

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

TIMEPAYMENT CORP.,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO. _____
)	
LISA GARGIULO and BALBOA CAPITAL CORPORATION,)	
)	
Defendants.)	
)	

COMPLAINT

Plaintiff TimePayment Corp. (“TPC”, the “Company” or “Plaintiff”), by and through its attorneys Seyfarth Shaw LLP as and for its Complaint against Defendants Lisa Gargiulo, formerly known as Lisa Gunville (“Gargiulo”) and Balboa Capital Corporation (“Balboa Capital”) (together, “Defendants”), states and alleges as follows:

NATURE OF ACTION

1. On October 24, 2011, Gargiulo resigned from TPC to join Balboa Capital in a directly competitive capacity. Approximately one month earlier she began downloading information about water filtration equipment dealers with whom TPC did business from the Company’s customer management relations system (the “CRM System”). Her efforts intensified as she traveled to California to meet with Balboa Capital executives at their corporate headquarters, going so far as to download TPC confidential information from the CRM System from her California hotel room on October 22, 2011 that included a variety of non-public and highly sensitive data such as dealer related financial information. On October 25, 2011, the day after she resigned from TPC, Gargiulo surreptitiously obtained another CRM System report from a friend who still worked at TPC, Jonathan McBride (“McBride”). On October 27, 2011,

Gargiulo accessed TPC financial information on the computer that had been provided by the Company, in spite of the instructions she had been given on the day of her resignation to immediately return the computer. Gargiulo subsequently provided the misappropriated confidential information and trade secrets to Balboa Capital, through Patrick G. Ontal (“Mr. Ontal”), the Vice President of Sales at Balboa Capital. Defendants have used this misappropriated data to systematically solicit and do business with dealers with whom TPC had a business relationship.

2. This is an action for preliminary and permanent injunctive relief to prevent Defendants from continuing to cause irreparable harm to TPC and for damages to redress injuries suffered by Plaintiff, all as a result of wrongful conduct by Defendants, including the misappropriation and disclosure of the above-referenced trade secrets. Defendants’ improper conduct constitutes common law and statutory misappropriation of trade secrets and other confidential information, tortious interference with advantageous relations, conversion, breach of an employee’s duty of loyalty, violation of the Computer Fraud and Abuse Act, civil conspiracy, and violation of Mass. Gen. Laws ch. 93A, §§2, 11.

PARTIES

3. TPC is, and at all relevant times was, a Delaware corporation with its principal place of business in Burlington, Massachusetts. Plaintiff is a financial intermediary specializing in leasing and financing of equipment that are typically in the \$500 to \$25,000 price range.

4. Upon information and belief, Gargiulo is an individual who resides at 2 Warren Street, Hull, Massachusetts. Until her resignation on Monday, October 24, 2011, Gargiulo worked as an Account Executive for TPC, primarily out of her home office.

5. Upon information and belief, Balboa Capital is a California corporation with its principal place of business in Irvine, California. Balboa Capital is a competitor of TPC.

JURISDICTION & VENUE

6. This Court has subject matter jurisdiction under the Computer Fraud and Abuse Act (“CFAA”), 18 U.S.C. §1030, *et seq.*

7. This Court has personal jurisdiction over Defendants because they transact business in the Commonwealth of Massachusetts, have made and performed contracts in Massachusetts and/or have breached duties and/or committed tortious acts in Massachusetts. Upon information and belief, Defendant Gargiulo resides in the Commonwealth of Massachusetts.

8. Venue is appropriate in this District pursuant to 28 U.S.C. §1391(b)(1)-(2) because a defendant resides in this District and a substantial part of the events giving rise to the claims occurred in this District.

FACTUAL ALLEGATIONS

A. The Microticket Financing Industry

9. TPC is the wholly-owned operating subsidiary of MicroFinancial, Inc. (“MFI”), a publicly traded company. TPC is a specialized finance company that originates equipment leases for “microticket” commercial and consumer equipment typically valued at less than \$25,000.

10. Microticket leases facilitate sales of equipment by allowing dealers of such equipment to make their products available to the dealers’ customers for a small monthly lease payment instead of a high initial purchase price. This allows the end-user businesses to preserve capital for other uses. In other words, equipment dealers offer their customers an option to lease equipment rather than purchase it outright, and for those customers who choose to do so, TPC purchases the equipment from the dealer and leases it to the end-user.

11. Typically, TPC’s microticket financing involves transactions of between \$500 and \$25,000. In 2010, the average amount financed by the Company was approximately \$5,800.

12. TPC generally originates leases for products with limited distribution channels. The Company finances a variety of equipment including water filtration systems, food service equipment, security equipment, point-of-sale cash registers, salon equipment, and fitness equipment. Water filtration systems represent the largest percentage of TPC's microticket leasing business, totaling approximately 23% in 2010.

13. TPC does not typically market its services directly to the end-users who are utilizing the equipment. Rather, its leases are presented as financing options through a nationwide network of independent equipment vendors (the "Dealers"). The Dealers interact directly with potential lessees. Thus, the Dealers market not only their own products, but also present financing options offered by TPC. The relationships TPC has with the Dealers are, therefore, critical to TPC's business.

14. Dealers use a TPC proprietary, Internet-based application to process lease application and credit approvals for potential lessees. The tool also allows Dealers to present a potential equipment lessee with a variety of leasing options. By assisting the Dealers in providing financing for their equipment contracts, TPC simultaneously promotes equipment contract sales and the utilization of TPC as a preferred finance provider. It is a beneficial arrangement for all involved.

15. TPC originates leases on transactions referred to it by Dealers by purchasing the underlying equipment from the referring Dealers when transactions are finalized, and then collecting monthly payments from the end-user. TPC also services the leases and owns the revenue streams from the leases. The Dealers continue to maintain and service leased equipment.

16. Because Dealer relationships play a critical role in TPC's business, an important component of TPC's business model is the credit assessment of Dealers. Dealers undergo both an initial screening process and ongoing evaluations, including examinations of Dealer portfolio credit quality and performance, lessee complaints, application activity, and conversion rates for potential lessees and other financial studies.

B. TPC's Trade Secrets – Dealer Lead Generation, Qualification, And Vetting Process

17. TPC expends a considerable amount of resources identifying sales leads for equipment dealers through professional lead generators, trade shows, online services (e.g., Hoover's), and other sources, using a list of criteria that TPC has determined to be the most relevant and useful. These sources provide lists of tens of thousands of potential leads that TPC then internally "qualifies," which is a time-consuming and expensive process that narrows the leads down to those that TPC believes are most likely to use its microticket financing services. Specifically, the leads are provided to TPC Business Development Representatives who initially call on them and determine whether they would actually utilize its services. Leads that have gone through this process are referred to as "Qualified Leads," and information regarding the qualification of each lead is included in TPC's customer relations management system (the "CRM System").

18. Qualified Leads are then passed off to Business Development Managers and Account Executives, such as Gargiulo, whose role is to get the Dealers to complete the TPC Dealer application and begin originating TPC leases as soon as possible. Initially, a Dealer submits a Dealer application to TPC with the assistance of a Business Development Manager or Account Executive. The application is sent to TPC's Credit Group for a credit check and other safeguards. After this process is complete, the Dealer becomes an "Approved Dealer." The

results of this process are also contained in the CRM System. As an Approved Dealer, it can utilize TPC's proprietary software to submit applications from businesses seeking financing for the Dealer's equipment. Although Business Development Managers and Account Executives are not discouraged from building relationships with TPC's Approved Dealers, TPC's Vendor Relations Group works with them to maintain these relationships. It is the Company's preference that the Vendor Relations Group take the leading role in maintaining Approved Dealer relationships.

19. The role of a Business Development Manager or Account Executive at TPC primarily consists of cold-calling Qualified Leads and attempting to convert them to Approved Dealers. They are not expected to identify leads of their own, other than occasionally through existing leads that TPC has identified and qualified and/or research on the Internet, in trade publications, and the like.

20. TPC's analysis of Dealers does not end when a Dealer becomes approved. TPC regularly vets Approved Dealers and analyzes the performance of their portfolios of customers to ensure that those Dealers who were initially qualified and approved are, in fact, doing the volume and type of business expected; offering financing to creditworthy customers who are making timely payments, and the like. Poor performing Dealers are subject to restrictions or are terminated. This analysis is performed by TPC's Finance and Legal Departments, as well as other senior executives, including the Chief Executive Officer, and the results of this vetting process are contained in the CRM System.

21. In fact, TPC maintains all of its sales lead and Dealer information on the CRM System, including: (a) contact information such as personal cell phone and e-mail addresses for individual contacts at Qualified Dealers and Approved Dealers; (b) information generated by

Business Development Representatives in the initial lead qualification process; (c) Dealer credit review and approval data; (d) financial information on Dealer lessee portfolios including credit quality and performance; (e) lessee complaint data about Dealers; (f) Dealer application activity and conversion rates; and (g) the aggregate value of leases funded through each Dealer.

22. As a necessary part of their jobs, TPC Business Development Managers and Account Executives also have access to information from the ongoing Dealer vetting process through the Company's CRM System, such as financial information on Dealer lessee portfolios including credit quality and performance, Dealer application activity and conversion rates, and the aggregate value of leases funded through each Dealer or specific contacts within a single Dealer organization.

C. TPC's Protection Of Its Confidential Information And Trade Secrets

23. Because TCP's Qualified Dealer lists and related information about Dealers and funding through Dealers are one of the Company's most valuable assets, Plaintiff has worked hard to keep this information confidential.

24. Business Development Managers and Account Executives, including Gargiulo, are an important component of TPC's business development efforts. Their work for TPC requires that Business Development Managers and Account Executives have access to vast amounts of information related to Dealers, including sensitive internally created compilations of Dealer information and non-public, TPC financial information related to transactions funded through Dealers. These compilations and financial information would be extremely valuable to competitors of TPC.

25. Because TPC's relationships with Dealers are a critically important part of the Company's business model, TPC limits access to the CRM System to only sales representatives

and Marketing Department personnel who have a need to access the information to perform their jobs, as well as a few very senior level members of the Company's management team.

26. Access to the CRM System is also secured by requiring individual logon passwords.

27. Reports generated through the CRM System, such as Dealer contact lists, contain a statement on the bottom of the generated document that the information is "**Confidential Information – Do Not Distribute . . . TimePayment Corp.**"

28. As an additional security measure, USB ports are disabled on TPC computers to prevent copying and removal of confidential and trade secret materials such as information on the CRM System.

29. At the outset of employment with TPC, the Company gives all employees an Employee Handbook and requires them to sign a form stating their intent to comply with its terms. The Employee Handbook Acknowledgment form specifically identifies compliance with policies protecting the confidentiality of TPC information. The Employee Handbook singles out certain information that must remain confidential and prohibits certain conduct to protect the confidential nature of the Company's proprietary information. For example, the Employee Handbook sets forth polices explicitly forbidding the disclosure of Company proprietary information to TPC competitors or sending confidential information by e-mail or otherwise over the Internet.

30. In addition, all TPC employees are also required to comply with the Company Code of Business Conduct and Ethics (the "Code of Ethics"), a copy of which is provided to them at the time they begin working at TPC. The Code of Ethics contains a provision explicitly prohibiting Company confidential and proprietary information from unauthorized disclosure or

use. Employees are also required to confirm, in writing, that they understand and will comply with the Code of Ethics and again periodically thereafter. The Certification form includes a statement that the employee “will maintain the confidentiality of information acquired in the course of my work . . . [and] will not use confidential information acquired in the course of my work for personal advantage.”

31. In order to protect its confidential, proprietary and trade secret information, at the conclusion of employment with the Company, an employee’s access card is promptly taken in order to prevent physical access to TPC’s building. Access to the Company’s information technology and computer systems is also promptly shut down, including termination of the ability to access the CRM System.

D. Gargiulo’s Employment With TPC

32. Gargiulo began working for the Company on or about February 7, 2006 as a Business Development Representative, and subsequently as a Business Development Manager. On or about August 3, 2009, Gargiulo was promoted to an Account Executive.

33. While employed by TPC, Gargiulo has always been assigned to work exclusively in the water filtration equipment industry. She was tasked with establishing new relationships with Dealers in that industry, as well as assisting in maintaining and growing existing TPC relationships with water filtration industry accounts.

34. Gargiulo did not have prior experience either in microticket financing or working in the water filtration equipment industry. She previously worked in the debt collection industry.

35. On her first day of work, TPC provided Gargiulo with a copy of the MFI/LC¹ Employee Handbook (the “Handbook”) and she signed the Acknowledgment form that same

¹ The term “LC” refers to Leasecomm Corp., another company owned by MFI.

day, stating that she would comply with the Company's policies and practices set forth in the Employee Handbook, "including, but not limited to policies on business conduct, [and] confidentiality of MFI/LC information"

36. Gargiulo was also provided with a copy of the Code of Ethics on her first day of work for TPC. On or about March 23, 2011, she was again provided with a copy of the Code of Ethics compliance re-certification and on that day executed the Certification form stating that she understood and would comply with the policies and practices set forth the Code of Ethics. In the Certification form, Gargiulo further stated that she:

will maintain the confidentiality of information acquired in the course of my work except when authorized or otherwise legally obligated to disclose such information. I will not use confidential information acquired in the course of my work for personal advantage.

37. The Code of Ethics also contains a detailed policy concerning TPC confidential and proprietary information that, among other things, specifies that:

All documents, records . . . and similar repositories of information containing information of a secret, proprietary, confidential or generally undisclosed nature relating to the Company or our operations and activities . . . belong to the Company and shall be held by you in trust solely for the benefit of the Company, and shall be delivered to the Company by you on the termination of your association with us

38. Gargiulo was one of just a few TPC sales personnel permitted to work from home and, as a result, she had broad access to Company resources including TPC's CRM System.

E. Gargiulo Leaves TPC To Work For A Competitor, Balboa Capital

39. Gargiulo began discussing employment opportunities with Balboa Capital in or about March 2011 through written and telephonic communications with Phil Silva, President of Balboa Capital.

40. On September 22, 2011, Gargiulo was already negotiating with Balboa Capital about the terms of her employment.

41. On October 19, 2011, Gargiulo traveled to Irvine, California to meet with Balboa Capital. She stayed in California until October 23, 2011.

42. Balboa Capital offered Gargiulo a job on or before October 20, 2012.

43. On October 24, 2011, Gargiulo telephoned Daniel Sacha DeMatteis (“DeMatteis”), TPC’s East Coast Director of Sales, and submitted her letter of resignation. DeMatteis informed Gargiulo that she should immediately stop all work for TPC and immediately return all TPC property, including her Company provided computer. The Company also shut down Gargiulo’s access to TPC’s computer systems.

44. Upon information and belief, Gargiulo immediately started employment with Balboa Capital. Indeed, upon information and belief, Gargiulo improperly began working for Balboa Capital while still employed with TPC.

45. Balboa Capital is a direct competitor of TPC in the microticket leasing industry.

F. Gargiulo’s Theft Of Confidential, Proprietary, Trade Secret Dealer Information And Disclosure To Balboa Capital

46. On October 27, 2011, Gargiulo still possessed the TPC provided computer and used that computer to access the Internet and documents pertaining to TPC’s finances, including pertaining to the water filtration equipment industry.

47. Defendants have also obtained and used TPC’s confidential information and trade secrets through improper means including, but not limited to, the information listed below.

(i) The September 22, 2011 Dealer Report

48. On September 22, 2011, Gargiulo ran a comprehensive report from the CRM System for water industry equipment Dealers with whom TPC does business and copied that

information into a spreadsheet (the “September 22, 2011 Dealer Report”). To avoid TPC’s technical safeguards against copying confidential information, and in direct contradiction to TPC policy on e-mail communications, Gargiulo sent the report from her TPC e-mail account to the e-mail address lisagargiulo@verizon.com, which is the personal e-mail address of Gargiulo.

49. Gargiulo again sent an identical copy of this report from her TPC e-mail account to her personal e-mail address on October 18, 2011.

50. Both versions of the September 22, 2011 Dealer Report contain non-public information about Dealers with whom TPC does business, including personal mobile telephone numbers and e-mail addresses.

51. On information and belief, the September 22, 2011 Dealer Report was shared with and used by Balboa Capital. Balboa Capital knew that the September 22, 2011 Dealer Report had been obtained by Gargiulo unlawfully and in violation of TPC’s policies.

(ii) **The October 22, 2011 Dealer Reports**

52. On October 22, 2011, while at her hotel in Irvine, California during her pre-resignation meeting with Balboa Capital, Gargiulo used her personal computer to run a series of at least six (6) reports in TPC’s CRM System, each one including non-public data on thousands of Dealer contacts such as the value of transactions funded through specific Dealers, private mobile telephone numbers, and private e-mail addresses. The October 22, 2011 Dealer Reports included information about Dealers that were not even assigned to Gargiulo.

53. Each of these reports contained the statement “**Confidential Information – Do Not Distribute**” along with the name “**TimePayment Corp.**”

54. Balboa Capital encouraged Gargiulo to access TPC's computer system and misappropriate the information contained in the October 22, 2011 Dealer Reports, as well as assisted Gargiulo to utilizing the misappropriated information.

55. Balboa Capital knew that the October 22, 2011 Dealer Report had been obtained by Gargiulo unlawfully and in violation of TPC's policies.

56. On information and belief, these October 22, 2011 Dealer Reports were shared with and used by Balboa Capital.

(iii) **The October 25, 2011 McBride Dealer Report**

57. The morning after her resignation from TPC, Gargiulo attempted to remotely access TPC's CRM System. Her efforts were unsuccessful because TPC had disabled her access the previous day.

58. Shortly thereafter, a TPC Business Development Manager, McBride, logged onto the TPC CRM System and ran a comprehensive search for TPC's Dealer contacts in the water filtration equipment industry. In his work for TPC, McBride was not assigned to work with water filtration equipment industry Dealers.

59. After accessing that data, McBride copied it into a spreadsheet containing detailed information on more than 3,000 Dealer contacts, including non-public contact information such as individual employee names, cell phone numbers and personal e-mail addresses (the "McBride Dealer Report").

60. The McBride Dealer Report also had columns containing data on the specific amount of funded transactions for specific contacts in the years 2008, 2009, 2010, year-to-date for 2011, and month-to-date for October 2011. Therefore, the data compilation included

financial information provided by and concerning certain Dealers with whom TPC did business during those time periods.

61. On the bottom left hand corner, the McBride Dealer Report states: “**Confidential Information – Do Not Distribute**” along with the name “**TimePayment Corp.**”

62. A few minutes after generating the report, McBride used his TPC e-mail account, Jonathan.McBride@timepaymentcorp.com to send the McBride Dealer Report to his personal e-mail account jonathan.d.mcbride@gmail.com.

63. Immediately after receiving the Dealer Report on his personal e-mail; McBride used his iPhone to forward it to Gargiulo’s personal e-mail address.

64. Defendants encouraged McBride to access TPC’s computer system and misappropriate the information contained in the McBride Dealer Report.

65. Defendants knew that the McBride Dealer Report had been obtained by McBride unlawfully and in violation of TPC’s policies.

66. After receiving the McBride Dealer Report, Gargiulo edited the spreadsheet and, on November 1, 2011, sent the edited report, now entitled “Master Water List 2” from her personal e-mail account to her Balboa Capital e-mail account.

67. On November 2, 2011, Gargiulo sent the document to Mr. Ontal, the Vice President of Sales at Balboa Capital.

68. On November 4, 2011, Mr. Ontal sent the Master Water List 2 report to Robert Rasmussen, Chief Operating Officer and Chief Risk Officer at Balboa Capital, with an e-mail that stated “According to Lisa [Gargiulo] most of the accounts found on the first spreadsheet you received from her appear here too.”

69. Each version of the McBride Dealer Report contains the statement “**Confidential Information – Do Not Distribute**” along with the name “**TimePayment Corp.**”

70. The McBride Dealer Report was used to enter over 1,000 TPC dealer contacts into Balboa Capital’s customer relations management system and has been used by Defendants to systematically contact and solicit business from key TPC Dealers to have the Dealers move their business to Balboa Capital.

(iv) *The October 18, 2011 Three Month Fundings Report*

71. On or about October 18, 2011, Gargiulo created a report using the TPC CMR System listing 145 different Dealers with whom TPC did business, listing the specific dollar value of transactions funded by each Dealer (the “Three Month Fundings Report”). This report lists each Dealer by a unique dealer code assigned by TPC. The financial information and the dealer codes are non-public information concerning TPC’s Dealer relationships, as is the compilation of these key water filtration equipment industry business partners.

72. Between October 18, 2011 and October 28, 2012, Gargiulo copied the Three Month Fundings Report from her TPC provided computer to her personally owned computer.

73. Using her personally owned computer, on November 1, 2011, Gargiulo sent a copy of the Three Month Fundings Report from her personal e-mail address to her Balboa Capital e-mail address.

74. Using her Balboa Capital provided computer, on November 2, 2011, Ms. Gargiulo sent a copy of the Three Month Fundings Report to Mr. Ontal at Balboa Capital.

75. Balboa Capital encouraged Gargiulo to access TPC’s computer system and misappropriate the information contained in the Three Month Fundings Report. Balboa Capital

knew that the Three Months Fundings Report had been obtained by Gargiulo unlawfully and in violation of TPC's policies.

76. Some or all of the data contained in the Three Month Fundings Report was entered into Balboa Capital's customer relations management system and has been used by Defendants to systematically contact and solicit business from key TPC Dealers to have the Dealers move their business to Balboa Capital.

G. Defendants' Use Of The Misappropriated TPC Confidential Information And Trade Secrets

77. The compilation of information contained in the above-referenced reports is considered a trade secret and confidential/proprietary information by TPC. The reports contain a broad range of non-public information concerning water filtration equipment industry Dealers with whom TPC does business and the data would be extremely valuable to any of TPC's competitors in the microticket finance industry.

78. After she began working with Balboa Capital, Gargiulo did not undertake any independent efforts to gather publicly available information. Rather, recognizing the difficulty in such a task, she took the easy way out and merely relied upon the misappropriated Dealer reports. In particular, relying heavily on the McBride Dealer Report, Gargiulo created a list of top Dealer targets of between approximately 100 to 200 Dealer contacts. In her work at Balboa Capital, Gargiulo has contacted and continues to contact those Dealer contacts, as well as many other Dealer contacts identified in the various reports.

79. In her work at Balboa Capital, Gargiulo is presented with Dealer lead information through the Balboa Capital customer relations management system. Upon information and belief, Gargiulo has used and continues to use the information in the various misappropriated

reports to determine that certain presented Dealer leads are not worth pursuing or to prioritize certain Dealers for solicitations.

80. Balboa Capital has at least one other business development employee working in the water filtration equipment industry. Upon information and belief, Balboa Capital employee(s) other than Gargiulo have used and continue to use confidential information and trade secrets misappropriated from TPC to solicit business from Dealers with whom TPC has conducted business.

81. Defendants have used the information misappropriated from TPC to systematically and solicit business from TPC's Accredited Dealers and Qualified Dealers in the water filtration equipment industry. Through those efforts, Defendants have caused certain dealers to cease doing business with TPC or to decrease the amount of profit TPC derives through leasing transactions funded through certain dealers.

H. Efforts To Resolve This Matter Without Litigation

82. Plaintiff has attempted to resolve this matter without litigation. Soon after Gargiulo began working for Balboa Capital, TPC contacted Defendants about concerns of misappropriated TPC confidential information and trade secrets, and demanded the return of same.

83. Plaintiff followed-up on these initial contacts by having TPC's outside counsel send cease and desist letters to Defendants that, among other things, demanded access to their computers in order to conduct an investigation concerning Gargiulo's conduct.

84. Defendants, through their counsel, agreed to present Gargiulo's personally owned computer and her Balboa Capital assigned computer for a limited forensic inspection, leading to the discovery of much of the above-referenced conduct by Gargiulo and other Balboa Capital

employees. Defendants have also presented a limited amount of additional information, while declining to provide other information requested by TPC's outside counsel.

85. During her deposition in the related case of *TimePayment Corp. v. Jonathan McBride*, Civil Action No. 12-CV-10306-PBS, Gargiulo admitted that:

- (i) While on a trip to Irvine, California to attend meetings with Balboa Capital, on October 22, 2011, which was just two (2) days before she resigned her position at TPC, Gargiulo ran a series of reports to obtain Dealer information from the TPC CRM system;
- (ii) On the morning of October 25, 2012, she received an e-mail from McBride with an attached report listing contact and financial information for over 3,000 water filtration equipment industry Dealer contacts improperly taken from TPC's CRM System;
- (iii) After receiving the McBride Dealer Report, Gargiulo did some editing work on it, and on November 2, while she was again in Irvine, California for meetings at Balboa Capital, she sent a copy of the revised McBride Dealer Report to her new boss, Mr. Ontal, Balboa Capital's Vice President for Sales so that the contact information could be entered into Balboa Capital's customer relations management system, even though the report was marked as "**Confidential Information – Do Not Distribute**" along with the name "**TimePayment Corp.**";
- (iv) Gargiulo extracted from the McBride Dealer Report between 100 to 200 key water filtration industry contracts and has targeted them for solicitations to

do business with Balboa Capital instead of TPC and has, in fact, done business with some of those entities;

- (v) Gargiulo has solicited and done business with Dealers listed in the McBride Dealer Report because it was the easiest way to contact those dealers.

86. During that deposition, Gargiulo also admitted that, in spite of receiving a cease and desist letter from TPC's outside counsel that specifically referenced document preservation obligations, she recently chose to delete text messages between herself and McBride that pertained to the subject matter of this action and the related McBride lawsuit.

87. Defendants dispute that the various TPC CRM System reports misappropriated by Gargiulo and Balboa Capital contain proprietary information or trade secrets.

COUNT I

Misappropriation Of Trade Secrets And Confidential Information Under Massachusetts Common Law (Against Gargiulo)

88. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 87 of the Complaint as if fully set forth herein.

89. By virtue of her employment at TPC and performance of responsibilities as a Business Development Manager and Account Executive, Gargiulo was given access to trade secrets as well as other confidential and proprietary business information belonging to TPC.

90. TPC took reasonable steps to preserve the secrecy of its confidential and proprietary business information and trade secrets. The Company derives independent economic value from that information not being generally known to the public or to other persons who can obtain economic value from their disclosure.

91. Gargiulo is under a continuing duty to maintain the confidentiality of TPC's trade secrets and other confidential/proprietary information, and not to use, exploit, or divulge such

information other than in connection with the performance of her duties, for the benefit of TPC and with the Company's authorization.

92. Gargiulo misappropriated, disclosed, misused and exploited TPC's trade secrets and/or confidential and proprietary information, to benefit herself and Balboa Capital, to the detriment of the Company.

93. Gargiulo's disclosure of the Dealer Report to Balboa Capital constitutes a misappropriation of confidential, proprietary, and trade secret information in violation of Massachusetts common law.

94. As a direct and proximate cause of Gargiulo's wrongful conduct, TPC has and will continue to suffer substantial direct and consequential damages. TPC has and will continue to suffer irreparable harm as a result of Gargiulo's conduct that cannot be adequately redressed at law. Unless injunctive relief is granted, TPC will be irreparably harmed in a manner not fully compensable by money damages.

COUNT II

Taking Of Trade Secrets And Confidential Information **In Violation Of Mass. Gen. Laws, Ch, 93, §42** **(Against Gargiulo)**

95. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 94 of the Complaint as if fully set forth herein.

96. Gargiulo's actions are also in violation of the Massachusetts Trade Secrets Act, Mass. Gen. Laws ch. 93, §42 because TPC has protectable confidential, proprietary and/or trade secret information for which it took reasonable steps to preserve the secrecy, and Gargiulo has used improper means to acquire, disclose and use that protected information.

97. Through Gargiulo's improper actions, including her misappropriation and distribution of the Dealer Report and other confidential, proprietary and trade secret information, TPC has lost valuable information, as well as customers, income and goodwill.

98. As a direct and proximate cause of Gargiulo's conduct in breach of Chapter 93, §42, TPC has and will continue to suffer substantial direct and consequential damages. TPC has and will continue to suffer irreparable harm as a result of Gargiulo's conduct that cannot be adequately redressed at law. Unless injunctive relief is granted, TPC will be irreparably harmed in a manner not fully compensable by money damages.

COUNT III

Tortious Interference With Advantageous Relations **(Against Gargiulo and Balboa Capital)**

99. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 98 of the Complaint as if fully set forth herein.

100. Gargiulo and Balboa Capital knew of TPC's advantageous business relationships with certain Dealers, many of which were identified in the Dealer Report, and TPC's expectation that its Dealer relationships would continue in the future.

101. TPC has reasonably come to expect that ongoing business relationships with Approved Dealers and Qualified Leads will continue, in that many of those Dealer relationships have existed for several years and TPC invested substantial resources into maintaining those Dealer relationships.

102. Despite having knowledge of these advantageous business relationships, Defendants interfered with those relationships without lawful justification or legitimate reason, including by surreptitiously obtaining and disclosing, and in the case of Balboa Capital,

accepting, confidential information about TPC's water filtration equipment industry Dealer relationships to a direct competitor.

103. Gargiulo's interference was malicious and unjustified and accomplished wrongful means, including misappropriation of TPC's confidential information accomplished in direct violation of Company policies prohibiting the use of its information technology systems in the manner undertaken by Gargiulo and against the disclosure of confidential information to competitors.

104. Balboa Capital's interference was malicious and unjustified and accomplished wrongful means, including the acceptance of TPC's confidential information and use of such information to attempt to convert dealers to working with it rather than TPC.

105. As a direct and proximate cause of the Defendants' interference, TPC has and will continue to suffer substantial direct and consequential damages. TPC has and will continue to suffer irreparable harm as a result of Defendants' conduct that cannot be adequately redressed at law. Unless injunctive relief is granted, TPC will be irreparably harmed in a manner not fully compensable by money damages.

COUNT IV

Conversion (Against Gargiulo)

106. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 105 of the Complaint as if fully set forth herein.

107. TPC had possession, or a right of immediate possession, of the confidential information that was available to Gargiulo through her work for the Company.

108. Gargiulo converted TPC confidential information to her own use by exercising dominion over it in violation of Company policies set forth in the Code of Ethics and the

Employee Handbook and in a manner that is otherwise inconsistent with TPC's policies. Both during her employment and after her employment, Gargiulo owes, and continues to owe, TPC a duty of loyalty.

109. The property converted by Defendant is worth more than \$200,000.

110. As a direct and proximate cause of Gargiulo's wrongful conduct, TPC has and will continue to suffer substantial direct and consequential damages. Plaintiff has and will continue to suffer irreparable harm as a result of Defendant's conduct that cannot be adequately redressed at law. Unless injunctive relief is granted, TPC will be irreparably harmed in a manner not fully compensable by money damages.

COUNT V

Breach Of Employee's Duty Of Loyalty **(Against Gargiulo)**

111. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 110 of the Complaint as if fully set forth herein.

112. As an Account Executive and top-performing sales representative at TPC, Gargiulo had access to the Company's confidential information concerning Dealers and financial data. Gargiulo, therefore, occupied a position of trust and confidence.

113. Gargiulo agreed to hold all confidential TPC information in trust solely for the benefit of Plaintiff and to return that Company property to TPC at the conclusion of her employment.

114. Following her resignation from TPC, Gargiulo copied, disclosed, and used TPC confidential information in violation of TPC policies, including by providing a copy of misappropriated TPC Dealer reports to Balboa Capital.

115. As a direct and proximate cause of Gargiulo's wrongful conduct, TPC has and will continue to suffer substantial direct and consequential damages. TPC has and will continue to suffer irreparable harm as a result of Gargiulo's conduct that cannot be adequately redressed at law. Unless injunctive relief is granted, TPC will be irreparably harmed in a manner not fully compensable by money damages.

COUNT VI

Violation Of The Computer Fraud And Abuse Act, 18 U.S.C. §1030, et seq.
(Against Gargiulo and Balboa Capital)

116. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 115 of the Complaint as if fully set forth herein.

117. TPC's CRM System and other computer systems comprise a protected computer that is used across state lines in interstate commerce and communication.

118. By the conduct described above, Gargiulo knowingly and with intent to defraud, accessed TPC's protected computer systems, without authorization and/or in excess of her authorized access, for her own benefit and the benefit of others, including Balboa Capital. Gargiulo and Balboa Capital thereby obtained information from a protected computer, and their conduct involved interstate communications.

119. By actions alleged above, Gargiulo obtained or attempted to obtain unauthorized use of TPC's protected computer system causing a loss and/or damage in excess of \$5,000 in any 1-year period, including, among other things, the costs of engaging a computer forensics firm to respond to Gargiulo's offenses and to analyze and assess the extent of Gargiulo's wrongful taking of information from TPC's computers.

120. As a result of the foregoing conduct, TPC was damaged.

121. Consequently, Gargiulo has violated 18 U.S.C.A. §1030 of the Computer Fraud and Abuse Act (“CFAA”).

122. Balboa Capital has violated 18 U.S.C.A. §1030(b), by conspiring with Gargiulo to violate or attempt to violate CFAA through the actions described in the preceding paragraphs and by Gargiulo’s conduct after she began performing services for Balboa Capital.

123. As a direct and proximate cause of Defendants’ violation of CFAA, TPC has and will continue to suffer substantial direct and consequential damages. TPC has and will continue to suffer irreparable harm as a result of Gargiulo’s conduct that cannot be adequately redressed at law. Unless injunctive relief is granted, TPC will be irreparably harmed in a manner not fully compensable by money damages.

COUNT VII

Violations Of Massachusetts General Laws Chapter 93A, §§2, 11 **(Against Balboa Capital)**

124. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 123 of the Complaint as if fully set forth herein.

125. At all time relevant, TPC and Balboa Capital are engaged in trade or commerce as defined by Mass. Gen. Laws ch. 93A, §1(b).

126. The conduct of Balboa Capital constitutes unfair and deceptive acts or practices in violation of Mass. Gen. Laws ch. 93A, §§2, 11, to compete unfairly with TPC, which has resulted in harm to TPC.

127. Balboa Capital’s actions, as stated herein, were made in bad faith with knowledge or reason to know that the conduct was unfair and/or deceptive acts or practices that violated Mass. Gen. Laws ch. 93A by, among other things, aiding and abetting Gargiulo in the theft of

TPC's confidential and proprietary information and trade secrets and using that improperly obtained dealer information to profit at the expense of Plaintiff.

128. As a direct and proximate cause of Balboa Capital's unfair and deceptive acts and practices, and unfair competition, TPC has and will continue to suffer substantial direct and consequential damages. TPC has and will continue to suffer irreparable harm as a result of Balboa Capital's conduct that cannot be adequately redressed at law. Unless injunctive relief is granted, TPC will be irreparably harmed in a manner not fully compensable by money damages.

COUNT VIII

Civil Conspiracy (Against Gargiulo and Balboa Capital)

129. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 128 of the Complaint as if fully set forth herein.

130. Defendants conspired with each other, and with McBride, to attempt to access and to access TPC's computer systems without authorization and/or beyond the scope of authorization, to acquire information concerning Dealers with whom TPC did business and other commercially valuable information.

131. Defendants conspired with each other, and with McBride, to misappropriate and convert TPC's confidential and proprietary information and trade secrets.

132. Defendants also conspired to use, and in fact used, this confidential and proprietary information and trade secrets, to solicit TPC's Dealers and interfere with TPC's advantageous relationships with such Dealers.

133. Defendants also conspired to compete unfairly with TPC in violation of Mass. Gen. Laws ch. 93A, §11 and Cal. Bus. Pro. Code §17200.

134. Defendants' conduct constitutes a conspiracy to misappropriate and convert TPC's confidential and proprietary information and trade secrets, to interfere with TPC's advantageous relationships with Dealers, and to compete unfairly, rendering both Defendants jointly liable for the breaches of the other's obligations.

135. As a direct and proximate cause of Defendants' conspiracy, TPC has and will continue to suffer substantial direct and consequential damages. TPC has and will continue to suffer irreparable harm as a result of Defendants' conduct that cannot be adequately redressed at law. Unless injunctive relief is granted, TPC will be irreparably harmed in a manner not fully compensable by money damages.

REQUESTED RELIEF

WHEREFORE, Plaintiff TimePayment Corp. respectfully requests the following relief:

1. Enter an Order granting the relief set forth in Plaintiff's proposed Order attached to its Motion for Temporary Restraining Order and Preliminary Injunction;
2. Enter an Order granting a permanent injunction to the same effect as the proposed preliminary injunction;
3. Enter judgment in favor of TimePayment Corp. and against Defendants on all counts of the Complaint;
4. Award compensatory damages in an amount to be proven at trial in excess of \$200,000;
5. Award consequential damages in an amount to be proven at trial;
6. As to Count II, award double damages pursuant to Mass. Gen. Laws ch. 93, §§42, 42A;
7. As to Count VII, award double or treble damages pursuant to Mass. Gen. Laws ch. 93A, §11.

8. Order an accounting of any and all profits earned by Defendants, or those acting in concert with Defendants, from dealer relationships of Plaintiff;

9. Enter an Order imposing a constructive trust and/or equitable lien on any and all profits earned by Defendants, or those acting in concert with Defendants, from dealer relationships of Plaintiff.

10. Award applicable pre-judgment and post-judgment interest;

11. Award Plaintiff its attorneys' fees and costs of suit; and

12. Award such other and further relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff demands a trial by jury on all issues in this action.

Respectfully submitted,

TIMEPAYMENT CORP.,

By its attorneys,

/s/ Kent D.B. Sinclair

Kent D.B. Sinclair (BBO# 639597)

Erik W. Weibust (BBO# 663270)

SEYFARTH SHAW LLP

World Trade Center East

Two Seaport Lane, Suite 300

Boston, Massachusetts 02210

TEL: (617) 946-4800

FAX: (617) 946-4801

E-Mail: ksinclair@seyfarth.com

E-Mail: eweibust@seyfarth.com

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