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8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF ORANGE – CENTRAL JUSTICE CENTER**
11

12
13 **BALBOA CAPITAL CORPORATION**

14 **Plaintiff,**

15 **vs.**

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

20 **Defendants.**

ELECTRONICALLY FILED
Superior Court of California,
County of Orange

03/11/2014 at 10:55:00 AM

Clerk of the Superior Court
By Eleanor Sutter, Deputy Clerk

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

Judge: Honorable Kirk Nakamura

**EX PARTE APPLICATION FOR
TEMPORARY RESTRAINING ORDER
AND ORDER TO SHOW CAUSE RE
PRELIMINARY INJUNCTION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT;
[PROPOSED]TRO; [PROPOSED]
ORDER TO SHOW CAUSE; and
DECLARATION OF PATRICK E.
BYRNE**

Code Civ. Proc. §§ 525 et seq.; Cal. Rules of
Court, rule 3.1150 and Cal. Rules of Court,
rules 3.1200 et seq.

Hearing Date: March 12, 2014
Time: 1:30 P.M.
Department: C-15

Complaint Filed: February 19, 2014
Trial Date: Not Set

1 **TO THE COURT AND ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF**
2 **RECORD:**

3 Plaintiff Balboa Capital Corporation, hereinafter, ("BALBOA") hereby applies, ex parte
4 for a Temporary Restraining Order ("TRO"), restraining and enjoining, Regents Capital
5 Corporation, hereinafter, ("RCC"), its agents, assigns, partners, employees, and any individual or
6 entity acting in concert with RCC including but not limited to DONALD HANSEN, DENNIS
7 ODIORNE, KIRSTEN MERZA, CHELSEA HAINES, JAVIER ENRIQUEZ, KEVIN
8 KUTTER, TRAVIS POWER, (Collectively "Defendants") from engaging in any of the
9 following acts pending a hearing on a Preliminary Injunction:

- 10 (1) Engaging in any solicitation of companies who submitted an application to
11 BALBOA that Defendants reviewed while at BALBOA; and
12
13 (2) Using, copying, dealing with, disclosing, trading, and otherwise exploiting or
14 misappropriating BALBOA's confidential information including its customer list
15 and customer files.

16 This Application for preliminary injunctive relief as set forth in the [proposed] TRO filed
17 herewith, is made upon the grounds that the conduct sought to be enjoined, if allowed to occur or
18 continue to occur, will, cause immediate and irreparable injury to BALBOA if relief is not
19 granted, will render an ultimate judgment in this action ineffectual because the legal remedy is
20 inadequate to redress the ongoing harm that BALBOA is suffering, that BALBOA is likely to
21 prevail on its claims against all Defendants, and that the balance of hardships is in BALBOA's
22 favor.
23

24 Plaintiff also requests the Court to issue an Order to Show Cause ("OSC") pursuant to
25 Cal. Rules of Court, rule 3.1150, affording Defendants the opportunity to appear and show cause
26 why a Preliminary Injunction should not issue restraining and enjoining in the same manner for
27 the remainder of this litigation or, alternatively, set a hearing date on Plaintiff's Application for a
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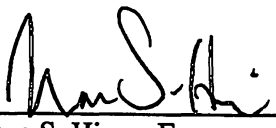
1 Preliminary Injunction filed and served herewith. There has not been a previous application for
2 such relief.

3 This Application is brought pursuant to California Code Civ. Proc. §§ 525 et seq. and
4 Cal. Rules of Court, Rules 3.1150 and 3.1200 et seq., and is based upon the attached
5 Memorandum of Points and Authorities, the supporting Declaration of Patrick E. Byrne, filed
6 and served herewith, the Complaint on file herein, and upon such other and further evidence and
7 arguments as may be presented at the hearing of this Application.
8

9 Dated: March 6, 2014

HINES CARDER

10
11
12 By:



Marc S. Hines, Esq.
Nicole M. Hampton, Esq.
Natalie Mirzayan, Esq.
Attorneys for Plaintiff
BALBOA CAPITAL CORPORATION

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1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE**
2 **APPLICATION FOR TEMPORARY RESTRAINING ORDER (TRO) AND ORDER TO**
3 **SHOW CAUSE (OSC) RE PRELIMINARY INJUNCTION**

4 (Code Civ. Proc. §§ 525 et seq.; Cal. Rules of Court, rule 3.1150 and Cal. Rules of Court, rules
5 3.1200 to 3.1207)

6 **I.**
7 **INTRODUCTION**

8 Plaintiff Balboa Capital Corporation (“BALBOA”) is entitled to a Temporary Restraining
9 Order to prevent Defendants REGENTS CAPITAL CORPORATION, hereinafter, (“RCC”),
10 DONALD HANSEN, (“HANSEN”); DENNIS ODIORNE, (“ODIORNE”); KIRSTEN MERZA,
11 (“MERZA”); CHELSEA HAINES, (“HAINES”); JAVIER ENRIQUEZ, (“ENRIQUEZ”);
12 KEVIN KUTTER, (“KUTTER”); TRAVIS POWER, (“POWER”) (collectively “Defendants”),
13 from continuing to harm Plaintiff through the improper use and exploitation of Plaintiff’s confidential
14 and proprietary information. Defendants have exploited Plaintiff’s strategic, proprietary, and
15 confidential information Defendants obtained during their employment with BALBOA for their
16 own financial gains. This proprietary and confidential information was essential to BALBOA’s
17 business operations, and necessary for Defendants’ performance of their employment with
18 BALBOA. The confidential and proprietary information includes BALBOA’s confidential
19 customer list and marketing strategies, which were compiled and developed through BALBOA’s
20 extensive and time consuming research, development, investigation, and marketing efforts,
21 intended solely for the benefit of BALBOA in its sales and marketing efforts directed to its
22 customer base and BALBOA’s customer files and related documents.
23
24

25 To protect BALBOA’s efforts and expense in developing its proprietary and confidential
26 customer lists and other business information, BALBOA has taken reasonable steps to ensure
27 that its proprietary and confidential information is kept confidential, not disseminated to
28

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

Thus, Defendants should be prevented from continuing to use and misappropriate BALBOA's confidential and proprietary information, including but not limited to its customer list and customer files. The misappropriation, conversion, and unauthorized and improper use of BALBOA's confidential and proprietary information, including its customer lists and customer files, for the purposes of soliciting BALBOA's customers, violates Business and Professions Code, Section 17200, *et seq.* and the Uniform Trade Secrete Act, ("UTSA"). Unless and until a TRO is issued by this Court, Defendants will continue their illegal efforts and schemes to exploit Plaintiff's confidential and propriety trade secret information.

TRO and Preliminary Injunction is appropriate because BALBOA will likely prevail on the merits of its claim at trial, and absent such immediate relief by the Court, the harm that

1 BALBOA is likely to sustain, as compared to the harm that the defendant is likely to suffer if the
2 order is issued, greatly weighs in BALBOA's favor. Absent TRO and Preliminary Injunction,
3 Defendants have caused and will continue to cause BALBOA irreparable harm.

4 II.

5 FACTUAL BACKGROUND

6 BALBOA has been a trusted financing resource in Southern California for many
7 thousands of businesses since 1988. Over years of hard work, expense, and dedication,
8 BALBOA researched and assessed the needs of its customers and potential customer base,
9 developed a proprietary and confidential customer list, and provides a broad array of financing
10 products, including equipment leasing, small business loans, commercial financing, vendor
11 financing and franchise financing targeted to its customer base.
12

13 To protect BALBOA's efforts and expense in developing its proprietary and confidential
14 customer lists and other business information, BALBOA has taken reasonable steps to ensure
15 that its proprietary and confidential information is kept confidential, not disseminated to
16 competitors and not used for the benefit of anyone or any company other than BALBOA. To
17 that end, each Defendant was advised by BALBOA of the importance, value, and confidential
18 nature of its proprietary information, including its customer list, made available to Defendants
19 during their employment with BALBOA via the "Comprehensive Agreement", that each
20 employee, including Defendants, was required to sign prior to employment. The Comprehensive
21 Agreement states in pertinent part:
22

23
24 Definition of Proprietary Information - As used herein, the term "Proprietary
25 Information" refers to any and all information of a confidential, proprietary, or secret
26 nature which is or may be applicable to or related in any way to (i) the business, present
27 or future, of the Employer, (ii) the research and development or investigations of the
Employer, or (iii) the business of any customer of the Employer. Proprietary Information
includes, for example and without limitations, trade secrets (as defined by California
Civil Code #3426), processes, formulas, data, inventions, technical and financial know-

1 how, improvements, techniques, marketing plans and strategies, and information
2 concerning employees, customers, or vendors.

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

12 Return of Materials at Termination – In the event of any termination of his/her
13 employment whether or not for cause and whatever the reason, Employee will promptly
14 deliver to the Employer all documents, data, records and other information pertaining to
15 his/her employment, and Employee shall not take with him/her any documents or data, or
16 any reproduction or excerpt of any documents or data, containing or pertaining to any
17 Proprietary Information.

18 Business Relationships – Employee acknowledges that the Employer's relationships with
19 its employees (including agents and representatives), customers, and vendors are valuable
20 business assets. Employee agrees that neither during his/her employment nor thereafter will
21 he/she disrupt, damage, impair, or interfere with those relationships, through solicitation
22 or otherwise. This provision shall not affect Employee's right to compete after
23 termination of employment with the Employer.

24 On December 10, 2012, Defendants HANSEN and ODIORNE submitted their
25 resignation to BALBOA, stating that their final date of employment would be December 13,
26 2012. Defendants MERZA, HAINES, ENRIQUEZ, KUTTER, and. POWER also submitted
27 their resignations to BALBOA with an effective resignation date of January 10, 2014.

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

1 Throughout their employment with BALBOA, Defendants were provided access to and
2 acquired propriety and confidential information belonging to BALBOA. This proprietary and
3 confidential information was essential to BALBOA's business operations, and necessary for
4 Defendants' performance of their employment with BALBOA. The confidential and proprietary
5 information includes, BALBOA's confidential customer list and marketing strategies, which
6 were compiled and developed through BALBOA's extensive and time consuming research,
7 development, investigation, and marketing efforts, intended solely for the benefit of BALBOA in
8 its sales and marketing efforts directed to its customer base and its customers' files and related
9 documents.
10

11 Armed with the strategic, proprietary and confidential information Defendants obtained
12 during their employment with BALBOA, including its customer lists and customer files,
13 Defendants HANSEN and ODIORNE resigned from BALBOA in order to form their own
14 competing business, RCC. Defendants formed RCC on 12/26/2013, less than two weeks
15 following Defendants HANSEN and ODIORNE's resignation from BALBOA.
16

17 While still employed by BALBOA and following their resignations, Defendants
18 HANSEN and ODIORNE improperly solicited other BALBOA vital sales employees, including
19 Defendants MERZA, HAINES, ENRIQUEZ, KUTTER, and POWER, all of whom subsequently
20 resigned from BALBOA on the same date, January 10, 2014.
21

22 In addition to Defendants' solicitation of BALBOA's key employees, 34 of BALBOA's
23 existing customers notified BALBOA that Defendants, or some of them, personally contacted
24 them and improperly, unfairly, and repeatedly solicited their business in efforts to divert that
25 business away from BALBOA. In fact, Defendants unfair conduct went beyond repeated and
26 improper solicitation of BALBOA's existing customers, but rather, some Defendants funded
27
28

1 deals at RCC using previously submitted applications to BALBOA, and took customer files and
2 other supporting documentation, including but not limited to customer tax returns to RCC.

3 As a result of Defendants' breaches of fiduciary duties, breaches of their employment
4 agreements and, specifically, their Comprehensive Agreements, misappropriation of BALBOA's
5 confidential and proprietary information, and improper solicitation and interference with its
6 contractual relationship with its customers, BALBOA incurred and continues to incur substantial
7 loss of business, profits, and customers. BALBOA believes that Defendants are and will
8 continue to improperly and unfairly use BALBOA's confidential and proprietary information,
9 including its customer list and customer files, for their own financial gains and to the detriment
10 of BALBOA, causing irreparable harm to BALBOA.

12 As a result of Defendants conduct, BALBOA filed its Complaint on February 19, 2014
13 against Defendants REGENTS CAPITAL CORPORATION, DONALD HANSEN, DENNIS
14 ODIORNE, KIRSTEN MERZA, CHELSEA HAINES, JAVIER ENRIQUEZ, KEVIN
15 KUTTER, TRAVIS POWER, and DOES 1 through 25.

17 Plaintiff seeks a Preliminary Injunction as prayed for in the Complaint on file herein,
18 restraining and enjoining Defendants from engaging in and continuing to engage in, the
19 following conduct for the remainder of this litigation:

- 20 (1) Engaging in any solicitation of companies who submitted an application to
21 BALBOA that Defendants reviewed while at BALBOA; and,
- 22 (2) Using, copying, dealing with, disclosing, trading, and otherwise exploiting or
23 misappropriating BALBOA's confidential information, including but not
24 limited to BALBOA's customer list and customer files.

26 Pending a hearing on a Preliminary Injunction, Plaintiff hereby applies for, and
27 submits that the interests of justice require that, a Temporary Restraining Order issue

1 restraining and enjoining Defendants from engaging in and continuing to engage in the
2 aforesaid conduct.

3 As stated in the Declaration of Patrick E. Byrne, filed herewith and incorporated
4 herein, absent said Temporary Restraining Order, BALBOA will suffer great and immediate
5 irreparable harm because Defendants will continue their illegal efforts and schemes to exploit,
6 misappropriate, convert, and improperly use BALBOA's confidential and proprietary
7 information, including its customer lists and customer files, for the purposes of soliciting
8 BALBOA's customers

9
10 **III.**

11 **A TEMPORARY RESTRAINING ORDER MAY ISSUE WHERE GREAT AND**
IRREPARABLE INJURY WILL RESULT TO THE APPLICANT UNLESS THE
OFFENDING CONDUCT IS IMMEDIATELY RESTRAINED

12 A TRO may issue when "it appears from the facts shown by affidavit or by the verified
13 complaint that great or irreparable injury will result to the applicant before the matter can be
14 heard on notice..." (Code Civ. Proc. § 527(c)(1).)

15 The Court should evaluate two interrelated factors when deciding whether or not to issue
16 a temporary restraining order. The first is the likelihood that the plaintiff will prevail on the
17 merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the
18 restraining order is denied; as compared to the harm that the defendant is likely to suffer if the
19 order is issued. Church of Christ in Hollywood v. Superior Court, 99 Cal. App. 4th 1244, 1251,
20 (2d Dist. 2002).

21 A TRO is distinguishable from a preliminary injunction in the following respects: It may
22 be issued ex parte; a bond, though commonly required, is not essential; and it is of short duration,
23 normally expiring at the time of the hearing on the preliminary injunction. Chico Feminist
24 Women's Health Center v. Scully, 208 Cal. App. 3d 230, 237 (3d Dist. 1989).

25 The granting or denial of a temporary restraining order is discretionary with the trial
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1 judge and amounts to a mere preliminary or interlocutory order to keep the subject of the
2 litigation in status quo pending the determination of the action on its merits. Gray v. Bybee, 60
3 Cal. App. 2d 564, 571 (3d Dist. 1943).

4 As stated in the Declaration of Patrick E. Byrne, and shown by the Complaint, if
5 Defendants are not immediately restrained and enjoined from engaging in and continuing to
6 engage in the aforesaid conduct, Plaintiff will suffer great and immediate irreparable harm in that
7 Defendants will continue their misappropriation, conversion, and unauthorized and improper use
8 of BALBOA's confidential and proprietary information, including its customer lists and
9 customer files, for purposes of soliciting BALBOA's customers. As a result of Defendants'
10 continuous actions of unfair competition, BALBOA would continue to suffer damages and
11 irreparable harm.
12

13 On the other hand, the Defendant is not likely to suffer any damages by reason of
14 granting the TRO. If the TRO is granted, Defendants would be compelled to cease and desist the
15 misappropriation of BALBOA's confidential and proprietary information including its customer
16 list and customer files to solicit BALBOA's customers. Defendants would resume their business
17 and would have to expend their own monies and efforts to create their own customer list as
18 opposed to misappropriating BALBOA's information obtained during their employment with
19 BALBOA.
20

21 As further stated in the Declaration of Patrick E. Byrne, there is a high likelihood that
22 Plaintiff will prevail on the merits at trial for the following reasons:
23

24 **1. Trade Secret**

25 BALBOA has stated a viable claim for unfair competition and misappropriation of trade
26 secrets because BALBOA's proprietary and confidential information, specifically its customer
27 list, meets the trade secret test as defined in California Civil Code §3426.1(d). A 'Trade secret'
28

1 means information, including a formula, pattern, compilation, program, device, method,
2 technique, or process, that: (1) Derives independent economic value, actual or potential, from not
3 being generally known to the public or to other persons who can obtain economic value from its
4 disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to
5 maintain its secrecy.” California Civil Code, § 3426.1(d).

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

20 Similarly, through time, effort, expense and BALBOA’s unique marketing techniques,
21 BALBOA identified and compiled the names, addresses, and other pertinent information of
22 targeted businesses identified through those efforts and marketing techniques to have particular
23 needs for the services BALBOA offers, within BALBOA’s customer list. As discussed below,
24 the name of the customers compiled by BALBOA on its customer list is not readily ascertainable
25 through public sources and BALBOA has taken reasonable steps to protect the secrecy of this
26

1 information. Accordingly, BALBOA's customer list is entitled to protection as a trade secret by
2 this Court.

3 **2. Information Not Readily Ascertainable**

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

15
16
17 The information compiled by BALBOA and contained within its customer list is not
18 generally available to the general public nor is it readily ascertainable through public resources,
19 such as business directories because through its many years of being in business, and since 1988,
20 BALBOA has developed algorithms for identifying and thoroughly analyzing potential customer
21 data (sometimes purchased from third party vendors) in order to ascertain business prospects
22 that, based on BALBOA's experience, are more likely to be in need of BALBOA's services and
23 are more likely to generate repeat or renewal business, and for scoring and ranking those
24 prospects for use by BALBOA's sales employees in calling on those potential customers. Such
25 information comprises BALBOA's customer list made available to Defendants for performance
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27
28

1 of their employment with BALBOA. For their own financial gains, Defendants misappropriated
2 this confidential and proprietary information contained in BALBOA's customer list.

3 **3. Independent Economic Value**

4 The requirement that confidential information have independent economic value to
5 qualify as a trade secret has been interpreted to mean that the secrecy of this information
6 provides a "substantial business advantage." E.g., a confidential list of customers has such value
7 because its disclosure would allow a competitor to solicit more selectively and more effectively.
8
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 BALBOA's customer list and customer files constitute trade secrets in that they contain
14 and are comprised of information that derives independent economic value from not being
15 generally known to the public or to other persons who can obtain economic value from its
16 disclosure or use.
17

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

27 ////

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 Twenty-one 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 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.*

17 In fact, Defendants' unfair conduct went beyond merely announcing their disassociation
18 from BALBOA and included repeated and improper solicitation of BALBOA's existing
19 customers, making use of applications previously submitted to BALBOA, and reviewed by
20 Defendants while still employed by BALBOA, to close the financing deal with and through RCC
21 and took customer files and other supporting documentation, including but not limited to
22 customer tax returns to RCC.
23

24 As stated by the court in Pillsbury, an employee does not have the right to take company
25 documents when leaving the company's employment, and an injunction may issue to compel
26
27

1 their return. *See, Pillsbury, Madison & Sutro v. Schectman*, 55 CA4th 1279, 1289,
2 (1997)(upholding preliminary injunction requiring attorney for former employee plaintiffs to
3 return confidential personnel documents removed from employer's files without its consent for
4 purpose of bolstering plaintiffs' case. *See also, Lab.C. § 2860*, the employee is not entitled to
5 take or retain copies of correspondence and memos prepared by the employee in the course of
6 employment. Such documents (as distinguished from personal letters written at work) belong to
7 the employer.

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

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

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

20
21 BALBOA made reasonable efforts under the circumstances to maintain the secrecy of its
22 proprietary and confidential information by limiting circulation of its customer lists and customer
23 files and by advising its employees, including Defendants, through their employment agreements
24 that BALBOA considered the information valuable and confidential. BALBOA has also
25 expended time, effort and expense to maintain the secrecy of its customer list by taking the
26 following steps: (i) BALBOA ensured that its confidential and proprietary information is secured
27

1 through password protections in order to restrict access to its data; (ii) BALBOA never published
2 any of its customer's names publicly or to persons who are under no obligation to protect its
3 confidentiality or in any advertisements or marketing materials; (iii) BALBOA included in all its
4 employment agreements a requirement that employees return all notebooks, documents, software
5 and the like upon termination of employment; (iv) BALBOA included in all its employment
6 agreements the confidentiality provision contained within the "Comprehensive Agreement," that
7 all employees were required to sign at the time of employment and were reminded of prior to
8 termination, which expressly provides that the employees' duty of confidentiality extends beyond
9 the duration of their employment, and which states in pertinent part:

11 Proprietary Information to be Kept in Confidence - Employee acknowledges that the
12 Proprietary Information is a special, valuable, and unique asset of the Employer, and
13 Employee agrees at all times during the period of his/her employment and thereafter
14 to keep in confidence all Proprietary Information. Employee agrees that during the
15 period of his employment and thereafter he will not directly use the Proprietary
16 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.

17 Return of Materials at Termination – In the event of any termination of his/her
18 employment whether or not for cause and whatever the reason, Employee will
19 promptly deliver to the Employer all documents, data, records and other information
20 pertaining to 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.

21 *See also, Morlife, Inc. v. Perry*, supra, 56 CA4th at 1522; *Whyte v. Schlage Lock Co.*,
22 101 CA 4th 1443, 1454 (2002) —requiring employees to sign confidentiality agreements is a
23 reasonable step to ensure secrecy; *ReadyLink Healthcare v. Cotton*, 126 CA4th 1006, 1018
24 (2005)(employer took reasonable steps to ensure the secrecy of its trade secret information by
25 requesting employees to sign nondisclosure agreements.) Thus, BALBOA's efforts to protect its
26 confidential information through requiring its employees to sign confidentiality agreements were
27

1 reasonable steps to ensure secrecy.

2 Thus, BALBOA's customer list meets the trade secret test and it should be
3 offered protection as such by this Court. For the above reasons, a Temporary Restraining Order
4 should be immediately issued to prevent further harm to BALBOA as alleged and as set forth in
5 the attached declaration..

6
7 **IV.**
8 **AN ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION SHOULD ALSO**
9 **ISSUE**

10 "A party requesting a preliminary injunction may give notice of the request to the
11 opposing or responding party either by serving a noticed motion under Code of Civil Procedure
12 section 1005 or by obtaining and serving an order to show cause ("OSC"). An OSC must be
13 used when a temporary restraining order ("TRO") is sought, or if the party against whom the
14 preliminary injunction is sought has not appeared in the action. If the responding party has not
15 appeared, the OSC must be served in the same manner as a summons and complaint." Cal. Rules
16 of Court, rule 3.1150(a).

17 "If the action is initiated the same day a TRO or an OSC is sought, the complaint must be
18 filed first. The moving party must provide a file-stamped copy of the complaint to the judge who
19 will hear the application. If an application is made in an existing case, the moving party must
20 request that the court file be made available to the judge hearing the application." Cal. Rules of
21 Court, rule 3.1150(b).

22 In the instant case Plaintiff filed the Complaint on February 19, 2014 and all Defendants
23 were served; however, Defendants have not appeared yet. Plaintiff has requested that the Court
24 file be made available in the department prior to the hearing on this Application.

26 Plaintiff requests that the instant TRO be issued based upon the evidence presented by
27 declaration and on the Complaint on file herein submitted with this application. Plaintiff further
28

1 requests a full hearing on a Preliminary Injunction for the same reasons and under the same
2 authorities as set forth herein, and requests that an Order to Show Cause be issued along with the
3 TRO to afford Defendants the opportunity to show why they should not be restrained and
4 enjoined in the same manner for the remainder of this litigation, or, alternatively, that a hearing
5 date be set on Plaintiff's application for a preliminary injunction filed and served herewith.

6 A Preliminary Injunction is proper in the following circumstances:

7
8 **A. Preliminary Injunction Standard**

9 "A preliminary injunction may be granted at any time before judgment upon a
10 verified complaint, or upon affidavit if the complaint in the one case, or the affidavits in the
11 other, show satisfactorily that sufficient grounds exist therefore. No preliminary injunction shall
12 be granted without notice to the opposing party." Code Civ. Proc. § 527(a).

13 "An injunction is a writ or order requiring a person to refrain from a particular act. It
14 may be granted by the court in which the action is brought, or by a judge thereof; and when
15 granted by a judge, it may be enforced as an order of the court." Code Civ. Proc. § 525.
16 Generally a plaintiff is entitled to a preliminary injunction if (1) it is reasonably probable that it
17 will prevail on the merits of its claim, *see San Francisco Newspaper Printing Co. V. superior*
18 *Court*, 170 Cal. App. 3d 438, 442 (1985), Civ. Proc. C. §526(a)(1); (2) there is a threat of
19 irreparable harm to the Plaintiff's rights, *see Civ. Proc. C. §526(a)(2)*; (3) there is no adequate
20 legal remedy, *see Civ. Proc. C. §526(a)(4)*; and (4) the balancing of the equities weights in favor
21 of the Plaintiff, *see Youngblood v. Wilcox*, 207 Cal. App. 3d 1368, 1372 (1989). All these four
22 factors strongly weigh in BALBOA's favor.
23

24
25 To obtain a preliminary injunction, the plaintiff must establish that the defendant should
26 be restrained from the challenged activity pending trial. *Trader Joe's Co. v. Progressive*
27 *Campaigns*, 73 Cal. App. 4th 425, 429 (1st Dist. 1999). As with a Temporary Restraining Order,

1 the Court weighs two interrelated factors; the likelihood the moving party will prevail on the
2 merits, and the relative interim harm to the parties from the issuance or non-issuance of the
3 injunction. Whyte v. Schlage Lock Co., 101 Cal. App. 4th 1443, 1449 (4th Dist. 2002).

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

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

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

17 An injunction may be granted "when it appears by the complaint that the plaintiff is
18 entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the
19 commission or continuance of the act complained of, either for a limited period or perpetually."
20 Civ. Proc. C. §526(a)(1). As discussed above, it is likely that BALBOA will prevail on the
21 merits of its claim.

22 **D. Irreparable Harm**

23 The function of a preliminary injunction is not merely to contain ongoing damage but to
24 prevent prospective damage. See, Nutro Products, Inc. v. Cole Grain, Co., 3 Cal. App. 4th 860,
25 867 (1992). Irreparable harm is shown when the Plaintiff is damaged in a way that cannot be
26 later repaired. People v. Mitchell Brothers' Santa Ana Theater, 118 Cal. App. 3d 863, 870-71
27

1 (1981). It is axiomatic that when a proprietary and confidential information is disclosed, it
2 cannot be undisclosed. By secretly obtaining and misappropriating Plaintiff's trade secrets and
3 confidential information, including but not limited to Plaintiff's customer list and customer files,
4 without Plaintiff's knowledge, consent, and/or authorization and concealing their intent to
5 establish a competing business with Plaintiff based on the proprietary and confidential
6 information obtained from Plaintiff, and by diverting corporate opportunities from Plaintiff to
7 their newly created competing business, RCC, that is identical in nature to BALBOA's business
8 Defendants have caused and are continuing to cause Plaintiff irreparable harm in the form of lost
9 business.
10

11 Preventing Defendants from using BALBOA's customer list, customer files, and
12 soliciting its customers will preclude further prospective damages including but not limited to
13 loss of profits, existing customers, and prospective economic advantage. The damage that would
14 be done if Defendants continue to use BALBOA's confidential and proprietary information,
15 including its customer list and customer files, and their continued solicitation of its existing
16 customers without granting the injunction sought in this Motion cannot be later repaired.
17

18 **E. Inadequate Legal Remedy**

19 In the context of injunctions, courts have held that no legal remedy is appropriate for
20 using the former employer's "proprietary and confidential information" to compete with
21 former employer and hence an injunction against former employees' use of such information
22 was proper either under the Uniform Trade Secrets Act or as unfair completion as it
23 constitutes misappropriation of trade secret. *See, MAI Systems Corp. v. Peak Computer, Inc.*,
24 991 F2d 511, 521–522 (9th Cir. 1993)(applying Calif. law); *ReadyLink Healthcare v. Cotton*,
25 126 CA4th 1006, 1018 (2005); *Wanke, Industrial, Comm'l, Residential, Inc. v. Sup.Ct.*
26 *(Keck)*, 209 CA4th 1151, 1174–1178 (2012)(upholding stipulated injunction precluding
27 solicitation of customers from customer list deemed to be protected trade secret.). *See also*,

1 Morlife, Inc. v. Perry, supra, 56 CA4th at 1520, holding that if he former employer's customer
2 list is protectable as a trade secret, the former employee and new employer may be enjoined
3 from using it to compete with the former employer and held liable in damages for whatever
4 benefit they derived from past use.

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

14 **F. Balancing of the Equities**

15 In deciding whether to grant a preliminary injunction, the court must exercise its
16 discretion "in favor of the party most likely to be injured ... if denial of an injunction would
17 result in great harm to the plaintiff, and the defendants would suffer little harm if it were granted,
18 then it is an abuse of discretion to fail to grant the preliminary injunction." Robbins v. Superior
19 Court, 38 Cal. 3d 199, 205 (1985.) In making this equitable consideration, first, the court must
20 consider who will suffer the greater injury from the granting or denial of the injunction. *See*,
21 Shoemaker v. County of Los Angeles, 37 Cal. App. 4th 618, 633 (1995). Second, the court must
22 evaluate who is likely to prevail on the merits of the case. *See*, Robbins, 38 Cal. App. 3d at 206.
23 BALBOA has shown a high likelihood of success on the merits. Moreover, the balancing of the
24 hardships clearly tips in BALBOA's favor. If the injunction is not granted, Defendants will
25 continue their misappropriation, conversion, and unauthorized and improper use of BALBOA's
26 confidential and proprietary information, including its customer lists and customer files, for
27

1 purposes of soliciting BALBOA's customers, and would continue their improper and unfair
2 solicitation of BALBOA's key sales employees. As a result of Defendants' continuous actions
3 of unfair competition, BALBOA would continue to suffer damages and irreparable harm. If the
4 injunction is granted, Defendants would be compelled to cease and desist the misappropriation of
5 BALBOA's confidential and proprietary information including its customer list to solicit
6 BALBOA's customers and would refrain from soliciting BALBOA's key employees to unfairly
7 compete with Plaintiff. In addition, Defendants would return all of BALBOA's customer files
8 and records to BALBOA and would cease to use all information obtained thereof. Defendants
9 would then resume their business and would have to expend their own monies and efforts to
10 create their own customer list and hire and train their own employees as opposed to
11 misappropriating BALBOA's information obtained during their employment with BALBOA.
12

13 As shown in the Declaration of Patrick E. Byrne submitted herewith, sufficient grounds
14 exist, and will be shown to exist, at the hearing on a Preliminary Injunction such that the Court
15 should issue same upon the grounds and facts as alleged herein which support the issuance of a
16 Temporary Restraining Order.
17

18 **V.**

19 **EX PARTE RELIEF IS PERMITTED UNDER THESE CIRCUMSTANCES AND**
20 **PLAINTIFF HAS COMPLIED WITH CALIFORNIA RULES OF COURT**

21 **A. Showing Required For Ex Parte Relief:**

22 Cal. Rules of Court, rule 3.1150 provides that "applications for ex parte temporary
23 restraining orders are governed by the ex parte rules in chapter 4 of this division." "An applicant
24 for an ex parte application must make an affirmative factual showing in a declaration containing
25 competent testimony based on personal knowledge of irreparable harm, immediate danger, or
26 any other statutory basis for granting relief ex parte." Cal. Rules of Court, rule 3.1202(c).

27 As shown by the attached Declaration of Patrick E. Byrne, there is an imminent and
28

1 present danger of irreparable harm exist for granting relief ex parte, in that Defendants will
2 continue to misappropriate BABLAO's confidential and proprietary information including its
3 customer list for their own financial gains.

4 **B. Document And Notice Requirements For Ex Parte Application For TRO and OSC:**

5
6 "An ex parte application for an order must be accompanied by an affidavit or declaration
7 showing: (1) that, within the applicable time period under (b) *[no later than 10:00 a.m. the court*
8 *day before the ex parte appearance]*, the applicant informed the opposing party when and where
9 the application would be made; or (2) that the applicant in good faith attempted to inform the
10 opposing party but was unable to do so, specifying the efforts made to inform the opposing
11 party; or (3) that, for reasons specified, the applicant should not be required to inform the
12 opposing party." Cal. Rules of Court, rule 3.1201.

13
14 "A party seeking an ex parte order must notify all parties no later than 10:00 a.m. the
15 court day before the ex parte appearance, absent a showing of exceptional circumstances that
16 justify a shorter time for notice." Cal. Rules of Court, rule 3.1203(a).

17 When notice of an ex parte application is given, the person giving notice must:

- 18 (1) State with specificity the nature of the relief to be requested and the date, time, and place
19 for the presentation of the application; and
20
21 (2) Attempt to determine whether the opposing party will appear to oppose the application.

22 Cal. Rules of Court, rule 3.1204(a).

23 An ex parte application must be accompanied by a declaration regarding notice stating:

- 24 (1) The notice given, including the date, time, manner, and name of the party informed, the
25 relief sought, any response, and whether opposition is expected and that, within the applicable
26 time under rule 3.1203, the applicant informed the opposing party where and when the
27

1 application would be made;

2 (2) That the applicant in good faith attempted to inform the opposing party but was unable to
3 do so, specifying the efforts made to inform the opposing party; or

4 (3) That, for reasons specified, the applicant should not be required to inform the opposing
5 party. Cal. Rules of Court, rule 3.1204(b).

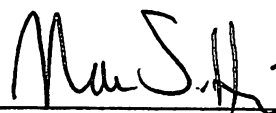
6 "No temporary restraining order shall be granted without notice to the opposing party..."
7 Code Civ. Proc. § 527(c). Plaintiff served notice of its intent to appear Ex Parte and the Ex Parte
8 Application and supporting papers on Defendants in accordance with the requirements set forth
9 above.
10

11 VI.
12 CONCLUSION

13 For all of the foregoing reasons and supporting facts and authorities, it is respectfully
14 requested that the Court issue a Temporary Restraining Order ("Proposed" Order submitted
15 herewith), and set an Order to Show Cause hearing for Preliminary Injunction consistent with
16 this Application ("Proposed" Order to Show Cause also submitted herewith).

17 Dated: March 6, 2014

HINES CARDER

18
19 By: 
20

21 Marc S. Hines, Esq.
22 Nicole M. Hampton, Esq.
23 Natalie Mirzayan, Esq.
24 Attorneys for Plaintiff
25 BALBOA CAPITAL CORPORATION
26
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