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

DEUTSCHE BANK TRUST COMPANY AMERICAS,

Plaintiff,

-against-

HPM PARTNERS LLC, BENJAMIN A. PACE III, LAWRENCE B. WEISSMAN, STEVEN A. KUROSKO, LINDSEY JONATHAN NADEL, QUINN JO-ROSE PORTFOLIO, and NEZA BEVC,

Defendants.

Index No._____.

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR DECLARATORY JUDGMENT, A PRELIMINARY INJUNCTION AND A TEMPORARY RESTRAINING ORDER IN AID OF ARBITRATION

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Plaintiff Deutsche Bank Trust Company Americas ("Plaintiff" or "DB") respectfully submits this Memorandum Of Law In Support Of Motion For Declaratory Judgment, A Preliminary Injunction And A Temporary Restraining Order In Aid Of Arbitration against defendants HPM Partners LLC ("HPM"), Benjamin A. Pace, III, Lawrence B. Weissman, Steven A. Kurosko, Lindsey Jonathan Nadel, Quinn Jo Rose Portfolio, and Neza Bevc (the individual defendants collectively the "Employee Defendants," together with HPM, the "Defendants").

PRELIMINARY STATEMENT

Last Friday evening, in a clearly choreographed commercial assault, HPM raided virtually the entire senior management cadre of portfolio consultants in DB's domestic Chief Investment Office ("CIO") and discretionary portfolio management ("DPM") private banking business. Disregarding notice and non-solicitation obligations and attempting to lift out 10 of the 12 Managing Directors in the business, as well as a number of the analysts and assistants who operate DB's domestic CIO/DPM private banking business, HPM has attempted to interfere with DB's ability to maintain its fiduciary obligations to its clients and has threatened the business with significant potential loss. Because HPM and the Employee Defendants have refused to acknowledge the enforceability of DB's notice and non-solicitation rights, DB has no choice but to make this emergency application for injunctive relief.

Through this emergency application, DB seeks this Court's intervention to maintain the *status quo,* to compel the Employee Defendants to abide by their various contractual obligations and to halt HPM's ongoing, concerted interference in DB's contractual relations and business pending a FINRA arbitration panel's adjudication of the parties' dispute. Absent injunctive relief, DB is powerless to stop the Defendants from breaching their notice and non-solicitation obligations, thereby destabilizing and irreparably harming DB's business. As discussed more

fully below and in the accompanying Affidavit of Cynthia P. Nestle, Affirmation of Emergency of John Siegal, and the Verified Complaint, the Employee Defendants unlawfully lured lower level employees away from DB, have attempted to induce valuable DB clients to leave, and engaged in activities that will, if not stopped, lead to devastating consequences to DB in favor of HPM. Concurrently, HPM unlawfully induced the Employee Defendants to resign *en masse*—some of whom did so in direct violation of notice requirements—and continues to solicit DB employees in an attempt to further destabilize DB's business and to compete unfairly with DB.

The temporary restraining order ("TRO") DB seeks is extremely narrow:

First, DB is seeking to specifically enforce employee non-solicitation obligations by enjoining the Employee Defendants from further contacting and soliciting DB's clients and other DB employees in violation of the non-solicitation provisions expressly stated in DB's Code of Professional Conduct (the "Code of Conduct") by which all Employee Defendants are bound, and certain employment agreements which the Employee Defendants executed (the "Employment Agreements").

Second, DB is seeking to specifically enforce the notice periods contained in DB's "Notice and Non Solicitation Obligations Policy – US," as well as certain of the Employment Agreements, and to prevent HPM from improperly hiring certain of the Employee Defendants in violation of these notice obligations.

Third and finally, DB is seeking to protect its confidential and proprietary information by enjoining the Employee Defendants and HPM from improperly using and/or disseminating any confidential and/or proprietary information belonging to DB that they may have in their possession. The TRO sought is reasonably limited in duration as well. Under FINRA rules, once this Court issues a TRO, an arbitration hearing on DB's request for permanent injunctive

relief will begin within 15 days of the date the Court issues the temporary injunctive order. *See* FINRA R. 13804 (b)(1).

This limited and narrowly-tailored injunctive relief is necessary to allow DB the opportunity to pursue the Defendants through mandatory FINRA arbitration to enforce its contractual rights and to recover the significant damages it has suffered and will continue to suffer as a direct result of the Defendants' unlawful conduct. Counsel for Pace and Weissman have already advised DB's counsel that they do not believe their clients are bound by the notice and non-solicitation covenants. Counsel for HPM has similarly challenged the enforceability of these covenants. DB has no assurances that the Employee Defendants will honor their contractual obligations—in fact, a number of them have already violated those obligations by improperly soliciting DB clients and employees—and HPM has not offered any lasting assurances that it will refrain from interfering with the Employee Defendants' continuing obligations to DB. If not prevented by the injunctive relief DB seeks, the Defendants' conduct will result in considerable loss and the potential destruction of DB's domestic business. DB respectfully requests that the Court immediately enter the narrowly-tailored TRO, grant DB a preliminary injunction in aid of arbitration, and order the Defendants to discontinue the solicitation of DB's clients and employees and refrain from use and/or dissemination of DB's confidential and proprietary information they may have in their possession.

STATEMENT OF FACTS[1]

The Employee Defendants are members of DB's domestic CIO/DPM private banking business. (Ver. Compl. at ¶¶ 12-17, 20; Nestle Aff. at ¶ 3.) They are portfolio consultants,

[1] The facts on which this memorandum relies are submitted in the accompanying Verified Complaint, sworn to on May 27, 2014, and the exhibits annexed thereto ("Ver. Compl."), and the Affidavit of Cynthia P. Nestle, sworn to May 27, 2014 ("Nestle Aff.").

portfolio assistants and portfolio analysts who act as investment advisors to DB's private banking clients. (Ver. Compl. at ¶¶ 12-17, 20-22; Nestle Aff. at ¶ 3.) The Employee Defendants effectively have exclusive day-to-day discretionary investment decision-making responsibilities regarding clients' portfolios and interface with the clients regarding investment strategy on a regular basis. (Nestle Aff. at ¶ 4.) The Employee Defendants have discretion in choosing the most suitable products for the clients' portfolios from among DB proprietary products, as well as third-party products in order to make the best investment decisions for the clients. (Ver. Compl. at ¶¶ 21, 23; Nestle Aff. at ¶¶ 5.) While DB develops and markets its own series of proprietary products, the Employee Defendants have discretion in choosing the right product for the clients' portfolios from among the available products on the market. (Nestle Aff. at ¶ 6.)

On Friday, May 16, 2014, while their direct supervisor, Randy Brown, was in London, defendants Pace and Weissman handed in their resignation letters, resigning from their positions at DB effective immediately and contending they could disregard their notice and non-solicitation obligations. (Ver. Compl. at ¶¶ 23-26; Nestle Aff. at ¶ 7.) At the same time, eight other DB employees who were subject to a notice provision—namely Steven A. Kurosko, Lindsey Jonathan Nadel, David D. Jumper, Foster J. McCoy, John Bosco Walsh, Ronald E. Colonna, Jr., Sean Gamble Magee, and Gary Joel Pollack[2]—also resigned. (Ver. Compl. at ¶ 28; Nestle Aff. at ¶ 7.) Between Sunday, May 18 and Tuesday, May 20, 2014, six additional DB employees, namely Quinn Jo-Rose Portfolio, Neza Bevc, Patrick Murray, Jessica Anne Farrell, Brittany Berry and Caitlin Brunton[3] also resigned. (Ver. Compl. at ¶ 30; Nestle Aff. at ¶ 8.)

[2] Messrs. Jumper, McCoy, Walsh, Colonna, Magee, and Pollack initially resigned on May 16, 2014, but are not named as defendants in this action.

[3] Mr. Murray, Ms. Farrell, Ms. Berry and Ms. Brunton initially resigned on May 19, 2014, but are not named as defendants in this action.

The concerted effort to poach DB's clients and additional DB employees began soon thereafter. For example, on May 19, 2014, while still working at DB and purporting to serve out his notice period, defendant Nadel, who is subject to notice period and non-solicitation restrictions, contacted one or more of DB's private banking clients and solicited their business for HPM. (Ver. Compl. at ¶ 33; Nestle Aff. at ¶ 15.) Also on Monday, May 19, 2014, Stephen Nielander of HPM contacted one of DB's clients, falsely stating that DB's "New York Investment Group" had joined HPM, and actively solicited that client's business. (Ver. Compl. at ¶ 32; Nestle Aff. at ¶ 16.)

In addition to having attempted to hire away nine of ten Managing Directors and nearly 50 percent of DB's domestic CIO/DPM private banking business—including Pace, the Chief Investment Officer, Weissman, a senior Managing Director, and several other Managing Directors, Directors and Vice Presidents—HPM has continued its efforts to unfairly compete with DB by continuing to contact other DB employees in this group to persuade them to join HPM. (Ver. Compl. at ¶ 29.)

The solicitations of clients and other employees by the Employee Defendants violate the Code of Conduct, DB's Notice and Non Solicitation Obligations Policy, the individual defendants' Employment Agreements, their fiduciary duties, and constitute unfair competition. HPM is also unfairly competing with DB by exploiting the instability at DB caused by the resignations and attempting to induce additional DB employees and DB clients to join HPM. DB is powerless to stop these actions absent intervention by the Court.

ARGUMENT

A preliminary injunction is appropriate here for three reasons: (1) DB is likely to ultimately succeed on the merits of its claims; (2) DB will suffer irreparable harm if injunctive relief is denied; and (3) the harm that DB will suffer if the injunctive relief is denied outweighs

the injury that the Defendants will suffer if the injunction is granted. CPLR 6301; *Stockley v. Gorelik*, 24 A.D.3d 535, 536 (2d Dep't 2005). These determinations are committed to the discretion of the trial court. *See Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Jiggets v. Perales*, 202 A.D.2d 341, 342 (1st Dep't 1994).

Until a FINRA arbitration panel hears and determines this matter, a TRO is necessary to preserve the *status quo* and to prevent the immediate irreparable injury that will otherwise result. *See* CPLR 6313. Without a TRO, there is nothing to prevent the Employee Defendants from violating (and in some cases, continuing to violate) their contractual obligations to DB, using confidential and propriety information gained at DB to HPM's benefit, and leveraging the relationships cultivated at the expense of DB to improperly transfer to HPM, customers with aggregated managed assets valued in the billions. This will only result in unfair competition in the marketplace. *See* CPLR 6313; *see also Dupree v. Scottsdale Ins. Co.*, 947 N.Y.S.2d 428, 429 (1st Dep't 2012) (affirming issuance of TRO where "direct, immediate, and irreparable injury" will occur prior to determination of preliminary injunction).

POINT ONE

DB IS LIKELY TO SUCCEED ON THE MERITS

In order to establish a likelihood of success on the merits, a movant must show that its right to preliminary injunctive relief is plain on the facts of the case. *See Merrill Lynch Realty Assoc., Inc. v. Burr*, 140 A.D.2d 589, 592 (2d Dep't 1988). At this preliminary stage of the action, however, the law requires only that DB make a *prima facie* showing of a likelihood of success. *See Florio v. Incorporated Village of Lynbrook*, 138 A.D.2d 672, 672-73 (2d Dep't 1988). Even where the facts are in dispute, a court can find that a plaintiff has a likelihood of success on the merits based on the evidence presented regardless of whether such evidence is conclusive. *Ma v. Lien*, 198 A.D.2d 186, 187 (1st Dep't 1993).

DB will prevail on the merits because (1) the notice and non-solicitation covenants contained in the Code of Conduct, the Notice and Non Solicitation Obligations Policy, and the Employment Agreements are enforceable, and (2) the Employee Defendants are violating their obligations under these covenants.

A. The Employee Defendants' Obligations Under DB's Code Of Professional Conduct, DB's Notice And Non Solicitation Obligations Policy And The Employment Agreements

Pursuant to the Code of Conduct, the Employee Defendants are contractually-barred from soliciting DB's customers, seeking to hire DB's current employees, or to use any confidential and/or proprietary information belonging to DB. The Code of Conduct expressly provides that during the course of employment and for a period of 120 days following termination of employment, any DB employee may not:

> (1) [D]irectly or indirectly, solicit, or facilitate obtaining business from any [DB] client which was a client of the employee's division at any time during his or her employment, in any case other than for [DB]; (2) induce or attempt to induce any such client to reduce or terminate its business with [DB]; or (3) directly or indirectly, solicit, induce, cause, participate or assist any third party in soliciting any employees from the employee's division to work for the employee or any entity.

(*See* Nestle Aff. Ex. B at 9.) The Code of Conduct also provides that:

> Certain [DB] employees are required to provide advance written notice of their intention to resign from employment. For additional information and the terms of obligation for covered employees, please refer to the Notice and Non Solicitation Obligations Policy – US.

Id. The Notice and Non Solicitation Obligations Policy – US provides in relevant part:

> All United States based employees . . . who hold the title of Vice President or above are required to provide Deutsche Bank with written notice before resigning their employment as set forth below and subject to the accompanying policy concerning Notice Periods and Non-Solicitation:
>
> - Corporate Banking and Securities, Global Transaction Banking, Asset Wealth Management, and Non-Core Operations Unit

- All Managing Directors are required to provide Deutsche Bank with written notice 90 calendar days prior to separation of employment.
- All Directors are required to provide Deutsche Bank with written notice 60 calendar days prior to separation of employment.
- All Vice Presidents will be required to provide Deutsche Bank with written notice 30 calendar days prior to separation of employment.

(*See* Nestle Aff. Ex. D at 4.) It also reiterates DB's non-solicitation policy contained in the Code of Conduct:

> **Non-Solicitation Obligations**
>
> All employees who hold the title of Vice President or above will also be subject to a nonsolicitation requirement. The Non-Solicit policy provides that during your employment and for 120 days thereafter (the "Non-Solicitation Period"), you will not, directly or indirectly, solicit or facilitate obtaining business from any Deutsche Bank client which was a client of your division at any time during your employment, in any case other than for Deutsche Bank; induce or attempt to induce any such client to reduce or terminate its business with Deutsche Bank; or directly or indirectly, solicit, induce, cause, participate or assist any third party in soliciting any employees from your division to work for you or any entity. The Non-Solicitation Period will begin to run on the date you commence employment and end on the date that is 120 days following the date on which your employment termination becomes effective, which, if you have a Notice Period, will be the last date of the Notice Period.

(*See* Nestle Aff. Ex. B at 5.) The Code of Conduct also makes clear that:

> Where an employee acquires confidential information about [DB] or its clients while employed by [DB] or any affiliate, such information is to be kept in strict confidence. This requirement extends beyond the termination of the employment relationship.

(*See* Nestle Aff. Ex. B at 4.)

All DB employees are required to review the Code of Conduct, and where applicable, the Notice and Non Solicitation Obligations Policy, annually as written, and proactively indicate their agreement to be bound by and in full compliance with the same. (Nestle Aff. ¶ 10.) These

provisions[4] are also repeated almost verbatim in the various employment agreements executed by at least 11 of the 12 Employee Defendants.[5] (*See* Nestle Aff. Ex. C.)

For example, the Employment Agreement for Lawrence Weismann expressly provides as follows:

> **4. Notice and Non-Solicit**
>
> In exchange for Deutsche Bank's promises in this Agreement, if you terminate your employment with us for any reason, you will provide us with a minimum of 90 days prior written notice (the "Notice Period"). During the Notice Period, (i) we will pay you your salary and continue certain benefits until your termination date and (ii) you will remain an employee of the Bank and will continue to work in order to transition your duties as directed by us. We may choose to place you on leave during the Notice Period or terminate your employment. You may not perform any services for any other employer during the Notice Period unless we agree in writing or we terminate your employment.
>
> You agree that during your employment and for 120 days thereafter (the "Non-Solicitation Period"), you will not, directly or indirectly, solicit or facilitate obtaining business from any Deutsche Bank client which was a client of your division at any time during your employment, in any case other than for Deutsche Bank; induce or attempt to induce any such client to reduce or terminate its business with Deutsche Bank; or directly or indirectly, solicit, induce, cause, participate or assist any third party in soliciting any employees from your division to work for you or any entity. The Non-Solicitation Period will begin to run following the end of any applicable Notice Period.

(*See* Nestle Aff. Ex. A.)

B. The Code Of Conduct, The Notice And Non Solicitation Obligations Policy And The Employment Agreements Are Valid, Binding And Enforceable

To be enforceable under New York law, the confidentiality and non-solicitation covenants must meet a three-prong reasonableness test: The restrictive covenants are reasonable

[4] Defendants Portfolio and Bevc were not subject to notice period requirements, but they are bound by DB's non-solicitation policy as described herein. (*See* Nestle Aff. Exs. B, D.)

[5] It is DB's practice to present new hires with an offer letter, which the employee will counter-sign to indicate their acceptance of the offer of employment. (Nestle Aff. at ¶ 9, n.4.) These offer letters constitute legally binding employment agreements between DB and its employees.

if it (a) is no greater in time or area than is necessary to protect the legitimate interest of the employer, (b) does not impose undue hardship on the employee, and (c) does not injure the public. *Portware v. Barot, LLC*, 11 Misc. 3d 1059(A), 2006 N.Y. Slip Op. 50282(U), at *3 (Sup. Ct. N.Y. County 2006); *see also BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 388-89 (1999). Each of these elements is satisfied here.

1. Enforcement Is Necessary To Protect DB's Business Interests

Restrictive covenants are enforced when necessary to protect the legitimate interests of employers. "[A]n employer has a legitimate interest . . . in safeguarding that which has made his business successful and to protect himself against deliberate surreptitious commercial piracy." *Ecolab Inc. v. Paolo*, 753 F. Supp. 1100, 1110 (E.D.N.Y. 1991) (internal quotation and citation omitted).

Under New York law, an employer's legitimate protectable business interests include trade secrets, confidential information, and goodwill. *Id.* ("Loss of good will constitutes irreparable harm which cannot be compensated by money damages."). The use and disclosure of an employer's confidential information and the possibility of loss of customers through such usage constitute irreparable harm. *See Ivy Mar Co. v. C.R. Seasons, Ltd.*, 907 F. Supp. 547, 565 (E.D.N.Y.1995) ("Numerous courts have held that harm to a company's operations, reputation, good will or customer relations is irreparable because money damages cannot provide adequate compensation for such injuries."); *Alside Div. Of Associated Materials Inc. v. Leclair*, 295 A.D.2d 873, 874 (3d Dep't 2002) (finding "a loss of customer good will can constitute irreparable harm for preliminary injunction purposes); *Zomba Recording LLC v. Williams*, 15 Misc.3d 1118(A), 2007 N.Y. Slip Op. 50752(U) at *10 (Sup. Ct. N.Y. County 2011) (preliminary injunction warranted to "protect a company's goodwill and credibility in its industry, . .[as] [t]his enhancement is not capable of monetary calculation.").

As alleged in DB's Verified Complaint, between Friday, May 16 and Tuesday, May 20, a number of DB customers were solicited by the Employee Defendants. Additionally, on Monday, May 19, 2014, DB learned that Stephen Nielander of HPM had contacted one of DB's clients earlier that day, stating falsely that DB's "New York Investment Group" had joined HPM and actively solicited that client's business. (Ver. Compl. at ¶ 32; Nestle Aff. at ¶ 16.)

It is thus evident that the Employee Defendants have misappropriated DB's confidential information to the detriment of DB and to the benefit of HPM by using that information to wrongfully solicit DB's clients, which conduct the Court should enjoin. *See e.g., Marsh USA Inc. v. Karasaki,* No. 08 Civ. 4195 (JGK), 2008 WL 4778239, at *21 (S.D.N.Y. Oct. 31, 2008) (entering a preliminary injunction enforcing non-solicitation agreement where former employee solicited highly valuable clients and employees of former employer); *Aon Risk Servs. v. Cusack*, 34 Misc. 3d 1205(A), 2011 N.Y. Slip Op. 52433(U), at *1, 23 (Sup. Ct., N.Y. County 2011) (enforcing two-year employee non-solicitation covenant where a systematic and coordinated raid conducted by former employee and his new employer resulted in the loss of more than 100 clients and over $20 million in revenue); *Ikon Office Solutions, Inc. v. Usherwood Office Tech., Inc.*, 21 Misc. 3d 1144(A), 2008 N.Y. Slip Op. 52499(U), at *3, 19 (Sup. Ct., N.Y. County 2008) (similar injunctive relief granted to enjoin former employees from further violating non-solicitation covenants).

Defendants' conduct also constitutes a misappropriation of DB's customer goodwill, which while not readily defined, has been described as "the intangible worth of buyer momentum emanating from the reputation and integrity earned by the company." *General Cigar Co., Inc. v. G.D.M. Inc*., 988 F. Supp. 647, 659 (S.D.N.Y. 1997) (internal citation omitted). Goodwill is generated by repeat business with existing customers or by referrals to potential

customers. *See United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 901 (2d Cir. 1992) (goodwill defined as the "expectation that the old customers will resort to the old place"). An individual's act of soliciting a potential client based on a relationship cultivated by the individual on behalf of a former employer constitutes harm to the former employer's goodwill. As a result, confidentiality and non-solicitation covenants are lawful and appropriate to prevent any damage to an employer's goodwill. Indeed, in *BDO Seidman*, the Court of Appeals held that an employer has a legitimate interest in preventing a former employee's use of customer relationships and goodwill acquired and developed by such employee while employed by the employer. 93 N.Y.2d at 392–93 (the firm's "legitimate interest here is protection against defendant's competitive use of client relationships which [the firm] enabled him to acquire through his performance of accounting services for the firm's clientele during the course of his employment."). *See also USI Ins. Servs. LLC v. Miner*, 801 F. Supp. 2d 175, 191 n. 15 (S.D.N.Y. 2011) ("New York law also recognizes an employer's interest in protecting clients procured through the use of a company's name and resources.").

Here, enforcement of the restrictive covenants is necessary to protect DB's confidential information, goodwill and customer relations. The notice provisions, which apply to 7 of the 12 Employee Defendants, are expressly aimed at seamlessly transitioning customer accounts upon an employee's departure from DB, and to ensure that the departure has no impact on DB's client relationships. Certain of the Employee Defendants' abrupt and unexpected resignations are clear violations of these provisions, particularly in the case of those who have taken the position that they are not bound by the notice and non-solicitation covenants. Evidence suggests that even those who purported to abide by their notice periods have already attempted to solicit DB's clients while still being ostensibly employed by DB. (Nestle Aff. at ¶ 15.) For example,

defendant Nadel, who is subject to notice period and non-solicitation restrictions, and who is ostensibly employed by DB at this moment, contacted one or more of DB's private banking clients and solicited their business for HPM. (Ver. Compl. at ¶ 33; Nestle Aff. at ¶ 15.) Such conduct alone merits injunctive relief. *See*, *e.g.*, *Aon Risk Servs. v. Cusack*, 2011 N.Y. Slip Op. 52433(U), at *15 ("a private communication, such as a phone call or email, may be reasonably understood . . . as a solicitation."); *Ecolab, Inc. v. K.P. Laundry Mach., Inc.*, 656 F. Supp. 894, 896-97 (S.D.N.Y. 1987) (activities as seemingly innocuous as sending "goodbye notes" can constitute the "first step in solicitation," thereby warranting a preliminary injunction). DB's customers face a potential disruption in the processing of their requests and the management of their investments. If the notice provisions are not now enforced, DB will be forced to find new coverage for the Employee Defendants' assigned accounts, which could have a staggering effect on its goodwill and client relationships.

These restrictive covenants were bargained-for contractual provisions, to which the Employee Defendants freely agreed and in exchange for which they received various benefits and promotions. The corollary to the freedom to contract is an obligation to be bound by the terms of that contract into which the parties freely entered and the benefit of which they have enjoyed. While the Employee Defendants are by no means obligated to work for DB indefinitely and against their wishes, they are in fact obligated to honor their agreement with DB and abide by their bargained-for notice and non-solicitation provisions in order to permit a smooth transition following their resignations. Immediate enforcement of the notice, confidentiality and non-solicitation covenants is thus merited to protect DB's critical business interests, especially where the employees are "exploiting or appropriating the good will of a client or customer, which had been created and maintained at the employer's expense, to the employer's competitive

detriment." *Evolution Markets, Inc. v. Penny*, 23 Misc. 3d 1131(A), 2009 N.Y. Slip Op. 51019(U), at *12(Sup. Ct., Westchester County 2009).

2. The Restrictive Covenants Are No Greater Than Is Necessary To Protect DB's Business Interests

The confidentiality and non-solicitation covenants as set forth in the Code of Conduct, the Notice and Non Solicitation Obligations Policy, and the Employment Agreements require the Employee Defendants to not disclose confidential information regarding the operations of DB, and to not solicit its current customers and employees. (*See* Nestle Aff. Exs. B, C.) These covenants are limited, and narrowly tailored to protect the legitimate interests of DB set forth above. DB has no legitimate interest in preventing the Employee Defendants from competing for the patronage of customers with whom they never developed a relationship while at DB, customers with whom they had established a relationship prior to their employment at DB, and customers with whom they began a relationship after leaving DB. *See Healthworld Corp. v. Gottlieb*, 12 A.D.3d 278, 278-79 (1st Dep't 2004) (affirming grant of preliminary injunction enjoining defendants from soliciting or accepting business from clients or former clients of their former employer was limited to clients of former employer with whom the defendants had contact during their employment). And the duration of the notice periods corresponds to the seniority and the level of responsibility of the particular employee, are necessary to ensure a smooth and seamless transition that would enable DB to carry out its fiduciary obligations to its clients. Thus, the restrictive covenants restraining the Employee Defendants' ability to resign immediately and/or to solicit clients and other employees is reasonable and enforceable. *See*, *e.g.*, *Rosenthal v. Mahler*, 141 A.D.2d 625, 628 (2d Dep't 1988) (granting injunctive relief where moving parties would have suffered "irreparable injury in the form of a loss of clients, business and prestige").

3. The Restrictive Covenants Do Not Impose Undue Hardship On The Employee Defendants, Nor Are They Injurious To The Public

The restrictive covenants do not impose an undue hardship on the Employee Defendants as such restrictions do not bar their ability to work in a similar field indefinitely or in an unbounded geographic area. *See Aon Risk Servs. v. Cusack*, 2011 N.Y. Slip Op. 52433(U) at *13 ("Covenants containing no geographic limitation have been upheld as reasonable where the purpose of the restriction was to protect the employer from losing customers to a former employee who, by virtue of his employment, gained special knowledge and familiarity with the customers' requirements."). Likewise, the restrictive covenants do not injure the public generally as they are reasonably targeted to protect DB's legitimate interests and do not unfairly restrain competition. *See BDO Seidman*, 93 N.Y.2d at 393-94 (finding the 18-month restraint on serving clients of the former employer's Buffalo office does not "seriously impinge on the availability of accounting services in the Buffalo area from which the public may draw, or cause any significant dislocation in the market or cause a monopoly in accounting services in that locale.").

Therefore, DB has a strong likelihood of success on the merits of their claims because the restrictive covenants are valid, binding, and enforceable.

POINT TWO

DB WILL SUFFER IRREPARABLE HARM IF DENIED INJUNCTIVE RELIEF

DB will be irreparably injured absent an order from this Court enjoining the Defendants because (1) the Employee Defendants' departures to HPM could have a detrimental effect on DB's business; and (2) the departures will necessarily provide HPM with a tremendous competitive advantage to the detriment of DB.

Where an employer has legitimate interests to protect, and a former employee discloses or uses confidential and proprietary information, or exploits customer relationships and goodwill,

New York courts will generally find that absent injunctive relief, the employer will suffer irreparable harm. *See Portware,* 2006 N.Y. Slip Op. 50282(U), at *7; *Penny*, 2009 N.Y. Slip Op. 51019(U), at *15. Irreparable injury in this context means any injury for which a monetary award alone cannot be adequate compensation. *See McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co., Inc.*, 114 A.D.2d 165, 174 (2d Dep't 1986). In *Portware, LLC*, the court held that the former employee's solicitation of the former employer's customers and the disclosure of the former employer's confidential information caused a loss of business to the former employer that was "impossible, or very near to difficult, to quantify." 2006 N.Y. Slip Op. 50282(U), at *7. *See also Innoviant Pharmacy, Inc. v. Morganstern*, 390 F. Supp. 2d 179, 188 (N.D.N.Y. 2005) (finding that where a breach of restrictive covenants has occurred, "courts have often taken a somewhat relaxed approach to the irreparable harm inquiry, and in certain circumstances have found it appropriate to presume the existence of such an inquiry").

Here, the Employee Defendants have violated and continue to violate the restrictive covenants set forth in the Code of Conduct, the Notice and Non Solicitation Obligations Policy, and Employment Agreements. As is explained more fully above, such violations include, without limitation, the Employee Defendants' (i) breach of their notice provisions, (ii) solicitation of other DB employees, and (iii) use and disclosure of DB's confidential and proprietary information to actively and directly solicit DB's customers, including various customers with whom the Employee Defendants worked and developed significant relationships and goodwill during their employ with DB. And HPM has attempted to continuously and systematically assault DB's business, its customer base, and its employees. Accordingly, the Employee Defendants' breaches and HPM's conduct have caused and continue to cause irreparable harm which cannot be readily remedied in damages in an action of law.

POINT THREE

THE BALANCE OF EQUITIES TIPS IN FAVOR OF DB

The balance of equities tips decidedly in favor of an injunction here, as the burden that will be caused to the Employee Defendants by the imposition of the relief requested herein will be less than the harm caused to DB by the Employee Defendants' continuing breaches of the restrictive covenants. Allowing the Employee Defendants to continue to violate the restrictive covenants—and permitting HPM to benefit from those violations—defeats DB's efforts to protect its business and goodwill, causing substantial and incalculable injury to DB.

Imposition of the relief requested herein, however, will not cause significant hardship to the Defendants. The Employee Defendants voluntarily and repeatedly agreed to comply with the Code of Conduct, the Notice and Non Solicitation Obligations Policy and Employment Agreements in consideration for, among other things, continued employment, promotions, and access to DB's confidential information. These restrictive covenants are narrowly tailored, and the Employee Defendants will not suffer significant hardship if compelled to abide by the limited restrictions by which they agreed to be bound. *Portware, LLC*, 2006 N.Y. Slip Op. 50282(U), at *7 (finding hardship to be minimal where restrictive covenants were reasonably limited). In any event, the TRO DB seeks would only restrain the Defendants for a short period of time until a FINRA panel is able to adjudicate the merits of DB's arguments. Under the circumstances, such minimal burden on the Defendants is justified in light of the irreparable harm DB will suffer absent an injunction. Immediate injunctive relief, therefore, is appropriate.

CONCLUSION

For the reasons described above, in the Verified Complaint and the accompanying affirmations and submissions, Deutsche Bank Trust Company Americas respectfully requests that the Court grant a preliminary injunction with a temporary restraining order against the

Defendants to preserve the *status quo* pending the resolution of an arbitration proceeding before FINRA, plus such other and further relief that the Court considers to be just, equitable and proper.

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Respectfully submitted,

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