

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

PROCEDURAL BACKGROUND..... 1

STATEMENT OF RELEVANT FACTS 2

ARGUMENT 7

I. IISI HAS A LIKELIHOOD OF SUCCESS ON ITS MISAPPROPRIATION OF TRADE SECRETS AND RELATED BREACH OF CONTRACT CLAIMS 8

 A. IISI’S Geospatial and Extended SQL ToolKit Products, Their Design, Specifications and Composition Are Protected Trade Secrets..... 8

 B. IISI Has Taken Reasonable Steps to Protects Its Trade Secret Rights..... 9

 C. Netezza’s Reverse Engineering Of Geospatial Was Improper and A Misappropriation of IISI’s Trade Secrets 11

 D. Netezza’s Current “Spatial for TwinFin” Results From Yet Another Instance of Its Misappropriation of IISI’s Trade Secret 13

 E. IISI Is Entitled To The Return Of All Copies of Its Extended SQL Toolkit Source Code From Netezza Pursuant to The Agreement..... 15

II. IISI WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF AN INJUNCTION PREVENTING NETEZZA FROM MAKING USE OF IISI’S TRADE SECRETS AND INTELLECTUAL PROPERTY 16

III. THE “BALANCE OF HARMS” FAVORS THE ENTRY OF A PRELIMINARY INJUNCTION BECAUSE INJUNCTIVE RELIEF IS EXPRESSLY AUTHORIZED BY LAW TO PREVENT THE KIND OF GROSS MISUSE OF TRADE SECRETS THAT HAS OCCURRED HERE 17

IV. THE ENTRY OF THE REQUESTED PRELIMINARY INJUNCTION WILL NOT BE ADVERSE TO THE PUBLIC INTEREST 20

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

AccuSoft Corp. v. Mattel, Inc.,
117 F. Supp. 2d 99 (D. Mass. 2000) (Gorton, J.).....13, 16, 17, 20

Eastern Marble Products Co. v. Roman Marble, Inc.,
372 Mass. 835 (1977)8, 18, 19

G.E. Co. v. Chien-Min Sung,
843 F. Supp. 776 (D. Mass. 1994).13, 14, 18, 19, 20

Jet Spray Cooler v. Crampton,
361 Mass. 835 (1972)9

Jet Spray Cooler v. Crampton,
377 Mass. 159 (1979)8, 9, 11, 17, 19, 20

Picker Internat'l Corp. v. Imaging Equipment Services, Inc.,
931 F. Supp. 18 (D. Mass. 1995) (Wolf, J.).....10, 11, 17, 18

TouchPoint Solutions, Inc. v. Eastman Kodak Co.,
345 F. Supp. 2d 23 (D. Mass. 2004) (Gorton, J.).....8, 9, 10, 11, 16, 18

Tri-Nel Management, Inc. v. Board of Health of Barnstable,
433 Mass. 217 (2001)8

USM Corp. v. Marson Fastener Corp.,
379 Mass. 90 (1979)10, 11

USM Corporation v. Marson Fastener Corp.,
392 Mass. 334 (1984)14, 15

STATUTES

M.G.L. c. 93, § 4211

M.G.L. c. 93, § 42A17

INTRODUCTION

Intelligent Integration Systems, Inc. (“IISI”) respectfully submits this memorandum of law, and the accompanying Affidavits of Richard Zimmerman (“Zimmerman Aff.”), Christian Hicks (“Hicks Aff.”), and Eileen Pellerin (“Pellerin Aff.”), each with attached documentary evidence or deposition testimony, in support of its Motion for Preliminary Injunction, filed herewith.

PROCEDURAL BACKGROUND

Netezza Corporation (“Netezza”) commenced this action against IISI on November 20, 2009. After an agreed period of discovery on the issue, this Court determined, in an August 19, 2010 summary judgment decision,¹ that the parties’ August 6, 2008 Purchase and Distribution Agreement (the “Agreement”) did not require IISI to perform certain work that Netezza claimed IISI was required to perform -- specifically creating a product that would process geospatial data on Netezza’s new “TwinFin” computer -- at the time Netezza relied on that nonperformance to terminate the Agreement on November 20, 2009.² As a result, the Court has entered summary judgment ruling that IISI did not breach the Agreement by declining to perform that work, and that Netezza’s termination of the Agreement was wrongful, and itself constituted a material breach of the Agreement by Netezza.³

¹ See Memorandum of Decision on Defendant Intelligent Integration Systems, Inc.’s Motion for Summary Judgment, dated August 19, 2010 (the “August 19th Order”).

² See S.J. Decision at 8-9 (“the Court concludes that IISI was not contractually obligated to make its software product work on Netezza’s TwinFin appliance.”).

³ See S.J. Decision at 9 (“the Court concludes that IISI did not materially breach that Purchase and Distribution Agreement, and, accordingly, Netezza wrongfully terminated that Agreement.”); *id.* at 10 (“under the circumstances involved here Netezza’s termination and undisputed repudiation of the Agreement amounted to material breach ...”).

STATEMENT OF RELEVANT FACTS

During discovery, Netezza's electronic records and witnesses revealed that in October of 2009, a month prior to its termination of the Agreement, Netezza secretly reverse engineered IISI's Geospatial product by, *inter alia*, modifying the internal installation programs of the product (called "Install Scripts") and using dummy programs to access its binary code -- all in direct violation of the Agreement⁴ -- to create what Netezza's own personnel referred to internally as a "hack" version of Geospatial that would run, albeit very imperfectly, on Netezza's new TwinFin machine. *See* Zimmerman Aff. at ¶¶ 28-38; Hicks Aff. at ¶¶ 7-9; Pellerin Aff. at Exh. 1 (Deposition of Jim Baum) at pp. 201-17 to 203-6.

Netezza then delivered this "hack" version of Geospatial to a U.S. Government customer (the Central Intelligence Agency) to whom it had previously misrepresented, in September of 2009, that it had a product called "Netezza Geospatial for TwinFin 12," when in fact it did not. *Id.* at Exh. 3. According to Netezza's records, the CIA accepted this "hack" of Geospatial on October 23, 2009, and put it into operation at that time. *Id.* at Exh. 8. Because Geospatial was

⁴ Under Section 2.2 of the Agreement, Netezza had been given a license to use IISI Products and "Documentation," which included installation and test scripts, "***solely as needed in connection with distribution of IISI Products*** in the Territory...". *See* Amended Complaint, Exh. 1, p. 3, §2.2 (emphasis added). It had also agreed that it would use IISI's Proprietary Information, which included all information provided to it by IISI concerning Geospatial, "***only for the purpose of fulfilling the obligations of this Agreement***" and "***not ... for any other purpose with the prior written consent of the disclosing party.***" *Id.* at p. 4, §4.2 (emphasis added). Under Section 3.4 of the Agreement, Netezza had further agreed that it would not

...reverse engineer, decompile, disassemble, translate, or otherwise convert into human readable form, in whole or in part, the geospatial IISI Product; use any editors or programs to access or read the binary code or object code of the geospatial IISI Product; "open source" the geospatial IISI Product; or disclose results of any program benchmark tests of the geospatial IISI Product...

Id. at p. 4, §3.4 (emphasis added). The evidence shows that Netezza has repeatedly violated all of these provisions. *See* Zimmerman Aff.; Hicks Aff.

not designed to work on the TwinFin, however, significant problems with the “hack” arose almost immediately, which are described by Netezza’s own personnel in their email exchanges of October and early November 2009. *See Zimmerman Aff.* at ¶ 38-40.

At that point, the evidence shows that Netezza assigned several of the same Netezza personnel who had been involved in creating the “hack” of Geospatial, and others who had long had access to IISI’s proprietary and trade secret information about Geospatial (including Geospatial’s specifications, test scripts, database formats, and portions of its source code), to develop what the Netezza’s Geospatial product manager Jon Shepherd called “*our own version of the spatial toolkit*,” which it called “Netezza Spatial.” *Zimmerman Aff.* at ¶¶ 39-47. In connection with this effort (the “Netezza Spatial Project”), the evidence clearly shows that Netezza personnel used and had access to IISI’s proprietary trade secret information, including actual database files formatted by Geospatial’s software to run on Geospatial, and specification information from, and proprietary test scripts and test results on, IISI’s Geospatial. *Id.*; *Pellerin Aff.* at Exh. 1 (Deposition of Jim Baum) at pp. 81-86, 93-95.

After several months, this team of personnel completed the new “Netezza Spatial” product, and Netezza introduced it to the market in early 2010, claiming that it had developed it on its own, even though the evidence clearly shows it was developed with the aid of, and using personnel who had extensive prior access to, IISI’s trade secret and proprietary information -- all in plain violation of the provisions of the Agreement protecting that information, and forbidding its use by Netezza for any purpose other fulfilling its obligations under the Agreement. *Id.* Netezza is now distributing this “Netezza Spatial” product to large numbers of its customers, with no credit being given or benefit accruing to IISI. *See Zimmerman Aff.* at ¶ 49.

Discovery has also revealed that Netezza, again in direct violation of the Agreement, improperly “ported” IISI’s Extended SQL Toolkit to -- *i.e.* modified it for use on -- Netezza’s new TwinFin machine, without the required permission from IISI, and in specific violation of the limits of the license granted to it under the Agreement. Pellerin Aff. at Exh. 13 (Jon Shepherd Email dated October 7, 2009)(“the IISI extended SQL functionality ported without issue”); Zimmerman Aff. at 49-50. Netezza continues to use the Extended SQL Toolkit functionality on the TwinFin machines it is currently marketing. *Id.* at ¶50.

In this regard, the Agreement strictly limited all categories of Netezza’s license to using and distributing the Extended SQL Toolkit “solely as needed *in connection with distribution of IISI Products* [which ran only on the NPS] *in the Territory...*”, *see* Amended Complaint, Exh. 1, p. 3, §2.2, and limited the use of IISI’s Proprietary Information “only for the purpose of fulfilling the obligations of this Agreement,” and “not ... for any other purpose with the prior written consent of the disclosing party.” *Id.* at p. 4, §4.2. Thus, Netezza was not permitted under the Agreement to use the Extended SQL Toolkit on TwinFin, or to modify it for that purpose, but did it anyway. It was also not permitted to use Geospatial on TwinFin, but it did it anyway. Lastly, under §2.2 of the Agreement, Netezza had been given a license to use the IISI Products and “Documentation”⁵ only “*until* this Agreement expires, *is terminated*, or ownership rights transfer to Netezza...,” Amended Compl., Exh. 1, p. 2, §2.2 (15th and 16th lines) (emphasis added), and in the face of Netezza’s material breach of the Agreement, IISI had the right to terminate it under § 8.2(a), which stated that

“[e]ither party may terminate this Agreement for cause upon written notice to the other party (i) *if the other party materially breaches this Agreement*

⁵ “Documentation” was defined broadly in § 1 of the Agreement as “all technical information and materials, in written or electronic form, provided by IISI” Amended Complaint, Exh. 1, p. 1 (emphasis added).

in a manner that cannot be cured and such breach either (A) *prevents such party from satisfying its obligations* under the Agreement or (B) results in the unauthorized disclosure of a Party's Trade Secrets...

id. at p. 8 (emphasis added), and IISI did so on January 21, 2010.⁶ Thus, even for a proper purpose, Netezza's license to use the IISI Products and Documentation, including the Extended SQL toolkit and all versions thereof, ceased to exist at that point.⁷

Importantly, it is undisputed that the IISI Products, and the IISI methods and techniques contained in them, are *bona fide* trade secrets of IISI, because Netezza expressly acknowledged that they were in the Agreement, which first defined the term "Trade Secret" as follows:

"Trade Secret" means information, including a formula, pattern, compilation, program, device, method, technique or process that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy ...,

and then stated that "[t]he *source code to the IISI Products*, and the *IISI methods and techniques* contained in the IISI Products are *Trade Secrets of IISI*." (emphasis added). *Id.* at p. 1, §1. It is also clear that Netezza was supposed to protect those trade secrets, with Section 2.2, for example, providing that:

Netezza shall use the same level of care in protecting IISI's Trade Secrets as Netezza uses to protect its own Trade Secrets but no less than a reasonable standard of care. Such level of care includes limiting the personnel who have access to such Trade Secrets to those Netezza employees who have a need to know and are subject to confidentiality restrictions at least as restrictive as those in this Agreement.

⁶ See First Amended Answer, Counterclaim, and Jury Demand of Intelligent Integration Systems, Inc., Exh. 1.

⁷ Section 8.4 of the Agreement, for example, specifically requires the return of all copies of the source code for both the Extended SQL Toolkit and Geospatial upon termination of the Agreement for breach by Netezza. See Amended Complaint at Exh. 1, p. 8.

Id. In this vein, and in keeping with IISI's desire to protect its intellectual property rights in its Geospatial product, Section 2.4 of the Agreement expressly prohibited Netezza from taking steps to reverse engineer and misappropriate IISI's Trade Secrets:

Netezza shall not (and shall not cause or permit anyone to): reverse engineer, decompile, disassemble, translate, or otherwise convert into human readable form, in whole or in part, the geospatial IISI Product; use any editors or programs to access or read the binary code or object code of the geospatial IISI Product; "open source" the geospatial IISI Product; or disclose results of any program benchmark tests of the geospatial IISI product.

(emphasis added). *Id.* at § 3.4. Also, in the event of a termination resulting from any breach of the Agreement by Netezza, it was required to "*promptly return all copies of the source code for the extended SQL toolkit product and for the geospatial product to IISI.*" *Id.* at § 8.4.

It is also clear that at all relevant times, IISI took reasonable steps to protect all its trade secret and proprietary information. As IISI's Chief Technology Officer Richard Zimmerman has explained in his affidavit:

20. Ever since I created the Geospatial, including its Libraries and Install Scripts, and its related Test Scripts, Specifications, all Spatial Databases, and all information concerning the methods and techniques used in it, and the Extended SQL Toolkit and all information concerning the methods and techniques used in it (all of the foregoing hereinafter referred to collectively as "***IISI's Trade Secret and Proprietary Information***"), I have treated all of them as trade secret proprietary information of IISI -- because they have very significant economic value as a result of not being readily ascertainable by other persons in the computer business, for whom it would take years to derive this information and know-how on their own, if they could do it at all.

21. As the original developer of IISI's Trade Secret and Proprietary Information, I outlined, followed, and constantly reminded others to follow, the ***stringent security measures that IISI used to protect them.*** Among other protections, the computer and test machines on which I developed Geospatial and the Extended SQL Toolkit, and all of IISI's related Trade Secret and Proprietary Information, ***were password protected and contained in a locked computer room, accessible only through the use of a security clearance card given only to IISI employees, who were subject to internal confidentiality and non-***

disclosure agreements. Similarly, the backup storage repository for IISI's Trade Secret and Proprietary Information *was password protected and encrypted to prevent against unauthorized use by third parties....*

22. IISI also took additional precautions to protect its Trade Secret material and Proprietary Information, *including labeling such materials Confidential and Proprietary...* IISI also has always followed a practice of consistently restricting the distribution of its Trade Secret and Proprietary Information only to those who have agreed to strict use and non-disclosure limitations.

Zimmerman Aff. at ¶¶20-22 (emphasis added). In short, there is no question that IISI's intellectual property in this case qualifies for trade secret protection.

ARGUMENT

IISI is seeking a preliminary injunction prohibiting Netezza, henceforward, from (1) marketing, distributing or in any way using the Geospatial "hack" or the Netezza Spatial, both of which were developed using IISI trade secrets and proprietary information in violation of the Agreement; (2) marketing, distributing or in any way using the Extended SQL Toolkit, or any versions or portions thereof installed on the NPS after termination of the Agreement, or installed on the TwinFin at any time; (3) making any further use, in any way, of IISI's trade secret and proprietary information as defined in the Agreement; and (4) developing, marketing or distributing any products that perform the functions of the Geospatial or Extended SQL Toolkit products for a period of three years, sufficient to remedy the misuse of IISI's trade secrets. *See* IISI's Motion for Preliminary Injunction.

A preliminary injunction in favor of IISI is warranted in this situation because (1) IISI has a likelihood of success on the merits of its misappropriation of trade secrets and related contract damages claims against Netezza; (2) irreparable harm will result to IISI from denial of the injunction; (3) in light of the IISI's likelihood of success on the merits, the risk of irreparable harm to IISI outweighs the potential harm to Netezza in granting the injunction, and (4) the

public interest will not be adversely affected by the entry of the requested injunction. *See Tri-Nel Management, Inc. v. Board of Health of Barnstable*, 433 Mass. 217, 219 (2001) (citing *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 617 (1980)).

I. IISI HAS A LIKELIHOOD OF SUCCESS ON ITS MISAPPROPRIATION OF TRADE SECRETS AND RELATED BREACH OF CONTRACT CLAIMS

“The essence of an action for the wrongful use of trade secrets is the breach of the duty not to disclose or to use without permission confidential information acquired from another.” *Jet Spray Cooler v. Crampton*, 377 Mass. 159, 165 (1979). To prevail on a misappropriation claim, a plaintiff must show (1) the existence of a trade secret; (2) that it has taken reasonable steps to preserve its secrecy; and that the defendant has used improper means in breach of a confidential relationship to acquire the secret. *See TouchPoint Solutions, Inc. v. Eastman Kodak Co.*, 345 F. Supp. 2d 23, 27 (D. Mass. 2004) (Gorton, J). A trade secret may consist of “any formula, pattern, device or compilation of information which is used in one’s business, and which [provides] an opportunity to obtain an advantage over competitors who do not know or use it.” *See Eastern Marble Products Co. v. Roman Marble, Inc.*, 372 Mass. 835, 838-39 (1977); *TouchPoint Solutions, Inc.*, 345 F. Supp. 2d at 27.

A. IISI’S Geospatial and Extended SQL ToolKit Products, Their Design, Specifications and Composition Are Protected Trade Secrets

“For software, trade secret protection is not limited to the source code;” instead the overall design of the software constitutes the trade secret. *See TouchPoint Solutions, Inc.*, 345 F. Supp. 2d at 28 (also finding “[i]t is the design of the program that is the most important, not the particular code that reflects that design...courts focus on whether that design could be duplicated without undue time or expense”); *Eastern Marble Products Co.*, 372 Mass. 838 (“A trade secret may consist of any formula, pattern, device or compilation of information which is used in one’s

business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it...”). In short, a “trade secret need not have the novelty that is requisite for a patent, it must only confer a competitive advantage on its possessor.” *TouchPoint Solutions, Inc.*, 345 F. Supp. 2d at 29; *Jet Spray Cooler v. Crampton*, 361 Mass. 835, 840 (1972) (“What is a trade secret depends in each case on the conduct of the parties and the nature of the information”).

In this case, the parties do not dispute that IISI’s Geospatial and Extended SQL Toolkit products, and the “methods” and “techniques” contained in them, are *bona fide* trade secrets, see Statement of Relevant Facts, *supra*, at p. 5, and in this regard, Massachusetts law recognizes that trade secret protection encompasses not only the actual source codes of IISI’s geospatial and extended SQL toolkit, but also the object code, machine code, binary code, specifications and the methods and techniques undertaken to develop these products and install them. See *e.g.*; *Jet Spray Cooler v. Crampton*, 377 Mass. 159, 167 (1979) (“[a] trade secret need not be a patentable invention...the complainant is entitled to be protected against invasion of *its right in the [secret] process* by fraud or by breach of trust or contract.”) (emphasis added); see also *TouchPoint Solutions, Inc.*, 345 F. Supp. 2d at 28 (“It is the design of the program that is the most important, not the particular code that reflects that design.”).

B. IISI Has Taken Reasonable Steps To Protect Its Trade Secret Rights

Clearly, IISI has taken reasonable measures to protect its trade secret material. In this regard, Massachusetts courts consider several factors in evaluating one’s efforts to protect trade secrets, including: (1) the existence or absence of an express agreement restricting disclosure; (2) the nature and extent of precautions taken; (3) the circumstances under which the information was disclosed; and (4) the degree to which the information has been placed in the public domain

or rendered readily ascertainable. *See USM Corp. v. Marson Fastener Corp.*, 379 Mass. 90, 98 (1979); *TouchPoint Solutions, Inc.*, 345 F. Supp. 2d at 29. Courts also consider the nature and conduct of the involved parties, balancing the complainant's conduct in maintaining its security measures against the alleged misappropriator's conduct in acquiring the information. *See USM Corp.*, 379 Mass. 90, *citing* Restatement of Torts, § 757, Comment b (1939) ("a substantial element of secrecy must exist, so that except by the use of improper means, there would be difficulty in acquiring the information.").

A party's measures to protect its trade secrets must only be reasonable, not perfect. *Id.* ("Reasonable precautions against predatory eyes we may require, but an impenetrable fortress is an unreasonable requirement, and we are not disposed to burden industrial inventors with such a duty in order to protect the fruits of their efforts."); *TouchPoint Solutions, Inc.*, at 30 ("the standard is reasonableness, not perfection"); *Picker Internat'l Corp. v. Imaging Equipment Services, Inc.*, 931 F. Supp. 18 (D. Mass. 1995) (Wolf, J.) ("It is not necessary...that an 'impenetrable fortress' be erected to retain legal protection for a trade secret."). Moreover, when parties agree to maintain certain information or processes as confidential, a misappropriator cannot later claim that the plaintiff failed to take the appropriate steps to protect his trade secret materials. *See TouchPoint Solutions, Inc.*, at 30-31 ("Kodak explicitly agreed that all information concerning [the product] was to be 'confidential.' Kodak cannot now claim surprise or unawareness of [claimant's] intention to conduct a wholly confidential exchange.") (citation omitted).

In this case, IISI sought to protect its Geospatial and Extended SQL Toolkit in all the ways detailed above and in the Zimmerman Aff., including following stringent security measures, imposing nondisclosure and confidentiality on all parties with access to these

materials, and negotiating all the protections in the Agreement that are discussed therein, which are themselves indicative that IISI took reasonable measures to secure its Trade Secret and Proprietary Information. *See TouchPoint Solutions, Inc.*, at 30; *Picker Intern. Corp.*, 931 F. Supp. 18, at 23 (noting that one consideration in finding reasonable precautions is the existence of a confidentiality-nondisclosure agreement).

In short, IISI's efforts to safeguard its Trade Secret and Proprietary Information were more than sufficient to protect against misappropriation as a matter of law. *See e.g., USM Corp. v. Marson Fastener Corp.*, 379 Mass. at 100, 102-03 ("USM's 'efforts at secrecy, like the process itself, met the basic criterion of success.'") (citation omitted); *TouchPoint Solutions*, at 30-31 ("*Kodak explicitly agreed that all information concerning [the product] was to be confidential. Kodak cannot now claim surprise or unawareness of TouchPoint's intention to conduct a wholly confidential exchange.*") (emphasis added).

C. Netezza's Reverse Engineering Of Geospatial Was Improper and A Misappropriation of IISI's Trade Secret

Once information is considered to be of "an appropriate nature to qualify the information as trade secret, any inquiry into the misuse of the trade secret *must focus on the conduct of the defendant.*" *Jet Spray Cooler*, at 168 (emphasis added). "If the defendant has acquired the information as a result of a confidential relationship which he enjoyed with the plaintiff, and, if the defendant has used the information without the permission of the plaintiff, then the defendant's use of the information is wrongful..." *Id.*; *see also* M.G.L. c. 93, § 42 ("Whoever embezzles, steals or unlawfully takes, carries away, conceals or copies, or by fraud or by deception obtains, from any person or corporation, with intent to convert to his own use, any trade secret, regardless of valuable, shall be liable in tort to such a person or corporation *for all damages* resulting therefrom...")

In this case, what Netezza did in creating the “hack” version of Geospatial was a clear breach of the “Reverse Engineering” and “Use of Proprietary Information” provisions of the Agreement, as well as a clear violation of the terms of the Geospatial license granted to it under the Agreement. *See* Statement of Relevant Facts, *supra*, at pp. 4-5. *See also*, Zimmerman Aff. at ¶¶ 29-36; Hicks Aff. at ¶¶ 7-11. Netezza’s actions were without IISI’s knowledge or consent and in complete and utter disregard for the language of the Agreement, and its own records prove what it did. *See* Zimmerman Aff. at Exhs. 1-20.

Netezza’s own records also show that Netezza was motivated to take this action in order to save face with the CIA, which considered a working geospatial product as “the driver” in its decision to purchase the TwinFin, and to book over a million dollars of revenue by the end of 2009. *See e.g.* Pellerin Aff. at Exh. 5 (“Someone should have told me this product was not ready. *We are negatively exposed to one of our most important customers now. In his eyes, we concealed info to close the deal,* or we are not ‘in the know.’ Either one is not good. *Please get the product ready immediately so we can get out of this predicament...*”) (emphasis added); *id.* at Exh. 7, p. 2 (“This one group [the CIA] just spent \$1M with us and *Spatial is the driver. Without it the [TwinFin] system is almost useless...*”) (emphasis added); *id.* at Exh. 8 (“All -- It appears that we may have the spatial toolkit working on the TwinFin 12 ...”).

Netezza’s self-described “hack” of IISI’s Geospatial product violates §§ 2.2, 3.4 and 4.2 of the Agreement and constitutes the misappropriation of trade secrets under Massachusetts law. *See, e.g.*, Agreement at §2.2 (granting Netezza a license “*solely* as needed in connection with distribution of *IISI Products* in the Territory...”); *see also* Agreement at § 3.4 (“Netezza shall not (and shall not cause or permit anyone to): reverse engineer, ... in whole or in part, the geospatial IISI Product; *use any editors or programs to access or read the binary code or object*

code of the geospatial IISI Product..."); see § 4.2 (“[“Netezza] shall use [IISI’s] *Proprietary Information only for the purpose of fulfilling the obligations of [the] Agreement, and [IISI’s] Proprietary Information shall not be used for any other purpose* without the prior written consent of [IISI].”); see also *AccuSoft Corp. v. Mattel, Inc.*, 117 F. Supp. 2d 99, 101-02 (D. Mass. 2000) (Gorton, J.) (issuing preliminary injunction against defendant for misappropriation of where evidence showed that defendant exceeded the scope of its license to use software by incorporating plaintiff’s trade secret material into its products); *G.E. Co. v. Chien-Min Sung*, 843 F. Supp. 776, 778 (D. Mass. 1994). (“Trade secret protection...extends not only to the misappropriated trade secret itself but also to materials “substantially derived” from that trade secret.”). As a result, IISI’s preliminary injunction seeking to prohibit any further use of this “hacked” geospatial product, or IISI’s trade secrets, is warranted. See *G.E. Corp.*, 843 F. Supp. 776.

D. Netezza’s Current “Spatial for TwinFin” Resulted from Yet Another Instance of Its Misappropriation of IISI’s Trade Secret

When subsequent tests of Netezza’s “hacked” version of IISI’s Geospatial on TwinFin revealed deficiencies that Netezza could not cure through further reverse engineering of IISI’s code, Netezza decided to retain a new set of technical consultants to “develop” what it now claims to be its own version of spatial for TwinFin. See e.g. IISI Depo Exh. 72 (“Hi Larry, I am having some issues with the ‘hack’ right now, but will work it out tonight...”); IISI Depo. Exh. 71 (“Brett, Suddenly I am seeing a lot of these types of errors in the spatial toolkit hack...”).

These “technical consultants,” however, were not new and or unfamiliar with IISI’s Trade Secret and Proprietary Information. See *Zimmerman Aff.*, at ¶ 40(a) - 40(k); *Shepherd Depo*, at 86-7 to 86-13 (Q: “So if we come back to Exhibit 80, we see that the gentlemen that you met with on October 28, 2009, *Peter Batty and Paul Ramsey*, were experts *who had worked*

previously for Netezza on the spatial product that IISI had provided to Netezza for use on the NPS series, right? A: *Yes.*”) (emphasis added); *see also* IISI Depo. Exhs. 80, 83-87. To the contrary, these consultants, and several Netezza employees working with them, were intimately familiar with and had direct access to some of IISI’s Trade Secrets because they had been previously employed by Netezza to assist in the installation of Geospatial and the Extended SQL Toolkit on Netezza’s NPS data warehouses in 2008. *See* Zimmerman Aff., at ¶ 40(a)-40(k); Shepherd Depo, at 86-7 to 86-13 ; *see also* IISI Depo. Exh. 80, 83-87.

Netezza’s retention of these experts in the fall of 2009 and their subsequent “development” another version of spatial for TwinFin was a further misappropriation of IISI’s Trade Secret material. *See, e.g. G.E. Co. v. Chien-Min Sung*, 843 F. Supp. at 779 (granting a preliminary injunction enjoining defendant from selling competing product “developed” by plaintiff’s former employee because the plaintiff’s former employee “was intimately familiar with the [plaintiff’s] trade secret technology and supervised the development of the [defendant’s] design, concluding “*Under Massachusetts trade secret law, these facts give rise to a compelling inference that the [defendant’s] product was substantially derived from [plaintiff’s] trade secrets.*”) (Emphasis added).

In this regard, the SJC’s ruling in *USM Corporation v. Marson Fastener Corp.*, 392 Mass. 334, 351 (1984) is controlling. There, the defendants undertook to construct an assembly machine similar to the plaintiff’s after hiring a junior engineer who was familiar with the plaintiff’s trade secret material. *See id.* at 337-38. Although the evidence showed that the defendants modified some of the processes for developing their assembly machine, the SJC affirmed judgment for the plaintiff, concluding: “Where modifications in the process are made by persons cognizant of the trade secret, as here, proof of the independent derivation of the

differing process is more difficult than would be the case if an apparent ‘modification’ were made by a person untainted with knowledge of the trade secret...There is simply no support for the defendant’s claim that the processes in their redesigned machines were derived from some source other than the USM trade secret.” Since Netezza’s actions, in using its two consultants who had regular access to IISI’s Trade Secrets, to create a new version of spatial for TwinFin, are nearly identical to the defendant’s in *USM Corp.*, a preliminary injunction is warranted.

E. IISI Is Entitled To The Return Of All Copies of Its Extended SQL Toolkit Source Code From Netezza Pursuant to The Agreement

Pursuant to the Agreement, IISI is entitled to the return of all copies of its Extended SQL Toolkit source code, any version of its Extended SQL Toolkit product installed on any Netezza data warehouse product following the termination of the Agreement on or about November 20, 2006 and any version of IISI’s Extended SQL Toolkit ported to TwinFin. Section 8.4 of the Agreement, specifically states that “In the event that this Agreement is terminated because of breach by Netezza pursuant to 8.2(a)(1) , then Netezza shall promptly return all copies of the source code for the extended SQL toolkit product...”

In this case, Netezza purported to terminate the Agreement, on or about November 20, 2009. *See* First Amended Complaint. Netezza terminated the Agreement by filing suit in this Court against IISI for alleged breach of contract and other related claims. *See id.* In doing so, Netezza notified IISI that the Agreement had been “terminated” and the parties operated publicly as if the Agreement no longer existed. *See* Letter from Netezza to IISI, dated November 20, 2009 (“Termination Letter”). On August 19, 2010, this Court ruled that Netezza’s termination of the Agreement was wrongful and constituted a breach of contract for which IISI was entitled to damages. *See* August 19th Order, at pp. 7-8.

Moreover, IISI is entitled to the return of all copies and versions of its Extended SQL Toolkit product ported to or operating on Netezza's TwinFin as a matter of law. IISI granted Netezza a license to use and distribute its extended SQL toolkit *solely for the purposes of fulfilling its "obligations under [the] Agreement,"* see Agreement, at ¶¶ 2.2 and 4.1, which was to distribute IISI's Geospatial and Extended SQL Toolkit in its *NPS* suite of data warehouses, not the TwinFin. As a result, Netezza's efforts to port IISI's Extended SQL Toolkit exceeded the scope of its license and constituted a misappropriation of IISI's trade secrets, entitled IISI to an injunction securing the return of any version of its Extended SQL Toolkit that has been ported to Netezza's TwinFin appliance. See *Accusoft Corp. v. Mattel, Inc.* 117 F. Supp. 2d 99 (D. Mass. 2000) (Gorton, J.) (granting preliminary injunction enjoining defendant from using or distributing its product where defendant exceeded the scope of its license by incorporating plaintiff's product into its own software).

II. IISI WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF AN INJUNCTION PREVENTING NETEZZA FROM MAKING USE OF IISI'S TRADE SECRETS AND INTELLECTUAL PROPERTY

It is well-settled under Massachusetts law that the "loss of a trade secret is generally found to constitute irreparable harm." See *TouchPoint Solutions, Inc.*, 345 F. Supp. 2d at 32 (citations omitted). That is in recognition of the fact that, "once the trade secret is lost it is gone forever." *Id.* Here, IISI has already shown its likelihood of success on the merits as to its misappropriation of trade secrets claim, and is therefore entitled to an injunction. Furthermore, absent an injunction here, Netezza will most certainly continue to use, distribute and benefit from the "Netezza Spatial" product it created using IISI's trade secrets, the "hack" version of Geospatial, and the versions of the Extended SQL Toolkit that it modified for use on the TwinFin.

This is precisely the sort of harm that weighs in favor of enjoining Netezza from further distributing these products, and from in any using or disclosing IISI's Trade Secret and Proprietary Information to third-parties. *See Accusoft Corp. v. Mattel, Inc.* 117 F. Supp. 2d 99 at 102, quoting *Concrete Machinery Co, Inc. v. Class Law Ornaments, Inc.*, 843 F. 2d 600, 611 (1st Cir. 1988) (“where the only hardship that the defendant will suffer is lost profits from an activity which has been shown likely to be infringing, such an argument in defense ‘merits little equitable consideration.’”).

III. THE “BALANCE OF HARMS” FAVORS THE ENTRY OF A PRELIMINARY INJUNCTION BECAUSE INJUNCTIVE RELIEF IS EXPRESSLY AUTHORIZED BY LAW TO PREVENT THE KIND OF GROSS MISUSE OF TRADE SECRETS THAT HAS OCCURRED HERE

It is well settled in Massachusetts that an injunction is the proper tool to protect against the unwarranted use of trade secrets. *See M.G.L. c. 93, § 42A* (“Any aggrieved person may file a petition in equity ... in the superior court for the county in which either the petitioner or respondent resides or transacts business, or in Suffolk county, to obtain appropriate injunctive relief ... restraining and enjoining the respondent from taking, receiving, concealing, assigning, transferring, leasing, pledging, copying or otherwise using or disposing of a trade secret...”); *Jet Spray Cooler, Inc. v. Crampton*, 377 Mass. 159, 166 (1979) (recognizing the Massachusetts courts have historically used injunctions to protect trade secrets against one who wrongfully uses them); *General Electric Co. v. Chien-Min Sung*, 843 F. Supp. 776, 778 (D. Mass. 1994) (Gorton, J.); *Picker International Corp. v. Imaging Equipment Services, Inc.*, 931 F. Supp. 18, 45 (D. Mass. 1995) (Wolf, J.) (“That equity will protect against the unwarranted disclosure or use of a trade secret is ‘settled beyond peradventure.’”)

In issuing trade secret injunctions, courts have routinely required defendants to remove the trade secret material from their products, discontinue the sale or conveyance of such trade

secret material to third parties, segregate any employees or consultants with access to the trade secret material from working on the development of competing products and to refrain from communicating with customers about their infringing products. *See, e.g. TouchPoint Solutions, Inc.*, at 32-33 (“To assure such non-disclosure, Kodak must segregate TouchPoint’s confidential information from any of its programs and avoid conveying such information to any third party. That segregation must include a restriction against Kodak engineers who have come into contact with confidential Catapult information from working with parties outside Kodak on RMS...”); *G.E. Co.*, 843 F. Supp. at 782 (“this Court intends to promote the policies underlying trade secret protection by 1) reversing the head start that [defendant] achieved at G.E.’s expense, 2) depriving [plaintiff] of the advantages of their wrongdoing[,] and placing G.E. in the same position it would have occupied had [defendant] not misappropriated its trade secrets.”); *Picker Int’l Corp. v. Imaging Equipment Services, Inc.*, 931 F. Supp. 18, at 45 (“Whereas here, it has been proved that the defendant has misappropriated trade secrets and continues to possess them, it is common for courts to order their return or destruction”).

It is also appropriate for this Court to prevent Netezza from producing, selling or otherwise distributing any version or type of geospatial software in its products for three years from the entry of the injunction. *G.E. Co.*, 843 F. Supp. at 780 (“The appropriate measure for determining the duration of the production injunction in this case is the amount of time it would have taken [the defendant’s employees] independently to develop or reverse engineer a technology for production of high-grade saw diamond.”). “Courts have imposed production injunctions in circumstances where a use injunction would be ineffective in eliminating the competitive advantage gained by a misappropriator.” *See id.* at 779; *Eastern Marble Products Corp.*, at 839 (“If...the secret is inextricably connected with defendant’s manufacture of the

product, the court may enjoin defendant from making the product itself.”). *See G.E. Co.*, 843 F. Supp. at 780 (“This Court concludes that [defendant’s] production of [the] saw grade diamond was inextricably connected to the technology found by the jury to be GE trade secrets ... Under these circumstances, a production injunction is warranted.”).

In this case, because Netezza agreed to a three-year license of IISI’s Geospatial and Extended SQL Toolkit products, after which time Netezza would have been entitled to the unlimited use of the source codes for both products, it is appropriate that Netezza should be restrained from creating or distributing any sort of spatial software for a period of three years. *See Eastern Marble Corp.*, at 842-43 (“the defendants should not be permitted a competitive advantage from their avoidance of the normal costs of invention and duplication...”); *Jet Spray Cooler*, at 171 (“In a petition for injunctive relief, we have indicated that the time necessary to engineer in reverse is one factor to be considered in determining the propriety of the duration of the injunctive relief.”).

Since it is clear that Netezza willfully misappropriated IISI’s Trade Secret and Proprietary Information in order to circumvent its further payment of IISI pursuant to the Agreement, Netezza should be enjoined from manufacturing products that compete or replicate the IISI products it licensed for three years -- the length of the Agreement. *See G.E. Co.*, 843 F. Supp. at 781 (“... this Court is mindful of the fact that [the defendant] was a willful, rather than innocent wrongdoer. [The defendant] made a calculated decision to circumvent the expensive and difficult process of developing their own saw grade diamond technology by purchasing stolen trade secrets”). For this reason, this Court should issue a preliminary production injunction against Netezza for three years from the date of the Court’s order.

IV. THE ENTRY OF THE REQUESTED PRELIMINARY INJUNCTION WILL NOT BE ADVERSE TO THE PUBLIC INTEREST

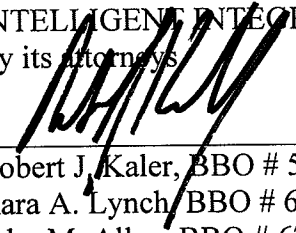
“As with the irreparable harm factor, it is ordinarily presumed that an injunction will serve the public interest” if the complainant “shows a likelihood of success on the merits.” See *Accusoft Corp. v. Mattel, Inc.*, 117 F. Supp. 2d 99, 102 (D. Mass 2000) (Gorton, J.); *G.E. Co. v. Chien-Min Sung*, 843 F. Supp. 776, 778 (D. Mass. 1994) (Gorton, J.) (“The purposed of an injunction in a trade secret case is to protect the secrecy of the misappropriated information, eliminate the unfair advantage obtained by the wrongdoer and reinforce the public policy of commercial morality). As the Court stated in *Jet Spray Cooler, Inc. v. Crampton* stated: “the protection [afforded] to trade secrets against one who wrongfully uses them is grounded on principles of public policy to which” courts have adhered for some time. 377 Mass. 159, 166 (“It is *the policy of the law, for the advantage of the public, to encourage and protect invention and commercial enterprise*. This encouragement and protection is afforded trade secrets because the *public has a manifest interest* not only in commercial innovation and development, but also in the maintenance of standards of commercial ethics.”) (citations omitted) (emphasis added).

CONCLUSION

For the foregoing reasons, IISI respectfully requests that the Court grant its Motion for Preliminary Injunction.

Respectfully submitted,

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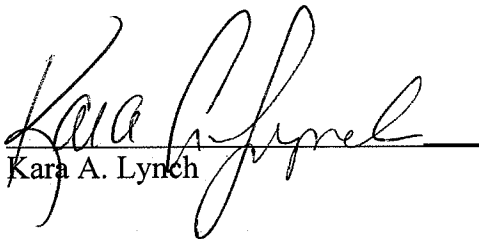
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CERTIFICATE OF SERVICE

I, Kara Lynch, hereby certify that I caused a true copy of the foregoing pleading to be serve upon the below counsel of record for Netezza Corporation by hand on this 7th day of September, 2010:

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