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

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BENJAMIN A. PACE III and LAWRENCE WEISSMAN,

Petitioners,

Index No. _____

-against-

I.A.S. Part

DEUTSCHE BANK SECURITIES INC.; DEUTSCHE BANK TRUST CORPORATION; DEUTSCHE INVESTMENT MANAGEMENT AMERICAS INC.; and DEUTSCHE BANK TRUST COMPANY AMERICAS,

Respondents.

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PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR INJUNCTION AND PROVISIONAL RELIEF IN AID OF ARBITRATION

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PRELIMINARY STATEMENT

Lawrence Weissman ("Weissman") and Benjamin A. Pace III ("Pace") (collectively "Petitioners") were forced to leave their employment at Deutsche Bank Securities Inc., Deutsche Bank Trust Corporation, Deutsche Investment Management Americas Inc., and Deutsche Bank Trust Company Americas (collectively "DB" or the "Bank"), because of the Bank's shady practices. Despite causing the employment relationship to end, DB seeks to force Petitioners to work for DB for an additional 90 days and to prevent Petitioners from offering their services to DB customers for 120 days after that. Petitioners respectfully request that the Court grant, in aid of arbitration before the Financial Industry Regulatory Authority ("FINRA"), a preliminary injunction against the Bank so Petitioners may leave DB and continue to work in their trade.

Weissman and Pace supervise a group at DB that is responsible for investing the personal assets of high net worth customers. Over the years, the customers have learned to trust Weissman, Pace, and other members of their group to make investment decisions that are beneficial to the customers, rather than solely profitable to the Bank. Indeed, those customers have given Petitioners' group discretionary authority to make investment decisions without customers' prior approval, thereby requiring the members of the group, including Petitioners, to act as fiduciaries.

Unfortunately, in recent years the Bank has come to view Petitioners' group as a distribution outlet to sell the Bank's investment products and has increasingly pressured Petitioners to commit the customers' assets to buy the Bank's proprietary investment products at the expense of the customers' own investment goals and needs. Most recently, on or about April 1, 2014, DB pressed Petitioners to commit at least $80 million of their customers' money by May 15 to a DB-financed investment fund, solely for DB's profit. Had Petitioners ceded to the pressure, they would have violated their promise to their customers that investment possibilities would not be limited to the Bank's products. Having no other choice, Petitioners were forced to resign on May 16, 2014.

Although DB has forced Petitioners to resign by pressuring them to violate their fiduciary obligation to their customers, DB has misinformed Petitioners' customers that they have been fired as a part of larger restructuring in order to prevent Petitioners from working for another employer and offering their services to their customers, who have come to rely on Petitioners for directing their investments. Petitioners now seek immediate injunctive relief preventing DB from enforcing restrictive covenants so that Petitioners may continue working in their trade without any restrictions. Without a preliminary injunction, Petitioners will be forced to work for DB, and their customers' assets will continue to be exposed to DB's dishonest practices.

STATEMENT OF FACTS

Background

Pace is a graduate of Columbia University and New York University, and he has worked in the financial services industry since approximately 1982. (Affidavit of Benjamin A. Pace III ("Pace aff") ¶¶ 2-3.) His experience includes work at PNC Financial, Bank of America, and JP Morgan Chase prior to his employment with DB. (*Id.* ¶ 3.) Pace began to work for DB's predecessor company Bankers Trust in 1994, and he became DB's Chief Investment Officer for Private Wealth Management in Americas in 2004. (*Id.* ¶ 4.) Since 2004, Pace also has been the Head of Discretionary Portfolio Management, Wealth Management in the Americas. (*Id.*) Pace was also a member of the Wealth Management Americas Executive Committee and the Deutsche Asset and Wealth Management Americas Investment Committee. (*Id.*)

Weissman is a graduate of Cornell University and Columbia University, and he has worked in the financial services industry since approximately 1985. (Affidavit of Lawrence Weissman ("Weissman aff") ¶¶ 2-3.) His experience includes work at TIAA-CREF, Neuberger Berman, and CitiGroup prior to his employment with DB. (*Id.* ¶ 3.) Weissman has been the Head of Portfolio Consulting at DB since 2010. (*Id.* ¶ 4) Weissman has the dual role of acting as a Portfolio Consultant ("PC") for some of DB's bigger clients and supervising other PCs, who are responsible for managing DB's customers' investment portfolios. (*Id.*)

<u>The Discretionary Portfolio Management Group</u>

During their last few years at DB, Petitioners have worked in the Discretionary Portfolio Management group (the "Group"), which is part of DB's Wealth Management division that manages investment portfolios of DB's customers. (Pace aff ¶ 6; Weissman aff ¶ 5.) The Group includes approximately 18 PCs, whose primary role is to develop relationships with predominantly high and ultra high net worth individuals (rather than with institutional customers), to understand the customers' needs, and to develop investment strategies. (Pace aff ¶ 7; Weissman aff ¶ 6.) Weissman supervises other PCs in the Group and reports to Pace, who is the Head of the Group. (Pace aff ¶ 4; Weissman aff ¶ 4.)

Almost all of the Group's customers have given their PCs discretionary authority to invest the customers' money, which means that individual PCs do not need customers' prior approval to make investment decisions. (Pace aff ¶ 8; Weissman aff ¶ 7.) Accordingly, the Group and the PCs have a fiduciary obligation to manage customers' money with the customers' best interest in mind. (*Id.*)

One of the primary ways the Group achieves that goal, and avoids conflicts, is by operating an "open architecture" platform. (Pace aff ¶ 9; Weissman aff ¶ 8.) That term means that, although the Group is part of DB, the individual PCs are free to, and in fact are required to, consider investment products from all institutions, including DB's competitors, to ensure the greatest potential for achieving the clients' financial goals. (*Id.*) The customers, in turn, pay a management fee to the Group based on the amount of assets the Group manages for them. (*Id.*) DB promotes the Group's "open architecture" platform to its customers in order to gain the customers' trust and confidence. (Pace aff ¶ 10; Weissman aff ¶ 9.) Customers have been told that the Group selects investments that best fit the customers' investment profile, rather than DB's bottom line. (*Id.*)

DB's Push to Sell High Margin Proprietary Products

A few years ago, DB merged its Asset Management, Wealth Management, and certain units from Corporate Banking & Securities Divisions. (Pace aff ¶ 11; Weissman aff ¶ 10.) The Asset Management Division is responsible for developing new investment products to offer to the public. (*Id.*) Since that time, DB management has inappropriately viewed the Group as a distribution outlet to sell DB products and has pushed the Group to invest its customers' money in proprietary DB products, i.e., products created by other areas of DB, such as the Asset Management division. (Pace aff ¶ 12; Weissman aff ¶ 11.)

Many of these proprietary products, while no doubt suitable for a limited number of DB customers, are not suitable for all of the Group's customers because the products sometimes had higher costs for the customers than the Group typically charged. (*Id.*) Moreover, by pressuring the Group to commit sufficient "seed" money to DB's proprietary products, the Bank could market its products to outside institutions. (Weissman aff ¶ 12.) Typically, out of concern that a product will fail, outside institutions will not consider investing in any product that does not have a minimum amount of capital from other investors. (*Id.*) In short, by pressuring the Group to provide "seed" money from its customers' assets, DB wanted to shift to the customers the risk that DB's new proprietary products may fail. (*Id.*)

One of these proprietary products was the DWS Strategic Equity Long-Short Fund (the "Fund"). (Pace aff ¶ 13; Weissman aff ¶ 13.) The Fund was being developed as an "alternative investment" product, which generally meant that it invested in complicated products such as hedge funds, rather than in stocks and bonds. (*Id.*) The Fund included four hedge funds managed respectively by Omega Advisors, Inc.; Chilton Investment Co. LLC; Lazard Asset Management LLC; and Atlantic Investment Management Inc. (*Id.*) DB planned to make an initial investment of $200 million of its own money to "seed" the Fund, that is, DB would provide money for the four hedge funds to invest. (Pace aff ¶ 14; Weissman aff ¶ 14.) This "seed" money would be provided to the Fund in the form of a "bridge loan" from DB. (*Id.*)

The Bank planned to recoup the money by selling the Fund product to existing customers, including those who invest with the Group. (*Id.*) As a result, DB began to pressure Petitioners to commit significant amounts of the customers' money to the Fund. (*Id.*) For many of the Group's customers, however, DB's alternative products are not suitable investments. (Pace aff ¶ 12; Weissman aff ¶ 11.) For example, some of the largest accounts Weissman manages are for retired investors who do not want to invest in the type of complicated alternative products pushed by DB. (Weissman aff ¶ 31.) Other customers already have an appropriately limited portion of their portfolios invested in such alternative products. (*Id.*) For the members of the latter group, it makes no sense to recommend that they divest themselves of existing products only to buy DB products, because the customers would only incur additional transaction fees. (*Id.*) To do so would be a violation of the PCs' fiduciary obligations. (*Id.*)

Nonetheless, Chip Packard ("Packard"), the Chief Executive Officer of DB's Private Bank, and Stephane Farouze ("Farouze"), DB's Global Head of Alternative Products and Fund Solutions (the DB group that created the Fund), repeatedly requested data on the portion of the Group's customer portfolios that was invested in hedge funds. (Pace aff ¶ 15; Weissman aff ¶ 15.) Packard, Farouze, and those who reported to them wanted to use that information to create numerical "targets" for the Group to invest in the Fund with the Group's customer assets. (*Id.*)

DB also pressured Pace to include its proprietary products in the Group's investment models, even in those circumstances where Pace believed the products were inappropriate. (Pace aff ¶ 20.) Pace's duties as Chief Investment Officer included recommending investment products to be included in model investment portfolios. (*Id.*) These model portfolios included a mix of investment products designed to meet the needs of customers who shared common investment profiles. (*Id.*) Where appropriate, the PCs could invest customer assets into one of the models. (*Id.*) DB pushed Pace to recommend that the Fund be included in one of the Bank's investment models in order to generate more sales for the Bank. Pace refused. (*Id.*)

On or about April 1, 2014, Bernard Abdo ("Abdo"), DB's Head of Alternative Investments in the United States, who reported to Farouze, pressed Petitioners to commit at least $80 million of their customers' money into the Fund by May 15. (Pace aff, Ex. A; Weissman aff, Ex. A.) Abdo wanted Petitioners to put "all hands on deck" to meet this "target" so that DB could pay back the bridge loan used to seed the Fund. (*Id.*) Thereafter, Petitioners were required to attend demand assessment meetings where DB management questioned them about their willingness to commit to the numerical "targets" DB had set for sale of various proprietary products, including the Fund. (Pace aff ¶ 17; Weissman aff ¶ 17.) However, Abdo was aware that the customers could view the Fund negatively because it was part of a class of investments that DB had labeled "hedge fund assets." (Pace aff ¶ 19.) To avoid this negative connotation, Abdo urged Pace to create a new asset class called "long/short equity" to obscure that the Fund consisted of investments in hedge funds. (*Id.*) Pace refused. (*Id.*)

Petitioners were also concerned that DB was trying to circumvent normal operating procedures so that it could recoup its "seed" money as quickly as possible. (Weissman aff ¶ 19.) New DB investment vehicles typically must go through a formal New Product Approval Process before they are marketed. (*Id.*) Because the Fund did not go through this process, DB's internal compliance department was investigating whether the Fund should even be shown to the Group's customers. (*Id.*) Nevertheless, Abdo continued to pressure the Group to sell the Fund. (*Id.*)

<u>History of DB's Pressure to Invest in Proprietary Products</u>

Although the Fund represented the first time that DB had actually set a numerical "target" for Petitioners, DB had previously tried to push investment products to the Group's customers without proper due diligence, with increasing level of forcefulness over time. In or about 2013, Farouze insisted that Pace help him use the customers' assets to provide financing for a real estate deal in Chicago because the lead investors needed additional investment capital quickly. (Pace aff ¶ 22; Weissman aff ¶ 20.) Pace refused Farouze's request because there had been no due diligence. (*Id.*) DB ultimately abandoned the deal when it learned that the lead investors had been barred for life from the securities industry for engaging in fraudulent practices. (*Id.*)

In or about 2012, Packard pressured the Group to create a sales campaign for a private equity offering by Softbank, solely based on the investment banking relationship DB had with Softbank. (Weissman aff ¶ 21.) Packard also became upset with Weissman because Weissman had refused to create a major sales campaign for another DB proprietary product, the Secondary Opportunities Private Equity Fund III, which was another alternative product that DB wanted the Group to fund using its customers' assets. (Weissman aff ¶ 23.) Indeed, Packard repeatedly insisted that Weissman commit more of the customers' assets to DB's proprietary products and stated that any reasonable estimate of potential sales by Weissman was "not enough." (Weissman aff ¶ 24.)

In another instance of trying to push its proprietary products, DB placed pressure on the Group to provide additional "seed" money to develop a new DB product that invested in European equities. (Weissman aff ¶ 22.) This new proprietary product would replace the non-DB products in which the Group had invested for its customers. (*Id.*) This type of "swap" of European portfolios would not have materially benefitted the Group's clients, who were already adequately invested in such a product; the switch to the proprietary product would, however, have benefitted DB. (*Id.*)

Indeed, DB had also pressured Pace to include various DB products in the Group's investment models. (Pace aff ¶ 21.) For example, DB pressured Pace to recommend that the Bank's European Equity Fund be included in the Group's investment model, even though that fund was not suitable for the particular model. DB's European Equity Fund invested only in European Union equities, whereas the model required investments into equities throughout Europe (including Great Britain and Scandinavian countries). (*Id.*) In another instance, DB wanted Pace to recommend that the Group replace an outside Japanese equity fund with DB's own proprietary Japanese equity fund, even though such a swap, if executed immediately, would generate adverse tax consequences for the Group's customers. (*Id.*) Pace refused to do so. (*Id.*)

The Planned Change in Reporting Structure

Moreover, Packard continually tried to find various ways to circumvent the Group's fiduciary obligations so that the Petitioners could sell more high margin proprietary products for DB's benefit. (Pace aff ¶ 23; Weissman aff ¶ 25.)

In or about August 2013, Packard and Dario Schiraldi ("Schiraldi"), DB's Global Head of Sales, hired Caroline Kitidis ("Kitidis") as DB's Head of Key Client Partners and Wealth Investment Counselors in the Americas. Packard and Schiraldi planned to have the Group report to Kitidis in order to "drive investment sales." (Pace aff ¶ 24; Weissman aff ¶ 26.) Kitidis is known to place sales quotas on members of her team. (*Id.*) Such a quota system, however, would have breached the Group's duty to customers to use an "open architecture" platform and its fiduciary obligations to put the customers' needs first. (*Id.*) Moreover, Kitidis would have been involved in determining the compensation for Weissman and other PCs in the Group, and thus could have exerted significant pressure on the Group to invest customer money into proprietary products. (Pace aff ¶ 25; Weissman aff ¶ 27.)

Not surprisingly, DB's legal department opposed the Group's reporting to Kitidis because such a supervisory structure presented a clear conflict. (Pace aff ¶ 26; Weissman aff ¶ 28.) Packard nevertheless continued (and continues) to put pressure on DB's legal department to approve his scheme. For example, Packard developed a plan to move six PCs, including Weismann, who collectively manage approximately $8 billion in assets, into DB's brokerage unit in an attempt to avoid the fiduciary-duty problem. (Pace aff ¶ 27; Weissman aff ¶ 29.) Because brokers do not have the same fiduciary obligations to their customers as financial advisors like the PCs, Packard hoped to make the PCs use their existing relationships with their customers to sell DB's products. (*Id.*) Packard also attempted to create a "dotted line" reporting relationship between the PCs and Kitidis. (Pace aff ¶ 28; Weissman aff ¶ 30.) Thus, while the PCs would continue to report to Pace, Kitidis would nevertheless be able to pressure PCs to sell DB's proprietary products. (*Id.*) Such schemes, however, would have created the same type of conflicts the Group was trying to avoid. (Pace aff ¶ 29; Weissman aff ¶ 31.)

Pace and Weissman became especially concerned when they learned that DB had fired Arnaud De-Servigny ("De-Servigny"), DB's Global Chief Investment Officer for Wealth Management. (Pace aff ¶ 31; Weissman aff ¶ 33.) De-Servigny had protested DB's efforts to use client money to pre-fund DB's investments and raised concerns about violation of DB's fiduciary obligations and questioned DB's plan to have PCs reporting to the sales department. (*Id.*)

<u>Petitioners' Repeated Complaints About the Conflicts</u>

Nevertheless, beginning in or about the Fall of 2013, Petitioners repeatedly complained about DB's efforts to have Petitioners and the Group breach their fiduciary obligations. (Pace aff ¶ 32; Weissman aff ¶ 34.) In or about November 2013, Pace expressed his concern to Randy Brown ("Brown"), DB's Global Chief Investment Officer, that DB viewed the Group as a large and convenient receptacle for the Bank's high margin products. (Pace aff ¶ 33.) Pace also told Brown that Pace was concerned that the Bank would not give Pace the authority to remove an underperforming proprietary product from an investment model. (*Id.*)

On or about March 6, 2014, Weissman sent an email to Pace stating that the pressure to use DB's internal products was limiting the Group's ability to act as fiduciaries and raised the prospect that Abdo, among others at DB, wanted to "double dip" on fees charged to customers, even though the Group has repeatedly told its customers that it does not engage in that practice. (Pace aff, Ex. B; Weissman aff, Ex. B.) In April 2014, Weissman also sent a memorandum to Christian Nolting ("Nolting"), DB's Global Head of Discretionary Portfolio

Management, expressing his concerns about Packard's plans and the resulting breach of the customers' trust (Weissman aff, Ex. C.); Nolting agreed and sent an email to Brown stating, among other things, that the Group could not have a reporting relationship with the sales department (i.e., Kitidis) because of the Group members' fiduciary duties to customers. On April 9, 2014, Weismann specifically raised his concerns to Pace that the push to sell the Fund was creating a significant conflict of interest because the Fund had not yet gone through the normal approval process. (Pace aff, Ex. C; Weissman aff, Ex. D.) The Group was being asked to "pre-sell" the Fund even though the customers could forfeit all of the expenses incurred if the "pre-sell" did not become effective; customers, however, would incur additional fees as a result. (*Id.*) Pace agreed with Weissman's concerns and forwarded Weissman's emails to upper management. (Pace aff ¶ 36; Weissman aff ¶ 38)

Weissman was subsequently called into meetings with Brown and Jerry Miller ("Miller"), Head of Asset and Wealth Management for the Americas. (Pace aff ¶ 37; Weissman aff ¶ 39.) Weissman told Brown and Miller that the Group was being pressured to sell products that were inappropriate for many clients and that he and Pace were concerned about the plan to move the Group to the sales department. (Weissman aff ¶ 39.) He also told them that he was concerned about his job if he did not comply. (*Id.*) However, neither Brown nor Miller was able to assure Weissman that the pressure would cease. (Pace aff ¶ 37; Weissman aff ¶ 39.)

DB Forces Petitioners to Quit, Misinforms Customers about the Nature of Their Resignation, and Seeks to Enforce Its Notice and Non Solicitation Policy

DB increasingly pressured Petitioners and put them in the untenable position of choosing between violating their fiduciary obligations to their customers and disobeying the mandates of DB's management. (Pace aff ¶ 38; Weissman aff ¶ 40.) On May 16, 2014, having no other choice, Petitioners gave DB their notice of resignation. (Pace aff ¶ 39; Weissman aff ¶ 41.)

Petitioners have not used any customer information to compete with the Bank nor have they contacted any customers to say that Petitioners are leaving the Bank. (Pace aff ¶ 40; Weissman aff ¶ 42.) Nevertheless, the Bank has begun spreading deliberate misinformation to customers about Petitioners' departure. The Bank sent an email to customers stating that Petitioners had left DB as "part of a larger restructuring." (Pace aff, Ex. D; Weissman aff, Ex. E.) Such email was intended to mislead the customers into believing that Petitioners had been dismissed for performance reasons. (Pace aff ¶ 41; Weissman aff ¶ 43.) In addition, on May 21, 2014, Brown called Pace and warned that Pace should "lay low" because if Pace did not do so, DB would get "deeply personal" and Pace would feel its "full wrath." (Pace aff ¶ 42.)

At the same time, DB seeks to enforce restrictive covenants against Petitioners, notwithstanding DB's continued pressure on Petitioners to breach their fiduciary duty to their customers. (Pace aff ¶ 43; Weissman aff ¶ 44.) Notably, DB claims that Petitioners are subject to a "Notice & Non-Solicitation Obligations Policy" (the "Policy"), which states that each Petitioner must "remain an employee of the Bank" for 90 days; "continue to work in order to transition his or her duties;" and may not "perform any services for any other employer during the Notice Period unless Deutsche Bank agrees in writing to terminate his or her employment." (Pace aff, Ex. E at 3; Weissman aff, Ex. F at 3.) The Policy also purports to prevent Petitioners from soliciting customers for 120 days from the end of the 90-day notice period. (Pace aff, Ex. E at 2; Weissman aff, Ex. F at 2.)

ARGUMENT

I. LEGAL STANDARD

"To obtain a preliminary injunction, a movant must demonstrate, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) a balancing of the equities in the movant's favor." (*Yedlin v Lieberman*, 102 AD3d 769, 769-770 [2d Dept 2013].) Notably, "[t]he determination to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court." (*Coinmach Corp. v Alley Pond Owners Corp.*, 25 AD3d 642, 643 [2d Dept 2006]; *see Butt v Malik*, 106 AD3d 849, 850 [2d Dept 2013].) Indeed, an employee is entitled to a preliminary injunction preventing an employer from commencing an action based on a restrictive covenant if the employee demonstrates that the covenant is likely to be "unenforceable," that there will be "irreparable injury to his career absent a preliminary injunction, and that a balancing of the equities favors him." (*Yedlin*, 102 AD3d at 770.) Here, Petitioners meet all three prongs.

II. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS

Petitioners are likely to be able to show that DB's post-employment restrictions are unenforceable. First, the 90-day notice period is unenforceable because the Court cannot order specific enforcement of a personal service contract. Second, DB forfeited its right to enforce the restrictions by constructively discharging Petitioners. In particular, DB urged the Petitioners to engage in deceptive practices that would have violated Petitioners' fiduciary obligations to their customers and thus compelled Petitioners to resign. Third, the restrictions are unreasonable because they would harm Petitioners' customers by denying the customers the right to invest with the advisors of their choice, with whom they have lengthy and trusted relationships and, in effect, force the customers to continue investing with DB, despite DB's questionable sales tactics.

A. The Notice Period Is Unenforceable

It is well settled that courts will not "order an individual to perform a contract for personal service." (*Am. Broadcast Co. v Wolf*, 52 NY2d 394, 401 [1981]; *see* Restatement [Second] of Contracts, § 367 [1] ["A promise to render personal service will not be specifically enforced."].) In addition to the "inherent difficulties courts would encounter in supervising the performance of uniquely personal efforts," it likely that such an injunction would violate the "Thirteenth Amendment's prohibition against involuntary servitude." (*Am. Broadcast*, 52 NY2d at 401-02; *see Bear, Stearns & Co., Inc. v Sharon*, 550 F Supp 2d 174, 179 [D Mass 2008] [refusing to enforce a "garden leave" provision because it would "force [the ex-employee] to submit to [the employer's] whim his employment activity in the near future"].) Accordingly, DB cannot show that the notice period – which is nothing more than a requirement that Petitioners remain DB employees for 90 days against their will – is likely to be upheld. (*See* Weissman aff, Ex. F at 3 [during the notice period "you will remain an employee of the Bank and will continue to work"].)

B. The Post-Employment Restrictions Are Unenforceable Because DB Constructively Discharged Petitioners

1. A Restrictive Covenant Is Unenforceable After a Firing Without Cause or a Constructive Discharge

"New York courts will not enforce otherwise enforceable covenants where the employer terminates the employee without cause." (*Random Ventures, Inc. v Advanced Armament Corp., LLC*, 2013 WL 113745, *52 [SD NY, Jan. 13, 2014, No. 12 Civ. 6792]; *see Arkelian v Omnicare, Inc.*, 735 F Supp 2d 22, 41 [SD NY 2010] [same].) The Court of Appeals explained the rationale behind this sensible rule:

> Acknowledging the tension between the freedom of individuals to contract, and the reluctance to see one barter away his freedom, the State enforces limited restraints on an employee's employment

> mobility where a mutuality of obligation is freely bargained for by the parties. An essential aspect of that relationship, however, is the employer's continued willingness to employ the party covenanting not to compete. Where the employer terminates the employment relationship without cause, however, his action necessarily destroys the mutuality of obligation on which the covenant rests as well as the employer's ability to impose a forfeiture.

(*Post v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 48 NY2d 84, 89 [1979]). Federal and state courts have continually reaffirmed this rule.[1]

The form of the post-employment restriction does not matter. The rule against enforceability "applies with equal force to covenants not to solicit a former employer's clients and employees; solicitation is simply a form of competition." (*Arkelian*, 735 F Supp 2d at 41; *see Grassi*, 82 AD3d at 702-703 [holding a non-solicitation-of-clients restriction unenforceable where employee was dismissed without cause]; *Tasciyan v Marsh USA, Inc.*, 2007 WL 950091,

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[1] (*See Lucente v Intern'l Business Machines*, 310 F3d 243, 255 [2d Cir 2002] ["Enforcing the non-competition provision [when an employee is involuntarily discharged without cause] would be 'unconscionable' because it would destroy the mutuality of obligation on which a covenant not to complete is based."]; *Grassi & Co. CPAs, P.C. v Janover Rubinroit, LLC*, 82 AD3d 700 [2d Dept 2011] [finding post-employment restrictions unenforceable], quoting *Post*, 48 NY2d at 89; *Arakelian*, 735 F Supp 2d at 41 (SD NY 2010) ["Enforcing a non-competition provision when the employee has been discharged without cause would be unconscionable because it would destroy the mutuality of obligation on which a covenant not to compete is based."] (citation and internal quotations omitted); *RCG Information Technology Inc. v Wiggington*, 2005 WL 1389075, *1 [SD NY, June 10, 2005, No. 05 Civ. 5233] ["when a termination is involuntary a non-compete clause may no longer be enforceable"]; *Handel v Nisselson*, 1998 WL 889041, *3 [SD NY, Dec. 18, 1998, No. 98 Civ. 6662] ["The Court concludes . . . that in enforcing a non-competition covenant, a court must first find that the employer was willing to continue providing employment to the employee."]; *UFG Intl. v DeWitt Stern Grp. (In re UFG Intl.)*, 225 BR 51, 55 [Bankr SD NY 1998] ["[A]n employee's otherwise enforceable restrictive covenant is unenforceable if the employee has been terminated involuntarily, unless the termination is for cause."]; *SIFCO Indus. v Advanced Plating Tech.*, 867 F Supp 155, 158 [SD NY 1994] ["New York courts will not enforce a non-competition provision in an employment agreement where the former employee was involuntarily terminated."]; *Borne Chemical Co. v Dictrow*, 85 AD2d 646, 649 [2d Dept 1981] ["In cases of involuntary discharge, if the employment has been terminated by the employer without cause, the employer will not be permitted to invoke the covenant."]; 28 New York Practice Contract Law § 7:26 ["An otherwise valid non competition provision in an employment agreement will not be enforced where the former employee has been involuntarily terminated without cause."].)

*1 n 6 [SD NY, Mar. 28, 2007, No. 07 Civ. 99] ["both the non-compete and non-solicitation clauses of the Employment Agreement are restrictive covenants subject to the same legal analysis with respect to their enforceability"]; *In re UFG Intl.*, 225 BR at 56 [holding a non-solicitation-of-clients provision unenforceable where employee was dismissed without cause and "solely for financial reasons"].)

The rule against enforceability also applies in circumstances where the employee was forced to leave rather than fired. The Court of Appeals has recognized that "[i]n some circumstances, an employee's decision to resign from his job may not be a free and voluntary choice." (*Morris v Schroder Capital Mgmt. Intl.*, 7 NY3d 616, 621 [2006].) Thus, post-employment restrictions are unenforceable where the employee has been constructively discharged because the "working conditions [were] so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." (*Id.* at 622, quoting *Pena v Brattleboro Retreat*, 702 F2d 322, 325 [2d Cir 1983].)

To be sure, a minority of courts have tried to limit the *Post* rule to the forfeiture context; that is, if the employee is fired without cause, the employer will not be permitted to forfeit the employee's future compensation as a penalty for competing. (*See e.g. Brown & Brown, Inc. v Johnson*, 115 AD3d 162 [4th Dept 2014].) Such a limitation makes little sense. The *Post* rule is based on the longstanding contract principle that a party cannot reap the material benefits of a contract while ignoring its own obligations. (*Post*, 48 NY2d at 89 ["Where the employer terminates the employment relationship without cause, however, his action *necessarily destroys the mutuality of obligation* on which the covenant rests as well as the employer's ability to impose a forfeiture."] (emphasis added).) In the employment context, the rule is "premised on the unfairness of permitting an employer who has destroyed the mutuality of obligation on which the covenant [not to compete] rests to benefit from the covenant . . . . [R]egardless of the scope of the covenant, an employer cannot hobble his employee by terminating him without cause and then enforce a restriction that diminishes his ability to find comparative employment." (*Handel*, 1998 WL 889041, at *3, quoting *In re UFG Intl.*, 225 BR at 56.) Once the employer destroys the "mutuality of obligation," which the Court of Appeals described as an "essential aspect" of the employment relationship (*Post*, 48 NY2d at 89), the covenant becomes unenforceable and the employer is not entitled to any remedy – forfeiture of the employee's future benefits or injunction.

None of the courts that have tried to limit the *Post* rule attempt to explain how an unenforceable covenant could result in an injunction restraining the employee's ability to work. Such a result is wholly at odds with New York's longstanding "reluctance" to enforce covenants limiting an employee's freedom to earn a living. (*Post*, 48 NY2d at 89; *see Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 307 [1976] ["judicial disfavor of these covenants is provoked by powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood"] (citation and internal quotation marks omitted).) Indeed, if it is "unconscionable" to impose a forfeiture on an employee who has been dismissed without cause (*Lucente*, 310 F3d at 255), it is equally "unconscionable" to prohibit him from earning a living. In either case, the "choice is essentially taken away from the employee" as a result of the employer's actions. (*Morris*, 7 NY3d at 622; *see Wrigg v Junkermeir, Clark, Campanella, Stevens, P.C.*, 362 Mont. 496, 504 [Mt. 2011] ["No informed decision exists, however, when an employee departs involuntarily."], citing *Morris*, 7 NY3d at 697.)

Put another way, the particular remedy an employer chooses to enforce the restrictive covenant makes no difference. The Court of Appeals has recognized that contractual covenants expressly prohibiting competition are no different from those requiring a former employee to "pay" in order to compete. Both are "form[s] of ancillary employee anti-competitive agreement[s] that will be carefully scrutinized by the courts." (*BDO Seidman v Hirshberg*, 93 NY2d 382, 388 [1999].) If anything, an injunction prohibiting future employment is a harsher remedy than a simple forfeiture of compensation. A forfeiture at least "leave[s] the ex-employee free to make a living as he chooses," albeit at a financial cost. (*Schlumberger Technology Corp. v Blaker*, 859 F2d 512, 516 [7th Cir 1988].) An injunction leaves the employee "cripple[d]" and "den[ies] other potential employers his services." (*Post*, 48 NY2d at 89; *see Wrigg*, 362 Mont. at 503 ["A covenant strips the employee of his livelihood"].)

2. Petitioners Were Constructively Discharged

DB created an intolerable working environment that forced Petitioners to leave and therefore, rendered the post-employment restrictions unenforceable. It is well settled that financial advisors, such as Petitioners, "owe the highest duty of loyalty to those on whose behalf they act." (*Beacon Hill CBO II, Ltd. v Beacon Hill Asset Mgmt. LLC*, 249 F Supp 2d 268, 273 [SD NY 2003], *affd on other grounds* 89 F Appx 749 [2d Cir 2004].) Indeed, applicable regulations required Petitioners as registered representatives to "only recommend products that were suitable for [their] clients" (*Gold v New York Life Ins. Co.*, 730 F3d 137, 140 [2d Cir 2013]), rather than ones that benefit the representatives' employer. (FINRA Manual Rule 2111.[2])

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[2] FINRA Rule 2111(a) states:

> A member or an associated person must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities suitable for the customer, based on information obtained through the reasonable diligence of the member or associated person to ascertain the customer's investment profile. A customer's investment profile includes, but is not limited to, the customer's age, other investments, financial situation and needs, tax status, investment objectives, investment

Even brokers who manage non-discretionary accounts (i.e., those where the customers, rather than the brokers, make investment decisions), are obliged to give "honest and complete information when recommending a purchase or sale." [*De Kwiatkowski v Bear, Stearns & Co., Inc.*, 306 F3d 1293, 1302 [2d Cir 2002]; *see In re Refco Sec. Litig.*, 759 F Supp 2d 310, 317 [SD NY 2010] [even where a general fiduciary duty is lacking, a broker must "use reasonable efforts to give [the customer] information relevant to the affairs that [have] been entrusted to them"].)

In order to profit the Bank at the expense of its customers, DB tried to force Petitioners to sell investments that were unsuitable. (*See* Pace aff ¶¶ 11-37; Weissman aff ¶¶ 10-39.) It is uncontested that Petitioners had discretionary authority to invest their customers' money without prior approval. (Pace aff ¶ 8; Weissman aff ¶ 7.) DB urged Petitioners to use this power to "pre-fund" a DB hedge fund product. (Pace aff ¶¶ 13-20; Weissman aff ¶¶ 12-17.) DB wanted Petitioners to commit to selling $80 million of interest in the hedge fund product, not because such an investment was appropriate for each customer, but because DB wanted to recoup its own $200 million investment (plus interest) in the same product.[3] (*Id.*) Indeed, the hedge fund product was not the only instance in which DB tried to put its own profits ahead of its customers' interests. (Pace aff ¶¶ 21-22; Weissman aff ¶¶ 20-24.)

> experience, investment time horizon, liquidity needs, risk tolerance, and any other information the customer may disclose to the member or associated person in connection with such recommendation.

[3] A recent article on similar funds warned about their pitfalls. (Rob Copeland, *The New Hedge-Fund-Like Retail Funds*, The Wall Street Journal [March 21, 2014], available http://online.wsj.com/news/articles/SB10001424052702303287804579445134053667514 [May 16, 2014] ["The strategies many of these mutual funds pursue are complex and difficult for investors to track closely. Many also have short track records and, like actual hedge funds, they often generate tepid results that fall short of the popular image of outsize gains."].)

Such exploitation was particularly nefarious given that DB touted Petitioners' investment advisory group as operating an "open architecture" platform where Petitioners were required to find the best investment products for their customers, regardless of whether or not DB had developed the product. (Pace aff ¶ 9; Weissman aff ¶ 8.) To make matters worse, DB tried moving Petitioners' group under the direction of the sales division whose sole purpose was to sell DB products. (Pace aff ¶¶ 23-28; Weissman aff ¶¶ 25-30.) Indeed, Kitidis, to whom Weissman would have reported, was known for placing members of her team on sales quotas. (Pace aff ¶ 24; Weissman aff ¶ 26.) Even after DB's legal department understandably opposed this idea as creating a conflict of interest, DB's upper management continued to press for such a reorganization. (Pace aff ¶¶ 26-28; Weissman aff ¶¶ 28-30.)

Undeterred, DB management, in order to circumvent Petitioners' fiduciary obligations to customers, engineered different schemes, such as moving members of Petitioners' group to DB's brokerage unit (where, in DB's view, they no longer would have any fiduciary obligations to look out for the best interests of their customers) and having Petitioners' group report indirectly to the sales division. Such scenarios created the same conflicts that Petitioners were trying to avoid. (*Id.*)

Moreover, it cannot be said that Petitioners quit at the first sign of trouble. Rather, they repeatedly raised their concerns with upper management to no avail. (Pace aff ¶¶ 32-37; Weissman aff ¶¶ 34-39.) Weissman complained to numerous DB managers. (Weissman aff ¶¶ 34-39.) Pace, who agreed with Weissman, also brought his concerns to upper management. (Pace aff ¶¶ 33, 36.) Indeed, Petitioners continued to try to rectify these serious issues despite strongly suspecting that DB fired De-Servigny, then Global Chief Investment Officer for Wealth Management, for raising similar issues. (*See* Pace aff ¶ 31; Weissman aff

33.) In short, Petitioners were placed in an untenable position of potentially breaching their fiduciary obligations to their customers or resigning. (Pace aff ¶ 38; Weissman aff ¶ 40.)

C. The Post-Employment Restrictions Are Unreasonable

Regardless of the reason for the termination of the employment relationship, a restrictive covenant must be reasonable to be enforced. (*See Airline Delivery Servs. Corp. v Lee*, 72 AD2d 731, 731 [3d Dept 1979].[4]) "A restraint is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose an undue hardship on the employee, and (3) is not injurious to the public." (*BDO Seidman*, 93 NY2d at 388-89.) "A violation of any prong renders the covenant invalid." (*Id.* at 389.)

Enforcement of DB's employment restrictions would harm the public, specifically those customers whose assets Petitioners were responsible for managing. It is uncontested that any agreement between DB and Petitioners cannot trump a customer's right to invest with the advisor of his choice. (*See* FINRA Manual Rule 2140 ["No member or person associated with a member shall interfere with a customer's request to transfer his or her account in connection with the change in employment of the customer's registered representative. . . ."].) Such customer choice is paramount where, as explained above, the employees were forced to leave because of the institution's dishonest practices.[5]

[4] The reasonableness inquiry is unnecessary if the Court finds, as it should, that DB constructively discharged Petitioners. (*See SIFCO*, 867 F Supp at 159 n 4 ["because we conclude that the individual defendants were involuntarily terminated, and conclude on that basis that SIFCO cannot as a matter of law enforce the non-competition provisions of the Confidentiality Agreements, we need not reach the issue of whether the non-competition provision itself is 'reasonable []'"].)

[5] To be sure, some courts have held that FINRA's non-interference rule does not prohibit the enforcement of post-employment restrictions. (*See e.g. First Empire Sec., Inc. v Miele*, 17 Misc 3d 1108(A), 2007 NY Slip Op 51884(U) [Sup Ct, Suffolk County 2007]). In none of those cases, however, did the employer engage in the type of misbehavior that forced the employees to leave.

III. PETITIONERS WILL SUFFER IRREPARABLE HARM

"Irreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient." (*Peyton v PWV Acquisition LLC*, 39 Misc 3d 1228(A), 2013 NY Slip Op 50793(U), *2 [Sup Ct, NY County 2013], quoting *L & M Franklyn Avenue, LLC v S. Land Development, LLC*, 98 AD3d 721, 722 [2d Dept 2012].) Here, absent a preliminary injunction, Petitioners must continue to work at DB for 90 days, even though DB has forced Petitioners to quit by pressuring them to breach their fiduciary duty to their customers. (*See* Pace aff, Ex. E at 3; Weissman aff, Ex. F at 3.) Neither will Petitioners be able to inform their customers about DB's dishonest practices for an additional 120 days following the initial 90-day period, even though Petitioners have been investing their customers' money for years on a discretionary basis with the customers' trust and confidence. (*See* Pace aff, Ex. E at 2; Weissman aff, Ex. F at 2.) Indeed, taking advantage of the notice and non-solicitation provisions, DB has already begun to misinform the Group's customers about the nature of Petitioners' resignation, conveying the false impression that Petitioners have been fired for performance reasons as a "part of a larger restructuring." (Pace aff, Ex. D; Weissman aff, Ex. E.) For such harms, there is "no certain pecuniary standard for the measurement of damages," and "the harm in question cannot be undone." (*Peyton*, 2013 NY Slip Op 50793(U), *2; *see Yedlin*, 102 AD3d at 770 [there would be "irreparable injury to [employee's] career absent a preliminary injunction" against former employer seeking to enforce restrictive covenant].).

IV. BALANCE OF THE EQUITIES FAVORS GRANTING AN INJUNCTION PROHIBITING ENFORCEMENT

Finally, equitable considerations warrant granting Petitioners' request for an injunction. For the reasons stated above, Petitioners have been forced to resign because of DB's shady practices. Petitioners have not breached the Notice and Non-Solicitation Policies and instead respectfully request that this Court grant a preliminary injunction in their favor until the parties arbitrate the unenforceability of these Policies. On the other hand, DB has already begun to mislead the Group's customers about the nature of Petitioners' resignation, suggesting that Petitioners have been fired for performance reasons, and Brown has specifically warned Pace to "lay low," threatening that Pace would otherwise face the "full wrath" of the Bank. (Pace aff. ¶ 42.)

Requiring Petitioners to sit on the sidelines for months while permitting DB to convey false information about the nature of Petitioners' resignation to their customers would be grossly inequitable in light of DB's pressure on Petitioners to breach their fiduciary duty. DB's "desire to insulate itself from competition . . . is simply not a ground for sustaining a non-competition agreement;" its customers should be allowed to "switch" and follow Petitioners, who have certainly taken their fiduciary obligation to their customers more seriously than DB has done. (*Nigra v Young Broad. of Albany, Inc.*, 676 NYS2d 848, 850 [Sup Ct, Albany County 1998].) Indeed, any injury to DB based on competition "cannot compare to the unfairness of driving the plaintiff [whose employment was terminated] out of work . . . ." (*Id.*; *see Yedlin*,102 AD3d at 770 [preliminary injunction against employer seeking to enforce a restrictive covenant is appropriate because "balancing of the equities favors" employee]; *cf. Reuschenberg v Town of Huntington*, 16 AD3d 568, 570 [2d Dept 2005] ["the balance of equities tips in the plaintiffs' favor" who "will lose their livelihood if the injunction does not issue"]; *Columbus Rose Ltd. v New Millennium Press*, 2002 WL 1033560, *10 [SD NY, May 20, 2002, No. 02 Civ. 2634] [balance of hardships tips in favor of plaintiff whose "livelihood depends on his reputation among the book-buying public" whereas defendant "faces a potential monetary loss" and "the hardship of which it complains is significantly of its own making"] (internal quotation marks and citation omitted).)

CONCLUSION

For these reasons, Weissman and Pace respectfully request that the Court grant their request for a preliminary injunction.

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