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

PRESENT: York Justice PART 2

E.G.L. Gem Lab Ltd.

INDEX NO. 601890/05

MOTION DATE

- v -

MOTION SEQ. NO. 01

Debbie Azan, et al

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

~~LOUIS B. YORK~~

FILED
AUG 24 2005

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

Dated: 8/12/05

LOUIS B. YORK J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 2

----------X

E.G.L. GEM LAB LTD.,

Plaintiff,

-against- Index No. 601890/05

DEBBIE AZAR and OLEG ZELTSER,

Defendants.

----------X

YORK, J.:

Plaintiff E.G.L. Gem Lab Ltd. (plaintiff or EGL) moves, pursuant to CPLR 6301, for a preliminary injunction enjoining two former employees, defendants Debbie Azar and Oleg Zeltser, from working for a competitor, Gem Experience LLC, d/b/a Gemological Science International (GSI), a company recently formed by plaintiff's former General Manager. Plaintiff also seeks to enjoin defendant Azar from soliciting business from plaintiff's customers or soliciting any of plaintiff's employees to leave their employment, and to enjoin both defendants from disclosing or using confidential information that they acquired about plaintiff's business. Finally, plaintiff asks this court to direct that defendant Azar return her cellular telephone to plaintiff and cause all cellular telephone numbers on the account which had been used at plaintiff to be returned to plaintiff.

EGL brought this motion by order to show cause and sought a temporary restraining order barring defendant Azar from attending the JCK jewelry trade show in Las Vegas, Nevada, which commenced on June 3, 2005. The order to show cause was signed on May 26, 2005. On May 31, 2005, defendants' counsel sought a stay of the temporary restraining order in the Appellate Division. Justice Angela Mazarelli modified the temporary restraining order to provide that

defendant Azar could attend the JCK trade show, but that she was not permitted to solicit any of EGL's customers at the trade show.

FACTUAL ALLEGATIONS

In support of its application for a preliminary injunction, plaintiff submits the moving and reply affirmations of Nachum Krasnianski, its sole owner, director and officer, and Mitch Jakubovic, identified as the new General Manager of EGL. Krasnianski alleges that EGL is in the business of operating a gemological laboratory which identifies gemstones for its customers and provides certificates certifying the identification and quality of gemstones. EGL's customers are primarily manufacturers and retail jewelers, and include some of the largest retail jewelry chains in the United States.

Krasnianski purchased the business in 1986 and, within a year or two, he hired Mark Gershburg as a gemologist. Over the years, Gershburg was given management responsibility, and he ultimately became the General Manager. Gershburg resigned on March 11, 2005. He had incorporated Gem Experience LLC on December 16, 2004, while he was still employed at EGL. The next day, December 17, 2004, he executed a lease for his new venture at 581 Fifth Avenue, just around the corner from EGL's offices. He publically announced that he was commencing business under the trade name GSI in June 2005, and there is no dispute that GSI is a direct competitor of the plaintiff.

Krasnianski contends that the gemological laboratory business is highly competitive, and that success depends on pricing strategy, cost management, marketing strategies, technology, quality of service and relationships built up over the years. He further contends that EGL relies heavily upon its employees, and their responsible use of the confidential business and technical

information entrusted to them, to maintain its competitive advantages. For this reason, in 2004, Gershburg and Krasnianski determined that all of EGL's employees should be required to sign confidentiality agreements.

Paragraph 1 of the Confidentiality Agreement prohibits the unauthorized disclosure of or use of confidential information during employment and for a period of five years thereafter. Confidential information is defined as including the object code and source code to EGL's software; marketing plans and strategies; plans for new product development; technical designs; data dictionaries; information regarding financial status; research and development; anything marked as confidential; and information about EGL's customers. Paragraph 2 requires the employee to devote his or her full time efforts to plaintiff's business, and not to engage in any other business while employed at EGL without written approval of EGL's president. Paragraph 7(b) of the Confidentiality Agreement, entitled "Non-compete Agreement," provides in full:

> (b) **Non-compete Agreement** During the time that I am employed by [EGL] and for a period of one year after my employment with [EGL] terminates, I will not, without the prior written consent of [EGL]:
>
> Solicit any customer or employee of [EGl] to discontinue the customer or employee relationship with [EGL].
>
> I will make every effort to avoid seeking employment with a direct competitor of [EGL] but if necessary, will not disclose company confidential information as cited in section 1 Confidential Information.

Complaint, Exhs. A and B: Confidentiality Agreement at p. 2.

It is undisputed that both Azar and Zeltser were required to sign the Confidentiality Agreement in or about May 2004, that none of the terms were explained to them, and that neither received any additional compensation.

Defendant Azar is a 24-year old high school graduate. She had been employed at EGL since December 2001, and at the time she left, she was EGL's Director of Chair Store Operations with an annual salary of approximately $40,000. Krasnianski contends that Azar was a key employee, and was responsible for implementing EGL's sales and marketing strategy. In addition to managing other sales personnel, Azar was EGL's senior sales contact with EGL's largest chain store customers and the manufacturers that sell to them.[1] She came to EGL without prior sales experience. Krasnianski alleges that in the course of her work for EGL, Azar developed valuable personal relationships with EGL's customers, all of which were built on EGL's time and at EGL's expense. EGL contends that it invested more than $100,000 in her business development activities in her last year of employment.

Krasnianski further contends that Azar possessed confidential information at the time she left EGL, which would assist any competitor in competing effectively with EGL. "For example, while EGL has published price lists, the prices it actually charges its customers, particularly its larger customers, are not the 'list' prices, but rather are specifically negotiated with each customer and are deal driven." Krasnianski 5/24/05 Affirm. ¶ 8. Azar is allegedly privy to EGL's "specific minimum price points, below which we will not go, for the various types of services we provide, and she knows what prices we are in fact charging our customers." Id.

Azar handed in her resignation along with Gershburg on March 11, 2005, and is now employed by GSI. Since leaving EGL, Azar has allegedly solicited several low to medium level

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[1]According to the moving affirmation of Mitch Jakubovic, the chain store jewelers that Azar serviced include Whitehall Jewelers, Fred Meyer Jewelers, Ultra Stores, Ross Simons, Diamonds International and Sterling Jewelers. She also serviced at least ten large manufacturers including Leo Schacter & Sons, Finesse, Fabrikant, Rosy Blue, Sangem, M.J. Grosbard, Summitt, JDM, Gotham and Louis Glick.

EGL employees to leave their jobs. For example, Jakubovic contends that he was told by an employee of EGL that Azar contacted an EGL employee named Julie in the data entry and itemization group, and that Azar told Julie that with Azar's connections she could help Julie and other EGL employees who were interested find jobs with customers of EGL and other companies in the industry that would pay them more than EGL paid them. It is undisputed that Azar did not solicit any EGL employee to join GSI; rather EGL contends that her motive is to hurt EGL by disrupting its operations and hurting morale by causing them to believe that they are underpaid.

Jakubovic avers that Azar has been in contact with all of her old customers to advise that she has left EGL and is now with GSI. She is also accused of "implicitly disparag[ing]" EGL to at least one customer, Leo Schacter and Company, by telling the customer that EGL would not be able to handle their work adequately during peak selling season without her involvement. EGL further contends that Azar began soliciting EGL's customers while she was still employed at EGL. On March 8, 2005, she e-mailed Gershburg about a discussion with Rosy Blue, a manufacturing customer of EGL, reporting that Ashish of Rosy Blue "wants to help us get started." Jakubovic 5/24/05 Affirm., Exh. B thereto. In February 2005, Azar e-mailed another customer, Whitehall Jewelers, asking for a meeting with Gershburg in early March, which meeting did, in fact, occur on March 15th, only four days after Azar and Gershburg resigned.

Finally, EGL contends that Azar has misappropriated a cellular telephone and phone number. In November 2004, Azar set up a new cellular phone account with Verizon in the name of Alla Gershburg, Gershburg's wife, but kept the same phone and cellular phone number as her old account with Nextel paid for by EGL. From November 2004 until Gershburg and Azar left in March 2005, the Verizon bill was sent to Gershburg's home, and he submitted it each month to

EGL, which paid the bill. When Azar left EGL, she did not return the phone or her cellular phone number to EGL. In this manner, customers could reach Azar at her new place of business when they called her cellular phone.

Defendant Azar denies that she has solicited any employees to leave EGL, disparaged EGL, or solicited any jewelry retailer or manufacturer to discontinue its relationship with EGL. She contends that she left EGL because she was unhappy with the way the business was being run, and specifically because she believed that there were inconsistencies in the quality of EGL's gemstone grading in the United States, which reflected badly on her reputation.

Azar contends that the identity of EGL's customers is publically available information and widely known in the industry, and that retailers and manufacturers advertise that they use many different gem labs to authenticate their diamonds and other gemstones. She denies knowledge of any formal marketing or future development strategies by EGL. As for pricing, Azar contends that EGL published its price list to customers, and, although it is true that EGL offered discounts, there was no formalized secret discount formula or price list used by EGL. Instead, prices were set on a case by case basis, based on a particular customer's needs or the volume of stones needed to be certified. She further contends that EGL's customers regularly disclosed the prices charged by or offered by competing labs as part of their business practices, and EGL was given a chance to match or beat those prices. According to Azar, most gem labs offer prices in a reasonably tight range, and the range of prices that various customers will find acceptable is widely known among gem labs. She further contends that any of EGL's pricing information she may have had is now outdated. Price is also just one factor a customer uses in picking a gem lab. The quality of the work and the service are critical components in the

customer's decision.

Defendant Zeltser has been employed by EGL since February 2004, and was responsible for network support and hardware maintenance in EGL's New York office. Krasnianski contends that Zeltser was also responsible for further development of, and maintenance of EGL's computer, networking and internet technology, and that he was involved in an ongoing and long-standing EGL project to improve the computer system through a re-design.

Zeltser did not resign with Gershburg and Azar on March 11, 2005. Krasnianski contends that, shortly thereafter, it was discovered that Zeltser was working for GSI at the same time he was employed at EGL. On March 16, 2005, a sign on the door of premises rented by Gershburg directed a company installing DSL to contact Zeltser if they had any questions or problems. Zeltser was terminated on March 18, 2005, after he allegedly refused to answer any questions about what information, if any, he had transferred from EGL to others. He was escorted to his desk, and all of his personal belongings were searched before he left the building.

Jakubovic claims that Zeltser "may" have taken EGL proprietary software with him to GSI. Jakubovic 5/24/05 Affirm. ¶ 25. His belief is based on the fact that GSI has promoted itself in trade publications as technologically-advanced, and that there is no way that GSI could have developed a specialized computer software system in the two months since Gerhsburg left EGL unless Zeltser misappropriated EGL's software. He also claims that Zeltser must have taken written plans or information relating to the re-design of EGL's computer system he was working on, because nothing in writing could be found after Zeltser was fired. Other EGL employees reported to Jabucovic that Zeltser took with him a piece of hardware, a prototype of a specialized keyboard developed at EGL and used to record observations on a computer-generated field.

Zeltser opposes plaintiff's motion, and denies that he took anything whatsoever from EGL. According to Zeltser, he was only responsible for network support and hardware maintenance at EGL. While he had some minor involvement with software problems when they arose, someone else, who is still employed by EGL, is responsible for software. He is currently employed by Integrated Data Consulting Services (IDCS), a company comprised of information technology professionals, who consult with many of the country's leading corporations. GSI is one of its current clients, and he was placed there as a consultant by IDCS. IDCS provides GSI with IT network support, and he works with an outside computer consultant that was hired by GSI to write GSI's computer program. He further contends that GSI's system is not based on the same principles, formulas or software as EGL's system, and is written in a different programming language. Lastly, he claims that IDCS has tried to no avail to place him with another client, and that if he is not permitted to continue his current assignment with GSI, he will be unable to work.

Zeltser states, that except for a few minor projects, he was not involved in the development of EGL's software, does not know how EGL developed the software that it uses, and could not recreate how programmers developed EGL's software. He denies taking anything with him, particularly EGL's source code. He also denies taking a specialized keyboard, and claims that the keyboard at issue is not proprietary and not unique to EGL, but is a commercially-available miniature keyboard.

DISCUSSION

Entitlement to a preliminary injunction requires a showing of (1) the likelihood of success on the merits, (2) irreparable injury absent the granting of preliminary injunctive relief, and (3) a

balancing of the equities in the movant's favor. Doe v Axelrod, 73 NY2d 748, 750 (1988); Sterling Fifth Assoc. v Carpentile Corp., Inc., 5 AD3d 328, 329 (1st Dept 2004). Disputed issues of fact may not, standing alone, be a sufficient basis for denying a preliminary injunction motion, and the court may order a hearing to resolve key factual issues. CPLR 6312(c). For the reasons set forth below, plaintiff has not demonstrated its entitlement to a preliminary injunction, with the exception of the return of its cell phone and cell phone number.

In New York, restrictive covenants that prevent an employee from pursuing a similar vocation after termination of employment are not favored by the law. American Broadcasting Cos., Inc. v Wolf, 52 NY2d 394, 404 (1981); Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp., 42 NY2d 496, 499 (1977). Powerful considerations of public policy militate against sanctioning the loss of an individual's livelihood (Purchasing Assoc., Inc. v Weitz, 13 NY2d 267, 272 [1977]), and the general public policy favoring robust and uninhibited competition should not give way merely because a particular employer wishes to insulate himself from competition (American Broadcasting Cos., 52 NY2d at 404). "At the same time, the employer is entitled to protection from unfair or illegal conduct that causes economic injury." Id. Therefore, a restrictive covenant will only be enforced "'to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee.'" BDO Seidman v Hirshberg, 93 NY2d 382, 389 (1999), quoting Reed, Robert Assoc., Inc. v Strauman, 40 NY2d 303, 308 (1976).

In Reed, Roberts Assoc., supra, the Court of Appeals limited the cognizable employer interest under the common-law rule to protection against the misappropriation of trade secrets or of confidential customer lists, or protection from competition by a former employee whose

services were unique or extraordinary. Reed, Robert Assoc., 40 NY2d at 308; see also BDO Seidman v Hirshberg, 93 NY2d at 389; American Broadcasting Cos., 52 NY2d at 403-04. However, the Court of Appeals modified the Reed, Roberts Assoc. holding in BDO Seidman v Hirshberg, supra. The Seidman Court held that an employer may legitimately seek to protect, in certain circumstances, the "good will" which an employee develops with the employer's clients in the course of the employment at the employer's expense and effort. The Court also provided for the severability and partial enforcement of non-compete covenants to the extent that they protect an employer's legitimate interests, rather than refusing to enforce overly broad restrictive covenants in their entirety. Id. at 394-95.

The language of paragraph 7(b) of the Confidentiality Agreement at issue herein only contains a best efforts promise to avoid seeking employment with a direct competitor. It specifically contemplates that employment with a competitor might be necessary, and if such is the case, the employee may not disclose any of EGL's confidential information. Plaintiff has demonstrated a likelihood of success on the merits of its claim that neither Azar nor Zeltser made any effort to avoid employment with a competing gem lab. Even if Azar's only marketable skill is her knowledge of the gem lab business, as she claims, and her sales experience would not be recognized in the diamond industry as a whole, this does not mean she could not have obtained employment on the customer-side of the gem lab business. Likewise, Zeltser's protestations that, even with ten years experience as a computer technician, IDCS could not find any other consulting position for him amongst their many clients other than GSI, Gershburg's newly-formed gem lab, is conclusory in the extreme. Zeltser offers no explanation of where or how IDCS purportedly tried to place him, and he offers no affidavit from IDCS to substantiate his

hardship claim.

The covenant not to solicit EGL's customers can only be enforced against Azar if her status as a unique or extraordinary employee exposes EGL to special harm; to prevent Azar from appropriating the good will of EGL's customers, which had been created or maintained at its expense; or to the extent necessary to prevent her use of EGL's trade secrets or confidential information.

The court is unpersuaded that a 24-year old high-school graduate, who worked for the plaintiff for less than four years in their sales department, and was making less than $50,000 a year in salary, was providing EGL with unique or extraordinary talents. "Such characteristics have traditionally been associated with 'various categories of employment where the services are dependent on an employee's special talents; such categories include musicians, professional athletes, actors and the like.'" AM Medica Communications Group v Kilgallen, 261 F Supp 2d 258, 264 (SD NY 2003), quoting Ticor Title Ins. Co. v Cohen, 173 F3d 63, 70 (2d Cir 1999); see also Purchasing Assoc., Inc. v Weitz, 13 NY2d 267, 274 (1963) (stating that an employee's services are to be deemed "unique or extraordinary" in this context only where it appears that her "services are of such character as to make [her] replacement impossible or that the loss of such services would cause the employer irreparable injury."). There is no claim here that Azar is "irreplaceable" or that her departure is causing any special harm to EGL. See Newco Waste Sys., Inc. v Swartzenberg, 125 AD2d 1004, 1005 (4th Dept 1986). The mere fact that an employee's services may be of high value to her former employer does not demonstrate than the services were special or unique. Reed, Robert Assoc., 40 NY2d at 309.

Relying on BDO Seidman v Hirshberg, supra, and Maltby v Harlow Meyer Savage, Inc.

(166 Misc 2d 481 [Sup Ct, NY County 1995], affd 223 AD2d 516 [1st Dept], lv dismissed 88 NY2d 874 [1996]), plaintiff contends that the one-year covenant not to solicit clients should be enforced to protect EGL's good will from being misappropriated by Azar, who was allowed to built relationships with EGL's largest customers at the expense and encouragement of EGL. However, both cases are very distinguishable on the facts.

In BDO Seidman, an accounting firm sought to enforce its contractual right to collect damages against a former manager for soliciting the firm's clients after he resigned. The Court of Appeals held that the protection of customer relationships the accountant acquired in the course of employment for the firm may indeed be a legitimate interest that would support enforcement of the restrictive covenant, noting that the "'risk to the employer reaches a maximum in situations in which the employee must work closely with the client or customer over a long period of time, especially when [her] services are a significant part of the total transaction.'" 93 NY2d at 391-92 (emphasis added), quoting Blake, Employee Agreements Not To Compete, 73 Harv L Rev 625, 661 (1960). In this case, Azar is not a highly-paid professional working directly for a customer, and whose skills and reputation the customer had been sold on, but rather a sales representative of the company whose function was to sell the services of EGL's gemologists, not to render those services herself. Thus, the risk that EGL will lose its largest customers due to Azar's departure is much less than in BDO Seidman.

The Court of Appeals also cautioned in BDO Seidman that the determination of whether a restrictive covenant should be enforced to the extent necessary to protect an employer's legitimate interest involves "a case specific analysis, focusing on the conduct of the employer in imposing the terms of the agreement." BDO Seidman, 93 NY2d at 394. "Factors weighing

against partial enforcement are the imposition of the covenant in connection with hiring or continued employment--as opposed to, for example, imposition in connection with a promotion to a position of responsibility and trust--the existence of coercion or a general plan of the employer to forestall competition, and the employer's knowledge that the covenant was overly broad." Scott, Stackrow & Co. v Skavina, 9 AD3d 805 (3d Dept 2004), citing BDO Seidman, at 395 (refusal to enforce overly broad covenant not to solicit clients against staff accountant who was required to sign the agreement containing the covenant upon hiring and as a condition to continued employment). Here, the Confidentiality Agreements were imposed by EGL, not just on Azar and Zeltser as a condition of continued employment, but on every employee at the company. Thus, EGL's policy appears to be more focused on suppressing all competition by employees who decide to leave the company than on protecting itself from unfair competition.

Maltby v Harlow Meyer Savage, Inc., supra, is also distinguishable on its facts. In that case, a brokerage house sought to enforce a six-month restrictive covenant on a group of highly-paid currency traders who had been employed on its forward dollar/mark trading desk, and left to join a competitor. The court enforced the restrictive covenant, finding that the traders all had unique relationships with the customers for whom they had been trading currencies, relationships that had been developed while working for the plaintiff, and that six months is needed for a new employee to build such a relationship and bring the plaintiff's business back to a normal level. There is no showing that Azar's departure has or will have any such dramatic effect on EGL's profitability, and plaintiff's theory would render any sales person with an expense account a unique employee.

EGL also contends that Azar was privy to confidential pricing and marketing information.

However, it is undisputed that EGL has a published price list, and that these prices are charged to some customers. For other customers, particularly EGL's larger customers, the prices "are specifically negotiated with each customer and are deal driven." Krasnianski 5/25/04 Affirm., ¶ 18. Krasnianski also admits that whether or not EGL meets a price a customer says it can get elsewhere depends on various factors, including its own cost structure, which presumably must change from time to time. Moreover, it does not appear that EGL takes any particular steps to maintain its pricing information as secret or confidential. All employees of EGL offices have direct, albeit password-protected access to EGL's database, including SKU numbers, pricing and customer contact information. Krasnianski further admits that, sometimes, EGL's discounted prices are disclosed by customers to other gem labs in order to obtain a better price.

There is no allegation that Azar misappropriated any written marketing or pricing materials belonging to EGL. Rather, EGL admits that the information that it claims Azar may divulge to GSI is "in her head." Krasnianski 5/24/05 Affirm., ¶ 18. However, "[i]t is well settled that an employee's recollection of information pertaining to specific needs and business habits of particular customers is not confidential." Investor Access Corp. v Doremus & Co., Inc., 186 AD2d 401, 404 (1st Dept 1992), lv denied 81 NY2d 706 (1993). And, presumably Gershburg, as the former General Manger of EGL, would have been privy to the same marketing and pricing information as Azar.

Plaintiff relies on Doubleclick, Inc. v Henderson, 1997 WL 731413 (Sup Ct, NY County 1997), where the court enjoined two former top executives from launching a competing business for six months. It is significant, however, that the motion for preliminary injunctive relief was supported by evidence seized from one of the executive's laptop computers which established

that the defendants had recorded information concerning Doubleclick's pricing and current sales for Internet advertising that they intended to use to compete with Doubleclick. Furthermore, one of the two executives was a member of Doubleclick's management team, the company's highest paid employee, and had access to highly confidential documents when he attended Doubleclick's board meetings.

For these reasons, a preliminary injunction restraining Azar from working for GSI or soliciting any of EGL's customers is not warranted on this record.

Non-solicitation agreements directed to the solicitation of employees of the former employer, sometimes called no-hire agreements, are also subject to the same analysis as the more conventional non-compete agreements, that is, a balancing of the interests of the employer, the employee, and the public. Automated Concepts Inc. v Weaver, 2000 WL 1134541 (ND Ill 2000)(applying New York law). It is undisputed that Azar has not solicited any EGL employees to work for GSI. To the extent that the no-hire provisions of the Confidentiality Agreement prevents a former employee from contacting any former co-workers and suggesting that they could find higher paying jobs elsewhere in the industry with her help, it is an overly broad restriction that is against public policy.

Finally, since Azar has agreed to reimburse EGL for the cost of the cell phone and to return the cell phone number to EGL, that portion of the motion is denied as moot.

Turning next to defendant Zeltser, although plaintiff does not make any argument that Zeltser is a unique or extraordinary employee. Enforcement of the one-year restrictive covenant is allegedly necessary to prevent his use or disclosure of EGL's proprietary software to GSI.

New York courts have recognized that computer software, or programs, can be a trade

secret. See Business Intelligence Servs., Inc. v Hudson, 580 F Supp 1068, 1072 (SD NY1984), citing Matter of Belth v Insurance Dep't of the State of New York, 95 Misc2d 18 (Sup Ct, NY County 1977). Computer programs have been found to constitute a trade secret where the source code is not easily copied or ascertainable by inspection of the program. See, e.g., Q-Co Indus., Inc. v Hoffman, 625 F Supp 608, 617 (SD NY1985) (finding source code of plaintiff's computer program was not accessible to the public and therefore the program was likely to be a trade secret).

Based on Zeltser's activities while employed at EGL, there is a strong possibility that Zeltser has breached his contractual obligation not to reveal confidential information about EGL's computer systems to a competitor and will continue to do so. This is revealed by his providing information to GSI while employed by EGL. It is also revealed his failure to answer questions regarding the information be imparted to EGL, from which guilty knowledge may be legitimately inferred. The best way to prevent him from engaging in any future harm to defendant is to prevent enjoin him from employment with EGL for the one-year period of the non-compete clause. If he doesn't possess the necessary computer skills to do harm to the plaintiff, what was the purpose of assigning him to plaintiff's direct competitor as a consultant by the outside consulting company?

Plaintiff has also demonstrated that it will suffer irreparable harm absent the preliminary injunctive relief requested with regard to Zeltser. In considering the balance of equities, it is noted that the covenant not to solicit EGL's customers, if enforced against Azar, would prevent GSI for competing for the business of many of the largest customers of gem lab services. The covenant not to solicit employees to leave EGL would prevent Azar from assisting EGL

employees from obtaining higher paying jobs elsewhere. Zeltser's failure to present any corroborative evidence that he couldn't be assigned elsewhere, except for his self-serving statements convinces the Court that the potential harm to him, pales besides the harm that could be caused to plaintiff results in the balance of equities shifting in favor of EGL.

CONCLUSION AND ORDER

Accordingly, it is

ORDERED that defendant Debbie Azar is directed to return to plaintiff E.G.L. Gem Lab Ltd. any cellular telephones purchased by plaintiff, and to cause the return of cellular phone number **347-242-0443** to plaintiff, both within five days of service of a copy of this order with notice of entry and the balance of the motion is denied, and it is further

ORDERED that the portion of the motion for a preliminary injunction against defendant Zeltser being employed by consulting, advising or doing any work for defendant Gemological Science International is granted, except that such injunction may not extend beyond March 18, 2005 should there be no final disposition by that date.

Dated: August 15, 2005

ENTER:

J.S.C.