SNELL & WILMER L.L.P.
Tiffanny Brosnan, Bar No. 184810
tbrosnan@swlaw.com
Erin D. Leach, Bar No. 247785
eleach@swlaw.com
Jordan M. Lee, Bar No. 295395
jmlee@swlaw.com
600 Anton Boulevard, Suite 1400
Costa Mesa, California 92626-7689
Telephone: 714-427-7000
Facsimile: 714-427-7799

Attorneys for Defendants Regents Capital Corporation, Donald Hansen, and Dennis Odiorne

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

BALBOA CAPITAL CORPORATION,

Plaintiff,

v.

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

Assigned to Hon. Kirk Nakamura

DEFENDANTS' OPPOSITION TO BALBOA CAPITAL CORPORATION'S *EX PARTE* APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION

Date: March 12, 2014
Time: 1:30 p.m.
Dept.: C15

Date of Filing: February 19, 2014
Trial Date: Not Set

Defendants Regents Capital Corporation, Donald Hansen and Dennis Odiorne submit the following opposition to plaintiff Balboa Capital Corporation's *ex parte* application for temporary restraining order and order to show case re preliminary injunctions.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

The plaintiff in this case is like the playground bully who doesn't want to share the sandbox. And like the playground bully, plaintiff's temporary restraining order papers are full of bluster and intimidation tactics, but short on substance. Plaintiff Balboa Capital Corporation ("Plaintiff") makes conclusory allegations such as "[f]or their own financial gain, Defendants misappropriated this confidential and proprietary information contained in Balboa's customer list and customer files." [Declaration of Patrick E. Byrne ("Byrne Decl."), ¶22.] But Plaintiff provides *no facts* to support this conclusion. Plaintiff does not state specifically what defendants allegedly took, which of the seven individual defendants took it, how they took it, when they took it, and how they are using it now such that it rises to the level of misappropriation. Plaintiff claims that some unnamed person at Plaintiff was contacted by 29 or 34 (the number varies) unnamed customers at an unknown time who said that they were contacted by "some" of the defendants and were "improperly, unfairly, and repeatedly solicited." [Byrne Decl., ¶18.] With only this single supporting "fact," Plaintiff leaps to the conclusion that the customers must have been contacted using trade secret information that was misappropriated, and then the customers were unlawfully solicited using this trade secret information. This leap of logic cannot support the issuance of a temporary restraining order. The actual facts presented by Defendants prove there is no trade secret to be protected given that Plaintiff broadcasts its customers' identities all over social media, and there has been no misappropriation.

Plaintiff seeks an incredibly broad and indefinable order barring Defendants from "(1) Engaging in any solicitation of companies who submitted an application to Balboa that Defendants reviewed while at Balboa; and (2) Using, copying, dealing with, disclosing, trading, and otherwise exploiting or misappropriating Balboa's confidential information, including but not limited to Balboa's customer list and customer files." This request should be denied for a number of reasons: there is no emergency, Plaintiff has not met its burden of showing a likelihood of prevailing on the merits, and the scope of relief requested is vague and overbroad.

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SUITE 1400
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II.

RELEVANT FACTUAL BACKGROUND

A. Background Regarding Plaintiff and the Equipment Financing Industry.

Plaintiff is an equipment financing corporation. Like defendant Regents Capital Corporation ("RCC") now, Plaintiff was born when Patrick Byrne and a co-worker left one equipment financing corporation to start their own competing company. [Declaration of Donald Hansen in Support of Opposition ("Hansen Decl."), ¶3.] Plaintiff has grown to have over 150 employees and as it says in its moving papers, has "many thousands of businesses" as its customers. [Ex Parte Application, p. 3; Hansen Decl., ¶3.] One way Plaintiff has grown is by recruiting sales people away from competitors who will bring with them their "books of business." [Hansen Decl., ¶11.] Indeed, when defendant Donald Hansen was working for plaintiff he was paid a "recruiting commission" equal to 1% of gross margin generated by Books of Business salespeople for any such salespeople that be brought in. [*Id.*]

The equipment financing market is highly competitive. [Hansen Decl., ¶5.] There are large national companies like GE Capital competing with companies like Plaintiff and even smaller companies like Defendants' start up. [*Id.*] Customers consist of any business seeking to finance any piece of equipment used in their particular operations – from a solo practitioner attorney who wants to finance a couple of computers, to an aerospace company who wants to finance a 747 jumbo jet. [*Id.*] Customers are not exclusive to one financing company. When that solo practitioner attorney wants to finance a refrigerator for his office break room, he may use a different finance company than he used for the computers. [*Id.*] It is not uncommon for a particular customer to work with more than one financing company. [*Id*; Declaration of Dennis Odiorne in Support of Opposition ("Odiorne Decl."), ¶6.] In some instances a customer will put a particular transaction out to bid to dozens of different finance companies. [Hansen Decl, ¶6; Odiorne Decl., ¶7.]

Information contained on Plaintiff's own website seriously undermines the arguments Plaintiff makes in its temporary restraining order papers. Under the press release section on Plaintiff's website, Plaintiff provides a link to a press release that explains "95% of business

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owners will need working capital during the next 12 months for inventory, receivables, employee payroll and marketing, among others." [Declaration of Tiffanny Brosnan in Support of Defendants' Opposition ("Brosnan Decl."), ¶3, Ex. A.] Plaintiff apparently determined this figure by sending an online survey to more than 300,000 business owners. [*Id.*] Thus, the sandbox all parties seek to play in is a large one.

On Plaintiff's "About Balboa Capital" page, plaintiff explains that "Balboa Capital has been the trusted financing resource for *many thousands* of businesses since 1988." [*Id.* (emphasis added).] Plaintiff proudly uses its website to showcase these customers in an attempt to drive additional business. Under the "Testimonials" page, Plaintiff explains that "Balboa Capital's equipment leasing professionals strive to provide the best customer service possible. This is no more evident than in the amount of video testimonials we receive, many of which are featured here." [Brosnan Decl., ¶4, Ex. A.] The site has links to approximately 45 videos, categorized by industry. [*Id.*] On the videos the customer typically identifies him or herself and his or her business, often with the company logo displayed. [*Id.*] Interestingly, on several of these videos the customers talk specifically about their relationships with some of the individual defendants being sued here (Donald Hansen, Dennis Odiorne, Kirsten Merza and Javier Enriquez). [Brosnan Decl., ¶¶5-8.] Plaintiff also maintains a YouTube site where these videos can also be found and a link to that site is provided on Plaintiff's website. [Brosnan Decl., ¶¶3, 10, Ex. B.] Plaintiff's Facebook page also features the videos and a link to that page is also provided on Plaintiff's website. [Brosnan Decl., ¶¶3, 11, Ex. C.] For example, on March 10, 2014, the Facebook page shared a YouTube link, stating "New testimonial video from repeat customer Kara Cermak, President of Rowell Incorporated. In her review she shares her experience with us acquiring financing for computer network equipment, for her business." [*Id.*] Plaintiff also lists its Facebook "Likes" on its Facebook page, many of which are its customers. [Hansen Decl., ¶9.] Anyone who visits Plaintiff's Facebook page can see all of these "likes"/customers. [*Id.*]

Similarly, Plaintiff frequently tweets on Twitter different companies that it recommends people connect with and follow on "follow Friday" ("#FF"). [Brosnan Decl., ¶14, Ex. F.] A link to Plaintiff's Twitter feed is provided on Plaintiff's website. [Brosnan Decl., ¶3.] Many of these

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companies that Plaintiff publicly asks people to follow on its Twitter page are Plaintiff's customers. [Hansen Decl., ¶9.] Plaintiff also has a Google+ page, accessible through Plaintiff's website, on which it is connected to 1,707 people/companies in its circle as of March 11, 2014 and shares customer testimonial videos. [Brosnan Decl., ¶¶3, 13, Ex. E.] Many of these people and companies plaintiff is connected to are its customers. [Hansen Decl., ¶9.] Anyone who goes on plaintiff's Twitter or Google+ page can see all of this information. Through social media, plaintiff itself has publicly advertised the identities of many of its customers.

Plaintiff's LinkedIn page, also accessible through its website, has content similar to its Facebook page and Google+ page, such as the link to the video by "repeat customer Kara Cermak, President of Rowell Incorporated," and connections with many of its customers. [Brosnan Decl., ¶¶3, 12, Ex. D; Hansen Decl., ¶9.]

The public announcement of Plaintiff's customers does not end with the video testimonials and "likes" of its customers or requests that people connect or follow its customers. Plaintiff also publishes its press releases on its website. [Brosnan Decl., ¶9, Ex. A.] Just the last six months of press releases include Plaintiff proudly publishing to anyone who wants to pick up the press release, all of the following: "Balboa Capital Becomes Qualified Lender for Carl's Jr. and Hardee's Franchise Owners," "Balboa Capital Becomes Preferred Lender for McAlister's Deli Franchise Owners," "Balboa Capital Becomes Preferred Financing Partner For Pita Pit Franchise Owners," "Balboa Capital Becomes Approved Lender for Domino's Pizza Franchise Owners," "Balboa Capital Becomes Preferred Financing Resource for LED Lighting Company, LEDtronics, Inc.," and "Balboa Capital Partners With Hoshizaki America, Inc. To Provide Zero Percent Financing On Ice Machines To Burger King Franchise Owners." [*Id.*]

All of this information was readily available to defendants' attorney by going to one website – Plaintiff's own. [Brosnan Decl., ¶3, Ex. A.] The customers are even easier to find by someone who knows the equipment financing business.

B. Background Regarding Defendants

Defendant Donald Hansen worked for Plaintiff for approximately 20 years. [Hansen Decl., ¶2.] When he resigned in December 2013 he was the Vice President of the Commercial

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Finance Division. [*Id.*] Defendant Dennis Odiorne worked for plaintiff for more than eight years. [Odiorne Decl., ¶2.] When Odiorne resigned, he was a sales manager in the Commercial Finance Division. [*Id.*] Hansen and Odiorne tried to make an amicable departure from Plaintiff. In their resignation letters, they informed Plaintiff that their goal was to provide a non-disruptive transition of their job duties. [Hansen Decl., ¶13, Ex. A; Odiorne Decl., ¶12, Ex. A.] They also stated that "[a]ll historical files, company data and documentation personally maintained during my tenure remain intact in Balboa network directories [and that] I remain in full compliance with all of our agreements." [*Id.*] They asked that if there were any questions about Balboa materials or compliance with their agreements (namely their employment agreements including the confidentiality provisions) that they make sure to resolve it prior to their separation from Balboa. [*Id.*] Defendants also reiterated verbally to Byrne and the Chief Operating Officer, Rob Rasmussen, that they would not be taking any of Plaintiff's documents with them. [*Id.*]

After submitting the resignation letters, Byrne asked Hansen and Ordiorne to stay through the end of the week and they agreed to do so. [Hansen Decl., ¶14; Odiorne Decl., ¶13.] Byrne and Rasmussen requested that Hansen continue processing transactions for Plaintiff up until his last day, Friday, December 13, 2013, and he did so. [Hansen Decl., ¶14.] Byrne and Rasmussen requested that Odiorne help with the transition by discussing the specifics of many of his accounts and how to approach the accounts with the sales managers that would be taking over those relationships. [Odiorne Decl., ¶13.]

When Hansen and Odiorne left Plaintiff, they did not take with them any customer lists or customer files or any documents from customer files or any supporting documentation concerning customers, including any customer tax returns. [Hansen Decl., ¶15; Odiorne Decl., ¶14.] RCC hired five of Plaintiff's former employees. [Hansen Decl., ¶18; Odiorne Decl., ¶17.] Hansen and Odiorne told each of these employees not to take anything from Balboa when they left, including any customers lists or files they may have had while working for Plaintiff. [*Id.*]

On December 26, 2013, RCC was registered with the Secretary of State and the articles of incorporation were filed. [Hansen Decl., ¶16.] When RCC entered the market it did so by investing significant resources to "buy leads." [Hansen Decl., ¶21.] This is the method used by

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Plaintiff and essentially all equipment leasing companies. [*Id.*] RCC explained its desired criteria to data.com and obtained 47,000 leads for potential companies, nationwide, who may need equipment financing. [*Id.*] RCC limited these leads to companies of $10 million to $250 million in annual revenue. [Hansen Decl., ¶21; Odiorne Decl., ¶21.] This is different than Plaintiff's focus. Plaintiff does "small ticket" business as well, working with companies with less than $1 million in annual revenue. [*Id.*] Armed with these leads, RCC directed each of its salespeople to make approximately 100 calls per day off of the list of leads. [Hansen Decl., ¶22; Odiorne Decl., ¶22.] In addition, Defendants have attended trade shows where they have personally handed out business cards and met people in the particular industry, such as potential customers, vendors and other competitors. [*Id.*] For example, Defendants attended CONEXPO in Las Vegas during the week of March 3, 2014, a construction industry trade show. [*Id.*] RCC has not in any way focused its marketing efforts specifically on companies that have worked with or are working with Plaintiff. [*Id.*]

C. Procedural History

Plaintiff filed its complaint on February 19, 2014 alleging 11 causes of action against RCC and seven of its employees. On March 7 and 10, 2014 Plaintiff served these Defendants with the temporary restraining order papers.

III.

PLAINTIFF'S REQUEST FOR A TEMPORARY RESTRAINING ORDER AND AN ORDER TO SHOW CAUSE ON THE PRELIMINARY INJUNCTION SHOULD BE DENIED.

A. There Is No Emergency that Would Support the Issuance of a Temporary Restraining Order.

Plaintiff brings this request for a temporary restraining order on an *ex parte* basis. "A TRO, like a preliminary injunction, is by design to preserve the status quo pending the evidentiary hearing to determine whether to issue a permanent injunction." *Scripps Health v. Marin* (1999) 72 Cal.App.4th 324, 334, citing *California State University, Hayward v. National Collegiate Athletic*

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Assn. (1975) 47 Cal.App.3d 533, 543. To justify *ex parte* relief, "[a]n applicant must make an affirmative factual showing in a declaration containing competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte." California Rules of Court, Rule 3.1202(c). Plaintiff has presented no evidence of any irreparable harm or immediate danger in its papers. Indeed, there are no dates *anywhere* explaining when any alleged misappropriation and alleged unlawful customer contact occurred. Plaintiff states that RCC was formed in December 2013 and all defendant ex-employees had left Plaintiff by early January. It is now mid-March. What is the alleged emergency?

B. Plaintiff Has Not Established A Likelihood of Prevailing on the Merits of Its Misappropriation Claim.

"A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Churchill Village, L.L.C. v. Genera. Elec. Co.* (N.D. Cal. 2000) 169 F.Supp.2d 1119, 1125 (denying motion for preliminary injunction where plaintiff could not demonstrate unlawful activity or that there was a possibility of irreparable injury); *see also Fortna v. Martin* (1958) 158 Cal.App.2d 634, 640 (reversing injunction and stating, "Injunctive relief should be granted only upon convincing proof of a harmful violation of the plaintiff's right. It should not be given an application that would overemphasize the employer's right to the detriment of the employee by treating as confidential and secret *all* information that might be useful to the employee." (emphasis added)).

In order to obtain injunctive relief, Plaintiff must establish two factors: (1) that it will suffer imminent irreparable harm if the injunction is denied; and (2) that it is likely to prevail on the merits at trial. Code Civ. Proc. §§526(a)(1)-(a)(5); *Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 Cal.App.4th 853, 858 (affirming denial of preliminary injunction where former employer did not show that employees misappropriated trade secrets). Plaintiff fails on both levels.

With regard to the first factor, Plaintiff's speculation about possible future harm is insufficient. "An injunction cannot issue in a vacuum based on the proponents' fears about something that may happen in the future. It must be supported by actual evidence that there is a

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realistic prospect that the party enjoined intends to engage in the prohibited activity." *Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1084 (dissolving preliminary injunction issued by trial court). Therefore, Byrne's speculation that "[t]he immediate harm Balboa will continue to suffer absent such a restraining order is irreparable because Defendants will continue to improperly and unfairly use Balboa's confidential and proprietary information . . . for their own financial gain and to the detriment of Balboa" is nowhere close to the standard of clear, imminent, irreparable harm needed to impose an injunction. [Byrne Decl., ¶23.]

California's long standing public policy is strongly opposed to the type of de facto non-competition proposal sought by Plaintiff. *See* Cal. Bus. & Prof. Code § 16600; *Metro Traffic Control, Inc.*, 22 Cal. App. 4th at 859. California law simultaneously protects trade secrets from improper disclosure and use, but never by flatly barring any competitive employment. These two policies are harmonized so that any restriction of the right to compete, based on assertion of a trade secret, is carefully limited. *Metro Traffic Contraol, Inc.* 22 Cal.App.4th at 860-61.

California law protects competition and citizens' ability to move from employer to employer. "[A] former employee may use general knowledge, skill, and experience acquired in his or her former employment in competition with a former employer...." *Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1519. This principle flows from the fundamental public policy protecting the right of employees to earn a living in their chosen profession, which includes the right to leave their employer and go to work for competitors.

> Every individual possesses as a form of property, the right to pursue any calling, business or profession he may choose. A former employee has the right to engage in a competitive business for himself and to enter into competition with his former employer, even for the business of those who had formerly been the customers of his former employer, provided such competition is fairly and legally conducted.

Id., at 1520 quoting *Continental Car-Na-Var Corp. v. Moseley* (1944) 24 Cal.2d 104, 110.

1. Plaintiff Has Not Even Identified the Trade Secret that Has Allegedly Been Misappropriated.

A "party seeking to protect trade secrets must 'describe the subject matter of the trade

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secret with sufficient particularity to separate it from matters of general knowledge in the trade or of special knowledge of those persons who are skilled in the trade, and to permit the defendant to ascertain at least the boundaries within which the secret lies." *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1453 (a case cited by Plaintiff affirming denial of a preliminary injunction). Plaintiff claims that an alleged trade secret "customer list" and "customer files" have been misappropriated, but nowhere does plaintiff describe this alleged "customer list." How is it maintained? In an electronic format? In a paper file? How many customers are on this list and what type of information is contained on it? Company names? Names of specific contact people? Contact information? Certain details about the customer and its transactions with Plaintiff? How does plaintiff define "customer?" The first prong of the proposed restraining order seems to indicate that any company that submitted a loan or lease application to Plaintiff at any point in time qualifies as a customer whether or not the application was ever converted to a transaction. Plaintiff's own "Comprehensive Agreement" with its employees (quoted on pages 3-4 of the *Ex Parte* Application) does not even include a "customer list" among the items it describes in its "Definition of Proprietary Information." Defendants Hansen and Odiorne simply do not know what "customer list" Plaintiff is referring to. [Hansen Decl., ¶24; Odiorne Decl., ¶24.] Plaintiff's vague term "customer files" is equally, if not more, problematic.

2. Plaintiff Advertises the Identity of Its Customers and Does Not Take Reasonable Efforts to Maintain the Secrecy of Its Alleged Trade Secrets.

By just visiting Plaintiff's website and its social media sites, it is obvious that plaintiff does not treat the identity and contact information of its customers as trade secrets. Instead, Plaintiff broadcasts this information all over social media in an attempt to gain additional customers. After doing this, Plaintiff cannot then say that the customer information is a trade secret that no one can use. *See DVD Copy Control Association, Inc. v. Bunner* (2004) 116 Cal.App.4th 241, 254 (noting, on a motion for preliminary injunction where moving party sought to enjoin disclosure or use of alleged trade secret already disseminated on the Internet, that it could "conceive of no possible justification for an injunction against the disclosure of information if the information were already public knowledge"). Using the playground bully analogy, Plaintiff

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is bringing all of its toys to the sandbox but then saying no one can use them.

3. Customer Contact Information Is Generally Known or Readily Ascertainable.

As Plaintiff says, 95% of all businesses are potential clients of equipment finance companies. There is no secret list. Equipment finance companies like Plaintiff and Regents Capital "buy leads" and cold call hundreds of businesses every day. [Hansen Decl., ¶21.] California's version of the Uniform Trade Secret Act ("UTSA") defines a trade secret as "information … that (1) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use." Cal. Civ. Code § 3426.1. Trade secret protection is afforded to information that has not yet been ascertained by others in the industry. *ABBA Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 21.

In *Avocado Sales Co.v. Wyse* (1932) 122 Cal.App. 627[1], the court found no trade secret can exist where identities of clients in the market can be known simply by seeing them do business. *Id.* at 629, 632-34. In that case, the clients were grocery stores who bought, then displayed and sold, avocados. Here, the customer is any business who may need equipment financing, which is 95% of all businesses according to Plaintiff's own website. And the customers are "displayed and sold" all over Plaintiff's social media. In either case, the identity of the customer is well-known, and thus cannot be a trade secret. *Id.*; *see also American Paper & Packaging Products, Inc. v. Kirgan* (1986) 183 Cal.App.3d 1318, 1326 (a case cited by Plaintiff affirming denial of a preliminary injunction, finding that identities of customers whose business operations show them to be in the market for a product or service are not trade secrets).

With regard to the particular entities Defendants themselves conducted business with while working for Plaintiff, Defendants are able to locate them with a simple Google search. [Hansen Decl., ¶19; Ordione Decl., ¶19.] They are thus not trade secrets. *Morlife*, *supra*, 56 Cal.App.4th at 1522 (stating that whether information can be readily ascertained from publicly available sources is an important factor in making the trade secret determination). Additionally,

[1] A case that is still frequently cited, and is described as "seminal" in *American Credit Indem. Co. v. Sacks* (1989) 213 Cal.App.3d 622.

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citing *Avocado Sales Co.*, the California Supreme Court noted that the identity of a client cannot be considered secret – or treated as a trade secret – when the relationship is not exclusive and competitors also call on the client. *Continental Car-Na-Var Corp.* 24 Cal.2d at 109-12. That is the case here. Customers will frequently work with more than one equipment financing company. [Hansen Decl., ¶5; Ordione Decl., ¶6.] The relationship is not an exclusive one. [*Id.*]

4. Plaintiff Has No Evidence that Defendants Misappropriated Trade Secret Information.

Plaintiff asserts only broad conclusions in support of its claim that Defendants misappropriated trade secrets.[2] Nowhere does Plaintiff state specifically what Defendants allegedly took, which of the seven individual Defendants took it, how they took it, when they took it, and how they are using it now such that it rises to the level of misappropriation. Plaintiff claims that some unnamed person at Plaintiff was contacted by 29 or 34 (the number varies) unnamed customers at an unknown time who said that they were contacted by "some" of the defendants and were "improperly, unfairly, and repeatedly solicited." [Byrne Decl., ¶ 18.] This is woefully inadequate.

"[G]reat caution should be practiced by the courts in the exercise of their power to enjoin and restrain a person from pursuing any calling or profession he may choose to follow . . . . It should not be taken from a person, except upon a clear and most convincing showing that in exercising his right to labor, he is violating an express duty he owes to others." *Avocado Sales Co.*, 122 Cal.App. at 629, *quoting Pasadena Ice Co. v. Reeder*, 206 Cal. 697, 703 (1929). Employees will necessarily develop skills and information with an employer, and they cannot and need not divorce themselves of those things when they leave for another opportunity. In other words, employees may use their general knowledge, skill and experience to compete with their former employer, so long as they do not use trade secrets in doing so. *Morlife*, 56 Cal.App.4th at 1519. The former employee is not required to "forget" the non-secret customer names he learned at a previous employer: "Equity has no power to compel a man who changes employers to wipe clean the slate of his memory." *Avocado Sales Co.*, 122 Cal.App. at 634. Here, Plaintiff has

[2] See Defendants' Evidentiary Objections to the Declaration of Patrick Byrne.

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presented no evidence even suggesting that Defendants crossed this line and used trade secret information to compete with Plaintiff.[3]

IV.

THE BALANCE OF HARDSHIPS TIPS SHARPLY IN DEFENDANTS' FAVOR.

By its motion, Plaintiff seeks a vague and overly broad injunction against Defendants that, if granted, would leave Defendants unable to determine who they can and cannot do business with. Yet the only imminent, irreparable harm Plaintiff, an employer of over 150 employees that has been in business for over 25 years, can point to is a conclusory assertion that "Balboa incurred and continues to incur a substantial loss of business, profits, and customers." [Byrne Decl., ¶21; Application, p. 18.] How? When? How much were the losses? Plaintiff's conclusory assertions unsupported by facts does not justify injunctive relief.

A. The Relief Plaintiff Seeks Is Vague and Overly Broad.

The relief Plaintiff seeks in its proposed order makes it clear that Plaintiff's application for a temporary restraining order is not so much about misappropriation of trade secrets as it is about attempting to put a new competitor out of business. Plaintiff asks the court to order Defendants to, among other things, refrain from "[e]ngaging in any solicitation of companies who submitted an application to BALBOA that Defendants reviewed while at BALBOA." Plaintiff, in other words, seeks to enjoin Defendants from soliciting business from any company that ever submitted an application to Plaintiff over a period of almost 20 years that any of the Defendants reviewed, regardless of whether Plaintiff ever did any business with this company and regardless of whether Defendants use Plaintiff's alleged trade secret information or not. Defendants reviewed thousands of applications during their employment with Balboa, many of which never converted to transactions. [Hansen Decl., ¶¶7, 23; Odiorne Decl., ¶¶8, 23.] In *Continental Car-Na –Var Corp.*, the court found that an injunction barring a former employee from competing for any of the former employer's clients, regardless of lack of connection to alleged solicitation, was too broad.

[3] Defendants will pursue all rights they have to attorney's fees from plaintiff under Civil Code section 3426.4 where it is found to be the prevailing party and where it can show that plaintiff's claim for misappropriation is made in bad faith.

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24 Cal.2d at 109-12. Plaintiff is seeking an equally broad injunction in this case, seeking to bar Defendants from doing business with any business that ever submitted an application to plaintiff that was subsequently reviewed by any of the Defendants at any time during their employment, regardless of whether that company ended up doing a transaction with plaintiff.[4] This is not narrowly tailored relief. *See People v. Mason* (1981) 124 Cal.App.3d 348 (recognizing that injunctive relief must be narrowly tailored so as to go no further than is *absolutely necessary* to protect the lawful rights of the parties seeking the injunction). Based on the overbreadth of this language and the uncertainty of who all submitted applications over the last 20 years, such relief is the equivalent of shutting RCC down and putting each of the individual defendants out of work. [Hansen Decl., ¶¶7, 25; Odiorne Decl., ¶¶8, 25.]

If the proposed injunction is granted, there is no way for certain that Defendants will know whether they are complying with the court's order. *See Brunton v. Superior Court* (1942) 20 Cal.2d 202, 205 (noting that a party bound by an injunction must be able to determine from its terms what he may or may not do)

B. Plaintiff Makes No Showing of Irreparable Harm.

Plaintiff does not identify a single contract it has lost to RCC as a result of Defendants' allegedly wrongful solicitations. Plaintiff does not even identify a solicitation made by Defendants to a former, current or "target" customer of Plaintiff. Plaintiff can only speculate that it may lose contracts to Defendants. Simply put, Plaintiff has made no showing that it has or will suffer irreparable harm, or any harm at all.

To the extent that Plaintiff has been harmed by Defendants' conduct, *i.e.*, if RCC beat Plaintiff out of a transaction, there is no reason why that harm could not be compensated for by an award of money damages. There is an easily discernible amount of profit that Plaintiff can claim it loses if a customer chooses to enter into a transaction with RCC as opposed to Plaintiff. Injunctive relief should not issue when this is the case. *See Pacific Decision Sciences Corp. v. Superior Court* (2004) 121 Cal.App.4th 1100, 1100 (recognizing that injunctions will rarely be

[4] Defendant Hansen was employed by Plaintiff for almost 20 years so this would bar even contacting a business that submitted an application 19 years ago which Hansen may have reviewed that has never actually done business with Plaintiff.

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granted where a suit for damages provides a clear remedy).

V.

IF THE TRO SHOULD ISSUE, PLAINTIFF SHOULD POST A SIGNIFICANT BOND.

If this court grants the temporary restraining order, despite the above, it should also require Plaintiff to post a bond which is sufficient to "pay to the party enjoined any damages . . . the party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction." Cal. Code Civ. Proc. § 529(a). In other words, Plaintiff must post a bond in an amount equal to the estimated value of the harmful effects which the injunction is likely to have on the restrained party. *ABBA Rubber Co.* 235 Cal.App.3d at 14. This amount includes lost profits that the individual would have made if he had not been enjoined from his business. *Id.* It is not reduced by any profits that might be made from sales to new customers. *Id.* at 15. The estimated lost profits per month if a temporary restraining order is issued are up to $100,000. [Hansen Decl., ¶27.]

VI.

CONCLUSION

For the reasons stated herein, Defendants respectfully request that the Court deny Plaintiff's *ex parte* application for temporary restraining order and order to show case re the issuance of a preliminary injunction.

SNELL & WILMER L.L.P.

Dated: March 12, 2014

By: _____
Tiffanny Brosnan
Erin D. Leach
Jordan M. Lee
Attorneys for Defendants Regents Capital Corporation, Donald Hansen and Dennis Odiorne

SNELL & WILMER L.L.P.
600 ANTON BLVD
SUITE 1400
COSTA MESA, CALIFORNIA 92626-7689

Snell & Wilmer
LLP.
LAW OFFICES
600 Anton Boulevard, Suite 1400
Costa Mesa, California 92626-7689
(714) 427-7000

PROOF OF SERVICE

Balboa Capital Corporation v. Regents Capital Corporation, et al.
OCSC Case No. 30-2014-00705733

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, CA 92626-7689.

On March 12, 2014, I served, in the manner indicated below, the foregoing document described as **DEFENDANTS' OPPOSITION TO BALBOA CAPITAL CORPORATION'S EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

Marc S. Hines, Esq. Nicole M. Hampton, Esq. Natalie Mirzayan, Esq. Hines Carder, LLP 3090 Bristol Street, Ste. 300 Costa Mesa, CA 92626	**Attorneys for Plaintiff** **Tel: 714-513-1122** **Fax: 714-513-1123** **mhines@hinescarder.com** **nhampton@hinescarder.com** **nmirzayan@hinescarder.com**

☐ BY REGULAR MAIL: I caused such envelopes to be deposited in the United States mail at Costa Mesa, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested (C.C.P. § 1013(a)). **Only as to those indicated below.**

☐ BY FACSIMILE: (C.C.P. § 1013(e)(f)).

☐ BY FEDERAL EXPRESS: I caused such envelopes to be delivered by air courier, with next day service, to the offices of the addressees **only as to those indicated below**. (C.C.P. § 1013(c)(d)).

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****

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 12, 2014, at Costa Mesa, California.

Ann Dufour