

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 THIRD JUDICIAL DISTRICT AT ANCHORAGE

12 CHUGACH ELECTRIC)
13 ASSOCIATION, INC.,)

14 Plaintiff,)

15 vs.)

16 RAY KREIG, STEPHEN ROUTH) Case No. 3AN-06-13743 Civil
17 and CHUGACH CONSUMERS,)

18 Defendants.)
19 _____)

20 PRELIMINARY INJUNCTION

21 THIS MATTER having come on before the above-entitled Court on plaintiff
22 Chugach Electric Association, Inc.'s ("Chugach") Motion for Preliminary Injunction, the
23 Court having reviewed the pleadings pertinent thereto, the files and records contained
24 herein, and being otherwise fully apprised in the premises; NOW, WHEREFORE

25 IT IS HEREBY ORDERED that Chugach's Motion for Preliminary Injunction is
granted, and

IT IS FURTHER ORDER as follows:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1. That defendants, and each of them, shall cease and desist from in any manner releasing, distributing or disclosing any Confidential Chugach Documents as defined in the Motion for Preliminary Injunction without the express authorization to do so by Chugach's Board of Directors ("Board"), acting as such;

2. That defendants, and each of them, shall immediately return to Chugach all Confidential Chugach Documents obtained during Kreig's tenure as a Chugach director or otherwise, through any means and in whatever form or media, including all copies, excerpts and summaries of same, to Chugach;

3. That defendants, and each of them, shall identify in writing all individuals or entities to whom defendants have provided copies, excerpts or summaries of any Confidential Chugach Documents in their possession now or at any time and to whom defendants have disclosed any information contained in the same; and

4. That Kreig shall comply with all aspects of Chugach Board Policy 128 as it existed in April of 2006.

DONE this _____ day of _____, 2007.

The Honorable Craig F. Stowers
Superior Court Judge

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) Case No. 3AN-06-13743 Civil
18 and CHUGACH CONSUMERS,)

19 Defendants.)
20 _____)

21 MOTION AND MEMORANDUM FOR PRELIMINARY INJUNCTION

22 Plaintiff Chugach Electric Association, Inc. ("Chugach") moves the court,
23 pursuant to Alaska R. Civ. P. 65(a), for a preliminary injunction enjoining defendants
24 Ray Kreig ("Kreig"), Stephen Routh ("Routh"), and Chugach Consumers from causing
25 Chugach immediate and irreparable harm. More specifically, Chugach seeks the
following injunctive relief:

1. That defendants be ordered to cease and desist from in any manner releasing, distributing or disclosing any Confidential Chugach Documents (as defined

below) without the express authorization to do so by Chugach's Board of Directors ("Board"), acting as such;

2. That defendants be ordered to immediately return to Chugach all Confidential Chugach Documents obtained during Kreig's tenure as a Chugach director or otherwise, through any means and in whatever form or media, including all copies, excerpts and summaries of same, to Chugach;

3. That defendants be ordered to identify in writing all individuals or entities to whom defendants have provided copies, excerpts or summaries of any Confidential Chugach Documents in their possession now or at any time and to whom defendants have disclosed any information contained in the same; and

4. That Kreig be ordered to comply with all aspects of Chugach Board Policy 128 as it existed in April of 2006.

FACTS

Chugach Consumers is an unincorporated association whose chairman is Routh. Answer of Chugach Consumers, Ray Kreig, and Stephan Routh, ¶ 2. Kreig is the vice chairman of Chugach Consumers. Id. From May 1994 through April 2000, and from July 2005 through April 2006, Kreig was a member of the Chugach Board. Id., ¶ 3. From time to time during his tenure as a member of the Chugach Board, Kreig was given access to, and in some cases copies of, highly confidential and privileged documents regarding Chugach ("Confidential Chugach Documents") solely for the purpose of discharging his duties as a member of the Chugach Board. Affidavit of Carol Johnson

*For the file
1/18/06
C. Johnson
1/18/06*

(“Johnson Aff.”), ¶ 2.

1 In particular, in his capacity as a member of the Chugach Board, Kreig was
2 provided with copies of the following Confidential Chugach Documents:

3 1. On January 18, 2006, Kreig was present at an executive session Board
4 meeting at which Chugach’s attorneys presented information and strategies for use in
5 upcoming labor negotiations with the International Brotherhood of Electrical Workers,
6 Local Union 1547 (“IBEW”). At that executive session, Kreig received a numbered
7 binder containing a hard copy of the information presented in executive session (the
8 “Black Book”). The Black Book, prepared by Chugach’s outside labor attorneys,
9 contains privileged attorney work product, attorney-client communications and
10 proprietary information owned by Chugach. Johnson Aff., ¶ 3.
11

12
13 2. On April 16, 2006, Kreig distributed a memo to the Chugach Board
14 discussing proposed alternatives for negotiating with the IBEW (the “April 2006
15 Memo”), which included a summary of the findings contained in, and excerpts from, the
16 Black Book. The April 2006 Memo constitutes a privileged attorney-client
17 communication and consists of proprietary information owned by Chugach. Johnson
18 Aff., ¶ 4.
19

20
21 3. During the period of 1995 through 1997, Kreig received copies of studies
22 prepared for Chugach by UMS Group, Inc. (“UMS”) (the “UMS Studies”). The UMS
23 Studies were created pursuant to contracts between UMS and Chugach that required
24 Chugach to treat all project information as confidential and not to be distributed beyond
25

Fairly good
So. Kreig's
preparation

Chugach's managers and employees without prior written permission from UMS.

1 Johnson Aff., Ex. A, B and C. In fact, several of the UMS Studies contain express
2 confidentiality legends. Johnson Aff., ¶ 5. Kreig is aware of this requirement and has
3 been so advised on numerous occasions. Id. Kreig is also aware that UMS has refused to
4 consent to the distribution of the UMS Study. Id.
5

6 At the time Kreig ceased to serve on the Chugach Board, the version of Chugach
7 Board Policy 128, Confidentiality then in effect provided that attorney-client
8 communications, information that Chugach is contractually required to keep confidential,
9 statutory and common law trade secrets and information discussed or disclosed in
10 executive session are among the types of information is the property of Chugach and
11 required to be kept confidential by Chugach board members. Pursuant to Chugach Board
12 Policy 128, only the full Chugach Board, acting in its official capacity, and the CEO have
13 the authority to waive the confidentiality of or to authorize the release of confidential
14 information and documents. In addition, the policy permits Chugach to seek equitable
15 relief to prevent or retrain any disclosure, breach, or threatened breach of the policy,
16 including the issuance of a preliminary and permanent injunction. Johnson Aff., ¶ 6,
17 Exhibit D.
18
19
20

21 Following Kreig's departure from the Chugach Board, Chugach's Board Chairman
22 sent a letter to Kreig demanding that he return all Confidential Chugach Documents in his
23 possession and delete those maintained in his possession or under his control in an
24 electronic format. Affidavit of Jeffrey Lipscomb ("Lipscomb Aff."), ¶ 2, Ex. A. When
25

1 Kreig did not respond to that letter, Lipscomb Aff., ¶ 3, Chugach’s general counsel called
2 to inquire whether Kreig planned to comply with those requests. Kreig refused to agree
3 to comply with Chugach’s written demands. Johnson Aff., ¶ 7.

4 Despite Chugach’s repeated demands, Kreig has refused to return copies of, or
5 delete any electronic versions of, the Confidential Chugach Documents in his possession,
6 including, but not limited to, the Black Book, the April 16 Memo and the UMS Studies.

7 On December 6, 2006, Kreig and Chugach Consumers improperly disclosed
8 copies of the Black Book, the UMS Studies and other Confidential Chugach Documents
9 when they filed those documents with the Regulatory Commission of Alaska (“RCA”)
10 and in the Superior Court for the State of Alaska, without the permission of Chugach’s
11 Board of Directors. Answer of Chugach Consumers, Ray Kreig, and Stephan Routh, ¶
12 10; Affidavit of Robert K. Stewart, Jr. (“Stewart Aff.”), ¶ 2, Ex. A (Interrogatory Answer
13 No. 3).

14 Kreig has also admitted that he has improperly disclosed copies of the Black
15 Book, the UMS Studies and other Confidential Chugach Documents to “[o]ur attorneys,
16 Ken Jacobus and Toby White,” as well as to his wife, Lee Ann Kreig. Stewart Aff., ¶ 2,
17 Ex. A (Interrogatory Answers Nos. 3 and 4). Through lax security measures, he has also
18 admitted he has exposed those documents to potential disclosure to numerous secretaries,
19 janitors, plant care attendants, visitors, messengers, casual employees and consultants.
20 Id. (Interrogatory Answer No. 5).

ARGUMENT

A. Defendants Have No Lawful Right to Possession of the Confidential Chugach Documents.

The Confidential Chugach Documents in Kreig's possession are the property of Chugach and defendants have no lawful interest in retaining possession of them.

"Corporate books and records are the property of the corporation and not of the officers or directors or shareholders." Fletcher Cyclopedia Corporations § 2192 (2006) (*citing U.S. v. Shlom*, 420 F.2d 263 (2nd Cir. 1969)). "Directors . . . do not, by virtue of their office, hold or possess any title to or interest in the property of the corporation." *Id.* at § 853. *See also Dines v. Harris*, 291 P. 1024, 1028 (Colo. 1930) ("It is ancient law that the books are not the private property of the directors or managers, but are the records of their transactions as trustees for the stockholders."). Chugach Board Policy 128, Confidentiality, also expressly provides for Chugach's sole ownership of confidential corporate documents.

Because former directors of a corporation have no ownership interest in such documents, they have a common law duty to return corporate papers to the corporation. *Beard v. Beard*, 133 P. 797, 800 (Or. 1913), *aff'd on reh'g*, 134 P. 1196 (officer whose term of office has expired is required to return books and papers obtained during the term). *See also* Fletcher Cyclopedia Corporations § 2193 (2006) ("It is the duty of retiring officers to turn the custody and possession of the corporate books and records

over to their successors in office.”).

1 The use of corporate information for one’s own purposes is a breach of the
2 fiduciary duty of loyalty owed by a director to the corporation. *Bull v. Logetronics, Inc.*,
3 323 F.Supp. 115, 133 (E.D. Va. 1971). *See also* 3 B. Buday and G. O’Gradney, Fletcher
4 Cyclopedia of the Law of Corporations §857.10 (rev. ed. 1994) (a director who uses
5 confidential corporate information for his own benefit is liable for damages suffered by
6 the corporation as a result of the breach of fiduciary duty).

8 Where the documents at issue are confidential, whether as attorney-client
9 communications or attorney work product, trade secrets, information belonging to third
10 persons which the corporation is required to keep confidential, or information discussed
11 in executive session, courts have expressly stated that the corporation is entitled to return
12 of such information. As the United States Supreme Court noted:

15 Confidential information acquired or compiled by a corporation in the
16 course and conduct of its business is a species of property to which the
17 corporation has the exclusive right and benefit, and which a court of equity
will protect through the injunctive process or other appropriate remedy.

18 *Carpenter v. U.S.*, 484 U.S. 19, 26 (1987) (holding that business information intended to
19 be kept confidential was corporate property regardless of existence of written policy
20 establishing the same) (*quoting* 3 W. Fletcher, Cyclopedia of the Law of Private
21 Corporations § 857.1 (rev. ed. 1986)). In fact, a corporation is entitled to prevent a
22 former director from reviewing attorney-client and work product privileged records
23 created during the director’s term in office. *Lane v. Sharp Packaging Sys.*, 640 N.W.2d
24

1 788, 803 (Wis. 2002) (preventing former director from accessing privileged documents
2 created during his tenure in office). *See also U.S. v. Chen*, 99 F.3d 1495, 1502 (9th Cir.
3 1996) (“The power to waive the corporate attorney-client privilege rests with the
4 corporation’s management and is normally exercised by its officers and directors[.]”)
5 (quoting *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 248 (1985)).

6 **B. Chugach is Entitled to Injunctive Relief Requiring Defendants to Return
7 Confidential Chugach Information to Chugach.**

8 Injunctive relief in the form of a mandamus order is the proper remedy to compel
9 delivery of corporate records by former officers or directors who refuse to return such
10 materials. *Nancy Lee Mines, Inc. v. Harrison*, 471 P.2d 39, 41 (Idaho 1970) (mandamus
11 granted to former director, among others, to return corporate records to the custody of the
12 plaintiff corporation). *See also Liberal Catholic Church v. Rogers*, 150 P.2d 486, 488
13 (Cal. Ct. App. 2d. 1944) (mandamus is proper action to compel return of books and
14 papers from former corporate officer); *Potomoc Oil Co. v. Dye*, 102 P. 677, 678-79 (Cal.
15 Ct. App. 1909) (in accord).

16
17 A preliminary injunction is appropriate where 1) the plaintiff faces irreparable
18 harm; 2) the defendant can be adequately protected; and 3) the plaintiff raises serious and
19 substantial questions going to the merits of the case. The “balance of hardships test is
20 applied in determining the propriety of granting injunctive relief.” *Alaska Public Utilities
21 Comm’n v. Greater Anchorage Area Borough*, 534 P.2d 549, 554 (Alaska 1975). Even if
22 the requesting party is unable to show irreparable harm, or is unable to show that the
23
24
25

1 other party can be adequately protected from injury resulting from the grant of the
2 injunction, a preliminary injunction may nevertheless be granted upon the plaintiff's
3 showing of probable success on the merits. *A.J. Indus., Inc. v. Alaska Pub. Serv.*
4 *Comm'n*, 470 P.2d 537, 540 (Alaska 1970), modified on other grounds, 483 P.2d 198
5 (Alaska 1971). The Ninth Circuit, using substantially the same test, notes that

6 Basically, plaintiffs are entitled to preliminary injunctive relief if: (1) they
7 demonstrate a probability of success on the merits, and a possibility of
8 irreparable harm; or (2) if they demonstrate a fair chance of success on the
9 merits (i.e., serious questions are raised), and the balance of hardships tips
10 sharply in their favor.

11 *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1389 (9th Cir. 1988)
(citations omitted).

12 In addition, Chugach Board Policy 128, Confidentiality, expressly contemplates
13 the use of injunctive relief to restrain disclosure of confidential documents or any breach
14 or threatened breach of the policy. In this case, Chugach is clearly entitled to the
15 injunctive relief sought in this motion.

16
17 1. Chugach Faces Irreparable Harm.

18 Because defendants have already improperly disclosed Confidential Chugach
19 Documents for their own purposes both to the RCA and the Superior Court for the State
20 of Alaska without the permission of Chugach's Board of Directors, as well as to Ken
21 Jacobus, Toby White and Lee Ann Kreig, there is a likelihood that defendants will
22 continue to use the information without permission whenever they perceive the use may
23 benefit their own, as opposed to Chugach's, interests. In addition, due to lax security
24
25

measures, Kreig has admitted he has exposed Confidential Chugach Documents to potential disclosure to numerous secretaries, janitors, plant care attendants, visitors, messengers, casual employees and consultants. That is an unacceptable risk to Chugach.

There can be little question but that Chugach will suffer irreparable harm if the Confidential Chugach Documents are released to the public. The Black Book and the April 2006 Memo both contain attorney-client and work product privileged information. This information is highly sensitive and consists of strategic analyses regarding Chugach's labor negotiations. Further, Chugach is contractually required to keep the UMS Studies confidential and disclosure of the UMS Studies would result in an irrevocable breach of that agreement damaging Chugach's credibility and ability to work with an important contractual partner.

2. Defendants Are Adequately Protected.

The only possible harm to defendants resulting from the grant of injunctive relief to defendants is their inability to use Confidential Chugach Documents for their own purposes. Because defendants have no ownership interest in the information, and because the use of such information would constitute a breach of Kreig's duties as a former Chugach directors, such "harm" should be disregarded.

3. Chugach Has Raised Serious and Substantial Questions Going to the Merits of the Case.

Chugach has shown that it is entitled to possession of the Confidential Chugach Documents and any other corporate books and records in the possession of defendants,

1 and that defendants have no interest in the retention of such information. In addition,
2 defendants agreed, pursuant to Chugach Board Policy 128, Confidentiality, that Chugach
3 could seek equitable relief to prevent of restrain any disclosure, breach, or threatened
4 breach of the policy, including the issuance of a temporary restraining order and
5 preliminary injunction.

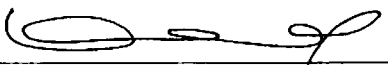
6 CONCLUSION

7 For the foregoing reasons, Chugach respectfully requests that he court grant the
8 following injunctive relief:

- 9
- 10 1. That defendants be ordered to cease and desist from in any manner
11 releasing, distributing or disclosing any Confidential Chugach Documents without the
12 express authorization to do so by Chugach's Board of Directors, acting as such;
- 13 2. That defendants be ordered to immediately return to Chugach all
14 Confidential Chugach Documents obtained during Kreig's tenure as a Chugach director
15 or otherwise, through any means and in whatever form or media, including all copies,
16 excerpts and summaries of same, to Chugach;
- 17 3. That defendants be ordered to identify in writing all individuals or entities
18 to whom defendants have provided copies, excerpts or summaries of any Confidential
19 Chugach Documents in their possession now or at any time, and to whom defendants
20 have disclosed any information contained in the same; and
- 21 4. That Kreig be ordered to comply with all aspects of Chugach Board Policy
22 128.
- 23
24
25

Dated this 20th day of March, 2007.

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

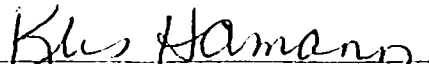
By: 
Robert K. Stewart, Jr.
Alaska Bar No. 8506082

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Certificate of Service

I hereby certify that a true copy
of the above was hand delivered on the
20th day of March, 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