UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LIBERTY POWER CORP., LLC Plaintiff, v. STUART KATZ, STUART A. KATZ, INC. AND FOUNDATION ENERGY SERVICES, LLC Defendants.	**CIV. ACTION NO.: 10-1938 (NAG) (CLP)** **PLAINTIFF'S SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION**

I. PRELIMINARY STATEMENT

Pursuant to the Court's order dated August 27, 2010, Plaintiff Liberty Power Corp., LLC ("Liberty Power") submits this supplemental brief in support of its motion for preliminary injunction. Since its original filing, Liberty Power has learned that Defendants Stuart Katz ("Katz"), Stuart A. Katz, Inc. and Foundation Energy Services, LLC (collectively "Defendants") have engaged in a pattern and practice of attempting to de-enroll customers who have valid and ongoing contracts with power providers. In light of all of the evidence of Defendants' willful trade secret misappropriation and Defendants' practice of de-enrolling customers, Liberty Power respectfully requests that the Court (1) grant all of the relief requested in Liberty Power's opening memorandum of law and (2) order that Defendants be precluded from contacting any of the customers on the lists that they stole from Liberty Power.

II. LEGAL ARGUMENT

Courts routinely grant injunctions in trade secret cases that go beyond the mere cessation of use of the misappropriated information. Indeed, because a defendant gains an unfair advantage through its acts of misappropriation, it is within the Court's power to level the playing field by limiting a defendant's future business activities. In the cases of misappropriation of customer information, that remedy typically involves an order

prohibiting the defendant from contacting the customers at issue even without using confidential information.

For example, in *Leibowitz v. Aternity, Inc.*, the Eastern District of New York determined that "Leibowitz is either in possession of or has knowledge of various forms of Aternity confidential information and trade secrets." *Leibowitz v. Aternity, Inc.*, 2010 U.S. Dist. LEXIS 70844 * 51 (E.D.N.Y. July 14, 2010). The evidence demonstrated that Leibowitz was entrusted with confidential information about Aternity products and product development, and had access to confidential customer contact and pricing information as well as Aternity's marketing plans. *Id.* Much like the Defendants did in this case via Keith Hernandez ("Hernandez") and Yamil Moya, Leibowitz e-mailed various confidential documents and trade secrets to his personal address. *Id.*

The court concluded that Leibowitz would inevitably either disclose or make use of this information when competing with Aternity. *Id.*, at *52 citing *Marcam Corp. v. Orchard*, 885 F. Supp. 294, 297 (D.Mass. 1995) (finding irreparable harm, despite ex-employee's promise not to disclose confidential information, because it was "difficult to conceive how all of the information stored in [the employee's] memory can be set aside as he applies himself to a competitor's business and its products."). The court further found that there was no serious question that the disclosure or use of this information would give Aternity's competitor an unfair advantage and that Aternity would be irreparably harmed if Leibowitz used this information to gain an advantage in soliciting Aternity customers or to disparage the company and its officers. *Id.* Based on these findings, the court ordered that Leibowitz not only ceases use of all of the confidential information that he stole, but also that:

> Leibowitz is enjoined from soliciting any business from any existing or prospective customers of Aternity in which such solicitation is competitive with any services or product offered by Aternity, for a period of one year, commencing on July 16, 2010 and ending on July 15, 2011.

Id., at *65.

Similarly, in *Innoviant Pharm., Inc. v. Morganstern*, the Northern District of New York ordered that a defendant be precluded from contacting any of the customers on the lists that he misappropriated. That court found that "Innoviant is [] likely to succeed in establishing that Morganstern engaged in unfair competition by misappropriating certain Innoviant documents developed through its expense and labors, and using them to the benefit of himself and his competitor following termination of the employment relationship. *Innoviant Pharm., Inc. v. Morganstern*, 390 F. Supp. 2d 179, 195 (N.D.N.Y. 2005). In turn, the court "ordered that defendant Max Morganstern hereby is enjoined and restrained from contacting the 114 referral sources set forth in a list attached to the supplemental declaration of Joseph J. McCann, dated April 25, 2005." *Id.*, at 196.

Courts outside of New York order similar injunctions preventing defendants from not only continued use of misappropriated confidential information, but also further contact from the customers at issue whether using confidential information or not. In *Alturnamats, Inc. v. Harry*, a Pennsylvania district court found that Alturnamats' customer list was a protectable trade secret given the fact that it was the product of substantial effort and money; was regarded by Alturnamats as highly confidential; significant efforts were made to protect its secrecy; the list itself as well as information peculiar to each dealer was not easily accessible in the public domain; and its acquisition provided a competitive advantage to Signature in the portable ground protection industry. *Alturnamats, Inc. v. Harry*, 2008 U.S. Dist. LEXIS 71446 *32-*33 (W.D. Pa. Sept. 16, 2008). The court further found that Alturnamats has suffered and will continue to suffer irreparable harm if injunctive relief is not granted:

> It is not the initial breach of a covenant which necessarily establishes the existence of irreparable harm but rather the threat of the unbridled continuation of the violation and the resultant incalculable damage to the former employer's business that constitutes the justification for equitable intervention.

Id., at *33. Accordingly, the court ordered that, in addition to returning all misappropriated information, "Signature and Harry are enjoined and restrained from soliciting business from those customers of Alturnamats that appeared on the customer lists misappropriated by Harry for a period of one (1) year from the date of this opinion." *Id.*, at *44.

Here, as set forth in Liberty Power's opening brief, Defendants have misappropriated detailed proprietary information for more than 4,300 Liberty Power customers including:

- specific contact information for individual contacts at its customers;
- customers' order history information;
- the rates paid by its customers;
- product type information, e.g. whether the customer has previously purchased a fixed price, variable price or index price product, or purchased other complex product structures;
- customers' upcoming renewal dates; and
- data regarding the customers' annual electricity consumption.

(collectively the "Proprietary Information"). Defendants have gained a massive, unfair advantage by having this information, which advantage can only be offset if Defendants are precluded from contacting these customers to ensure that Defendants do not continue to benefit from their unlawful acts.

In addition, any claim by Defendants that they only used the stolen Proprietary Information to re-sign customers with Liberty Power is specious. Putting aside the fact that re-signing customers with Liberty Power caused irreparable damage to Liberty Power's relationships with the other sales channels who were responsible for the customers that Defendants stole (as set forth in extensive detail in Liberty Power's opening papers), Hernandez has testified that Katz told him he wanted to take Liberty

Power customers to other power providers. *See* Declaration of Keith Hernandez dated April 29, 2010, ¶ 13.

In addition, Liberty Power has recently learned that Defendants' pattern and practice is to steal customers whose contracts are not expiring by convincing the customers that they will not have to pay an early termination fee. *See* Declaration of Harris Rosen dated September 13, 2010, Exh. A. Defendants' disregard for the sanctity of valid, subsisting customer contracts only provides further credibility to Katz's statement that he intends to take the customers about which Defendants obtained Proprietary Information to other power providers. Based on all of the evidence set forth in this brief and Liberty Power's opening brief, then, this Court should enjoin Defendants from contacting any of the more than 4,300 customers on the lists that Defendants stole. *Leibowitz v. Aternity, Inc.*, 2010 U.S. Dist. LEXIS 70844 at * 65; *Innoviant Pharm., Inc. v. Morganstern*, 390 F. Supp. at 195-196; *Alturnamats, Inc. v. Harry*, 2008 U.S. Dist. LEXIS 71446 at *44.

III. CONCLUSION

Based upon the foregoing, Liberty Power respectfully requests that the Court enjoin Defendants from further acts of trade secret misappropriation and unfair competition, order Defendants to immediately return all Proprietary Information in their possession, custody or control to Liberty Power, and order that Defendants be prohibited from contacting any of the customers on the lists that they misappropriated from Liberty Power.

Dated: September 13, 2010

Respectfully submitted,

David Saenz
Heidi Garfield
Julie Bookbinder
GREENBERG TRAURIG LLP
200 Park Avenue
New York, NY 10166
Telephone: 212-801-6930
Facsimile: 212-801-6400

Attorneys for Plaintiff Liberty Power Corp., LLC