheet calculator Mendez had created while working at PEG (what appellants call "PEG's Excel spread sheets"), but he testified that none of the data in the calculation came from PEG and that the formulas embodied in the spreadsheets reflected principles of "engineering fluid dynamics" and could be found in the valve manufacturer's catalogs. Charles Moncrief III, the president of H2O, testified: some of the information on exhibit XX was part of BP's specifications for soliciting bids; the formula for calculating pressure drops reflected laws of physics[21]; and, Mendez did not disclose any confidential or proprietary information to him. In short, there was no evidence that Mendez or PEG invented the scientific principles he embodied in Excel spreadsheets, though appellants appear to suggest otherwise.

Mendez further explained that files titled "future business lines.doc" and "New business opportunities.DOC" (printed out in Exhibit 29 and listed on Exhibit 33[22]) were compilations of his ideas for developing PEG's business and his assessment of their patentability. The second document was an expansion of the first. He wrote his ideas

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[21] The trial court made the following findings about the Excel calculator. "[A]t trial PEG attempted to prove that Mendez used three 'trade secrets' after leaving PEG: a time sheet, a type of calculator, and information about a particular mechanical part that is widely available for purchase. The court finds these do not meet the criteria of trade secrets. Any information 'used' was information that Mendez possessed, independently of any data on the computer. This accusation is tantamount to accusing someone of accessing and using a multiplication table."

[22] Exhibit 33 was a June 30, 2013 printout of the files in a folder titled "Joe's Documents" on his HP computer (to be distinguished from the "Joe's Files" folder on the external drive). Piper testified that "[m]ost" of files listed in Exhibit 33 "appear to be PEG data," specifically the business lines and business opportunities files.

down in August 2009[23] at the request of either Piper or Robin Bienemann.[24] Mendez denied taking those files after he was terminated. "I didn't even know it was in the XP."

We understand PEG's position to be essentially that the trial court was required to believe its witnesses, including the opinions of its forensic computer examiner, Peter Hale, whose conclusions were presented in a PowerPoint presentation that became Exhibit TT. Hale testified about his discovery of computer "artifacts" indicating that Mendez had copied "PEG work files folder content" to the XP computer and later to his HP computer. Hale stated that what he called the PEG work files folder contained "hundreds of documents that had indicia about them that appear to be PEG data in them, ——that *we believe there may be PEG data in them* or filings or titles or captions or some other indicia that made me believe it was PEG information." (Our emphasis.) Among those files was "a work files engineering folder containing what appeared to be designs, sizing calculations, drawings." Information in the folder titled "Joe's Files" indicated "that it was PEG designated *or could be PEG information*." (Our emphasis.)

Hale was an expert in identifying which files were present on a computer and when files had been accessed, copied, or deleted, but he was not an expert on which files contained PEG's data. On cross-examination, he acknowledged, "Well, I'm no particular expert on what PEG proprietary is."

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[23] Mendez testified that the first document was created August 28, 2008 based on a printout of its properties, but he misread the exhibit, as it is clearly dated "08/28/2009," three days earlier than the creation date of the second document.

[24] Robin Bienemann was a trial witness who testified that she became an outside consultant of PEG in 2008 and provided a "Chairman's View" evaluation of the business's attributes. In the summer of 2009, she and Mendez met with attorneys to discuss the patentability of some of his ideas.

Mendez recalled there was no pursuit of patents immediately after that meeting, but in 2010, he began filing provisional patent applications for which PEG paid him $500 apiece. To his knowledge, each application expired without being perfected.

In this case, appellants employed Hale as an expert to identify files and folders copied by Mendez onto the XP computer that might contain PEG data. Considering that any files and folders copied by Mendez were mere copies of files and folders on the PEG computer network, it would be routine for a corporate officer or employee to identify one or more of the particular files located by Hale as belonging to PEG or containing confidential or proprietary information. CEO Piper was the witness who attempted to fill this evidentiary gap, but she did so by testifying to her belief that "all documents of [PEG] are confidential," including the entire contents of each of the 53 folders listed in Exhibit 18. She acknowledged that the folders included information downloaded from the Internet, material picked up at trade shows, and publicly available manufacturer's manuals for operating tools.

In light of Piper's expansive notions of PEG data and confidentiality, the trial court was not required to accept her speculation and opinions about the contents of specific files. As this court stated in *South Bay Transportation Co. v. Gordon Sand Co.* (1988) 206 Cal.App.3d 650, "Uncontradicted testimony should not be arbitrarily rejected by the fact finder, but it may be self-impeaching and warrant disbelief for a number of reasons, such as inherent improbability, obvious bias, vagueness, or inappropriate certainty." (*Id.* at p. 657 and cases there cited; cf. *Rivcom Corp. v. Agricultural Labor Relations Bd.* (1983) 34 Cal.3d 743, 758-759, 762.) We do not intend to suggest that her testimony was uncontradicted, as there was conflicting testimony about the ownership of the files copied by Mendez. The trial court chose to credit Mendez's testimony about his personal files over Piper's.

Appellants specifically dispute the following finding by the trial court. "The credible evidence is that Mendez accessed the hard drive in order to retrieve his personal information (which was properly on the computer). He copied his personal data onto his computer, leaving the hard drive intact. *The data kept by Mendez was his own*." (Our emphasis.)

If the question before us were whether substantial evidence supports this finding, we would have to conclude that it does. "[I]n evaluating a claim of insufficiency of

evidence, a reviewing court must resolve all conflicts in the evidence in favor of the prevailing party and must draw all reasonable inferences in support of the trial court's judgment." (*Aidan Ming-Ho Leung v. Verdugo Hills Hosp.* (2012) 55 Cal.4th 291, 308.) Mendez's testimony supports this finding.

However, because PEG did not carry its burden of proof, we face a different question, namely, whether the trial evidence conclusively established that Mendez copied "PEG's Workfiles in bulk, PEG data included," and not just his personal data. Our review of the evidence cited by appellants reveals that they offered Hale's speculation that what Mendez copied could or might include PEG data and Piper's expansive opinion that every file in network storage belonged to PEG. This testmony was disputed and far from compelling.

In observing that PEG in this case failed to prove that Mendez copied anything other than personal information, we intend to express no general opinion about the ownership of documents similar to those he copied or other intellectual property created by another employee for another employer.[25]

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[25] We summarily dismiss another contention by appellants. In addition to asserting a new and different violation of section 502 on appeal, appellants also invoke another statute for the first time. They contend that PEG, as Mendez's employer, owned all or some of the data he copied pursuant to Labor Code section 2860, which states, "Everything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment."

We find no reference to Labor Code section 2860 in appellants' trial briefs. A party may not pioneer a new legal theory for the first time on appeal when "the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial . . . ." (See *Panopulos v. Maderis* (1956) 47 Cal.2d 337, 340-341.) It is too late for PEG to attempt to prove on appeal what Mendez acquired "by virtue of his employment."

2. PEG Failed to Prove that Mendez Acted without Permission in Retrieving Personal Data

While appellants' opening brief asserts over 30 times that Mendez copied PEG data as well as personal data, they also contend that, as soon as Piper terminated his employment, Mendez needed PEG's permission to retrieve his personal files from a backup copy of PEG's network storage kept on PEG's external drive in his residence. They assert "[t]he issue of permission presents a question of law." Mendez responds by quoting the trial court's findings about permission, but does not otherwise cite evidence on this topic.

We recognize that the law defining an employee's rights of ownership of and privacy in personal information stored on an employer's computer system is evolving. (E.g., Annot, Employee's Expectation of Privacy in Workplace (2006) 18 A.L.R.6th 1; Annot., Invasion of Privacy by Using or Obtaining E-Mail or Computer Files (2011) 68 A.L.R.6th 331.) But we do not believe we are confronted with the cutting edge of this issue. For the purpose of storing documents and photos, a computer is akin to a filing cabinet or desk. (Cf. *People v. Balint* (2006) 138 Cal.App.4th 200, 209 ["we conclude the open laptop computer at issue here amounts to an electronic container capable of storing data similar in kind to the documents stored in an ordinary filing cabinet".)

We believe that when an employer expressly or implicitly authorizes an employee to personalize his or her workspace with personal property, the employee has implicit authority to remove such personal property upon separation from employment (within any parameters reasonably needed to protect coworkers and the employer's property).[26]

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[26] Appellants cite *Conn v. Superior Court* (1987) 196 Cal.App.3d 774 for the proposition that an employee has "no right to take 'personal files' upon termination of employment." In that case, an employee who considered himself constructively terminated "took with him . . . three boxes of documents (over ten thousand pages in all), which he claimed were his 'personal files.'" (*Id.* at p. 777.) The trial court eventually found the employee in contempt for failing to comply with a court order "to return substantially all of the documents taken." (*Id.* at p. 780.) The trial court questioned the

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The employer does not acquire ownership of the employee's personal property by some kind of adverse possession. We see no reason why the same principle should not apply to an employee's personal information when it is stored on a work computer system. As the trial court implicitly concluded, Mendez had permission to retrieve his personal data from the external drive. In any event, it was PEG's burden to prove Mendez acted without permission, not his burden to prove he had permission.

We recognize that an employee's personal privacy rights can be limited, for example, by an employer's policy prohibiting any personal use of the employer's computer system[27], but there was no evidence PEG had such a policy. Indeed, CFO Nelson testified that Piper and Mendez had music-sharing programs on their work computers and Mendez testified that it was routine for employees to keep personal contact information in the Act! database.

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personal nature of some documents, which appeared to be letters from third parties about company business. (*Id.* at pp. 780-781.)

On appeal the employee asserted no personal right to the documents. Instead, he claimed unsuccessfully that: the "order was invalid because it exceeded the scope" of his former employer's request (*Conn v. Superior Court*, *supra*, 196 Cal.App.3d at p. 785); some documents were "protected by the attorney/client and work product privileges" (*ibid.*); and there were procedural defects in the contempt hearing (*id.* at pp. 785-786). The appellate court concluded that the trial court imposed a fine beyond its jurisdiction. (*Id.* at p. 788.) The opinion reflects no holding about the scope of an employee's right to retrieve truly personal files.

[27] Case law has recognized an employer's ability to restrict use of company equipment. (E.g., *TBG Ins. Services Corp. v. Superior Court* (2002) 96 Cal.App.4th 443, 453 ["Zieminski fully and voluntarily relinquished his privacy rights in the information he stored on his home computer" by signing company's policy limiting computer use]; *Holmes v. Petrovich Development Co.* (2011) 191 Cal.App.4th 1047, 1069 [employee waived privilege in attorney-client communications in e-mails "because she was warned that the company would monitor e-mail to ensure employees were complying with office policy not to use company computers for personal matters, and she was told that she had no expectation of privacy in any messages she sent via the company computer."].)

Appellants suggest that the February 2010 confidentiality agreement, which Mendez judicially admitted signing in his verified complaint, functioned to restrict his permission. They twice quote the following part of paragraph 5: "All documents and tangible materials that I receive from [PEG] during the course of my employment with [PEG], including (but not limited to) all such items that incorporate Confidential Information, are [PEG]'s property; and I will deliver to [PEG] all such documents and materials upon the termination of my employment, or earlier upon [PEG]'s request. I will not keep copies of such documents or materials, recreate them, or deliver them to anyone else. I will also return all [PEG] property, including laptop computer, personal digital assistant (PDA), mobile telephone, and all memory sticks, credit cards, entry cards, identification badges and keys, and any other [PEG] equipment in my possession, custody or control."

This passage is limited by its terms to returning "documents and tangible materials" that Mendez *received* from PEG, not to any documents originated by Mendez or any personal information that he kept on the external drive. PEG failed to convince the trial court that Mendez kept a copy of a single document he received from PEG. To the extent his permission was limited by the confidentiality agreement, it appears he complied with the limitations, as the trial court implicitly found.[28]

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[28] On appeal, appellants invoke another document as purportedly prohibiting "using PEG computer devices for personal use." At trial, Mendez identified Exhibit U as a five-page e-mail from Piper dated June 10, 2010, that claimed to incorporate portions of a personnel manual. The final page states in part: "[PEG]'s personal computers (the personal computers in the office, or laptops made available for work away from the office) are to be used exclusively for business purposes unless you receive permission from your manager and arrange to reimburse [PEG.] Permission will be given for the use of personal computers during non-business hours so long as employees record all time, for which they will be charged, and supply their own diskettes."

No witness at trial was asked about the meaning of this provision and PEG's trial briefing did not draw attention to it. It is too late for PEG to pioneer this new theory on appeal. (See fn. 25 *ante*.) In any event, this purported policy would merely create a

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We observe that another part of paragraph 5 not quoted by appellants is relevant to their complaint that Mendez deleted and erased data from the XP computer. Appellants contend that "Mendez asserted ownership of the computer and refused to relinquish it unless he was presented with documentary proof it had been purchased with PEG funds. [Citation.] When alerted the proof would be forthcoming, Mendez scrubbed the hard drive to remove evidence of the PEG data he had taken."

On cross-examination, Mendez denied that he scrubbed the XP hard drive clean in February 2011 to prevent PEG from finding anything. Instead, as PEG had failed for a month to produce evidence of its claimed ownership of the XP computer, he was proceeding with his plan to donate what he still considered his computer, and he attempted to clean off his personal information first. To the extent any PEG documents remained on that computer, this conduct sounds like compliance with the final sentence of paragraph 5, which stated, "The employee will delete all [PEG] documents and all Confidential Information that exists on any computer, PDA, and other electronic devices that employee owns."

Appellants further contend that Mendez conceded during cross-examination that he did not have permission to copy his own files. We read the cited testimony differently. He admitted that he did not ask PEG for express permission to copy "my personal contacts and . . . my engineering calculations." He explained, "I didn't think I needed it." While some of his testimonial answers were ambiguous, it was up to the trial court to resolve the ambiguity. (See fn. 19 *ante*.) We cannot say as a matter of law that his statements are susceptible to only one reasonable interpretation.

The scope of an employee's "permission" within the meaning of section 502, subdivision (c) will be case- and fact-specific, depending on any relevant written or oral agreements with the employer and also the employer's culture and business practices. In

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conflict with the testimony of Mendez and Nelson about how company computers were actually used to store personal information.

this case there was conflicting testimony about PEG's culture and business practices. The trial court credited the testimony of Mendez, who created and maintained the network backup system, over Piper, who professed to be unaware of its existence. We see nothing that compelled the trial court to evaluate their credibility differently. On appeal, PEG fails to demonstrate that it produced compelling evidence at trial either that Mendez copied any PEG data or that he acted without permission in extracting his personal information from PEG's external drive.[29]

V. OTHER CAUSES OF ACTION

A. BREACH OF FIDUCIARY DUTY

1. PEG's Claims in the Trial Court

In the trial court, the allegations of PEG's unverified cross-complaint and the arguments in its opening and closing briefs adhered to the theme that Mendez, after his termination, breached fiduciary duties to protect PEG's confidential information by providing H2O with PEG confidential information to enable H2O to successfully compete with PEG on a BP Paulsboro Sovereign project.

2. Trial Court Findings

The trial court generally found, "It is questionable whether Mendez, a former employee of PEG, owes a fiduciary duty to PEG, but, assuming arguendo that he does, PEG did not meet its burden of proving a breach of this duty." We have already quoted (*ante*, fn. 21) the trial court's findings that the Excel spreadsheet calculator and information about a widely available mechanical part were not trade secrets and its finding that "[t]he data kept by Mendez was his own." Regarding the trade secrets claim the trial court further found, "There is no credible evidence that Mendez wrongfully

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[29] Because PEG failed to establish that Mendez acted without its permission, we need not consider whether retrieving personal files would fit within the statutory exemption in section 502, subdivisions (h) and (i) for employees acting within the scope of their employment. (Cf. *Chrisman v. City of Los Angeles* (2007) 155 Cal.App.4th 29, 37.) Appellants argue that any protection afforded by this exemption ends immediately upon termination.

acquired or used or disclosed any of these 'trade secrets'. [¶] Lastly, PEG must prove 'resulting or threatened injury'. There was no evidence that PEG was harmed or threatened by Mendez' actions."

3. PEG's Claims on Appeal

On appeal, PEG adheres to its theme that "Mendez breached his fiduciary duty when he breached his employment agreement. He breached his fiduciary duty by taking PEG's data on the BP project and using the electronically stored software calculator he developed at PEG to enable [H2O] defeat [*sic*] PEG on the BP Project." Mendez does not respond to this contention. Unlike appellants, we do not regard his omission as a concession that PEG produced incontrovertible evidence of these allegations.

For the sake of discussion, we will assume that "[e]quity recognizes a fiduciary duty of an employee after leaving employer's service not to take an unfair advantage of trade secrets and customers' lists." (*Morris v. Harris* (1954) 127 Cal.App.2d 476, 478.) In *Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, this court stated that an agent's duty of loyalty involves, among other obligations, "the duty 'not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party' [citation]." (*Id.* at p. 416.)

Here the trial court concluded that how to calculate pressure drops across a valve using principles of fluid dynamics was not a trade secret of PEG's nor was Mendez's incorporation of those formulas into an Excel spreadsheet.

On appeal, appellants assert, "Regardless whether the software and data is a trade secret, it is PEG's property that Mendez wrongfully took and gave to another for use against PEG. Mendez was forbidden from taking, duplicating, or recreating PEG' s material upon termination of employment regardless whether it was confidential or not."

Mendez testified that the information he provided to H2O was not derived from PEG data. H2O's president testified that Mendez did not disclose any confidential or proprietary information to him. The trial court concluded that the data he took was his own. We see no compelling evidence establishing as a matter of law that Mendez breached a fiduciary duty as asserted by appellants.

B. BREACH OF THE CONFIDENTIALITY AGREEMENT

1. PEG's Claims in the Trial Court

In the trial court, PEG's unverified complaint and opening brief adhered to the theme that the same conduct that amounted to a breach of a fiduciary duty also amounted to a breach of the confidentiality agreement.

PEG's closing trial brief did not argue under a separate heading that Mendez breached the confidentiality agreement. However, under a heading alleging misappropriation of trade secrets, PEG contended, "By taking, accessing or using even one file within the 53 directories listed on Exhibit 18, for example the '[Act!]' database file, or 'P *(for prospects)*' file, Mendez did so in breach of his duty of confidentiality. By using the special PEG 'calculator' (the one Mendez testified he invented at PEG and everyone else at PEG relied upon for calculations), to deliver calculations and parts information to [H2O] in its quest to defeat PEG on the BP Paulsboro Sovereign bid, Mendez caused PEG to suffer actual damage."

2. The Trial Court's Findings

We have just quoted (*ante* in pt. V.A.2) trial court findings that are also relevant to whether Mendez breached the confidentiality agreement. The trial court also found, "He copied his personal data onto his computer, leaving the hard drive intact." "Defendants did not meet their burden of proving that Mendez violated the Confidentiality Agreement. There was no credible evidence of this."

3. PEG's Claims on Appeal

On appeal it appears that PEG's theory has changed about what conduct breached the confidentiality agreement. PEG contends, "It is undisputed that Mendez breached the terms of the agreement by taking, duplicating, retaining and using PEG's documents, data, materials and tangible things after the termination of his employment." Also "Mendez withheld computer devices owned by PEG in order to take, copy and use documents, materials and data he knew belonged to PEG." Mendez's response is simply that he neither had nor used any trade secret of PEG.

PEG's failure to prove that Mendez copied or used any PEG data defeats its attempt to prove that he violated the confidentiality agreement by duplicating and using PEG's documents and data.[30] We reiterate that paragraph 5 of the confidentiality agreement was limited by its terms to documents and tangible materials he *received* from PEG.

As to PEG's claim that Mendez breached the agreement by withholding the XP computer, Mendez testified that he believed he owned that computer from the time of its purchase in August 2007 until PEG produced contrary evidence in March 2011. The trial court implicitly found this was an honest mistake and not a breach of the agreement.

VI. THE AWARD OF ATTORNEY FEES

The trial court's statement of decision included a "Judgment" section that stated, "On the cross-complaint, the court finds in favor of the Cross-defendant, Mendez. [¶] Plaintiff Joseph Mendez is determined to be a prevailing party pursuant to Code of Civil Procedure section 1032(a)(4) as the party with a net positive recovery and the party against whom the cross-complainant did not recovery [*sic*] any relief."

Following this finding and the entry of the real judgment, which contained identical language, both sides filed motions requesting attorney fees as the prevailing party and opposed each other's request for fees.

After a hearing, the trial court took the motions under submission and, on October 24, 2014, filed a ruling denying appellants' motion and granting "Plaintiff's Motion for Award of Reasonable Attorney's Fees and Costs as Plaintiff is the prevailing party under Cal. Civ. Code § 1717 and award[ing] the entire $110,077.56 sought."

In the original appeal, PEG contends that it prevailed by defeating Mendez's complaint against it and Piper contends that Mendez did not defeat her cross-complaint

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[30] PEG's inability to prove that Mendez took its data also defeats what appellants treat as separate arguments, that Mendez misappropriated PEG's assets, that he "improperly took and continues to possess PEG data," and that "PEG suffered real damage" remediable under section 502.

because she was not a cross-complainant. In fact, Mendez defeated PEG's cross-complaint and he obtained declaratory relief on his complaint preventing further attempts by both appellants to enforce the noncompetition agreement in his MSA with Piper. This award of declaratory relief justifies the trial court's prevailing party determination. (Cf. *Krueger v. Bank of America* (1983) 145 Cal.App.3d 204, 217.)

The premise of appellants' separate appeal from the post-judgment order is simply that "the judgment, prevailing party determination and award of attorney fees should all be reversed and vacated" because they have demonstrated "reversible error" in their main appeal. As we have not reached that conclusion, the award stands.

VII. DISPOSITION

The judgment is affirmed. The post-judgment award of attorney fees is affirmed. Mendez shall recover costs on appeal.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

_____
GROVER, J.

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H041122 & H041681