

1 Robert K. Stewart, Jr.
2 Karmyn A. Olmstead
3 Davis Wright Tremaine LLP
4 701 W. 8th Avenue, Suite 800
5 Anchorage, Alaska 99501
6 (907) 257-5300, telephone
7 (907) 257-5399, facsimile

8 Attorneys for Plaintiff
9 Chugach Electric Association, Inc.

10 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
11
12 THIRD JUDICIAL DISTRICT AT ANCHORAGE

13 CHUGACH ELECTRIC)
14 ASSOCIATION, INC.,)

15 Plaintiff,)

16 vs.)

17 RAY KREIG, STEPHEN ROUTH)
18 and CHUGACH CONSUMERS,)

19 Defendants.)
20)

21 Case No. 3AN-06-13743 Civil

22 OPPOSITION TO MOTION TO VACATE PRELIMINARY INJUNCTION

23 Plaintiff Chugach Electric Association, Inc. respectfully submits this
24 memorandum in opposition to defendants Ray Kreig ("Kreig") and Chugach Consumers'
25 Motion to Vacate Preliminary Injunction ("Motion to Vacate").

After failing to timely oppose Chugach's Motion for Preliminary Injunction, or to show any cause or excusable neglect for their failure to do so, see Opposition to Motion for Extension of Time, defendants now move to vacate the Preliminary Injunction entered by this Court on April 4, 2007. The reasons stated in support of the Motion to Vacate are

1 that 1) Chugach will not suffer irreparable harm if Kreig keeps its confidential property,
2 2) Kreig “needs these documents” to continue litigation against Chugach, and 3) it would
3 be impossible to comply with the requirement that Kreig immediately return to Chugach
4 its confidential documents. None of those arguments have merit.

5 At the outset, defendants’ motion is really a Civil Rule 60 motion for relief from
6 an order of the Court. However, defendants make none of the showings necessary for
7 relief under that rule, such as mistake, inadvertence, surprise, excusable neglect or newly
8 discovered evidence. Alaska R. Civ. P. 60(b). For that threshold reason, defendants’
9 motion should be denied.
10

11 It should also be noted that defendants do not raise any arguments or cite any
12 authority controverting the undisputed facts and law establishing Chugach’s entitlement
13 on the merits to return of the Confidential Chugach Documents in the possession of
14 Kreig, Routh and Chugach Consumers. Instead, they make the specious argument that
15 there will be no irreparable injury to Chugach associated with Kreig’s retention of the
16 Chugach Confidential Documents.
17

18 The mere fact that the Chugach Confidential Documents are Chugach’s property
19 justifies their immediate return to Chugach. Chugach’s interests are heightened by the
20 fact that most of the Chugach Confidential Documents consist of attorney-client
21 communications and/or attorney work product. Chugach certainly has an undeniable
22 interest in regaining exclusive possession of those documents to insure that those
23 privileges are not deemed waived or irreparably compromised by intentional or
24
25

inadvertent disclosures by Kreig, Routh or Chugach Consumers.

1 The risk of irreparable harm to Chugach is well documented by the facts, which
2 are not denied by defendants, that Kreig and Chugach Consumers have already
3 improperly intentionally disclosed copies of the Black Book, the UMS Studies and other
4 Confidential Chugach Documents to the Regulatory Commission of Alaska, the Superior
5 Court for the State of Alaska, “[o]ur attorneys, Ken Jacobus and Toby White,” as well as
6 to Kreig’s wife, Lee Ann Kreig, all without the permission of Chugach’s Board of
7 Directors. The risk of inadvertent disclosures, which would have the same grievous
8 consequence to Chugach, is also well documented by the undisputed facts that Kreig has
9 exposed those documents to potential disclosure to numerous secretaries, janitors, plant
10 care attendants, visitors, messengers, casual employees and consultants through lax
11 security measures.¹

12
13
14 Chugach should not be compelled to rely upon representations by Kreig that he
15 does not intend to further distribute Confidential Chugach Documents in the future. In
16 the course of its ongoing investigation into the facts relating to this matter, Chugach has
17 learned that Kreig disclosed portions of the contents of a confidential UMS study

21 ¹ Kreig’s criticism of the manner in which Chugach has handled the Black Books is both irrelevant and inaccurate. Because the Black Books, as well as other Confidential Chugach Documents, are Chugach’s property, it has the exclusive right to strike the balance in terms of the degree and types of safeguards that it believes are warranted. The point is that Chugach is stripped of its right to exercise such exclusive discretion when third persons, such as Kreig, unilaterally retain its confidential records. As to the events in January or February of 2006, it is Ms. Hillemeier’s recollection that she stayed on those occasions through the end of the executive sessions, as she routinely does in the ordinary course of business, and collected all confidential materials which directors did not take with them. It is also her recollection that she never found three copies of the Black Books inexplicably located in her office. Chugach will submit an affidavit from Ms. Hillemeier if the Court believes it is necessary to delve more deeply into these facts.

1 conducted in 1995 to a reporter for the Alaska Journal of Commerce on or about April
2 10, 2005. See Exhibit 1. Chugach also has reason to believe Kreig posted an unredacted
3 copy of a letter from himself to Bruce Davidson, then the President of Chugach's Board
4 of Directors, which discusses confidential Chugach information on a hidden portion of
5 his website at www.chugachconsumers.org. See Exhibit 2 (redacted version as printed
6 from website). The temptations of disclosing Confidential Chugach Documents for
7 purposes of advancing his personnel agenda in derogation of Chugach's corporate rights
8 may prove to be too tempting to Kreig. The only way to insure that there are no improper
9 disclosures of the Confidential Chugach Documents by defendants in the future is to
10 return exclusive custody of those documents to Chugach.
11

12 Moreover, Kreig's representation concerning his intent to not disclose
13 Confidential Chugach Documents actually supports Chugach's position. If Kreig truly
14 has no intention of making any such disclosures, then there is simply no reason for him
15 not to return the Confidential Chugach Documents to Chugach immediately.
16

17 Defendants' argument that Kreig "needs these documents" is equally specious. To
18 the extent Kreig contends that as a former director that he has some special legal duty to
19 the corporation and its members which authorizes him to retain the Confidential Chugach
20 Documents in his possession, he is incorrect. Matter of Cohen v. Cocoline Prods., 127
21 N.E.2d 906, 907-08 (N.Y. 1955) (former director loses right to review corporate
22 documents because he no longer has a stewardship obligation to the corporation requiring
23 him to keep informed of its business and affairs).
24
25

1 Likewise, to the extent Kreig claims he needs the documents to prosecute this and
2 other litigation against Chugach, and that such a need otherwise justifies his wrongful
3 possession and retention of the Confidential Chugach Documents, his argument is
4 fallacious in its circularity. It is akin to a car thief arguing that he should not return a
5 stolen vehicle because it may prove useful to him in getting to and from work. The
6 arguable utility associated with continued wrongful possession of property does not under
7 any circumstances justify the unlawful misappropriation and retention of the property in
8 the first instance. Chugach's Board of Directors, not Kreig, has the sole authority to
9 determine when the Confidential Chugach Documents are to be disclosed and for what
10 purposes.²

12 As to any interest Kreig might have to inspection of Confidential Chugach
13 Documents in the event claims are asserted against him relating to his acts or omissions
14 during his tenure as a Chugach Director, the law recognizes a qualified right of inspection
15 under those circumstances. See, e.g., Kelley v. Heritage Nat'l Bank, 897 S.W.2d 96, 97
16 (Mo. Ct. App. 1995) (former director has no right to examine books and records extant

18
19 ² Again, the discussion in Kreig's affidavit concerning the Southern Intertie studies is both irrelevant and inaccurate.
20 First, because Kreig was on the Chugach Board of Directors in 1998 and was actually instrumental in the decision to
21 obtain the 1998 DFI study, he had no need to retain that document in order to understand its contents when he left
22 the Board of Directors in 2000. Second, that study, which was later publicly released in December of 2002, did not
23 conclude that the project was not in the best interest of Chugach members. See Exhibit 5, p. 53. In fact, it
24 concluded Chugach ratepayers would most likely benefit from the Southern Intertie. Third, contrary to Kreig's
25 inference, the 1998 DFI study showed the Southern Intertie to have a positive cost-benefit ratio of 3.50 to Chugach.
Id. at 20. Fourth, the other 1998 DFI study which Kreig references was commissioned by the Intertie Participant's
Group, not by Chugach management, see Exhibit 6. Finally, Chugach's decision to withdraw from the Southern
Intertie project was not based upon release of the 1998 DFI study, but rather upon an increased estimate of
construction costs in the range of \$10,000,000-19,000,000 and loss of the accrued interest on state funds in the
amount of approximately \$30,000,000, both of which events occurred in or about April of 2003. As before,
Chugach will submit affidavits or evidentiary testimony if the Court believes it is necessary to delve more deeply
into these facts.

1 during the term of his directorship unless he has been or may be charged with an
2 unlawful act or failure to act during such term); Cohen v. C-C Clubs, Inc., 171 N.Y.S.2d
3 873, 872 (N.Y. Sup. 1958) (qualified right of former director to inspect corporate books
4 where his or her conduct is called into question does not permit inspection where there is
5 only a possibility of such a claim). However, a former director's interest is limited to
6 situations where there is an actual, not merely a hypothetical, claim asserted against him
7 and that interest only extends to inspection, not possession, of the records. No such
8 circumstances have been presented here by Kreig justifying inspection, much less
9 retention, of the Confidential Chugach Documents.
10

11 Finally, Kreig's argument that it would be "impossible" to comply with the
12 requirement that he immediately return the Confidential Chugach Documents to Chugach
13 is nothing more than a smokescreen for his failure to make any reasonable efforts to
14 comply with either the Preliminary Injunction or his preexisting obligations in this
15 lawsuit. Defendants, including Kreig, had an obligation pursuant to Civil Rule
16 26(a)(1)(D) to identify, organize and make available to Chugach all relevant documents.
17 That certainly included all Confidential Chugach Documents as defined in the Complaint.
18 Defendant's Civil Rule 26 filing was due on February 26, 2007, and finally served on
19 March 12, 2007. Defendants' Initial Disclosure states that all relevant documents are
20 available for inspection upon reasonable advance notice. See Exhibit 3.
21
22

23 For defendants, especially Kreig, to now contend that identification and return of
24 the Confidential Chugach Documents is physically impossible is disingenuous in the
25

1 extreme and yet another example of their disdainful disregard for deadlines set by this
2 Court and the Civil Rules. The Confidential Chugach Documents should have been
3 identified and organized for purposes of production to Chugach nearly two months ago.
4 Kreig's affidavit, which suggests he has not even begun that task, indicates that
5 defendants' Initial Disclosures most likely contained a material misrepresentation. There
6 is no excuse, given defendants' obligation under Civil Rule 26, for any difficulties with
7 compliance with Paragraph 2 of the Preliminary Injunction.

8 Even were one to ignore defendants', including Kreig's, lack of diligence to date,
9 there is absolutely no reason why they could not immediately comply with Paragraph 2 of
10 the Preliminary Injunction as to those Chugach Confidential Documents which are
11 readily at hand and readily identifiable. That would clearly include the originals and all
12 electronic and other copies of the Black Book, the UMS studies and the April 2006
13 Memo. Even though counsel for Chugach put defendants on notice in these regards on
14 April 6, 2007, see Exhibit 4, as of this date not a single Confidential Chugach Document
15 has been returned to Chugach by defendants. Defendants' contemptuous conduct is not
16 worthy of reward.

17
18 For the foregoing reasons, defendants' Motion to Vacate should be denied.
19
20
21
22
23
24
25

Dated this 19th day of April, 2007.

Davis Wright Tremaine LLP
Attorneys for Plaintiff
Chugach Electric Association, Inc.

By: 

Robert K. Stewart, Jr.
Alaska Bar No. 8506082

Certificate of Service

I hereby certify that a true copy
of the above was hand delivered on the
19th day of April, 2007, to:

Kenneth P. Jacobus
Law Offices of Kenneth P. Jacobus
310 K Street, Suite 200
Anchorage, Alaska 99501


Kris Hamann

Davis Wright Tremaine LLP
LAW OFFICES
Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399