SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PART 54

Index Number : 650459/2011

H.D. SMITH WHOLESALE DRUG CO.

vs.

MITTELMARK, RICHARD

SEQUENCE NUMBER : 001

PRELIMINARY INJUNCTION

INDEX NO. ______

MOTION DATE 08/20/11

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	3-6, 8
Answering Affidavits — Exhibits	11-14, 20
Replying Affidavits	15, 19

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/18/11

JUSTICE SHIRLEY WERNER KORNREICH

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

--X

H.D. SMITH WHOLESALE DRUG CO.,

Plaintiff,

-against-

RICHARD MITTELMARK,

Defendant.

--X

Index No.: 650459/2011

DECISION and ORDER

HON. SHIRLEY WERNER KORNREICH, J.:

This action arises out of the alleged breach of non-compete and confidentiality provisions of an employment agreement between plaintiff/employer H.D. Smith Wholesale Drug Co. (HD Smith) and defendant/employee Richard Mittelmark. HD Smith brought a claim against Mittelmark for breach of contract and sought a preliminary injunction and an accounting. On February 22, 2011, plaintiff moved by order to show cause for a temporary restraining order and a preliminary injunction barring Mittelmark from: "a) contacting, soliciting and doing business with customers of H.D. Smith in breach of the noncompete provision in his employment agreement; and b) disclosing any confidential information, including but not limited to information about the H.D. Smith pricing structure, in breach of the confidentiality provision in the employment agreement"–substantially the same relief as is sought in its complaint. This court granted the order and imposed a TRO ordering that Mittelmark "be restrained and enjoined from contacting, soliciting or doing business with plaintiff's existing customers who he had not brought with him to H.D. Smith and from divulging or using any confidential information, including but not limited to information about the H.D. Smith proprietary pricing structure." At oral argument the court lifted the TRO and reserved, until now, on the question of the preliminary injunction. Tr. 13.

Background

Plaintiff's Factual Basis for the Preliminary Injunction

On March 20, 2006, HD Smith, a wholesale seller of pharmaceuticals, entered into an employment agreement (Agreement) with Mittelmark.[1] Bergman Aff., ¶ 3. Mittelmark was given the title of "Territory Manager," and was to work as a salesperson in the New York City area. *Id.*, ¶ 4, 9, Ex. 2, § 3(b), (d). The first paragraph of the Agreement states that: "[d]uring the term of employment set forth in Paragraph 2 of this Agreement, the Company hereby agrees to employ the Employee, and the Employee agrees to serve, an [sic] employee of the company on the terms and conditions contained herein." *Id.* Under Paragraph 2 the duration of his employment under the contract was to be for a period of three years immediately following execution of the Agreement, "unless further extended or sooner terminated as hereinafter provided." *Id.*

Mittelmark voluntarily resigned on December 31, 2010. Bergman Aff., ¶ 9. Allegedly, he then immediately commenced working for Alliant RX, LLC (Alliant), a representative of AmeriSource Bergen Corp., which plaintiff claims is "a direct competitor of H.D. Smith in the drug wholesaling business." *Id.*, ¶ 10. Plaintiff alleges that since joining Alliant, Mittelmark has "embarked on a course of contacting customers of H.D. Smith and soliciting business from them using confidential pricing information he obtained from H.D. Smith." *Id.*, ¶ 11. This confidential pricing information consisted of a "matrix" or "graph that ties the volume of goods a customer purchases to the discounts a customer receives on its purchases." Dominguez Aff., ¶ 8. In

[1] Mittelmark attests, and HD Smith does not appear to deny, that the Agreement was drafted entirely by plaintiff and that he did not make any changes to it prior to signing. Mittelmark Aff. ¶ 5.

essence, plaintiff argues that Mittelmark drew away its customers by offering prices lower than those he knew HD Smith to be offering to them. Plaintiff claims that those "[c]ustomers then confronted H.D. Smith with the lower prices Mittelmark offered and forced H.D. Smith to lower its own prices even further in order to keep its customers." Bergman Aff., ¶ 5. Indeed, plaintiff alleges that the customers "leveraged that information to force H.D. Smith to narrow its margins to the point where we have become unprofitable with those customers just to stay in business." Dominguez Aff., ¶ 15.

Based on this conduct by Mittelmark, plaintiff identifies three distinct categories of wrongdoing which allegedly constitute violations of express provisions of the Agreement. The first is Mittelmark's alleged solicitation of its customers. Paragraph 6 of the Agreement states that

> In the even [sic] of the termination of employment, whether voluntary or involuntary, Employee agrees that he will not for a period of (one) year from the effective date of termination of employment, solicit, divulge or furnish any information or business, either directly or indirectly, to any entity that was a customer of H.D. Smith during the term of the Employee's employment.

Bergman Aff., Ex. B. The second consists of his having "used and disclosed confidential H.D. Smith pricing information in order to undercut the H.D. Smith pricing structure and solicit those customers for himself." *Id.*, ¶ 4. Paragraph 7 of the Agreement holds that:

> During the course of this Agreement, the Employee may develop or learn of the Company's confidential information, or of confidential information entrusted to the Company by other persons, corporations or entities. The confidential information of the Company includes proprietary matters not generally known outside the Company, including but not limited to, information relating to the financial activities of the Company, financial performance and strategic plans of the Company, the people and organizations with whom the Company has business relationships and those relationships, trading history and fee structures. The Employee agrees not to disclose any confidential information of the Company or

> entrusted to the Company by others, or make use of it, except on behalf of the Company, whether or not such information was produced by the Employee's efforts, unless and until such information has become known to the public generally (other than as a result of unauthorized disclosure by the Employee), or the Employee is required to do so by a Court or other body with jurisdiction to required [sic] it to do so. The provisions of this Paragraph 7 shall survive the termination or expiration of this Agreement.

Third, plaintiff alleges that Mittelmark's immediate acceptance of employment with Alliant, a direct competitor, violated Section 6's requirement that: "[f]or a period of one year, the Employee agrees not to become any [sic] employee, or consultant or independent contractor for any entity competing with H.D. Smith in New York or New Jersey."

As a result of these actions, plaintiff asserts that "H.D. Smith has already lost revenue and business will [sic] continue to lose more money and business unless Mittelmark is restrained and enjoined from contacting customers and divulging confidential pricing information." Bergman Aff., ¶ 6. In support, plaintiff has submitted a chart indicating its estimates for the decline in the value of accounts with the customers whom it alleges Mittelmark solicited after his resignation. *Id.*, Ex. 3. It appears to show that the estimated monthly losses directly attributable to Mittelmark's actions are $11,651.00. *Id.* Plaintiff insists that it "will suffer irreparable harm if Mittelmark continues to contact and solicit business from its customers and to use confidential, proprietary information to undercut H.D. Smith's prices." *Id.*, ¶ 22. It adds that "[m]oney damages will not adequately compensate H.D. Smith for the injury to its business relationships, reputation and goodwill, which H.D. Smith has spent years developing, with a substantial expenditure of time and money." *Id.*, ¶24.

Defendant's Response

A major point of contention in this action is whether or not the terms of the Agreement governed the conduct of the parties in the period following Mittelmark's resignation. Defendant commenced his employment relationship with HD Smith in March 2001. Mittelmark Aff., ¶ 4. He began in the position of "sales representative" and was employed on an at-will basis. *Id.* When Mittelmark informed HD Smith in early 2006 that he had received attractive offers from other pharmaceutical wholesalers, he was presented with the Agreement. *Id.*, ¶ 4-5. As part of the Agreement, his title was changed from "sales representative" to "Territory Manager." *Id.*, ¶ 5.

Mittelmark claims that shortly after the three-year term of the Agreement expired, he inquired to Robert Gallagher, the firm's Director of Sales for New York, as to whether or not the Agreement would be extended or if he would be given a new contract. *Id.*, ¶ 7. He never received a response from Gallagher or any other HD Smith employee. *Id.* Instead, he attests that "[HD] Smith demoted [him] from Territory Manager to [his] former position as sales representative and took away a large part of [his] sales territory." *Id.*, ¶ 8. Over the following year, Mittelmark's relationship with his employer deteriorated, and in December of 2010 he notified HD Smith that he would be terminating the relationship and then commenced employment with Alliant in January of 2011. *Id.*, ¶ 9.

Defendant claims, and plaintiff does not seem to dispute, that the term of the Agreement was never extended through an express written agreement by the parties. *Id.*, ¶ 10. Mittelmark argues that the Agreement thus cannot have been extended by virtue of Paragraph 9 which states that: "[f]or the purpose of this Agreement, notices, demands and all other communications provided for in this Agreement shall be in writing..." Bergman Aff., Ex. 2. And, even if it could be extended orally, he asserts that his superiors rebuffed his attempts to discuss any extension. He, thus, argues that the non-compete provision is inapplicable to any conduct subsequent to the end of the one year period following the termination of the Agreement, which he alleges occurred in March of 2009. Mittelmark Aff., ¶¶ 10-17.

As for the confidentiality provision, Mittelmark accepts that it is of infinite duration. *Id.*, ¶ 18. However, he denies taking any confidential information with him when he left HD Smith and further denies using any of its pricing information in his subsequent work with Alliant. *Id.*, ¶¶ 19-20. Instead, he states that:

> In my sales call [sic] I use the pricing structure of my employer Alliant RX which it developed without any input from me. I use Alliant RX pricing and only that pricing in my sales calls. I have no authority to vary the pricing offered by Alliant RX to lure away Smith customers.

Id., ¶ 20. The affidavit of Alliant's president, Andrew Gellman, supports this assertion. He avers that

> Mr. Mittelmark has had no involvement or input in setting pricing for the programs and products offered through the GPO, by Alliant and/or Mr. Mittelmark. Mr. Mittelmark has no authority to set prices or lower prices offered to customers.

Gellman Aff., ¶¶ 6-7.

Discussion

A preliminary injunction is a "drastic" remedy. *1234 Broadway LLC v West Side SRO Law Project*, 86 AD3d 18 (1st Dept 2011). It "substantially limits a defendant's rights and is thus an extraordinary provisional remedy requiring a special showing." *Id.*, 86 AD3d, at 23. "Accordingly, a preliminary injunction will only be granted when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tipping in favor of the moving party." *Id.*; *Counsel of City of New York v Guiliani*, 248 AD2d 1, 4 (1st Dept 1998) *lv to appeal dismissed in* *part, denied in part* 92 NY2d 938 (1998). "Proof establishing these elements must be by affidavit and other competent proof, with evidentiary detail. If key facts are in dispute, the relief will be denied." *Faberge Intl. v Di Pino*, 109 AD2d 235, 240 (1st Dept 1985). *See 1234 Broadway*, 86 AD3d, at 23.

> With respect to likelihood of success on the merits, the threshold inquiry is whether the proponent has tendered sufficient evidence demonstrating ultimate success in the underlying action. While the proponent of a preliminary injunction need not tender conclusive proof beyond any factual dispute establishing ultimate success in the underlying action, "[a] party seeking the drastic remedy of a preliminary injunction must [nevertheless] establish a clear right to that relief under the law and the undisputed facts upon the moving papers."

Id. (internal citations omitted). "Conclusory statements lacking factual evidentiary detail warrant denial of a motion seeking a preliminary injunction." *Id.* As for the element of irreparable harm, the key determinant is whether or not that harm may be compensated by money damages if the motion is not granted. *WHG CS, LLC v LSREF Summer REO Trust 2009*, 79 AD3d 629 (1st Dept 2010); *EdCia Corp. v McCormack*, 44 AD3d 991 (2nd Dept 2007) ("[e]conomic loss, which is compensable by money damages, does not constitute irreparable harm").

Likelihood of Success on the Merits

Taking plaintiff's allegations in reverse order, the first issue is Mittlemark's alleged disclosure of HD Smith's purportedly confidential pricing matrix. Paragraph 7 of the Agreement expressly bars Mittelmark from "disclos[ing]" or "mak[ing] use of" certain categories of confidential information, one of which includes "fee structures," and states that the duty will "survive the termination or expiration of this Agreement." Mittelmark does not contest that he is under a continuing duty not to divulge this information to his new employer or to prospective customers. To the extent that he has and doing so has damaged HD Smith, it would almost certainly be entitled to ultimate relief.

However, it is far from clear based on the evidence submitted that Mittelmark has violated his duty not to reveal the pricing matrix. Mittelmark unequivocally denies that he took any records containing HD Smith's pricing matrix or that he revealed any such information to Alliant for use in formulating its own pricing matrix. He further denies that he is able to use any knowledge of HD Smith's pricing matrix in his work for Alliant since he has no authority to offer prices that deviate from its pricing matrix. The affidavit of Alliant's president supports these assertions.

Also uncertain is the merit of plaintiff's claim based on Mittelmark's alleged solicitation of HD Smith customers in violation of the Agreement. The parties do not dispute that Paragraph 6(a) of the Agreement holds that "for a period of (one) year from the effective date of termination of employment" he was barred from soliciting any persons or entities which were customers of HD Smith "during the term of the Employee's employment." Nor does Mittelmark expressly deny that, subsequent to leaving HD Smith, he has solicited business from companies who were customers of HD Smith while he was employed there. *See* Mittelmark Aff., ¶¶ 10-22.

Instead, the crucial question is when the one year non-compete period commenced. Plaintiff argues that the contract was extended beyond its three year term and that the period began on December 31, 2010–the day he terminated his employment relationship. Pl. Mem. of Law, P. 3-4. If this is the case, then his solicitation of former customers over the past year would have been a violation of the non-compete provision. On the other hand, defendant argues that the contract was not extended and the non-compete period began the day the Agreement terminated–March 20, 2009. If he is correct, any solicitation of former clients on behalf of Alliant would have occurred almost a year after the expiration of the non-compete period.

Plaintiff urges that even if the Agreement's language calls for the one-year period to begin on the third anniversary of the execution of the Agreement, it can be inferred from the conduct of the parties that Mittelmark and HD Smith impliedly agreed to maintain their relationship on the same terms such that a one year non-compete period commenced upon the final termination of his employment. According to plaintiff, "[u]nder New York law, the continuation of employment after the expiration of a fixed term in an employment contract creates a presumption that the employee is serving under a new contract having the same terms and conditions as the original one, even though the parties have not expressly entered into a new agreement.[2] Pl. Rep. Mem. of Law, p. 3. This is accurate. *Borne Chemical Co., Inc. v Dictrow*, 85 AD2d 646, 648 (2nd Dept 1981); *Martin v Campanaro*, 156 F2d 127 (2nd Cir. 1946) (under New York law, "[w]hen an agreement expires by its terms, if, without more, the parties continue to perform as theretofore, an implication arises that they have mutually assented to a new contract containing the same provisions as the old") *cert denied* 329 US 759 (1946). *See also, North Am. Hyperbaric Ctr. v City of New York*, 198 AD2d 148 (1st Dept 1993).

Nonetheless, "[t]he presumption is one of fact and may be rebutted." *Borne Chemical Co., Inc.*, at 648. Here, the parties dispute whether or not, after March 20, 2009, Mittelmark continued on in the same position and carried out the same duties as provided for in the Agreement, or if he was demoted back to his original position as a sales representative with a commensurately smaller sales territory. His assertion that his explicit entreaties to extend the

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[2] Defendant's counterargument that the Agreement could not have been extended without written notice is not on point. Plaintiff's assertion is not that the Agreement itself was extended, but that a new contract was formed, albeit on identical terms.

term of the Agreement were rebuffed further contradicts any presumption that the plaintiff intended to do so. Thus, while it may well be that upon completion of discovery it will be found that, by the conduct of the parties, a new contract was formed on the same terms as the Agreement, that cannot be determined now based on undisputed facts.

Finally, as in all actions seeking the specific enforcement of a non-compete provision in an employment contract, ultimately it will have to be determined whether or not the restraint is reasonable. This is far from certain since such provisions are strongly disfavored by New York courts. *Price Paper and Twine Co., supra* ("[r]egardless of the existence of a restrictive covenant between an employee and a former employer, courts disfavor any action which sanctions the loss of a person's livelihood") citing *Reed, Roberts Assoc. v Strauman*, 40 NY2d 303 (1976); *JAD Corp. of Am. v Lewis*, 305 AD2d 545 (2nd Dept 2003) citing *Columbia Ribbon & Carbon Mfg. Co., Inc. v A-1-A Corp.*, 42 NY2d 496 (1977) (recognizing the "powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood"). Under New York law, such a restraint "is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public ... A violation of any prong renders the covenant invalid." *BDO Seidman v Hirshberg*, 93 NY2d 382, 388-389 (1999). In applying this test, courts are to "[focus] on the particular facts and circumstances giving context to the agreement." *Id.* Morever, the test is to be applied strictly to limit the effect of broad restraints on competition. *Id.*

The "legitimate interest[s] of the employer" are limited "to the protection against misappropriation of the employer's trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary." *Id.*, at 389.

The latter interest generally arises in the context of employees who work so closely with the client and who are so central to a transaction that the client's primary loyalty will be to the employee, not the employer, even though the establishment of the relationship was only made possible by virtue of the employee's position with the employer. *BDO Seidman*, at 392-393. A provision barring such an employee from soliciting former clients for a limited period following termination of his employment gives the former employer a legitimate opportunity to reestablish the relationship between the client and a current employee. *Id.* at 393. Such considerations only apply to limited classes of employees–employees found to have such unique skills are generally members of the "learned professions" whose duties include giving substantial amounts of specialized advice to particular clients. *See Reed, Roberts Assoc, supra*; *Karpinski v Ingrasci*, 28 NY2d 45 (1971); *BDO Seidman, supra.* However, as "our economy is premised on the competition engendered by the uninhibited flow of services, talent and ideas ... no restrictions should fetter an employee's right to apply to his own best advantage the skills and knowledge acquired by the overall experience of his previous employment." *Reed, Roberts Assoc.*, at 307. Thus, restrictive covenants that merely serve to prevent an employee from using skills developed in past employment are strongly disfavored and rarely enforced.

HD Smith has not demonstrated to the court's satisfaction that either legitimate interest is in any imminent danger. The prices a company charges its customers, particularly for fungible goods, generally do not constitute trade secrets or proprietary information. *Apollo Stationary Co. v Pilmar*, 11 Misc2d 263 (Sup Court, NY County, 1958) citing *Peerless Pattern Co. v Pictorial Review Co.*, 147 AD 715 (1st Dept 1911); *Richard M. Krause, Inc. v Gardner*, 99 NYS2d 592 (SUP COURT, NY COUNTY, 1950) ("There is nothing secret in the decision of how much of a mark-up percentage is necessary for a good profit."); *Matter of Belth v Insurance Dept. of State of N.Y.*, 95 Misc2d 18 (SUP COURT, NY COUNTY, 1977). *See Price Paper and Twine Co.*, *supra*; *Briskin v All Seasons Services, Inc.*, 206 AD2d 906 (4th Dept 1994). Though HD Smith may not wish Mittelmark to divulge such information to its customers or competitors, an employee's "'mere knowledge of the intricacies of a business' does not qualify as a trade secret." *Eastman Kodak Co. v Carmosino*, 77 AD3d 1434 (4th Dept 2010); *Catalogue Service of Westchester, Inc. v Henry*, 107 AD2d 783 (2nd Dept 1985).

Nor has plaintiff proffered evidence to show that Mittelmark's skills are "unique or extraordinary." A seller of fungible goods, in particular, is highly unlikely to be so central to its employer's transactions with its customers as to warrant such treatment. In the words of the Court of Appeals:

> That the defendant [salesman of wrapping paper] has profited by the experience which he obtained in the plaintiff's service may be true. To use this acquired skill elsewhere is no legal wrong. Experience, competency and efficiency in selling goods are qualifications which can hardly be so rare as to require the aid of equity to prevent an irreparable loss to an employer who finds himself compelled to substitute one salesman for another. An express negative covenant not to work for another will not, as a rule, be granted save in those exceptional cases where, by reason of the peculiar or extraordinary character of the services a violation of an agreement will cause injury to the employer for which an action at law will afford no adequate remedy.

Clark Paper & Mfg. Co. v Stenacher, 236 NY 312 (1923). *Briskin, supra* (the "fact that plaintiff was a knowledgeable and experienced sales representative does not establish that his skills were unique or that he was irreplaceable"). It appears that in his employment with HD Smith, Mittelmark was sent to offer pharmaceuticals to retail outlets at the fixed prices listed in the pricing matrix. He avers that in his current position with Alliant he is only permitted to offer the prices put forth in Alliant's pricing matrix and is equally constrained from negotiating the terms of sales. Mittelmark Aff., ¶ 20. It, therefore, is unclear to the court what unique or extraordinary skills Mittelmark possesses and uses beyond the broad smile and firm handshake common to all accomplished salesmen.

Finally, even where the employer has legitimate interests to protect, the restraint must be reasonable in terms of duration and geographic area so as not to impose an undue burden on the former employee and unnecessarily restrict the public's right to benefit from unfettered competition. *BDO Seidman*, at 389; *Reed, Roberts Assoc.*, at 307; *Gelder Medical Group v Webber*, 41 NY2d 680 (1977). The Agreement calls for a one year prohibition on Mittelmark becoming an "employee, or consultant or independent contractor for any entity competing with H. D. Smith in New York or New Jersey." When asked at oral argument about the extremely broad geographic scope contemplated by this provision, plaintiff's counsel denied that it sought to enjoin Mittelmark from working in the entirety of both states, but instead stated that the desired geographic scope of the injunction was limited to those parts of New York and New Jersey in which he had originally worked for HD Smith or, at a minimum, New York City. Tr. 6-7. It appears that Mittelmark's original territory encompassed the boroughs of Manhattan and the Bronx. August Letter, dated June 21, 2011, Ex. A. While limited in terms of physical area, these are two of the most populous and commercially developed counties in the nation, and plaintiff has made no showing to justify its argument that allowing Mittelmark to compete in this market, let alone that of the New York metropolitan area (including, apparently, some portion of northern New Jersey) will cause it irreparable harm. *Compare*, *Karpinski*, *supra* (finding reasonable a covenant permanently restricting an oral surgeon from competing in several small, sparselypopulated, rural counties in upstate New York).

Irreparable Injury

Plaintiff has not demonstrated that, in the event this motion is denied, it will suffer an injury which monetary compensation would be insufficient to repair. Its frequent conclusory assertions to that effect are inadequate. *EdCia Corp.*, *supra* ("plaintiff's bare, conclusory allegations were insufficient to satisfy its burden of demonstrating irreparable injury"). On the contrary, the primary injury it alleges it is suffering is sales lost to Alliant by virtue of the disclosure of the pricing matrix, and it appears to have no trouble quantifying these losses. Indeed, in support of its motion it has calculated its purported monthly and yearly damages down to the cent. Bergman Aff., Ex. 3. Furthermore, as Mittelmark possesses no unique skills justifying any loyalty from HD Smith's former clients to him, it should suffer no irreparable losses from him soliciting them on behalf of Alliant. *Frederick Bros. Artists Corp. v Yates*, 271 AD 69 (1st Dept 1946) (failure to show "any individual talent or skill beyond that possessed by any successful salesman or employment agent" prevented a showing of irreparable injury sufficient to warrant injunctive relief).

Balancing the Equities

This is not a situation where the confidential information a former employee is alleged to be disseminating constitutes a secret formula or method vital to the manufacture of the former employer's unique products or specialized knowledge necessary for the provision of its unique services. In such a case, the employee's new employer may profit from the former employer's investment of time and money developing those products or services, and so the failure to enjoin the employee from revealing the information might dissuade the employer from making additional investments in the future–a decision that clearly would be detrimental to consumers. The confidential information at issue here consists merely of the prices plaintiff offers to customers based on the volume of purchases, not information it uses to develop better products or services. Its revelation to a competitor will, at most, facilitate that company's efforts to offer consumers lower prices for common, fungible commodities which it is already selling in the marketplace.

Additionally, when balancing the equities, a court must determine whether "the [purported] irreparable injury to be sustained by the plaintiff is more burdensome to it than the harm caused to defendant[s] through imposition of the injunction." *Price Paper and Twine Co.*, *supra* citing *Polling Transp. Corp. v A & P Tanker Corp.*, 84 AD2d 796 (2nd Dept 1981). Granting the injunction, to the extent requested by plaintiff, might substantially interfere with Mittelmark's ability to make a living in his chosen occupation in the entirety of the nation's largest metropolitan area. Denial, at most, will force plaintiff to lower its prices to a few of its customers. The harm caused defendant by granting the injunctive relief requested clearly outweighs that alleged by plaintiff. Accordingly, it is hereby

ORDERED that plaintiff's motion for a preliminary injunction is denied.

Dated: November 18, 2011

Enter:

J.S.C.