SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

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DEUTSCHE BANK TRUST COMPANY AMERICAS,

Plaintiff-Respondent,

-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-Appellants.

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BENJAMIN A. PACE III and LAWRENCE WEISSMAN,

Petitioners-Appellants,

-against-

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

Respondents-Respondents.

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Original

MEMORANDUM OF LAW IN SUPPORT OF APPELLANT BENJAMIN A. PACE III's REQUEST TO VACATE TEMPORARY RESTRAINING ORDER

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PRELIMINARY STATEMENT

On May 16, 2014, Appellant Benjamin A. Pace III ("Appellant" or "Pace") an investment professional at Deutsche Bank Trust Company Americas ("DB" or the "Bank") resigned his position because of the Bank's shady sales practices. Pace was forced out by the Bank's continuing efforts to sell investments that were not suitable for his customers. At the time of his resignation, Pace had not entered into any restrictive covenants agreement with DB. Nevertheless, on May 30, 2014, Supreme Court, New York County, issued an order temporarily enjoining Pace from, inter alia, soliciting or doing business with DB customers. Pace respectfully brings this emergency request for preliminary relief because DB has failed to meet even its threshold obligation of establishing that Pace entered into a binding contract containing any post-employment restrictions.

STATEMENT OF FACTS

In 1994, Pace started working as an investment professional for DB's predecessor Bankers Trust Company ("Bankers Trust"). Pace and Bankers Trust entered into an employment agreement that contained all of the material terms of employment. (Affirmation of Valdi Licul, dated June 3, 2014 ("Licul Aff."), Ex. E (the "Employment Agreement")). The Employment Agreement contained no restrictive covenants limiting Pace's ability to work after his employment with DB ended.

Periodically throughout his employment, Pace was sent and asked to acknowledge various iterations of DB's policy manual, also known as the "Code of Professional Conduct – US" (the "Code"). (Licul Aff., Ex. F.) The Code described "the values and minimum standards of ethical business conduct that each employee of [DB] is expected to follow." (*Id.* at 2.) The Code covered a wide-range of employment-related topics such as "values" and "promises to stakeholders." (*Id.*) DB "expect[ed] employees to be guided by both

the letter and spirit of th[e] Code's provisions." (*Id.*) For example, DB expected that employees would "communicate openly," "respect challenging views," "put common goals of the firm" at the forefront, and "respect[] and work[] with each other." (*Id.*) The Code also encouraged employees to employ an "entrepreneurial spirit." (*Id.*) Embedded in the Code were provisions stating that employees at the Managing Director level (Pace's position) were (a) required to provide 90 days written notice prior to resigning their employment and (b) prohibited from soliciting DB customers and employees for 120 days following the termination of employment. (*Id.* at 9.)

The Code included the following disclaimer language, which was prominently placed at the end of the Code's introductory section:

> Notwithstanding the foregoing, neither the Code, nor compliance with the Code, should be construed as creating any contract of continued employment. Deutsche Bank reserves its right to change the Code at any time, without prior notice.

(Licul Aff., Ex. F at 3.)

A similar disclaimer was repeated in the notice and non-solicitation section:

> This policy is not intended to be, and should not be construed as creating a contract guaranteeing employment for any specific duration. The relationship between you and Deutsche Bank is one of at will employment. Either you or Deutsche Bank may terminate your employment at any time for any lawful reason or no reason and Deutsche Bank may terminate your employment without notice.

(Licul Aff., Ex. G, at 5.)

On May 16, 2014, Pace gave DB notice that he was being forced to resign his position. (Licl Aff., Ex. H ¶ 39.) Pace had been consistently pressured to sell investment products to customers that were, in many cases, profitable to the Bank but not suitable for the

customer.[1] He repeatedly complained to upper management about these inappropriate practices, to no avail. (*Id.* ¶¶ 32-37.) DB ultimately put Pace in the untenable position of choosing between violating his fiduciary obligations to customers and disobeying the mandates of DB's management. (*Id.* ¶ 38.) He chose to resign rather than betray his customers. (*Id.* ¶ 39.)

Upon receiving Pace's resignation notice, the Bank began spreading misinformation to customers about Pace's departure. (*Id.* ¶ 41.) The Bank sent an email to at least one customer stating that Pace left the Bank as "part of a larger restructuring." (*Id.*) This email was intended to mislead customers into believing Pace was dismissed for performance reasons. (*Id.*)

On May 28, 2014, DB sued Pace seeking, among other things, to (a) force Pace to work for DB during the 90-day notice period contained in the Code and (b) prohibit Pace from soliciting or doing business with DB's customers.[2] (Licul Aff., Ex. D.) DB argued that Pace was contractually bound by the Employment Agreement (which did not contain any restrictive covenants) and the Code (which contained an express disclaimer of contractual rights). (*Id.* ¶¶ 35-43.) On May 29, 2014, Pace filed a special proceeding against DB seeking a declaration in aid of arbitration that he was not required to comply with any post-employment restrictions. (Licul Aff., Ex. C) After hearing oral argument on May 29, 2014, the Honorable Marcy Friedman denied DB's request that Pace observe the notice period but nevertheless enjoined Pace from soliciting or doing business with DB's customers. (Licul Aff., Exs. A, B)

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[1] For a more complete recitation of the numerous ways in which DB tried to push its proprietary products on customers, see paragraph 11 through 31 of the Affidavit of Benjamin A. Pace III, attached as Exhibit H to the Licul Aff.

[2] DB also sued a number of Pace's colleagues who, like Pace, terminated their employment.

ARGUMENT

I. LEGAL STANDARD

In reviewing the grant of a provisional remedy, this Court must determine whether the movant has "clearly demonstrate[d] (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." (*Hous. Works, Inc. v City of New York*, 255 AD2d 209, 213 [1st Dept, 1998].) Here, the Bank has failed to meets its burden as to all three prongs.

II. LIKELIHOOD OF SUCCESS ON THE MERITS

A provisional order imposing restrictive covenants on an employee must be vacated where the employee "did not sign a contract precluding him from joining a competing firm, and he did not sign a nonsolicitation agreement." (*See U.S. Re Companies, Inc. v Scheerer*, 41 AD3d 152, 156 [1st Dept, 2007].) That is precisely what has occurred here.

A. Pace's Employment Agreement Contains No Restrictive Covenants

In order to prevail on a breach of contract claim, the plaintiff (in this case, DB) must "demonstrate the existence of a . . . contract reflecting the terms and conditions of [his] . . . purported agreement." (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 181-82 [2011].) Even where a binding agreement exists, however, courts "may not by construction add or excise terms . . . and thereby make a new contract for the parties under the guise of interpreting the writing." (*Consedine v Portville Cent. Sch. Dist.*, 12 NY3d 286, 293 [2009].)

There is only one binding contract between Pace and DB – the March 18, 1994 Employment Agreement Pace signed when he was hired by Bankers Trust, DB's predecessor entity. (Licul Aff., Ex. E) That agreement contains no provision requiring Pace to provide notice to DB prior to terminating his employment. (*Id.*) Nor does that agreement prohibit Pace from soliciting customers or employees upon the termination of his employment with the

Bank. (*Id.*) DB could have easily included such restrictive covenants language in Pace's agreement, as it did for his colleague Weissman. (Licul Aff., Ex. I at 2.)[3] It did not. (*See Lopez v Geui Shun Shiau*, 88 AD3d 598 [1st Dept 2011] [refusing to read into a contract a provision that was "unmistakably" not present].) Accordingly, DB cannot show a likelihood of success on the merits because its argument that Pace breached the Employment Agreement fails as a matter of law.

B. DB's Policy Manual Is Not a Contract

Having failed to produce a valid contract imposing any restrictive covenants on Pace, DB attempts to manufacture a binding contract out of its employee policy manual. This argument also fails as a matter of law.

"The New York Court of Appeals has held that an express disclaimer of contractual rights in an employee manual bars an action for breach of contract based on the terms of the manual." (*Mirabella v Turner Broadcasting Sys. Inc.*, 2003 WL 21146657, *2 [SDNY May 19, 2003, No. 01 Civ. 5563], citing *Lobosco v New York Tel. Co./NYNEX*, 96 NY2d 312, 317 [2001].) Otherwise, all "written policies" would lead to "liability for breach of employment contracts upon the mere allegation of reliance on a particular provision." (*Lobosco*, NY2d at 317.) Indeed, Courts routinely dismiss as a matter of law claims that an employee manual, such as the policy documents DB relies on here, create any contractual

[3] Weissman's restrictive covenants, while included in an individualized contract, are unenforceable because, as explained in the Supreme Court proceedings, DB constructively discharged him. (Licul Aff., Ex. C ¶ 2.) At this time, Weissman is not seeking a stay with respect to his well-founded claim that the restrictive covenants contained in his separate employment agreement are unenforceable because he was forced to resign as a result of the Bank's dishonest sales practices.

obligations. (*See Ferring v Merrill Lynch & Co., Inc.*, 244 AD2d 204, 204 [1st Dept 1997] [employee manuals are not enforceable].)[4] DB's claim is no different.[5]

First, there can be no cause of action for breach of an employer's policy manual where such manual contains an "express disclaimer of contractual rights and obligations." (*Lobosco*, 96 NY2d at 314). Such "conspicuous disclaiming language . . . prevents the creation of a contract." (*Id.* at 317; *see id.* [a party "seeking to rely on a provision arguably creating a promise must also be held to reliance on the disclaimer"]; *Verrochia v Federal Express Corp.*, 2011 WL 831430, *4 [NDNY, Mar. 3, 2011, No. 3:09-cv-1376] ["An explicit disclaimer in a contractual relationship will defeat any claim of a contractual relationship."]) Here, DB inserted the following disclaimer in its Code: "Notwithstanding the foregoing, neither the Code, nor compliance with the Code, should be construed as creating any contract of continued employment." (Licul Aff., Ex. F at 3.) The Code further states that it "is not intended to be, and should not be construed as creating a contract guaranteeing employment for any specific duration." (*Id.*, Ex. G, at 5) "This disclaimer is fatal to [DB's] breach of contract claim." (*Ubal-Perez*, 2014 WL 223227, *6.)

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[4] (*See also Ubal-Perez v Delta Air Lines, Inc.*, 2014 WL 223227, *7 [EDNY, Jan. 21, 2014, No. 13 Civ. 2872]; *Sharkey v J.P. Morgan Chase & Co.*, 2011 WL 135026, *10 [SDNY, Jan. 14, 2011, No. 10 Civ. 3824]; *Fraser v Fiduciary Trust Co.*, 2009 WL 2601389, *10 [SDNY, Aug. 25, 2009, No. 04 Civ. 6958]; *Kessler v Time Warner Cable*, 862 NYS2d 815, *3 [Sup Ct, Ulster County Apr. 16, 2008]; *Goldberg v Four Seasons Nursing and Rehabilitation Center*, 800 NYS2d 346, *3 [Sup Ct, Kings County Dec. 30, 2004].)

[5] Not surprisingly, DB has failed to cite a single case where a court has enforced a restrictive covenant based solely on an employee manual or policy. (*See Marsh USA Inc. v Karasaki*, 2008 WL 4778239, *21 [SDNY, Oct. 31, 2008 No. 08 Civ. 4195] [enforcing restrictive covenant based on an employment agreement, not policy]; *Aon Risk Servs. v Cusack*, 34 Misc3d 1205(A), 2011 NY Slip Op 52499(U), *17 [Sup Ct, NY County 2011] [same]; *Ikon Office Solutions, Inc. v Usherwood Office Tech., Inc.*, 21 Misc3d 1144(A), 2008 NY Slip Op, *17 [Sup Ct, Albany County 2008] [same].)

Second, the Code is not a contract because it does not impose any legal obligations on DB. It is axiomatic that a contract requires that "each party *must* be bound to some extent." (*Dorman v Cohen*, 66 AD2d 411, 415 [1st Dept 1979].) DB, however, has drafted its policy documents to ensure that it did not "bind [itself] to do anything." (*Id.* at 415.) DB has expressly reserved to itself the unilateral "right to change the Code at any time, without prior notice" (Licul Aff., Ex. F at 3) and to "terminate [the employee's] employment without notice" (*id.*, Ex. G at 5). The Court of Appeals has held that virtually identical language in an employment manual is "hardly the harbinger of a legally binding set of arrangements." (*Maas v. Cornell Univ.*, 94 NY2d 87, 88 [1999]; *see* Restatement [Second] of Contracts § 2 ["Words of promise which by their terms make performance entirely optional with the 'promisor' whatever may happen, or whatever course of conduct in other respects he may pursue do not constitute a promise . . . . Even if a present intention is manifested, the reservation of an option to change that intention means that there can be no promisee who is justified in an expectation or performance."]; Restatement [Second] of Contracts § 368, Comment *a*. ["[i]f a term of the agreement allows the party to terminate at will so as to make his promise illusory, no contract is created and no question of enforcement arises."].)

Finally, courts have refused to find that employee policy manuals are binding contracts where they include "hortatory language [that] serves only as a guideline" for employees. (*Slue v New York Univ. Med. Ctr.*, 409 FSupp2d 349, 359 [SDNY 2006]; *see Lobosco*, 96 NY2d at 314-15 [finding no contract where, *inter alia* the employer's "Code" discussed "a variety of legal and ethical considerations relevant to . . . employee," including "general encouragement of moral behavior"]; *Patrowich v Chem. Bank*, 98 AD2d 318, 322 [1st Dept 1984], *affd*, 63 NY2d 541 [1984] ["The manual provides only general policy statements

and supervisory guidelines."].) DB's Code includes numerous provisions that are purely aspirational. For example, the first page of the Code encourages employees to "behav[e] beyond reproach"; to be "guided by both the letter and the spirit of [the] Code's provisions"; to "communicate openly" and "respect challenging views"; and to "put the common goals of the firm before 'silo' loyalty by trusting, respecting and working with each other." (Licul Aff., Ex. F at 2.) As even DB would have to concede, these are not intended to be contractually binding promises. The notice and non-solicitation provision, which is contained in the same policy document, is no different.[6]

Before the Supreme Court, DB made much of the fact that periodically throughout his employment Pace electronically signed an acknowledgement that he had read and would follow the Code. This argument misses the mark. Signing an agreement which states that it is not a contract, does not covert it into a contract.

In short, DB has failed to produce any enforceable contract where Pace agreed to be bound by restrictive covenants. The only employment contract DB has produced makes no mention of such restrictions. Accordingly, DB cannot meet the threshold requirement for the granting of injunctive relief – a likelihood of success on the merits – and, therefore, the Supreme Court's orders should be vacated. (*See Patrolmen's Benevolent Assoc. of City of N.Y. Inc. v City of N.Y.*, 2014 WL 1884404, *1 [1st Dept, May 13, 2014] [vacating a preliminary injunction where the movant "failed to make the requisite showing of a likelihood of success on the merits" even if the movant could meet the other requirements for an injunction].)

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[6] Certainly, DB cannot be heard to argue that certain provisions of the Code are contractually binding, while others are not. Such a scenario would leave an employee like Pace helpless while DB cherry picks those provisions of its Code it wishes to enforce.

III. IRREPARABLE HARM

It is well settled that a party cannot show irreparable harm where it has an adequate remedy at law. (*See Cliff v R.R.S. Inc.*, 207 AD2d 17, 20 [3d Dept 1994].) Accordingly, where, as here, the "non-competition agreement is for a finite period of time, . . . any loss of sales occasioned by the alleged improper conduct of the defendant can be calculated. Thus, [the former employer] has an adequate remedy in the form of monetary damages, and injunctive relief is both unnecessary and unwarranted." (*Eastman Kodak Co. v Carmosino*, 77 AD3d 1434, 1436 [4th Dept 2010], quoting *D & W Diesel v McIntosh*, 307 AD2d 750, 751 [4th Dept 2003]; *see Price Paper & Twine Co. v Miller*, 182 AD2d 748, 749 [2d Dept 1992] [denying restrictive covenant where a party "can fully be recompensed by a monetary award"].) Thus, even if DB could ultimately prove that its restrictions are enforceable (which it cannot), it can attempt to seek money damages for Pace's alleged breach of the 120-day non-solicitation period.

Conversely, Pace will suffer irreparable harm if the non solicitation restrictions are not vacated. Pace cannot inform his customers of why he left the Bank, even though these customers have learned to trust Pace with their money. (*See* Licul Aff., Ex. H at 2.) Indeed, taking advantage of the non-solicitation provisions, DB has already begun to misinform customers about Pace's departure, conveying the false impression that he was fired for performance reasons as a "part of a larger restructuring." (*Id.* at 9-10.) For such harms, there is "no certain pecuniary standard for the measurement of damages," and "the harm in question cannot be undone." (*Peyton v PWV Acquisition LLC*, 39 Misc 3d 1228(A), 2013 NY Slip Op 50793(U), *2 [Sup Ct, NY County 2013]; *see Yedlin v Lieberman*, 102 AD3d 769, 770 [2d Dept 2013] [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

Finally, equitable considerations warrant vacating the injunction. For the reasons stated above, Pace was forced to leave because of DB's shady practices. Requiring Pace to sit on the sidelines for months while permitting DB to convey false information about the nature of his resignation to customers would be grossly inequitable in light of DB's pressure on Pace to breach his 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 Pace, who has certainly taken his fiduciary obligation to customers more seriously than DB has done. (*Nigra v Young Broad. of Albany, Inc.*, 676 NYS2d 848, 850 [Sup Ct, Albany County 1998].) Under such circumstances a "balance of the equities" requires that the injunction be denied. (*Brown & Brown, Inc. v Johnson*, 115 AD3d 162 [4th Dept 2014], citing *Carmosino*, 77 AD3d at 1436; *see Carmosino*, 77 AD3d at 1436 [finding that "balance of the equities . . . do not favor granting the preliminary injunction" where, *inter alia*, the employee "was terminated without cause"].)

CONCLUSION

For these reasons, Pace respectfully request that the Court vacate the Supreme Court's injunction.

Dated: New York, New York
June 3, 2014

VLADECK, WALDMAN, ELIAS & ENGELHARD, P.C.

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