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. 651622/2014 Hon. Marcy S. Friedman **DEFENDANT HPM PARTNERS LLC'S RESPONSE TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER IN AID OF ARBITRATION**

Defendant HPM Partners, LLC ("HPM") respectfully submits this memorandum in opposition to Plaintiff Deutsche Bank Trust Company Americas' ("Plaintiff") Motion For A Temporary Restraining Order In Aid Of Arbitration against Defendants HPM, Benjamin A. Pace, III, Lawrence B. Weissman, Steven A. Kurosko, Lindsey Jonathan Nadel, Quinn Jo Rose Portfolio, and Neza Bevc.

INTRODUCTION

On or about Friday, May 16, 2014, a number of Plaintiff's employees resigned after reaching agreements to become employed by HPM. The following Monday, May 19, 2014, Plaintiff sent HPM a letter in which it asserted that the employees were subject to restrictive covenants that imposed notice and non-solicitation obligations (the "Restrictive Covenants"). *See* Affirmation of Kevin S. Reed ("Reed Aff."), Ex. A. HPM responded the following day with a letter stating that HPM "was aware that certain of the Employees were ostensibly subject to notice and non-solicitation obligations referenced and that HPM Partners would not be party to

or encourage any violation of those obligations unless and until a court determined them to be invalid." *Id.*, Ex. B at 1. HPM noted, however, that there were questions concerning the enforceability of the Restrictive Covenants and asked Plaintiff to provide by noon on Friday, May 23, 2014 "documents sufficient to establish each Employee's agreement to all such provisions that you maintain bind him." *Id.* at 2.

Plaintiff did not, and to date has not, come forward with such documents.[1] Instead, on Tuesday, May 27, 2014, Plaintiff filed this action, and the following day, Plaintiff served HPM with the instant application for a temporary restraining order. In particular, Plaintiff seeks a TRO barring HPM from aiding and abetting a violation of the Restrictive Covenants or misappropriating Plaintiff's confidential information. Plaintiff also asks the Court to impose a judicially created restrictive covenant by prohibiting HPM from soliciting any client that one of its newly hired employees serviced for Plaintiff, regardless of whether one of the newly hired employees directly or indirectly participates in soliciting those clients.

As detailed below, Plaintiff does not come close to making the showing necessary to warrant the issuance of the extraordinary remedy of a temporary restraining order against HPM. Using inflammatory words like "assault," "raid" and "poach," Plaintiff tries to portray HPM's hiring of Plaintiff's employees as an unlawful act. But those employees were at will and, under

[1] In discussions, Plaintiff has taken the position that the Restrictive Covenants are enforceable against all of the employees hired by HPM because they are set forth in a code of conduct that Plaintiff deems to be applicable to all of its employees. Publishing an employee "code of conduct," however, does not create a binding employment agreement, especially where, as here, the code specifically states that it does not create an employment contract. *Sharkey v. J.P. Morgan Chase & Co.*, 10 CIV 3824, 2011 WL 135026 (S.D.N.Y. Jan. 14, 2011); *see also Lobosco v. N.Y. Tel. Co./NYNEX*, 96 N.Y.2d 312, 317 (N.Y. 2001) ("Routinely issued employee manuals, handbooks and policy statements should not lightly be converted into binding employee agreements…"). Plaintiff's Code of Conduct also states that it may be changed at any time, (*see* Plaintiff's Ex. B at 3), another factor counseling against enforceability as an employee contract. *See Maas v. Cornell Univ.*, 94 N.Y.2d 87 (N.Y. 1999) (fact that university handbook could be altered any time was "hardly the harbinger of a legally binding set of arrangements").

both the law and free market principles, HPM was absolutely entitled to hire them, so long as it did not do so using wrongful means. Plaintiff does not even allege, much less attempt to prove, any wrongful conduct by HPM in the hiring process, so its complaint on this score is nothing more than empty rhetoric. Plaintiff equally fails to allege, or attempt to prove, any basis to conclude that HPM has or will induce or encourage any employee to violate a valid restrictive covenant. Indeed, it is striking that in an application to enjoin HPM from participating in a violation of the Restrictive Covenants or misappropriating confidential information, Plaintiff does not include a single fact suggesting that HPM has done or is likely to do either of those things. Plaintiff also fails to allege facts showing that the employees themselves have or are likely to commit a violation of the Restrictive Covenants that HPM even could abet. Plaintiff thus has shown no likelihood whatsoever of prevailing on any claim against HPM, nor has Plaintiff shown that it stands to suffer any imminent harm, much less irreparable harm, at the hands of HPM. Accordingly, Plaintiff's motion for a temporary restraining order against HPM must be denied.

ARGUMENT

A. A temporary restraining order is a drastic remedy.

Temporary restraining orders are drastic remedies and should be used sparingly. *Silvestre v. De Loaiza*, 12 Misc. 3d 492, 493, 820 N.Y.S.2d 440, 441 (N.Y. Sup. Ct. 2006) (citing 67A N.Y. Jur. 2d, Injunctions § 57); *see also Koultukis v. Phillips,* 285 A.D.2d 433,435, 728 N.Y.S.2d 440,442 (1st Dept. 2001) ("Preliminary injunctive relief is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and the undisputed facts found in the moving papers."). A party seeking preliminary injunctive relief must clearly demonstrate: (1) the likelihood of ultimate success on the merits; (2) the prospect of irreparable

injury if the injunction is not issued; and (3) a balance of the equities in the movant's favor. *U.S. Re Companies, Inc. v. Scheerer*, 41 A.D.3d 152, 154, 838 N.Y.S.2d 37, 39 (1st Dep't 2007) (citing any McKinney's N.Y. C.P.L.R. § 6301).

B. There is no basis for the issuance of an injunction against HPM Partners.

Plaintiff fails to show any of the elements required for the issuance of a temporary restraining order against HPM. In particular, Plaintiff fails to show that HPM has or will abet a violation of the Restrictive Covenants or that any employee has or will commit a violation of the Restrictive Covenants that HPM *could* abet. Plaintiff is, consequently, unable to show a likelihood of success on any claim or that it faces any irreparable harm or prevails in a balancing of the equities.

As an initial matter, the none-too-subtle suggestion in Plaintiff's papers that HPM committed a wrong merely by hiring Plaintiff's employees is completely without merit. The employees at issue here were indisputably at will, and under New York law, one employer's hiring of another's at will employees is actionable only if it is accomplished through intentional wrongdoing or solely to harm a competitor. *See Men Women NY Model Mgmt., Inc. v. Ford Models, Inc.*, 32 Misc. 3d 1236(A), 938 N.Y.S.2d 228 (N.Y. Sup. Ct. 2011) ("mere inducement of an at-will employee to join a competitor is not actionable, unless dishonest means are employed, or the solicitation is part of a scheme designed solely to produce damage").[2] Plaintiff does not allege, much less seek to prove, that HPM did either of those things in connection with

[2] *See also, e.g., Krinos Foods, Inc. v. Vintage Food Corp.,* 30 A.D.3d 332, 334 (1st Dep't 2006) (claim of unfair competition requires more than a showing of "commercial unfairness"; it requires a showing of "bad faith misappropriation of plaintiff's skill, labor, and expenditures."); *Snyder v. Sony Music Entertainment*, 252 A.D.2d 294, 300 (1st Dep't 1999) (to support a claim of tortious interference with business relations, plaintiff must show that the interference was accomplished by "wrongful means," consisting of fraud, misrepresentation, physical violence, civil suits, criminal prosecutions and some degree of economic pressure).

hiring the employees at issue here. Thus, HPM has shown no likelihood of success on any claim against HPM for "raiding" or unfair competition through hiring Plaintiff's employees, and no injunction may issue based on such claims.

Plaintiff has also failed to show a likelihood of success on any claim against HPM for inducing or participating in any violation of a Restrictive Covenant. Fundamentally, Plaintiff offers no proof that there has been any violation, or threatened violation, of any of the Restrictive Covenants in which HPM *could* have participated. Plaintiff thus does not claim that any employee has refused to honor any purportedly enforceable obligation to provide notice before terminating his employment with Plaintiff or has violated a purportedly enforceable notice period by commencing work for HPM (and, in fact, none has). Plaintiff also does not offer any competent proof that any employee has violated or threatened to violate any non-solicit obligation purportedly owed to Plaintiff. The only allegation Plaintiff makes on that score is one, based on information and belief, that a single employee "while serving out his notice period" said unspecified things to "one or more" unnamed clients in an effort to solicit their business for HPM. *See* Nestle Aff. at ¶ 15. However, aside from the fact that this allegation is so vague as to be meaningless, Plaintiff offers no evidence whatsoever tying HPM to this alleged conduct.

It is true, as Plaintiff points out, that both HPM and certain of the employees have questioned the enforceability of the Restrictive Covenants. Neither HPM nor the employees, however, have used or threatened to use such questions as a justification to violate the covenants. To the contrary, HPM informed Plaintiff in a letter that it would treat the Restrictive Covenants as valid until a court ruled otherwise. Likewise, the two most senior employees brought their

questions to this Court in an action filed yesterday seeking a declaration that the Restrictive Covenants are unenforceable; they did not resort to or threaten self-help.

Plaintiff seeks to support its claims by alleging, again on information and belief, that an HPM employee named Steven Nielander contacted one of Plaintiff's clients and solicited that client's business by stating that certain of Plaintiff's employees had joined HPM. Assuming the truth of this allegation for argument's sake, it does not strengthen Plaintiff's application for injunctive relief. Plaintiff does not claim that Mr. Nielander was under any obligation not to solicit Plaintiff's clients (he was not), nor does Plaintiff claim that Mr. Nielander used Plaintiff's confidential information in making such solicitations (he did not). What Mr. Nielander allegedly said – that certain of Plaintiff's employee's had joined HPM – contains no derogatory or disparaging statements regarding Plaintiff and was true. His statement, therefore, does not violate the non-disparagement clause in the Settlement Agreement Plaintiff cites. *Id.* at ¶ 15. Indeed, Plaintiff neglects to mention that the Settlement Agreement specifically permits Mr. Nielander to make truthful, non-disparaging statements to clients in order to compete against Plaintiff:

> It shall also not be a violation of this Paragraph for the Parties to make truthful statements to clients or prospective clients, in which HPM is compared to Deutsche Bank or vice versa, in order to persuade such prospective clients to become clients or to retain clients, as long as such statements do not include disparaging or derogatory information which reflects negatively upon the professional, business, corporate or personal reputation or character of another Party and as long as no confidential or proprietary information of Deutsche Bank is used or conveyed.

See Reed Aff. at ¶ 6.

Finally, despite seeking an injunction barring HPM from misappropriating Plaintiff's confidential information and seeking an order directing HPM to return documents and electronic media containing its confidential information, Plaintiff does not even purport to allege that HPM

(or any of the employees) has misappropriated or misused its confidential information. That portion of its request, like the rest, is consequently frivolous.

In sum, Plaintiff manifestly has failed to show that HPM has or will engaged in any wrongdoing, that Plaintiff faces imminent irreparable harm, or that it prevails in balancing equities.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for a temporary restraining order against HPM should be denied.

DATED: New York, New York
May 29, 2014

QUINN EMANUEL URQUHART & SULLIVAN LLP

By: _____

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