

**STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE**

MARCONE APW, LLC,

Plaintiff,

vs.

**SERVALL COMPANY,
KARL P. ROSENHAHN, and
MARK J. CREIGHTON,
Defendants.**

**MEMORANDUM
DECISION AND
ORDER**

**Index No.
7257/2010**

UNDER SEAL

BEFORE: JUSTICE JOHN A. MICHALEK

APPEARANCES:

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MICHALEK, J.

Plaintiff Marccone APW, LLC moves for an order broadening the previously entered preliminary injunction against defendants Servall Company, Karl P. Rosenhahn, and Mark J. Creighton, pending determination

of this action, to include an order enjoining defendants from soliciting or making any sales to certain of Marcone's customers contained on a list defendants allegedly purloined (Donathen Affid., Ex. 28).¹ Defendants opposed the motion, oral argument was held and decision reserved.

BACKGROUND

Despite heavy motion practice, the court has held no hearings in this matter. The following represents the facts as alleged by the parties in the several thousand page record.

Marcone APW, LLC is the largest wholesale distributor of appliance parts in the United States, and Servall Company is the second largest (Ex. 18 ¶¶3-4). In January 2010, Marcone purchased AP Wagner (APW), a long-standing local appliance parts distributor, with clients primarily in the northeastern United States. Marcone then sent a WARN letter, apparently to all of the western New York employees, informing them that their positions might be terminated as of April 8, 2010 (Ex. A to Ex. 13; Labor Law § 860-b). Notwithstanding that letter, Marcone ultimately offered employment to some of the APW employees, including defendant Mark J. Creighton, who had been APW's United States Wholesale Business Sales Manager (Ex. 9 at 9). Defendant Karl P. Rosenhahn, who had been APW's Buffalo Call Center Director (Retail), asserts that he was told in early March

¹ References to Exhibits ("Ex.") are to the Donathen Affirmation, dated November 14, 2010, Exs. 1-51, unless otherwise stated.

2010 that he would not be retained in his position with Marcone (Ex. 13 ¶ 5). Thereafter, he interviewed with Servall, and then resigned from Marcone on March 23, 2010, and went to work for Servall on March 29 as National Call Center Director (Ex. 10 at 4, 6, 17). Creighton resigned on April 20, 2010, and within six days became Servall's Vice President of Sales for the Northeast Region (Ex. 9 at 10).²

Although there are disputed facts whether Rosenhahn himself asked for and/or took electronic information from Marcone /APW when he left its employ, it is established that he received by email several Marcone APW customer lists from now-former Marcone APW employees (Ex. 10 at 18, 21-22; Ex. 25). Rosenhahn admittedly emailed himself a "manufacturer brand locator" program that he had developed while at APW that permitted the user, with passwords, to access manufacturer databases in search of parts (Ex. 10 at 18; Ex. 22).

Further, after Creighton left Marcone and went to work with Servall, he provided Rosenhahn access to electronic documents on a Marcone thumb drive (Ex. 10 at 25; Ex. 9 at 51-52). On Creighton's first day of work, he asked Rosenhahn to forward to Servall's Chief Operating Officer Kevin Sullivan two files, an "end lot" pricing spreadsheet (bulk sale discounts) and

² In late August, 2010, the court granted expedited depositions of Creighton and Rosenhahn (see Exs. 9-12 [transcripts of depositions]).

an accounts receivable spreadsheet, both of which had been developed and maintained by APW; the accounts receivable spreadsheet covered up to March 2010 (Ex. 9 at 52-55).

Creighton did not tell anyone at Marccone/APW that he kept the information, and did not believe he had "improperly" obtained it (Ex. 9 at 33). Nonetheless, Creighton had executed an employee confidentiality and non-competition agreement with APW, barring him from competing by working with any of the three other major competitors in the northeast, including Marccone, but Servall was not one of the listed competitors (Ex. 9 at 36-44). No copy of such a document appears in the record.

On April 21, 2010, Rosenhahn forwarded five electronic files to Servall's Chief Operating Officer Kevin Sullivan by email (Ex. 10 at 25-30; Ex. 11 at 5; Ex. 40). The files were:

1. a Marccone accounts receivable spreadsheet with customer names, sales year to date (2010) and aging of accounts for over 2,000 customers (hereafter the Accounts' Receivable List [Ex. 40 (a)]);
2. a Marccone customer list with names and contact information for approximately 2,500 customers along with projected sales and pricing details (hereafter Customer List [Margin] [Exhibit 40 (b)]);

3. A Marcone customer list (4,800 customers) with email and representative contact information (Customer List [Contact] [Ex. 40 (c)]);
4. Marcone's 2010 bid to a large customer, PSE&G, with cost information (Ex. 40 [d]); and
5. a spreadsheet from Marcone containing "end lot" pricing data (Ex. 40 [e] [purchases in bulk]).

Rosenhahn, who later swore before this court that he had never used a certain customer contact information sheet from Marcone/APW in his work for Servall (see Ex. 13), sent an email on April 12, 2010 to the Information Technology Director at Servall:

Attached is the APW customer list that the guys are working off of. Can you have a file created on the shared drive, that all the agents can access and write to?
I am planning on saving this file to that drive as a shared workbook, so that all of them can document their progress and not duplicate efforts.

(Ex. 28 [attachment file "cust list.xls"]).

By the end of the first week of April, Rosenhahn testified, all of Servall's wholesale call center agents were using a Marcone/APW customer list to call customers (Ex. 10 at 22-23). The customer list was placed on a shared drive so that multiple people could write to it, and remained there until "just recently," Rosenhahn testified on September 7, 2010 (Ex. 10 at 24-25; see Ex. 6 to Ex. 21 [Sullivan email]).

Creighton also had an address list of Marccone/APW's customers on the iPhone given to him by Servall, a standard list with over 3,000 customers, contact information, APW account numbers, and year to date sales (Ex. 9 at 65-66, Ex. 12 at 7-9).³

Marccone filed the instant complaint on July 20, 2010 alleging causes of action for misappropriation of Marccone's confidential and proprietary business information; unfair competition; tortious interference with business relations, and unjust enrichment (Ex. 1). It then moved by order to show cause for a temporary restraining order, which the court granted to the extent of barring defendants and any person connected with them from "using Marccone's Information [and] from misappropriating any more of Marccone's confidential and proprietary information" (Ex. 2 at 4). Marccone's "Information" was defined as including "its Customer and Vendor Lists, Design Plans and Pricing Strategies... illegally obtained from Marccone" (*id.* at 2). The order also directed all parties to preserve until further order "any electronically stored information or other information or documents, including hard copies, in any way pertaining to the subject matter" of the case (*id.* at 4). The preliminary injunction motion was set for argument on July 29, 2010.

³ Creighton deleted that customer list prior to receiving notice of the court's preservation order, issued on July 20, 2010 (Ex. 12 at 6).

In an affidavit submitted in opposition to the motion for a preliminary injunction, Servall's Chief Operating Officer (COO) Sullivan swore that "[a]t no time has Servall Company used any proprietary or trade secret information obtained from AP Wagner Inc. or Marcone APW, LLC" (Ex. 18 ¶ 3). He denied, however, that the Marcone Information that plaintiff had discovered had been emailed to defendant Rosenhahn was either "confidential" or "proprietary". He further denied that Servall had ever requested or authorized any current or former Marcone employees to take information. He stated that "[n]o evidence has been submitted that any documentation which is the basis of this action has been distributed on Servall's system or used at all in any way in Servall's business" (Ex. 18 ¶ 26). Sullivan asserted that on March 29, 2010, when he came to Buffalo to meet with certain Marcone employees to offer them jobs with his company, he instructed them not to take even "a paperclip" from their former employer (Ex. 18 ¶ 3). Sullivan described how, believing the pending merger between Marcone and APW to offer opportunities for Servall, his employees developed lists of customers to solicit based upon publically available sources (*id.* ¶¶ 6-11). In a reply affidavit, he further stated:

I do not know whether the number of accounts Servall has opened represents rapid deployment, but as I have said before, we obtained that business without using any information from Marcone, and there is no proof to the contrary.

(Ex. 19 ¶ 13 [sworn to Aug. 2, 2010]). At least in hindsight, that statement

was clearly incorrect.

Further, Sullivan opined that Marcone's "credit limit" information was neither proprietary nor secret, and that at Servall they developed their own credit limits based upon credit reports for their customers (Ex. 17 ¶ 8).

However, the evidence now shows that Rosenhahn provided a spreadsheet ("APW limits .xls") to the Servall Director of Credit, Susan Crain, on April 12, 2010 by email, and included a note stating:

I am also attaching the credit limit file from a certain company (confidential of course). Hope this helps.

(Ex. 32).⁴ Other internal Servall emails show that Crain used the Marcone/APW credit limits as reference points many times (*see e.g.* Exs. 34, 35, 36, 44, 47, 49).

On August 3, 2010, after further submissions by both sides, the Court broadened the TRO into a preliminary injunction (Ex. 4), in the following oral decision:

[Plaintiff] has established a likelihood of success on the merits on its claims for misappropriation of its information by Mr. Creighton and Mr. Rosenhahn, and on the claim for unfair competition. The Defendants have at most, established an issue of fact whether the plaintiff's customer list, vendor list and pricing strategies are in fact trade secrets. Plaintiffs have also established the possibility that they will suffer irreparable harm if the injunction is not granted pending resolution of this action, including preventing defendants from using their [I]nformation, in that the

⁴ That list contains 3,000 customer names from fourteen states, contact information, ranking based upon sales generated and credit terms provided by Marcone/APW (Ex. 24).

damage that might result might be speculative and difficult to quantify. The court would cite *People v Anderson*, 137 AD2d 259 [4th Dept 1988]; *Pfizer, Inc v PCS Health Systems, Inc.*, 234 Ad2d 18 [1st Dept 1996]). On this record, however, the court declines to enjoin defendants from soliciting current or former customers of plaintiff **provided that the defendants do not use any of the plaintiff's [I]nformation to compete.** Fair competition will not be enjoined. **However, the injunction on solicitation of customers is denied without prejudice to renewal if and when Mr. Donathen obtains direct evidence that Marcone's information has been unfairly used.**

(Ex. 3 at 2-3 [emphasis supplied]).

Also on August 3, the court ordered Rosenhahn and Creighton to turn over their personal computers and any portable storage devices for cloning, subject to a protocol for privilege review (Ex. 4). The court also ordered defendants to return any of Marcone's Information they possessed (Donathen Ex. 4 at 3).⁵ After Marcone brought another order to show cause, the court permitted expedited depositions of the two individual defendants

⁵ The order to return Marcone's Information was made orally on August 3, 2010. On August 18, 2010 (fifteen days later), Sullivan sent an email to Rosenhahn, Creighton, the Buffalo Call Center and Susan Crain, among others, titled "Use of Competitors Information", in which Sullivan ordered the employees to cease using and to send to him and then delete or destroy "any information that may have been originally generated by Marcone/AP Wagner" (Ex. 6 to Ex. 21 [hereafter "Sullivan Email"]). He further stated: "Be aware that although I expect immediate compliance with this instruction I will be out of town until August 30, 2010 and I may not be able to respond to your emails until then" (*id.*). The order on the court's oral decision was not filed until September 1, 2010. As noted, the Marcone customer list remained on the Servall computer system until just prior to Rosenhahn's deposition on September 7, 2010 (Ex. 10 at 24-25).

(Ex. 8 at 2-3; Exs. 9-12).

At some time prior thereto, however, Rosenhahn had deleted Marcone/APW Information from his Servall laptop (Ex. 10 at 33). Creighton admitted that, sometime during May or June 2010, he destroyed the Marcone/APW thumb drives he had retained by crushing them in a vise, after he received a letter from Marcone threatening to sue him based upon his non-competition agreement, and demanding that he return its proprietary information (Ex. 7; Ex. 9 at 19, 31-33, 50). In mid-June 2010, Creighton also destroyed an external, back-up hard drive he had attached to his Servall laptop by smashing it with a hammer (Ex. 9 at 58-60). Forensic evidence developed by plaintiff indicates that Creighton ran a shredding program on his Servall laptop three times. Such programs are designed to permanently delete information from a computer's hard drive (Rowan Affid. ¶ 11).

In affidavits submitted in opposition to the motion for a preliminary injunction, Rosenhahn and one of his call center agents, former Marcone/APW employee Lawrence S. Matuszak, now Servall's wholesale call center supervisor for the northeast region, had sworn under oath that they had neither seen nor used Marcone's Information in their sales work for Servall (Ex. 13 & 14 ¶ 12).

At the end of August, 2010, Rosenhahn issued an affidavit "recant[ing]" certain statements he had made. In that affidavit, he "recanted" his statement that he had not used a customer contact

information file sent to him by a Marcone employee; he recanted the statement that the information was never used by the call center operations of Servall under his management, and he recanted the statement that the information was of no significance (compare Donathen Ex. 13 & 15). Similar recantations were made by Matuszak (Donathen Ex. 14 & 16).

Although the COO of Servall, Kevin Sullivan, did not recant his statements denying unequivocally that Servall had used any customer lists or other business information belonging to Marcone APW, in an affidavit submitted in opposition to the instant motion, he stated the following:

On the initial motion for a preliminary injunction, based on my discussions with my employees, I was under the impression that no materials alleged to be proprietary by plaintiff were in use by Servall's employees. **When I said Servall was not using any lists, I was speaking for myself as Chief Operation Officer.** Regrettably, I was misinformed. I failed to learn all relevant facts until after defendants' papers were served. In August 2010, I learned that a customer list received from a former Marcone employee had been used by Servall's customer service people before the injunction was issued.

...

Since the Court granted the preliminary injunction on August 3, 2010, defendants have observed the terms of it in all respects.

(Sullivan Affid. ¶¶8, 11 [emphasis supplied]).

However, Marcone has submitted a copy of an email sent to Mr. Sullivan on April 21, 2010 by Defendant Rosenhahn, containing five spreadsheet attachments (".xls"), including "Contact.xls" (Ex. 40 [B]; see Ex. 11 at 5-6), which appears to be a list of Marcone APW's customers in descending order based upon projected sales. The email from Mr.

Rosenhahn states "Kevin, Please call Marc C to discuss these files."⁶

Further forensic evidence reveals that a list of about 100 customers was sent to Sullivan by another former Marcone/APW employee who had been fired by Marcone, and who included in the list APW account numbers and contact information. Mr. Sullivan responded to the new salesperson, welcoming him to Servall, thanking him for the list and asking, "Karl and Larry please keep me updated how we do working this list" (Ex. 26).

In a July affidavit filed with the court, Sullivan discussed one of Marcone's larger customers, PSE&G, explaining that Servall had won some of its business by hiring a former Marcone salesman Glen Foley who was well-liked by the customer (Ex. 17 ¶ 16). That affidavit did not include the information that both Rosenhahn and Creighton had previously secretly provided Sullivan with copies of Marcone's 2010 bid to PSE&G (see Exs. 40 [d] & 50 [April 21 & 22, 2010]).

According to Sullivan, Servall opened approximately 300 accounts in the northeast region of the United States in 2010, twenty-six (26) of them

⁶ Sullivan alleged that he receives many emails. He did not state that he never received the April 21 email, rather, he stated that he "never saw any customer lists or other documents that were allegedly sent to me as attachments to emails" (Sullivan Affid. ¶ 23). Creighton denied that Sullivan ever talked to him about the files (Creighton Affid. ¶ 13). The court notes further that, on April 27, 2010, Rosenhahn sent Sullivan an email stating "Here is the email file" (Ex. 42). The attachment to that email appears as Exhibit 42(c).

prior to April 1, 2010 (Sullivan Affid. ¶ 12). Servall opened seventy-one (71) accounts after August 3, 2010. Thus, the remaining accounts (approximately 203) were opened between April 1, 2010 and August 3, the date of the court's oral decision on the preliminary injunction motion.

Discussion

A motion for a preliminary injunction is addressed to the sound discretion of the trial court (*Destiny USA Holdings LLC v Citigroup Global Markets Realty Corp.*, 69 AD3d 212, 216 [4th Dept 2009]). To establish a right to a preliminary injunction, the movant must demonstrate by clear and convincing evidence: (1) a likelihood of success on the merits; (2) irreparable injury absent granting the preliminary injunction; and (3) a balance of the equities in the movant's favor (*W. T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981]; *Gambar Enterprises, Inc. v Kelly Services, Inc.*, 69 AD2d 297, 306 [4th Dept 1979]).

On the prior motion for a preliminary injunction the court determined that Marcone had established a likelihood of success on the merits that defendants Rosenhahn and Creighton, its former employees, had misappropriated Marcone's confidential information and engaged in unfair competition.⁷ The court also determined that Marcone had established that

⁷ "A plaintiff claiming misappropriation of a trade secret must prove: (1) it possessed a trade secret, and (2) defendant is using that trade secret in breach of an agreement, confidence, or duty, or as a result of discovery by improper means.' (*Integrated*

it would suffer irreparable harm if defendants continued to use its confidential business information.

The unrebutted evidence now demonstrates that defendants Rosenhahn and Creighton, with the ratification and ultimate assistance of Servall managers, intentionally took and/or received from other Marcone employees (current or former) seven electronic spread sheets and a database of Marcone APW's confidential customer information: information on products sold, pricing, credit terms, sales to date, receivable aging, email addresses, contact personnel, phone and fax numbers for thousands of customers.

Servall also hired numerous former Marcone/APW salespeople, and opened three new distribution sites in the northeast United States: in Colonie and in Buffalo, New York and in New Jersey. Servall incurred "obligations" for personal property leases and other start up costs, which (without documentary back-up) it alleges at approximately \$500,000, not including its real property leases (Sullivan Affid. ¶ 21), while its salespeople worked

Cash Management Services, Inc. v Digital Transactions Inc., 920 F2d 171, 173 [2d Circuit 1990]). A claim for unfair competition requires 'the bad faith misappropriation of a commercial advantage belonging to another . . . by exploitation of proprietary information or trade secrets.' *Eagle Comtronics, Inc. v Pico Products, Inc.*, 256 AD2d 1202, 1203 [4th Dept 1998]" (*Shaw Creations Inc. v Galleria Enterprises, Inc.*, 29 Misc3d 1213 (A),*7 [Sup Ct New York County 2010]).

Marcone APW's customer list and consulted its private credit information and the make-up of its 2010 bid to one of its larger customers, PSE&G.

Meanwhile, Servall employees attempted to hide their actions through physical destruction of thumb drives, back-up hard drives, and discs; the running of shredding programs; and service on the court of affidavits containing falsehoods.

Servall's COO assured the court that it was not competing unfairly, and that Marcone APW's information was of no interest to it, despite the certain knowledge of high level managers that lists of Marcone/APW customers were being worked by its salespeople, to solicit them to its new distribution centers.

Now, after Marcone has presumably spent a small fortune uncovering this conduct through computer forensics, Servall makes five basic points: 1) Servall has not violated the preliminary injunction – by which it appears to mean it has not used Marcone's information since the signing of the court order on August 31, 2010, but continued to use it during the month of August, at least until August 18, 2010, the date of the Sullivan Email; 2) it would be improper for the court to award in a preliminary injunction the ultimate relief sought; 3) some of the customers on Marcone APW's lists were already customers of Servall in other areas of the country, so it would be unfair to bar Servall from soliciting their business; 4) many of the salespeople they have hired have personal relationships with customers on

the lists, and that's why the customers switched to Servall; and 5) none of the Marcone APW information Servall used constituted "trade secrets" or confidential information.

Only the final point need be discussed at any length. The classic definition of a trade secret is "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it" (*Ashland Management Inc. v Janien*, 82 NY2d 395, 407 [1993] [internal citations omitted]).⁸

Servall attempts to rely upon the court's determination on the preliminary injunction motion that Servall had established ("at most") a question of fact whether Marcone APW's customers list and other information constituted trade secrets (see Ex. 3 at 2). However, Servall met its burden of production on that motion with affidavits later admitted to be false (see, e.g. Ex. 13-16). Further, the record on that motion was limited,

⁸ As stated in *Ashland*: "The Restatement suggests that in deciding a trade secret claim several factors should be considered: '(1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others' (Restatement of Torts § 757, comment b)." (*Ashland Management Inc. v Janien*, 82 NY2d at 407).

and the record has been greatly expanded now.

Each party submitted an expert affidavit on the subject of trade secrets. Defendants' expert asserts that customer lists are not trade secrets in wholesale appliance parts distribution, and that such a list with credit terms and additional sales data would not be a "valuable" trade secret. These opinions, however, are not based upon the precise factual situation clearly at issue here, where virtually all of APW's customer information was misappropriated and, as documented extensively, used by Servall.

Further, Servall has consistently claimed in discovery responses that its customer lists, pricing, margins, credit limits and similar information are all confidential and proprietary trade secret information it will not produce without execution of a confidentiality agreement with an "attorneys' eyes only" provision (Crandell Affid. ¶¶5-8 & Exs. 2 & 4). It should be estopped from contending that similar information owned by Marcone cannot be trade secrets.

There has not yet been a hearing on how much effort APW or Marcone expended to keep the Information secret; Servall – without submitting any evidence – claims that little or no effort was made but the point is clearly disputed. Whether information is kept sufficiently secret to qualify is generally a question of fact (*Ashland*, 82 NY2d at 407; see generally CPLR 6312[c]). Marcone has not established that the individual defendants here – and their fellow former employees at Marcone who assisted them in the

industrial piracy that occurred here – were bound to Marcone by confidentiality agreements (although defendant Creighton admits that he had an agreement with APW, Servall disputes that fact). Marcone did establish that APW’s employee handbook admonished employees not to copy its records absent management approval, and Marcone/APW’s Information Technology director averred that the Information was password protected and only provided to the employees – such as the individual defendants here – who had need of it (Noonan Affid. & Exs. 1-3). That evidence adds little to an employee’s common law duty not to compete unfairly with his or her former employer through physical taking of the employer’s information.

The court determines that Marcone’s expert affidavit supports a finding of trade secret status for Marcone’s information at this juncture, were such a finding necessary. In the final analysis, it does not matter, because Marcone APW’s own employees pilfered the information while working for Marcone, and passed it on to Servall.

In a decision written by my colleague Justice John M. Curran, *Creative Collections of New York, Inc. v DiBlasi* (15 Misc3d 1130 [A], * 5 [Sup Ct Erie County Apr. 24, 2007]), the court entered an injunction barring the solicitation of customers. In that case, employees of a collection agency that primarily repossessed equipment for financial clients secretly determined to start a competing business and lure away the plaintiff’s biggest sources. The defendants physically stole computers, databases, electronic and paper

customer files, and solicited other employees to come with them to their new firm. On one day they resigned from the plaintiff's employ, and set up shop the next day with plaintiff's equipment, information and employees.

The court cited the Court of Appeals case *Leo Silfen Inc. v Cream*: "If there has been a physical taking or studied copying, the court may in a proper case enjoin solicitation, not necessarily as a violation of a trade secret, but as an egregious breach of trust and confidence while in plaintiffs' service" (29 NY2d 387, 391-392 [1972]). The *Creative Collections* court further stated:

It is appropriate to issue a preliminary injunction against former employees even without a restrictive covenant where they have breached trust or stolen the employer's proprietary information (*Hecht Foods, Inc. v Sherman*, 43 AD2d 850, 850-851 [2d Dept 1974]; *Props for Today, Inc. v Kaplan*, 163 AD2d 177 [1st Dept 1990]; *Churchill Communications Corp. v Demyanovich*, 668 F Supp 207 [SDNY 1987]). ... Injunctive relief is appropriate under such circumstances to prevent the offending former employees from "reaping the fruits of their improper conduct" (*Pace Sec., Inc. v Pollack*, 157 AD2d 557, 558-559 [1st Dept 1990])....

While the disloyalty of the defendant employees might ultimately be remedied, at least in part, through an award of damages... the misappropriation of the plaintiff's business information and goodwill is not something that can be adequately remedied at law. The Courts have recognized the need for an injunction under such circumstances

(*Creative Collections*, 15 Misc3d 11340 (A), *4 [collecting cases]). This court believes that the instant case is one of similar character (*see also Eastern Bus. Sys. Inc. v Specialty Business Solutions, LLC*, 292 AD2d 336,338 [2nd Dept 2002]).

Nor is a hearing necessary at this procedural juncture, prior to entry of the instant relief (*see Albany Medical College v Lobel*, 296 AD2d 701, 702 [3rd Dept 2002]).

Where future damages will be difficult to calculate, but nonetheless real, that constitutes irreparable harm (*see. e.g Pfizer Inc. v PCS Health Systems, Inc.*, 234 AD2d 18, 19 [1st Dept 1996]; *Repair Tech Inc. v Zakarin*, 8 Misc3d 1022 [A], *5 [Sup Ct Kings County July 28, 2005]).

Further, the balance of the equities in this matter favors plaintiff.

Thus, the court orders that Servall is IMMEDIATELY as of the date of this memorandum decision and order, enjoined from **soliciting any sales** from the 640 customers on the list entitled "Prospect.xls" that was returned by Servall to Marcone pursuant to the court's September 1, 2010 order (*see* Ex. 51),⁹ and further, it is enjoined from **making any sales** to any of the accounts it obtained between the dates of April 1, 2010 and August 31, 2010, including the two-hundred and three (203) accounts it has documented in this record, unless it can prove that it obtained the accounts without the use of plaintiff's Information.

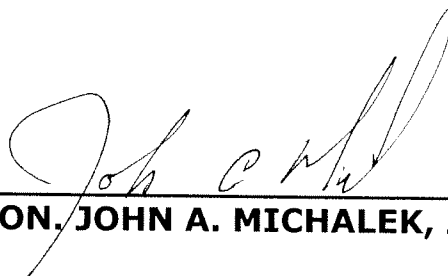
⁹ Servall included this document in its return to Marcone APW of Marcone APW's information (Noonan Affid. ¶ 5). Marcone asserts that "[t]his is the list of core customers that Servall culled from Donathen Aff. Ex. 28, that Servall actively used to solicit and make sales", and Marcone requests such a more limited injunction in its reply brief (Plaintiff' Reply Memo of Law at 14), i.e. limited when compared to the relief requested in its notice of motion.

The court agrees with Marcone that Servall's alleged evidence in support of the amount of an undertaking is unpersuasive. To sustain this expanded injunction, Marcone is ordered to post a bond or other collateral for \$500,000.00.

Finally, Marcone has established good cause to seal the record and the decision and order on the instant motion.

SO ORDERED.

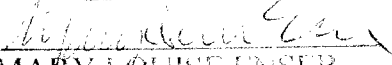
Date:



HON. JOHN A. MICHALEK, J.S.C.

GRANTED

FEB 08 2011

BY 
MARY LOUISE ENSER
COURT CLERK