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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 Case No. 3AN-06-13743 Civil

21 PRELIMINARY INJUNCTION

22 THIS MATTER having come on before the above-entitled Court on plaintiff  
23 Chugach Electric Association, Inc.'s ("Chugach") Motion for Preliminary Injunction, the  
24 Court having conducted hearings on April 20, 2007, and May 11, 2007, and having  
25 reviewed the pleadings pertinent thereto, the files and records contained herein, and being  
otherwise fully apprised in the premises; NOW, WHEREFORE

The Court makes the following findings of fact and conclusions of law and issues  
the following orders:

FINDINGS OF FACT

1           1.     From May 1994 through April 2000, and from July 2005 through April  
2 2006, Ray Kreig was a member of the Chugach Board of Directors (“Board”).

3           2.     From time to time during his tenure as a member of the Chugach Board,  
4 Kreig was given access to, and in some cases copies of, highly confidential and  
5 privileged documents regarding Chugach (“Confidential Chugach Documents”) solely for  
6 the purpose of discharging his duties as a member of the Chugach Board.  
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8           3.     In particular, in his capacity as a member of the Chugach Board, Kreig was  
9 provided with copies of the following Confidential Chugach Documents:

10           a.     On January 18, 2006, Kreig was present at an executive session  
11 Board meeting at which Chugach’s attorneys presented information and strategies for use  
12 in upcoming labor negotiations with the International Brotherhood of Electrical Workers,  
13 Local Union 1547 (“IBEW”). At that executive session, Kreig received a numbered  
14 binder containing a hard copy of the information presented in executive session (the  
15 “Black Book”). The Black Book, prepared by Chugach’s outside labor attorneys,  
16 contains privileged attorney work product, attorney-client communications and  
17 proprietary information owned by Chugach.  
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19           b.     On April 16, 2006, Kreig distributed a memo to the Chugach Board  
20 discussing proposed alternatives for negotiating with the IBEW (the “April 2006  
21 Memo”), which included a summary of the findings contained in, and excerpts from, the  
22 Black Book. The April 2006 Memo constitutes a privileged attorney-client  
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communication and consists of proprietary information owned by Chugach.

1           c.       During the period of 1995 through 1997, Kreig received copies of  
2 studies prepared for Chugach by UMS Group, Inc. ("UMS") (the "UMS Studies"). The  
3 UMS Studies were created pursuant to contracts between UMS and Chugach that  
4 required Chugach to treat all project information as confidential and not to be distributed  
5 beyond Chugach's managers and employees without prior written permission from UMS.  
6 The UMS Studies contain express confidentiality legends. Kreig was aware of that  
7 requirement and was so advised on numerous occasions. Kreig is also aware that UMS  
8 has refused to consent to the distribution of the UMS Studies.  
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11           4.       At the time Kreig went off of the Chugach Board in 2000, the version of  
12 Chugach Board Policy 128, Confidentiality then in effect provided that only the full  
13 Chugach Board, acting in its official capacity, and the Chugach CEO had the authority to  
14 waive the confidentiality of or to authorize the release of confidential information and  
15 documents. Chugach Board Policy 128 also authorizes Chugach to seek equitable relief  
16 to prevent or retrain any disclosure, breach, or threatened breach of the policy, including  
17 the issuance of a preliminary and permanent injunction.  
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19           5.       Following Kreig's departure from the Chugach Board in April 2006,  
20 Chugach's Board Chairman Jeff Lipscomb sent a letter to Kreig demanding that he return  
21 all Confidential Chugach Documents in his possession and delete those maintained in his  
22 possession or under his control in an electronic format.  
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24           6.       When Kreig did not respond to that letter, Chugach's General Counsel  
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1 called Kreig to inquire whether he planned to comply with those requests. Kreig refused  
2 to agree to comply with Chugach's written demands.

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

7 8. On December 6, 2006, Kreig and Chugach Consumers improperly  
8 disclosed copies of the Black Book, the UMS Studies and other Confidential Chugach  
9 Documents when they filed those documents with the Regulatory Commission of Alaska  
10 ("RCA") and in the Superior Court for the State of Alaska, without the permission of  
11 Chugach's Board of Directors.  
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13 9. Kreig has also improperly disclosed copies of the Black Book, the UMS  
14 Studies and other Confidential Chugach Documents to Ken Jacobus, Toby White, and  
15 Lee Ann Kreig.  
16

17 10. Kreig has also admitted he has exposed the Confidential Chugach  
18 Documents to potential disclosure to numerous secretaries, janitors, plant care attendants,  
19 visitors, messengers, casual employees and consultants.  
20

21 CONCLUSIONS OF LAW

22 1. The Chugach corporate books and records, including the Confidential  
23 Chugach Documents, in defendants' possession are the property of Chugach and not the  
24 property of its directors, officers or shareholders. Directors do not, by virtue of their  
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office, hold or possess title to or interest in the property of the corporation.

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2. Because former directors of a corporation or cooperative have no ownership interest in corporate records, they have a common law duty to return such records to the corporation. It is the duty of retiring officers to turn the custody and possession of corporate books and records over to either the corporation or to their successors in office.

3. The use of corporate records and information for one's own purposes is a breach of the fiduciary duty of loyalty owed by a director to the corporation. That duty of loyalty survives the expiration of a director's tenure on a corporate board of directors.

4. Even where the motives of a former director may be to advance the public interest, the interest of the cooperative's members or directly or indirectly the public interest through court process or the RCA, such motives do not excuse retention of corporate records and information or the dissemination of such corporate records and information because there are other appropriate, lawful ways to accomplish such objectives.

5. A corporation, such as Chugach, is entitled to return of such confidential corporate records and information from a former director through the injunctive process or other appropriate remedy. Injunctive relief in the form of a mandamus order is the proper remedy to compel delivery of corporate records by former officers or directors who refuse to return such materials.

6. Where the documents at issue are confidential, whether as attorney-client

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communications or attorney work product, trade secrets, information belonging to third persons which the corporation is required to keep confidential, or information discussed in executive session, courts have expressly stated that the corporation is entitled to return of such information. As the United States Supreme Court noted:

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

*Carpenter v. U.S.*, 484 U.S. 19, 26 (1987).

7. A corporation is entitled to prevent a former director from reviewing attorney-client and work product privileged records created during the director's term in office.

8. The power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors.

9. Based upon the uncontroverted factual findings set forth above and the court's conclusion that the law protects the documents and records that Chugach has demonstrated are confidential either because they are attorney-client privileged, attorney work product, proprietary, confidential by contract with UMS, or contain information that would be presented in executive session, Chugach has demonstrated under both the higher and lower standards that it has been harmed, that it risks irreparable injury.

10. Defendants, including Kreig, can be protected in the face of issuance of this injunction and will not suffer substantial injury.

11. Chugach has shown that its claim is not frivolous or without merit. In fact,  
1 Chugach has shown that there is a serious and substantial question, and even moreover,  
2 that it is likely to prevail on the merits.

3 12. To the extent defendants Kreig and Chugach Consumers have retained and  
4 disseminated the Confidential Chugach Documents, which are protected from disclosure  
5 and which are to be strictly maintained in confidence, constitutes irreparable harm to  
6 Chugach.  
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8 ORDER

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10 BASED UPON THE FOREGOING, IT IS HEREBY ORDERED that Chugach's  
11 Motion for Preliminary Injunction is granted, and

12 IT IS FURTHER ORDER as follows:

13 1. Defendants, and each of them, shall cease and desist from in any manner  
14 releasing, disseminating or disclosing any Confidential Chugach Documents as defined in  
15 the Motion for Preliminary Injunction without the express authorization to do so by  
16 Chugach's Board of Directors, acting as such;  
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18 2. Defendants, and each of them, shall immediately return to Chugach by the  
19 close of business on Friday, April 20, 2007, the Black Book, the April 16 Memo and the  
20 UMS Studies, including all copies, excerpts and summaries of same, excepting only that  
21 Kenneth Jacobus may retain a single copy of the Black Book, the April 16 Memo and the  
22 UMS Studies solely for the purpose of litigating, and until such time as the RCA has  
23 ruled on, the pending motion which Chugach has filed with the RCA seeking the return  
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1 of confidential documents. Mr. Jacobus shall not otherwise discuss or disseminate such  
2 documents. If the RCA grants Chugach's motion seeking the return of confidential  
3 documents, then Mr. Jacobus shall immediately return to Chugach the single copies of  
4 the Black Book, the April 16 Memo and the UMS Studies in his possession.

5 3. Before the close of business on May 11, 2007, the parties shall cause the  
6 two file cabinets, each containing five drawers, and the eight banker's boxes of  
7 documents which contain Confidential Chugach Documents in Kreig's possession to be  
8 moved to a mutually agreeable secure, neutral location which can be accessed only  
9 through joint consent and presence of counsel for Chugach and counsel for defendants.  
10 Or their designees. The parties shall thereafter promptly review those files and banker's  
11 boxes and identify all documents which are a) clearly marked as attorney-client, attorney  
12 work product, confidential or submitted in executive session, or b) which a reasonable  
13 person could conclude are confidential by looking at the face or contents of the  
14 document. Upon the completion of that review, all such documents shall be promptly  
15 returned to Chugach. Defendants have represented that the two file cabinets and eight  
16 banker's boxes contain all documents obtained during Kreig's tenure as a Chugach  
17 director or otherwise, through any means and in whatever form or media, including all  
18 copies, excerpts and summaries of same, which might be characterized as Confidential  
19 Chugach Documents. Defendants, and each of them, shall further certify that all  
20 electronic versions of all such documents which are not otherwise returned to Chugach  
21 (such as those residing on computer hard drives, portable storage drives and devices)  
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1 have been irrevocably destroyed. If after May 11 4, 2007, defendants, or any of them,  
2 discover any Confidential Chugach Documents which have been inadvertently  
3 overlooked, they will immediately return such documents to Chugach.

4 4. While conducting the review described in Paragraph 3, the parties shall  
5 prepare a list of all Chugach documents obtained during Kreig's tenure as a Chugach  
6 director or otherwise which are a) clearly marked as attorney-client, attorney work  
7 product, confidential or submitted in executive session, or b) a reasonable person could  
8 conclude are confidential by looking at the face or contents of the document, but which  
9 defendants contend are not confidential. The list shall identify each such document by  
10 name, nature, date, author, recipient and state the reasons why defendants contend the  
11 document is not confidential. Upon completion, the list shall be filed with the Court.  
12 The Court, or a master appointed by the Court, will resolve any such disputes.

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14 5. All Confidential Chugach Documents which defendants filed with this  
15 Court shall be immediately returned to Chugach.

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17 6. Chugach shall preserve all documents returned to it by defendants until  
18 further order of the Court.

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

24  
25 8. 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

Certificate of Service

I hereby certify that a true copy  
of the above was hand delivered on the  
5<sup>th</sup> day of June, 2007, to:

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