

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

-----oo0oo-----

RACKWISE, INC., a Nevada  
Corporation,

Plaintiff,

v.

GUY ARCHBOLD, an individual,

Defendant.

CIV. NO. 2:17-797 WBS CKD

MEMORANDUM AND ORDER RE: MOTION  
FOR PRELIMINARY PROHIBITORY AND  
MANDATORY INJUNCTION

-----oo0oo-----

Plaintiff Rackwise, Inc. brought this action against defendant Guy A. Archbold for conversion, fraud, breach of the duty of good faith and fair dealing, tortious interference with prospective economic advantage, and declaratory relief arising from defendant's actions before and after his purported termination as plaintiff's President, CEO, and Chairman of the Board of Directors. Before the court is plaintiff's Motion for preliminary prohibitory and mandatory injunctive relief. (Docket No. 6.)

1     I.     Factual and Procedural History

2             In 2011, defendant became President, CEO, and Chairman  
3 of the Board of Rackwise.<sup>1</sup> (First Am. Compl. ("FAC") ¶ 9 (Docket  
4 No. 4).) On May 7, 2014, Rackwise Funding II, LLC ("RFII")  
5 allegedly entered into a Subscription Agreement that entitled it  
6 to appoint two members to Rackwise's board of directors and  
7 created warrants that permitted RFII to purchase shares of  
8 Rackwise upon notice and payment. (Id. ¶¶ 10-11; id., Ex. B  
9 ("Subscription Agreement") (Docket No. 7-3).) Defendant, as  
10 Rackwise CEO, also allegedly granted another company, Triple R-F,  
11 LLC, warrants to purchase shares of Rackwise stock. (Richert  
12 Suppl. Decl. ¶¶ 4-5, Exs. 2-3 (Docket Nos. 10-1, 10-3 to -4).)

13             On February 2, 2017, plaintiff alleges its board of  
14 directors consisted of Archbold, John Kyees, and Michael  
15 Feinberg. (Imeson Decl. ¶ 9 (Docket No. 6-3).) That day,  
16 Patrick Imeson, as RFII's Managing Member, allegedly appointed  
17 himself and Bart Richert to Rackwise's Board of Directors  
18 pursuant to RFII's Subscription Agreement. (FAC ¶ 13; Imeson  
19 Decl. ¶¶ 10-12.) On February 3, 2017, Feinberg, Kyees, Imeson,  
20 and Richert allegedly held a special board meeting and terminated  
21 Archbold as President, CEO, and chairman of the board. (FAC ¶  
22 14.) Archbold disputed the validity of this action.

23             On March 22, 2017, RFII and Triple R-F exercised their  
24 warrants to purchase shares of plaintiff's stock. (Imeson Decl.  
25 ¶¶ 14, 16; Richert Suppl. Decl. ¶¶ 9-10.) The next day,

---

26             <sup>1</sup> Rackwise previously merged with Visual Network Design,  
27 Inc. ("VND"), which caused VND's bylaws to become Rackwise's  
28 bylaws. (See FAC ¶ 7; id., Ex. A ("Rackwise Bylaws") (Docket No.  
7-2).)

1 shareholders possessing over 79% of Rackwise's outstanding stock  
2 voted by written consent to terminate Archbold as President, CEO,  
3 and chairman of the board.<sup>2</sup> (Imeson Decl. ¶¶ 20-23; FAC Ex. E  
4 ("Written Consent of Shareholders") (Docket No. 7-6); Richert  
5 Suppl. Decl. ¶¶ 13-15.)

6 After his alleged termination, defendant continued to  
7 act as CEO, President, and chairman of Rackwise. He allegedly  
8 held himself out as the CEO to Rackwise constituents and  
9 employees, held a meeting with other former Rackwise board  
10 members purporting to act on Rackwise's behalf, filed documents  
11 with the SEC on Rackwise's behalf,<sup>3</sup> communicated with potential  
12 Rackwise investors using confidential and proprietary Rackwise  
13 information, and terminated a contract with a current client.  
14 (FAC ¶¶ 28-36; Imeson Decl. ¶¶ 26-28, 34-40, 44.)

15 Plaintiff initiated this action against defendant,  
16 alleging conversion, fraud, breach of the duty of good faith and  
17 fair dealing, and tortious interference with prospective economic  
18 advantage. Plaintiff now moves for a preliminary prohibitory  
19 injunction preventing defendant from (1) accessing or logging  
20 into Rackwise's account in the SEC's online EDGAR filing system;  
21 (2) representing himself to anyone as being an officer, director,

---

22 <sup>2</sup> Imeson and Richert signed the written shareholder  
23 consent. Imeson signed as the managing member of shareholders  
24 RFII, Black Diamond Financial Group, LLC, Rackwise Funding, LLC,  
25 and Black Diamond Holdings, LLC. (Imeson Decl. ¶¶ 2-3, 21.)  
Richert signed as the managing member of shareholder Triple R-F.  
(Id. ¶ 3; Richert Decl. ¶ 1.)

26 <sup>3</sup> Defendant also allegedly accessed and filed documents  
27 using Rackwise's online S.E.C. account after the February board  
28 of directors action, but before the written shareholder action.  
(See Imeson Decl. ¶ 42.)

1 or employee of, or otherwise affiliated with, Rackwise; and (3)  
2 acting, attempting to act, or purporting to act on behalf of  
3 Rackwise. Plaintiff also moves for a mandatory injunction  
4 requiring defendant to submit a declaration attesting to (1) the  
5 identities of all Rackwise customers he has contacted since March  
6 22, 2017, purportedly on behalf of Rackwise with true and correct  
7 copies of all communications with those customers and (2) the  
8 identifies of all potential investors that Archbold has solicited  
9 or attempted to solicit investments or financial on behalf of  
10 Rackwise, including copies of all communications.

## 11 II. Discussion

12 State law "controls the issue of whether a plaintiff is  
13 entitled to seek injunctive relief on the claim." Anselmo v.  
14 Mull, Civ. No. 2:12-1422 WBS EFB, 2012 WL 5304799, at \*6 (E.D.  
15 Cal. Oct. 25, 2012). The parties do not dispute that state law  
16 permits plaintiff to seek a preliminary injunction. However,  
17 "federal, not state, standards govern issuance of a preliminary  
18 injunction when a federal court is sitting in diversity or  
19 exercising supplemental jurisdiction over state law claims." Id.  
20 at \*5; see, e.g., Certified Restoration Dry Cleaning Network,  
21 L.L.C. v. Tenke Corp., 511 F.3d 535, 541 (6th Cir. 2007) ("[W]e  
22 apply our own procedural jurisprudence regarding the factors to  
23 consider in granting a preliminary injunction . . . ."); Equifax  
24 Servs., Inc. v. Hitz, 905 F.2d 1355, 1361 (10th Cir. 1990)  
25 ("[T]he doctrine of Erie . . . does not apply to preliminary  
26 injunction standards . . . ."); Kane v. Chobani, Inc., Case No.:  
27 12-CV-2425-LHK, 2013 WL 3776172, at \*3 (N.D. Cal. July 15, 2013)  
28 ("[A]pplying federal standards to determine whether a preliminary

1 injunction should be issued will not alter the final outcome of  
2 the litigation.").

3 In order to obtain a preliminary injunction, the moving  
4 party must establish (1) it is likely to succeed on the merits,  
5 (2) it is likely to suffer irreparable harm in the absence of  
6 preliminary relief, (3) the balance of equities tips in its  
7 favor, and (4) an injunction is in the public interest. Winter  
8 v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20-21 (2008); Humane  
9 Soc. of the U.S. v. Gutierrez, 558 F.3d 896, 896 (9th Cir. 2009).  
10 Injunctive relief is "an extraordinary and drastic remedy, one  
11 that should not be granted unless the movant, by a clear showing,  
12 carries the burden of persuasion." Mazurek v. Armstrong, 520  
13 U.S. 968, 972 (1997) (per curiam).

14 To determine likelihood of success on the merits, the  
15 court must first determine whether Rackwise will be likely to  
16 establish that plaintiff's shareholders validly removed defendant  
17 from his positions as CEO, President, and chairman of the board.

18 A federal court sitting in diversity applies the choice  
19 of law rules of the forum state. Mazza v. Am. Honda Motor Co.,  
20 666 F.3d 581, 589 (9th Cir. 2012). Under California's internal  
21 affairs doctrine, "a court must look to the law of the state of  
22 incorporation with respect to matters involving the regulation of  
23 [a corporation's] 'internal affairs.'" Patriot Scientific Corp.  
24 v. Korodi, 504 F. Supp. 2d 952, 956 (S.D. Cal. 2007) (citing  
25 State Farm Mut. Auto. Ins. Co. v. Superior Court, 114 Cal. App.  
26 4th 434, 442 (2d Dist. 2003)). Because plaintiff Rackwise is  
27 incorporated in Nevada, Nevada law governs its internal affairs.

28 Plaintiff argues that shareholders possessing over 75%

1 of Rackwise's outstanding stock removed defendant as CEO,  
2 President, and chairman of the board by written consent.<sup>4</sup> The  
3 Rackwise bylaws permit the removal of a director by "at least  
4 seventy-five percent (75%) of the outstanding shares of stock" by  
5 written consent. (Rackwise Bylaws § 3.3.)

6 On March 22, 2017, RFII, pursuant to an existing  
7 Subscription Agreement, allegedly exercised its warrants and  
8 purchased 1,448,400 shares of Rackwise stock. (Imeson Decl. ¶¶  
9 13-14; Pls.' Mot., Ex. 2.) On the same day, Triple R-F exercised  
10 its warrants and purchased 9,638,740 shares of Rackwise stock.<sup>5</sup>  
11 (Richert Decl. ¶¶ 3-4; Richert Supp. Decl. ¶¶ 9-11.) On March  
12 23, 2017, Imeson and Richert, as the managing members of the  
13 entities allegedly holding 79.8% of Rackwise's outstanding common  
14 stock, signed a written shareholder action terminating defendant  
15 from the Board of Directors and as CEO and President of Rackwise.  
16 (FAC, Ex. F; Imeson Decl. ¶¶ 20-22; Richert Suppl. Decl. ¶¶ 13-

---

17 <sup>4</sup> Plaintiff also argues that defendant was removed  
18 following a special meeting of the Board of Directors on February  
19 2, 2017. (FAC ¶ 14.) The Rackwise bylaws allegedly permit the  
20 removal of a director by a majority vote of the board; however,  
21 "[w]ritten notice of the time and place of special meetings shall  
22 be delivered personally to each director" at least 48 hours in  
23 advance. (Rackwise Bylaws § 4.4.) It is unclear at this stage  
24 whether all directors received adequate notice of the February 2  
25 meeting, and defendant avers that he, as a director on February  
26 2, did not receive any such notice. (See Archbold Decl. ¶¶ 7,  
27 9.)

28 <sup>5</sup> In his opposition, defendant argues that the exercise  
of the warrants was not taken "with proper corporate procedure,"  
but fails to explain how this action was impermissible either  
under the bylaws or Nevada law. At oral argument, defendant  
raised for the first time that the warrants were not validly  
exercised because he was the only officer, the warrants had to be  
delivered to an officer of the corporation, and he never received  
notice of the warrants being exercised. Defendant has not  
provided documentary evidence supporting this proposition.

1 15.) This action appears to have been taken in compliance with  
2 section 3.3 of Rackwise's bylaws and Nevada Revised Statute §  
3 78.335. Therefore, for purposes of this Motion, plaintiffs has a  
4 likelihood of success on its allegation that defendant was  
5 properly terminated from his positions at Rackwise.

6 Plaintiff must next be likely to succeed on the merits  
7 of its claims. Where a party asserts multiple claims, plaintiff  
8 only needs to show he is likely to succeed on the merits of at  
9 least one claim. See Fin. Express LLC v. Nowcom Corp., 564 F.  
10 Supp. 2d 1160, 1168 (C.D. Cal. 2008). Under California law,  
11 there are five elements of the tort of intentional interference  
12 with prospective economic advantage:

13 (1) an economic relationship between  
14 plaintiff and a third party, with the  
15 probability of future economic benefit to the  
16 plaintiff; (2) defendant's knowledge of the  
17 relationship; (3) an intentional act by the  
18 defendant, designed to disrupt the  
19 relationship; (4) actual disruption of the  
relationship; and (5) economic harm to the  
plaintiff proximately caused by the  
defendant's wrongful act, including an  
intentional act by the defendant that is  
designed to disrupt the relationship between  
the plaintiff and a third party.

20 Edwards v. Arthur Andersen LLP, 44 Cal. 4th 937, 944 (2008).

21 First, plaintiff had an economic relationship with  
22 third parties--its customers, including Unisys, and investors.  
23 Second, defendant, as the purported former CEO, President, and  
24 chairman of Rackwise, was allegedly aware of these relationships,  
25 as shown by his alleged communication with Unisys and investors.  
26 (Imeson Decl. ¶¶ 37-38, 40.) Third, defendant allegedly  
27 intentionally acted with the purpose of interfering with these  
28 relationships by canceling Unisys's contract with plaintiff,

1 communicating with current and former investors, seeking  
2 additional investments for Rackwise, and filing documents with  
3 the SEC that created a question as to Rackwise's leadership.  
4 (Id. ¶¶ 31-40, 44.) Lastly, defendant may have actually  
5 disrupted and caused harm to plaintiff by submitting forms with  
6 the SEC that confuses customers, investors, the public, and the  
7 SEC as to the proper representatives of the corporation;  
8 interfering with customer contracts and investor relations; and  
9 disseminating confidential and proprietary information. (Id. ¶¶  
10 32-34, 37-39, 44, 46-47.)

11 For purposes of plaintiff's motion for a preliminary  
12 injunction, plaintiff has sufficiently shown that it is likely to  
13 succeed on the merits of its claim.

14 Plaintiff must next "establish that irreparable harm is  
15 likely, not just possible, in order to obtain a preliminary  
16 injunction." All. for the Wild Rockies v. Cottrell, 622 F.3d  
17 1127, 1131 (9th Cir. 2011) (emphasis in original) (citing Winter,  
18 555 U.S. at 22). "[A] preliminary injunction will not be issued  
19 simply to prevent the possibility of some remote future injury."  
20 Winter, 555 U.S. at 21. "[I]ntangible injuries that are  
21 incapable of measurement, like reputation or goodwill, may  
22 constitute irreparable harm." Design Furnishings, Inc. v. Zen  
23 Path, LLC, Civ. No. 2:10-2765 WBS GGH, 2010 WL 5418893, at \*6  
24 (E.D. Cal. Dec. 23, 2010).

25 Plaintiff may be irreparably harmed if defendant is not  
26 enjoined from attempting to access and file documents on  
27 Rackwise's behalf using its online SEC account, as he allegedly  
28 has done in the past, because false or inconsistent filings would



1 harm the reputation and goodwill of plaintiff with investors,  
2 customers, and the SEC. As recently as April 2017, Rackwise's  
3 account has allegedly had inconsistent Form 8-K filings resulting  
4 from this dispute, and there is no indication that this would  
5 change in the future absent injunctive relief. Plaintiff may  
6 also suffer loss of reputation and goodwill from customers and  
7 investors if defendant is not enjoined from holding himself out  
8 as Rackwise's CEO, President, and chairman to customers and  
9 investors.

10 Further, defendant's representations that he is the  
11 CEO, President, and chairman of Rackwise's board will likely  
12 result in irreparable harm because defendant would be able to  
13 enter plaintiff into "transactions which would be difficult to  
14 unscramble." See Calumet Indus., Inc. v. MacClure, 464 F. Supp.  
15 19, 28 (N.D. Ill. 1978). Defendant is purportedly attempting to  
16 line up potential investments for Rackwise and cancel contracts  
17 with current customers. (See Imeson Decl. ¶¶ 37-40.) Finally,  
18 plaintiff argues that defendant has disseminated confidential and  
19 proprietary information in a PowerPoint presentation, suggesting  
20 that defendant may continue to disseminate this information  
21 absent injunctive relief. (See id. ¶ 34.) Plaintiff has met the  
22 irreparable harm requirement.

23 The last two prongs also weigh in favor of issuing a  
24 preliminary injunction. Defendant argues the harm he will incur  
25 if he is improperly enjoined is that he will be prevented from  
26 continuing to raise money and align future customers for  
27 Rackwise. While this may cause some harm to defendant, that  
28 would only be as a result of his role as the purported President,

1 CEO, and chairman of Rackwise's board. It is unclear whether  
2 defendant is a Rackwise shareholder and whether he has any  
3 interest in the company beyond the fact he is the "long-time CEO"  
4 of Rackwise. On the other hand, plaintiff may suffer great harm  
5 if defendant is not enjoined from holding himself out as CEO and  
6 President and acting on behalf of Rackwise, as discussed above.

7 The public has an interest in avoiding "confusion in  
8 the marketplace during the interval" and ensuring that only  
9 proper individuals hold themselves out as a corporation's  
10 representatives. Cf. Abercrombie & Fitch v. Fashion Shops of  
11 Ky., Inc., 363 F. Supp. 2d 952, 968 (S.D. Ohio 2005) (finding it  
12 was in the public interest to prevent the dissemination of items  
13 bearing plaintiff's trademark because it avoids confusion in the  
14 marketplace). The public therefore has an interest in the  
15 injunction because the injunction prevents confusion over the  
16 leadership of Rackwise pending final resolution of this action.

17 Plaintiff has met the four Winter prongs. Accordingly,  
18 the court will grant plaintiff's Motion for preliminary  
19 prohibitory injunctive relief.

20 In addition to a prohibitory injunction, plaintiff  
21 seeks a mandatory injunction requiring defendant to disclose the  
22 identities of all customers and potential investors that  
23 defendant has contacted since March 22, 2017. "Such 'mandatory  
24 preliminary relief' is subject to heightened scrutiny and should  
25 not be issued unless the facts and law clearly favor the moving  
26 party." Dahl v. HEM Pharm. Corp., 7 F.3d 1399, 1403 (9th Cir.  
27 1993) (quoting Anderson v. United States, 612 F.2d 1112, 1114  
28 (9th Cir. 1980)). Plaintiff has not discussed this heightened

1 standard, let alone how it has met this standard. Accordingly,  
2 the court must deny plaintiff's request for a mandatory  
3 injunction.

4 Federal Rule of Civil Procedure 65(c) provides that the  
5 court may require the posting of a security bond "[i]n an amount  
6 that the court considers proper to pay the costs and damages  
7 sustained by any party found to have been wrongfully enjoined or  
8 restrained." Plaintiff has not presented evidence of any  
9 meaningful inconvenience to it by the imposition of a bond. The  
10 court considers a bond in the sum of \$10,000 to be appropriate  
11 under the circumstances. See Barahona-Gomez v. Reno, 167 F.3d  
12 1228, 1237 (9th Cir. 1999) (holding district court has discretion  
13 "to determine the amount and appropriateness" of a security  
14 bond).

15 At oral argument, defense counsel raised for the first  
16 time that any disputes regarding the Subscription Agreements are  
17 subject to binding, mandatory arbitration. The court declines to  
18 decide this issue without briefing from both parties. The court  
19 will set briefing and argument for any motion on this issue, but  
20 the parties may stipulate to an expedited briefing schedule.

21 IT IS THEREFORE ORDERED that plaintiff's Motion for  
22 preliminary injunction (Docket No. 6) be, and the same hereby is,  
23 GRANTED IN PART and DENIED IN PART. Upon the posting of the  
24 \$10,000 bond, pending hearing upon any motion for a permanent  
25 injunction, defendant Guy Archbold, his agents, and any party  
26 acting in concert with him or his agents are enjoined from:

27 (1) accessing or logging into, or attempting to access  
28 or log into, Rackwise, Inc.'s account in the U.S. SEC's online

1 EDGAR filing system;


2 (2) representing himself to anyone as being an officer,  
3 director, or employee of, or otherwise affiliated with Rackwise,  
4 Inc.; and

5 (3) acting, attempting to act, or purporting to act on  
6 behalf of Rackwise, Inc.

7 Plaintiff's remaining requests for mandatory injunctive  
8 relief are DENIED.

9 IT IS FURTHER ORDERED that plaintiff shall file any  
10 motion to compel arbitration by June 26, 2017. Any opposition to  
11 such motion shall be filed by July 10, 2017. Any reply to such  
12 opposition shall be filed by July 17, 2017. Any hearing on such  
13 motion shall take place on July 24, 2017, at 1:30 p.m.

14 Dated: June 13, 2017

  
15 **WILLIAM B. SHUBB**  
16 **UNITED STATES DISTRICT JUDGE**