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BALBOA CAPITAL CORPORATION

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE – CENTRAL JUSTICE CENTER**

BALBOA CAPITAL CORPORATION

Plaintiff,

vs.

REGENTS CAPITAL CORPORATION;
DONALD HANSEN; DENNIS ODIORNE;
KIRSTEN MERZA; CHELSEA HAINES;
JAVIER ENRIQUEZ; KEVIN KUTTER;
TRAVIS POWER; DOES 1 through 25,
inclusive,

Defendants.

CASE NO. 30-2014-00705733-CU-BT-CJC

Judge: Kirk Nakamura

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
INJUNCTION; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

**Filed Concurrently with Declaration
of Patrick E. Byrne in support
thereof; Proposed Order**

Date: March , 2014

Time: 2:00 P.M.

Dept.: C-15

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1 **TO DEFENDANTS REGENTS CAPITAL CORPORATION; DONALD HANSEN;**
2 **DENNIS ODIORNE; KIRSTEN MERZA; CHELSEA HAINES; JAVIER ENRIQUEZ; KEVIN**
3 **KUTTER; TRAVIS POWER AND THEIR ATTORNEYS OF RECORD:**

4
5 Please take notice that on March ____ 2014, at 2:00 P.M. in Department C-15 of the
6 above entitled Court, located at 700 Civic Center Drive, Santa Ana, CA 92701, Plaintiff Balboa
7 Capital Corporation ("BALBOA") will move this Court pursuant to California Rules of Court
8 Rule 359(a), and Code of Civil Procedure §§ 526 and 527 for an order preliminarily enjoining
9 Defendants REGENTS CAPITAL CORPORATION, ("RCC"); DONALD HANSEN, DENNIS
10 ODIORNE, KIRSTEN MERZA, CHELSEA HAINES, JAVIER ENRIQUEZ, KEVIN
11 KUTTER, TRAVIS POWER and all of their agents from:

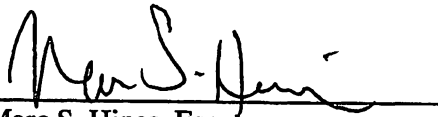
- 12 (i) Engaging in any solicitation of companies who submitted an
13 application to BALBOA that Defendants reviewed while at BALBOA;
14 (ii) Using, copying, dealing with, disclosing, trading, and otherwise
15 exploiting or misappropriating BALBOA's confidential information
16 including its customer list and customer files;
17 (iii) Destroying any documents or files of any kind, actively or
18 passively, whether in written or electronic form, that relate in any way to
19 BALBOA's Confidential Information, and/or BALBOA's actual or
20 prospective customers; and
21 (iv) Requiring Defendants and all persons acting or claiming to act
22 under, in concert with, or for Defendants, or any of them to return all of
23 BALBOA's Confidential Information in their custody, possession, or
24 control to BALBOA.
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1 This motion is made on the grounds that irreparable injury will result to BALBOA if
2 relief is not granted, that the legal remedy is inadequate to redress the ongoing harm that
3 BALBOA is suffering, that BALBOA is likely to prevail on its claims against all Defendants,
4 and that the balance of hardships is in BALBOA's favor.

5 This motion is based on the accompanying Memorandum of Points and Authorities, the
6 Declaration of Patrick E. Byrne, the Complaint and Exhibits attached thereto, and all pleadings
7 and papers on file in this action, and upon such other and further evidence and arguments as may
8 be presented at the hearing.
9

10 Dated: March 5, 2014

HINES CARDER

11
12 By: 
13 Marc S. Hines, Esq.
14 Nicole M. Hampton, Esq.
15 Natalie Mirzayan, Esq.
16 Attorneys for Plaintiff
17 BALBOA CAPITAL CORPORATION
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I. INTRODUCTION

Plaintiff Balboa Capital Corporation (“BALBOA”) is entitled to a preliminary injunction to prevent Defendants from continuing to harm Plaintiff through the improper use and exploitation of Plaintiff’s confidential and proprietary information. Defendants have exploited Plaintiff’s strategic, proprietary, and confidential information Defendants obtained during their employment with BALBOA for their own financial gains. This proprietary and confidential information was essential to BALBOA’s business operations, and necessary for Defendants’ performance of their employment with BALBOA. The confidential and proprietary information includes BALBOA’s confidential customer list and marketing strategies, which were compiled and developed through BALBOA’s extensive and time consuming research, development, investigation, and marketing efforts, intended solely for the benefit of BALBOA in its sales and marketing efforts directed to its customer base and BALBOA’s customer files and related documents.

To protect BALBOA's efforts and expense in developing its proprietary and confidential customer lists and other business information, BALBOA has taken reasonable steps to ensure that its proprietary and confidential information is kept confidential, not disseminated to competitors and not used for the benefit of anyone or any company other than BALBOA. To that end, each Defendant was advised by BALBOA of the importance, value, and confidential nature of its proprietary information, including its customer list, made available to Defendants during their employment with BALBOA via the "Comprehensive Agreement", attached hereto as ("Exhibit A"), that each employee, including Defendants, was required to sign prior to employment and was reminded of following their resignation.

As a result of Defendants' misappropriation of BALBOA's confidential and proprietary information and breaches of their employment Agreements and, specifically, their

1 Comprehensive Agreements, BALBOA incurred and continues to incur a substantial loss of
2 business, profits, and customers. BALBOA firmly believes that Defendants are and will
3 continue to improperly and unfairly use BALBOA's confidential and proprietary information,
4 including its customer list and customer files in Defendants' possession, custody and control to
5 improperly and unfairly solicit BALBOA's customers for their own financial gain and to the
6 detriment of BALBOA, causing irreparable harm to BALBOA.

7
8 Thus, Defendants should be prevented from continuing to use and misappropriate
9 BALBOA's confidential and proprietary information, including but not limited to its customer
10 list and customer files. The misappropriation, conversion, and unauthorized and improper use of
11 BALBOA's confidential and proprietary information, including its customer lists and customer
12 files, for the purposes of soliciting BALBOA's customers, violates Business and Professions
13 Code, Section 17200, *et seq.* and the Uniform Trade Secrets Act, ("UTSA").

14
15 Unless and until enjoined by order of this Court, Defendants will continue their illegal
16 efforts and schemes to exploit Plaintiff's confidential and proprietary trade secret information. An
17 injunction is BALBOA's only remedy because BALBOA has no adequate remedy at law for the
18 irreparable injuries Defendants have caused and continue to cause, including, but not limited to,
19 damage to BALBOA's confidential information, business, and profits.

20 **II. FACTUAL BACKGROUND**

21 BALBOA has been a trusted financing resource in Southern California for many
22 thousands of businesses since 1988. Over years of hard work, expense, and dedication,
23 BALBOA researched and assessed the needs of its customers and potential customer base,
24 developed a proprietary and confidential customer list, and provides a broad array of financing
25 products, including equipment leasing, small business loans, commercial financing, vendor
26 financing and franchise financing targeted to its customer base.
27
28

1 To protect BALBOA's efforts and expense in developing its proprietary and confidential
2 customer lists and other business information, BALBOA has taken reasonable steps to ensure
3 that its proprietary and confidential information is kept confidential, not disseminated to
4 competitors and not used for the benefit of anyone or any company other than BALBOA. To
5 that end, each Defendant was advised by BALBOA of the importance, value, and confidential
6 nature of its proprietary information, including its customer list, made available to Defendants
7 during their employment with BALBOA via the "Comprehensive Agreement", that each
8 employee, including Defendants, was required to sign prior to employment. The Comprehensive
9 Agreement states in pertinent part:
10

11 Definition of Proprietary Information - As used herein, the term "Proprietary
12 Information" refers to any and all information of a confidential, proprietary, or secret
13 nature which is or may be applicable to or related in any way to (i) the business, present
14 or future, of the Employer, (ii) the research and development or investigations of the
15 Employer, or (iii) the business of any customer of the Employer. Proprietary Information
16 includes, for example and without limitations, trade secrets (as defined by California
Civil Code #3426), processes, formulas, data, inventions, technical and financial know-
how, improvements, techniques, marketing plans and strategies, and information
concerning employees, customers, or vendors.

17 Proprietary Information to be Kept in Confidence - Employee acknowledges that the
18 Proprietary Information is a special, valuable, and unique asset of the Employer, and
19 Employee agrees at all times during the period of his/her employment and thereafter to
20 keep in confidence all Proprietary Information. Employee agrees that during the period
21 of his employment and thereafter he will not directly use the Proprietary Information
other than in the course of performing his/her duties as an employee of the Employer and
with the consent of the Employer. Employee will abide by the Employer's policies and
regulations as established from time to time, for the protection of its Proprietary
Information.

22 Return of Materials at Termination - In the event of any termination of his/her
23 employment whether or not for cause and whatever the reason, Employee will promptly
24 deliver to the Employer all documents, data, records and other information pertaining to
25 his/her employment, and Employee shall not take with him/her any documents or data, or
any reproduction or excerpt of any documents or data, containing or pertaining to any
Proprietary Information.

26 Business Relationships - Employee acknowledges that the Employer's relationships with
27 its employees (including agents and representatives), customers, and vendors are valuable
28 business assets. Employee agrees that neither during his/her employment nor thereafter will

1 he/she disrupt, damage, impair, or interfere with those relationships, through solicitation
2 or otherwise. This provision shall not affect Employee's right to compete after
3 termination of employment with the Employer.

4 On December 10, 2012, Defendants HANSEN and ODIORNE submitted their
5 resignation to BALBOA, stating that their final date of employment would be December 13,
6 2012. Defendants MERZA, HAINES, ENRIQUEZ, KUTTER, and. POWER also submitted
7 their resignations to BALBOA with an effective resignation date of January 10, 2014.

8 Prior to their last date of employment, BALBOA sent each of the Defendants a
9 Resignation Acknowledgment letter, attached hereto as ("Exhibit B"), reminding Defendants of
10 and reiterating the terms set forth in each Defendant's New-Hire Package, and, specifically, the
11 relevant language from their Comprehensive Agreement regarding the return and non-use of
12 BALBOA's confidential and proprietary information, and a demand to refrain from contacting
13 BALBOA's customers and vendors.
14

15 Throughout their employment with BALBOA, Defendants were provided access to and
16 acquired propriety and confidential information belonging to BALBOA. This proprietary and
17 confidential information was essential to BALBOA's business operations, and necessary for
18 Defendants' performance of their employment with BALBOA. The confidential and proprietary
19 information includes, BALBOA's confidential customer list and marketing strategies, which
20 were compiled and developed through BALBOA's extensive and time consuming research,
21 development, investigation, and marketing efforts, intended solely for the benefit of BALBOA in
22 its sales and marketing efforts directed to its customer base and its customers' files and related
23 documents.
24

25 Armed with the strategic, proprietary and confidential information Defendants obtained
26 during their employment with BALBOA, including its customer lists and customer files,
27 Defendants HANSEN and ODIORNE resigned from BALBOA in order to form their own
28

1 competing business, RCC. Defendants formed RCC on 12/26/2013, less than two weeks
2 following Defendants HANSEN and ODIORNE's resignation from BALBOA.

3 While still employed by BALBOA and following their resignations, Defendants
4 HANSEN and ODIORNE improperly solicited other BALBOA vital sales employees, including
5 Defendants MERZA, HAINES, ENRIQUEZ, KUTTER, and POWER, all of whom subsequently
6 resigned from BALBOA on the same date, January 10, 2014.

7 In addition to Defendants' solicitation of BALBOA's key employees, 34 of BALBOA's
8 existing customers notified BALBOA that Defendants, or some of them, personally contacted
9 them and improperly, unfairly, and repeatedly solicited their business in efforts to divert that
10 business away from BALBOA. In fact, Defendants unfair conduct went beyond repeated and
11 improper solicitation of BALBOA's existing customers, but rather, some Defendants pursued
12 customers who had previously submitted applications to BALBOA, which applications were
13 reviewed by Defendants and pending when Defendants left BALBOA, and took customer files
14 and other supporting documentation, to RCC.
15

16 As a result of Defendants' breaches of fiduciary duties, breaches of their employment
17 agreements and, specifically, their Comprehensive Agreements, misappropriation of BALBOA's
18 confidential and proprietary information, and improper solicitation and interference with its
19 contractual relationship with its customers, BALBOA incurred and continues to incur substantial
20 loss of business, profits, and customers. BALBOA believes that Defendants are and will
21 continue to improperly and unfairly use BALBOA's confidential and proprietary information,
22 including its customer list and customer files, for their own financial gains and to the detriment
23 of BALBOA, causing irreparable harm to BALBOA.
24
25

26 **III. ARGUMENT**

27 **A. Preliminary Injunction Standard**

28

1 “An injunction is a writ or order requiring a person to refrain from a particular act.” Civ.
2 Proc. C. §525. Generally a plaintiff is entitled to a preliminary injunction if (1) it is
3 reasonably probable that it will prevail on the merits of its claim, *see San Francisco*
4 *Newspaper Printing Co. V. superior Court*, 170 Cal. App. 3d 438, 442 (1985), Civ. Proc. C.
5 §526(a)(1); (2) there is a threat of irreparable harm to the Plaintiff’s rights, *see* Civ. Proc. C.
6 §526(a)(2); (3) there is no adequate legal remedy, *see* Civ. Proc. C. §526(a)(4); and (4) the
7 balancing of the equities weights in favor of the Plaintiff, *see Youngblood v. Wilcox*, 207 Cal.
8 App. 3d 1368, 1372 (1989). All these four factors strongly weigh in BALBOA’s favor.

9 **B. Nature of the Relief Requested**

10 Through this motion, BALBOA seeks to enjoin Defendants from using BALBOA’s
11 unique marketing techniques; its customer lists in which BALBOA identified and complied
12 names, addresses, and other pertinent information of targeted businesses that were identified
13 through BALBOA’s marketing efforts to have particular needs for the services BALBOA
14 offers; compel Defendants to return BALBOA’s customer files and other documents to
15 BALBOA; enjoin Defendants from contacting and unfairly and improperly soliciting
16 BALBOA’s customers; and from misappropriating and continuing to use BALBOA’s
17 proprietary and confidential information for the benefit of Defendants and to the detriment of
18 BALBOA. In other words, the substance of the order being sought in this motion would
19 prevent Defendants from using BALBOA’s customer list and customer files to identify and
20 contact BALBOA’s customers for the purpose of soliciting business from those customers to
21 the benefit of Defendants and detriment of BALBOA.

22 **C. Likelihood of Success on the Merits**

23 An injunction may be granted “when it appears by the complaint that the plaintiff is
24 entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the
25 commission or continuance of the act complained of, either for a limited period or perpetually.”
26 Civ. Proc. C. §526(a)(1). It is likely that BALBOA will prevail on the merits of its claim for the
27 following reasons:

28 ////

1 **1. Trade Secret**

2 BALBOA has stated a viable claim for unfair competition and misappropriation of trade
3 secrets because BALBOA's proprietary and confidential information, specifically its customer
4 list, meets the trade secret test as defined in California Civil Code §3426.1(d). A 'Trade secret'
5 means information, including a formula, pattern, compilation, program, device, method,
6 technique, or process, that: (1) Derives independent economic value, actual or potential, from not
7 being generally known to the public or to other persons who can obtain economic value from its
8 disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to
9 maintain its secrecy." California Civil Code, § 3426.1(d).
10

11 In Morlife, Inc. v. Perry, 56 Cal.App.4th 1514 (1997), where the court found a customer
12 list to be a protected trade secret under the definition stated above, the subject customer list was a
13 compilation of names, addresses and data derived from business cards which were removed from
14 the employer's business by a former sales representative and included pricing information and
15 particular information about the roofs and roofing needs of the employer's customers. -The court
16 found the employer "to be engaged in a relatively unusual roofing service, namely commercial
17 roof repair and maintenance as opposed to replacement roofing" and that the identity of those
18 particular commercial buildings using such services was not generally known to the roofing
19 industry. The court also found that the employer made reasonable efforts to maintain the
20 secrecy of its customers' identity by limiting circulation of its customer lists and by advising its
21 employees, through an employment agreement and an employee handbook, that the employer
22 considered the information valuable and confidential.
23

24 Similarly, through time, effort, expense and BALBOA's unique marketing techniques,
25 BALBOA identified and compiled the names, addresses, and other pertinent information of
26 targeted businesses identified through those efforts and marketing techniques to have particular
27 needs for the services BALBOA offers, within BALBOA's customer list. As discussed below,
28

1 the name of the customers compiled by BALBOA on its customer list is not readily ascertainable
2 through public sources and BALBOA has taken reasonable steps to protect the secrecy of this
3 information. Accordingly, BALBOA's customer list is entitled to protection as a trade secret by
4 this Court.

5 **2. Information Not Readily Ascertainable**

6 BALBOA's proprietary and confidential information, such as its customer list, deserves
7 the protection of this court. While courts are reluctant to protect customer lists to the extent they
8 embody information which is "readily ascertainable" through public sources, such as business
9 directories; however, "where the employer has expended time and effort identifying customers
10 with particular needs or characteristics, courts will prohibit former employees from *using* this
11 information to capture a share of the market. Such lists are to be distinguished from mere
12 identities and locations of customers where anyone could easily identify the entities as potential
13 customers. American Paper & Packaging Products, Inc. v. Kirgan, 183 Cal.App.3d 1318, 1326
14 (1986). As a general principle, the more difficult information is to obtain, and the more time and
15 resources expended by an employer in gathering it, the more likely a court will find such
16 information constitutes a trade secret." *Id.* at 1522.

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19 The information compiled by BALBOA and contained within its customer list is not
20 generally available to the general public nor is it readily ascertainable through public resources,
21 such as business directories because through its many years of being in business, and since 1988,
22 BALBOA has developed algorithms for identifying and thoroughly analyzing potential customer
23 data (sometimes purchased from third party vendors) in order to ascertain business prospects
24 that, based on BALBOA's experience, are more likely to be in need of BALBOA's services and
25 are more likely to generate repeat or renewal business, and for scoring and ranking those
26 prospects for use by BALBOA's sales employees in calling on those potential customers. Such
27
28

1 information comprises BALBOA's customer list made available to Defendants for performance
2 of their employment with BALBOA. For their own financial gains, Defendants misappropriated
3 this confidential and proprietary information contained in BALBOA's customer list.

4 **3. Independent Economic Value**

5 The requirement that confidential information have independent economic value to
6 qualify as a trade secret has been interpreted to mean that the secrecy of this information
7 provides a "substantial business advantage." E.g., a confidential list of customers has such value
8 because its disclosure would allow a competitor to solicit more selectively and more effectively.
9 Morlife, Inc. v. Perry, supra, 56 CA4th at 1522; see also, Whyte v. Schlage Lock Co., 101
10 CA4th, 1456 (information related to cost and pricing, marketing strategy and manufacturing
11 technology can be trade secret; also market research if it relates to needs of numerous and
12 diverse buyers, rather than a single customer.) *Id.*

13
14 BALBOA's customer list and customer files constitute trade secrets in that they contain
15 and are comprised of information that derives independent economic value from not being
16 generally known to the public or to other persons who can obtain economic value from its
17 disclosure or use.

18
19 Defendants misappropriated BALBOA's trade secrets and confidential information,
20 including its customer list and customer files, in order to obtain an unfair business advantage
21 and, making use of that trade secret and confidential information, diverted BALBOA's
22 customers to their own competing business, RCC. By using BALBOA's customer list and
23 customer files, Defendants were able to more selectively and more effectively solicit BALBOA's
24 customers without incurring any costs or efforts to create the list. Defendants, by their
25 nonconsensual disclosure and use of BALBOA's trade secret and confidential information have
26 violated California Civil Code §3426.1 (b)(2) and are causing BALBOA irreparable harm.
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1 **4. Misappropriation -- Disclosure or Use of Trade Secret**

2 Defendants misappropriated BALBOA's confidential and proprietary information by and
3 through their unauthorized use and retention of that information to improperly and unfairly
4 solicit BALBOA's customers and to obtain an unfair competitive advantage.

5 Thirty-four (34) of BALBOA's existing customers notified BALBOA that Defendants, or
6 some of them, personally contacted them and improperly, unfairly, and repeatedly solicited their
7 business in efforts to divert that business away from BALBOA. Due to the proprietary and
8 confidential nature of BALBOA's customer list, the names of said solicited customers will not
9 be listed in this Motion. Defendants conduct constituted misappropriation. The use made of the
10 information was beyond the Defendants contacting former customers to simply announce their
11 disassociation from BALBOA and their new place of employment. *See, Morlife, supra, and*
12 *Golden State, supra. See also, Aetna Bldg. Maint. Co., Inc. v. West, 39 Cal.2d 198, 204 (1952)*
13 *("(m)erely informing customers of one's former employer of a change of employment, without*
14 *more, is not solicitation... Equity will not enjoin a former employee from receiving business from*
15 *the customers of his former employer, even though the circumstances be such that he should be*
16 *prohibited from soliciting such business.").* *Id.*

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19 In fact, Defendants unfair conduct went beyond repeated and improper solicitation of
20 BALBOA's existing customers, but rather, some Defendants solicited BALBOA customers
21 using applications that had been submitted to BALBOA and reviewed by Defendants prior to
22 leaving BALBOA, which applications were pending, and took customer files and other
23 supporting documentation, for purposes of closing those deals with RCC.

24
25 As stated by the court in Pillsbury, an employee does not have the right to take company
26 documents when leaving the company's employment, and an injunction may issue to compel
27 their return. *See, Pillsbury, Madison & Sutro v. Schectman, 55 CA4th 1279, 1289,*

1 (1997)(upholding preliminary injunction requiring attorney for former employee plaintiffs to
2 return confidential personnel documents removed from employer's files without its consent for
3 purpose of bolstering plaintiffs' case. *See also*, Lab.C. § 2860, the employee is not entitled to
4 take or retain copies of correspondence and memos prepared by the employee in the course of
5 employment. Such documents (as distinguished from personal letters written at work) belong to
6 the employer.

7
8 As stated above, Defendants, or some of them, took BALBOA's customer files and
9 customer applications without BALBOA's prior consent or knowledge and repeatedly and
10 improperly contacted those customers, diverted their business to RCC and closed the financing
11 deals. Clearly, Defendants conduct constitutes misappropriation and conversion of BALBOA's
12 confidential and proprietary information.

13 **5. Subject to Reasonable Efforts to Maintain its Secrecy**

14 Courts have defined trade secrets as a peculiar kind of property. Their only value
15 consists in their being kept private. Thus, "the right to exclude others is central to the very
16 definition of the property interest. Once the data that constitute a trade secret are disclosed to
17 others, or others are allowed to use those data, the holder of the trade secret has lost his property
18 interest in the data." *See, DVD Copy Control Assn., Inc. v. Bunner*, 31 Cal.4th 864, 881 (2003).

19
20 BALBOA made reasonable efforts under the circumstances to maintain the secrecy of its
21 proprietary and confidential information by limiting circulation of its customer lists and customer
22 files and by advising its employees, including Defendants, through their employment agreements
23 that BALBOA considered the information valuable and confidential. BALBOA has also
24 expended time, effort and expense to maintain the secrecy of its customer list by taking the
25 following steps: (i) BALBOA ensured that its confidential and proprietary information is secured
26 through password protections in order to restrict access to its data; (ii) BALBOA never published
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1 any of its customer's names publicly or to persons who are under no obligation to protect its
2 confidentiality or in any advertisements or marketing materials; (iii) BALBOA included in all its
3 employment agreements a requirement that employees return all notebooks, documents, software
4 and the like upon termination of employment; (iv) BALBOA included in all its employment
5 agreements the confidentiality provision contained within the "Comprehensive Agreement," that
6 all employees were required to sign both at the time of employment and prior to termination,
7 which expressly provides that the employees' duty of confidentiality extends beyond the duration
8 of their employment, and which states in pertinent part:
9

10 Proprietary Information to be Kept in Confidence - Employee acknowledges that the
11 Proprietary Information is a special, valuable, and unique asset of the Employer, and
12 Employee agrees at all times during the period of his/her employment and thereafter
13 to keep in confidence all Proprietary Information. Employee agrees that during the
14 period of his employment and thereafter he will not directly use the Proprietary
15 Information other than in the course of performing his/her duties as an employee of
16 the Employer and with the consent of the Employer. Employee will abide by the
17 Employer's policies and regulations as established from time to time, for the
18 protection of its Proprietary Information.
19

20 Return of Materials at Termination – In the event of any termination of his/her
21 employment whether or not for cause and whatever the reason, Employee will
22 promptly deliver to the Employer all documents, data, records and other information
23 pertaining to his/her employment, and Employee shall not take with him/her any
24 documents or data, or any reproduction or excerpt of any documents or data,
25 containing or pertaining to any Proprietary Information.
26

27 *See also, Morlife, Inc. v. Perry*, supra, 56 CA4th at 1522; *Whyte v. Schlage Lock Co.*,
28 101 CA 4th 1443, 1454 (2002) —requiring employees to sign confidentiality agreements is a
29 reasonable step to ensure secrecy; *ReadyLink Healthcare v. Cotton*, 126 CA4th 1006, 1018
30 (2005)(employer took reasonable steps to ensure the secrecy of its trade secret information by
31 requesting employees to sign nondisclosure agreements.) Thus, BALBOA's efforts to protect its
32 confidential information through requiring its employees to sign confidentiality agreements were
33 reasonable steps to ensure secrecy.

1 Thus, BALBOA's customer list meets the trade secret test and it should be
2 offered protection as such by this Court.

3 **D. Irreparable Harm**

4 The function of a preliminary injunction is not merely to contain ongoing damage but to
5 prevent prospective damage. *See, Nutro Products, Inc. v. Cole Grain, Co.*, 3 Cal. App. 4th 860,
6 867 (1992). Irreparable harm is shown when the Plaintiff is damaged in a way that cannot be
7 later repaired. *People v. Mitchell Brothers' Santa Ana Theater*, 118 Cal. App. 3d 863, 870-71
8 (1981). It is axiomatic that when a proprietary and confidential information is disclosed, it
9 cannot be undisclosed. By secretly obtaining and misappropriating Plaintiff's trade secrets and
10 confidential information, including but not limited to Plaintiff's customer list and customer files,
11 without Plaintiff's knowledge, consent, and/or authorization and concealing their intent to
12 establish a competing business with Plaintiff based on the proprietary and confidential
13 information obtained from Plaintiff, and by diverting corporate opportunities from Plaintiff to
14 their newly created competing business, RCC, that is identical in nature to BALBOA's business
15 Defendants have caused and are continuing to cause Plaintiff irreparable harm in the form of lost
16 business.
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19 Preventing Defendants from using BALBOA's customer list, customer files, and
20 soliciting its customers will preclude further prospective damages including but not limited to
21 loss of profits, existing customers, and prospective economic advantage. The damage that would
22 be done if Defendants continue to use BALBOA's confidential and proprietary information,
23 including its customer list and customer files, and their continued solicitation of its existing
24 customers without granting the injunction sought in this Motion cannot be later repaired.
25

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E. Inadequate Legal Remedy

In the context of injunctions, courts have held that no legal remedy is appropriate for using the former employer's "proprietary and confidential information" to compete with former employer and hence an injunction against former employees' use of such information was proper either under the Uniform Trade Secrets Act or as unfair completion as it constitutes misappropriation of trade secret. *See, MAI Systems Corp. v. Peak Computer, Inc.*, 991 F2d 511, 521–522 (9th Cir. 1993)(applying Calif. law); *ReadyLink Healthcare v. Cotton*, 126 CA4th 1006, 1018 (2005); *Wanke, Industrial, Comm'l, Residential, Inc. v. Sup.Ct. (Keck)*, 209 CA4th 1151, 1174–1178 (2012)(upholding stipulated injunction precluding solicitation of customers from customer list deemed to be protected trade secret.). *See also, Morlife, Inc. v. Perry*, supra, 56 CA4th at 1520, holding that if he former employer's customer list is protectable as a trade secret, the former employee and new employer may be enjoined from using it to compete with the former employer and held liable in damages for whatever benefit they derived from past use.

As noted above, the ongoing and future use of proprietary and confidential information related to Defendants use of BALBOA's trade secrets, solicitation of its customers, and key employees cannot be fully redressed by a damages award on its own. It will be impossible for customers on BABLOA's list to obtain BALBOA's services after being solicited by Defendants. Similarly, it will be impossible for BALBOA to maintain the secrecy and confidentiality of its proprietary information, including but not limited to its unique marketing techniques, after being disclosed and improperly used by Defendants. Thus, the legal remedy is inadequate to compensate BALBOA for its loss of profits, business, and disclosure of its trade secrets and other confidential information.

F. Balancing of the Equities

In deciding whether to grant a preliminary injunction, the court must exercise its discretion "in favor of the party most likely to be injured ... if denial of an injunction would result in great harm to the plaintiff, and the defendants would suffer little harm if it were granted,

1 then it is an abuse of discretion to fail to grant the preliminary injunction.” Robbins v. Superior
2 Court, 38 Cal. 3d 199, 205 (1985.) In making this equitable consideration, first, the court must
3 consider who will suffer the greater injury from the granting or denial of the injunction. *See*,
4 Shoemaker v. County of Los Angeles, 37 Cal. App. 4th 618, 633 (1995). Second, the court must
5 evaluate who is likely to prevail on the merits of the case. *See*, Robbins, 38 Cal. App. 3d at 206.
6 BALBOA has shown a high likelihood of success on the merits. Moreover, the balancing of the
7 hardships clearly tips in BALBOA’s favor. If the injunction is not granted, Defendants will
8 continue their misappropriation, conversion, and unauthorized and improper use of BALBOA’s
9 confidential and proprietary information, including its customer lists and customer files, for
10 purposes of soliciting BALBOA’s customers, and would continue their improper and unfair
11 solicitation of BALBOA’s key sales employees. As a result of Defendants’ continuous actions
12 of unfair competition, BALBOA would continue to suffer damages and irreparable harm. If the
13 injunction is granted, Defendants would be compelled to cease and desist the misappropriation of
14 BALBOA’s confidential and proprietary information including its customer list to solicit
15 BALBOA’s customers and would refrain from soliciting BALBOA’s key employees to unfairly
16 compete with Plaintiff. In addition, Defendants would return all of BALBOA’s customer files
17 and records to BALBOA and would cease to use all information obtained thereof. Defendants
18 would then resume their business and would have to expend their own monies and efforts to
19 create their own customer list and hire and train their own employees as opposed to
20 misappropriating BALBOA’s information obtained during their employment with BALBOA.
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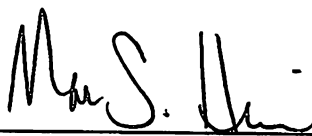
24 IV. CONCLUSION

25 For the foregoing reasons, Balboa respectfully requests that the motion for
26 preliminary injunction and permanent injunction be granted, enjoining Defendants and all
27 persons acting or claiming to act under, in concert with, or for Defendants, or any of them
28 from: (1) Engaging in any solicitation of companies who submitted an application to

1 BALBOA that Defendants reviewed while at BALBOA; (2) Using, copying, dealing with,
2 disclosing, trading, and otherwise exploiting or misappropriating BALBOA's confidential
3 information, including but not limited to BALBOA's customer list and customer files; (3)
4 Destroying any documents or files of any kind, actively or passively, whether in written or
5 electronic form, that relate in any way to BALBOA's employment of Defendants, BALBOA's
6 confidential information, and/or BALBOA's actual or prospective customers; and (4)
7 Requiring Defendants and all persons acting or claiming to act under, in concert with, or for
8 Defendants, or any of them to return all of BALBOA's confidential information in their
9 custody, possession, or control to BALBOA.

10 Dated: March 5, 2014

HINES CARDER

11
12
13 By: 

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