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 MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO CONDUCT EXPEDITED DISCOVERY**

QUINN EMANUEL URQUHART
& SULLIVAN LLP
Kevin Reed
Haley Plourde-Cole
kevinreed@quinnemanuel.com
haleyplourdecole@quinnemanuel.com
51 Madison Avenue
New York, New York 10010
Tel: 212-849-7000
Facsimile: 212-849-7100

*Attorneys for Plaintiff HPM Partners LLC*

June 3, 2014

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page**

### Cases



### Miscellaneous

Defendant HPM Partners LLC ("HPM") respectfully submits this memorandum of law in support of its motion requesting leave to conduct expedited discovery of Plaintiff Deutsche Bank Trust Company Americas ("DB") to permit development of the record in advance of a preliminary injunction hearing set by the Court for June 24, 2014.

## FACTUAL BACKGROUND

On or about Friday, May 16, 2014, a number of Plaintiff's employees – including Benjamin A. Pace, III, Lawrence B. Weissman, Steven A. Kurosko, Lindsey Jonathan Nadel, Quinn Jo-Rose Portfolio, and Neza Bevc (the "Employee Defendants") – 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 Haley Plourde-Cole, Ex. A. HPM responded the next 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 also noted its concern regarding 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 provided such documents.

The Employee Defendants had all worked in the Discretionary Portfolio Management group at DB, which was supervised by Defendants Pace and Weissman and invests the personal assets of high net worth individuals ("the Group"). In sworn affidavits filed in an action consolidated with this one, Pace and Weissman explain that members of the Group act as fiduciaries toward their customers, who entrust them with discretionary authority to make

investment decisions for their accounts and expect them to act at all times in their best interests. *See* Plourde-Cole Aff., Ex. C at ¶ 4 and Ex. D at ¶ 4. Pace and Weissman further explain that they were impelled to leave DB because senior executives at the firm were pressuring them and other members of the Group to invest customer funds in proprietary DB products, regardless of whether such investments were in the customers' best interests, which would have amounted to a violation of the Group members' fiduciary duties to the customers. *Id.*, Ex C. at ¶ 12-21 and Ex. D at ¶11-24, 31. Among other things, Pace and Weissman testified that, on or about April 1, 2014, DB pressured them to commit at least $80 million of their customers' assets to a DB-financed fund by May 15, 2014, the day before they resigned.[1] *Id.*, Ex C. at ¶ 16 and Ex. D at ¶16. Pace and Weissman have urged in the consolidated action that DB's conduct resulted in a constructive termination of their DB employment, which renders the Restrictive Covenants unenforceable. *Id.*, Ex. E at 14-21.

On May 28, 2014, DB served HPM and the Employee Defendants with the Complaint in this action, which as to HPM alleges numerous claims arising out of HPM's supposed participation in the Employee Defendants' supposed breaches of the Restrictive Covenants and their fiduciary duties. The Complaint asks for both compensatory and punitive damages from HPM, as well as permanent injunctive relief.

Notwithstanding its filing and service of a full-fledged complaint, DB also filed a motion by order to show cause for a TRO and a preliminary injunction in aid of a FINRA arbitration against HPM and the Employee Defendants. On May 30, 2014, the Court issued a TRO enjoining HPM and the Employee Defendants from (i) soliciting certain DB customers to move

[1] For additional detail regarding Pace and Weissman's constructive termination allegations, HPM respectfully refers the Court to their affidavits and Memorandum of Law in Support of Petition for Injunctive and Provisional Relief in Aid of Arbitration. *See* Plourde-Cole Aff. Ex. C, D, and E.

their business to HPM, (ii) soliciting any DB employee to become employed by HPM, and (iii) using any confidential information or trade secrets belonging to DB. The Court also set a hearing on DB's motion for a preliminary injunction for June 24, 2014 and ordered that Defendants' opposition papers be served not later than June 13, 2014.

In the memorandum of law it submitted in support of its preliminary injunction motion, DB informed the Court that, if it issued a TRO, an arbitration hearing before FINRA would commence within 15 days thereafter, *see* Pl. Mem. at 2-3, presumably mooting the need for this Court to hold a preliminary injunction hearing. At least as to HPM, however, that is not true. HPM is not a member of FINRA, *see* Plourde-Cole Aff. at ¶ 9, and is, therefore, not subject to FINRA's arbitral jurisdiction. Plaintiff's claims against HPM, and its motion for a preliminary injunction against HPM, must be heard by this Court.

## ARGUMENT

HPM seeks targeted expedited discovery to permit it to defend against DB's preliminary injunction motion, now set for hearing on June 24, 2014. Specifically, HPM seeks documents and testimony that will evidence whether: (1) the Employee Defendants actually agreed to the Restrictive Covenants; (2) whether these Restrictive Covenants were enforceable; and (3) whether the Employee Defendants were constructively terminated, so as to render the Restrictive Covenants unenforceable. The testimony and the documents sought in HPM's document requests (set forth as Exhibit A to Defendant HPM's Proposed Order to Show Cause) are uniquely in the control of the Plaintiff and will help to resolve these factual issues. Without the testimony of these individuals and the requested documents, HPM will be hampered in putting forth a fully developed defense to the assertions DB has made in its Motion.

### A. Trial Courts Have the Authority to Order Expedited Discovery.

It is well established that trial courts have inherent authority and broad discretion to control the scope and the timing of discovery. *Maiorino v. City of N.Y.*, 39 A.D.3d 601, 834 N.Y.S.2d 272, 273 (N.Y. App. Div. 2007) ("A trial court is given broad discretion to oversee the discovery process."). The court's power to order expedited discovery is expressly contemplated by and permissible under the C.P.L.R. *See* C.P.L.R. § 3120 (noting that documents requests may be served *after* commencement of an action); C.P.L.R. § 3106 (a) (noting that deposition may be taken *before* a party's time for serving a responsive pleading has expired upon "*leave of the court*, granted on motion"); C.P.L.R. § 3107 (stating that requesting party must provide 20 days notice for taking deposition "*unless the court orders otherwise*") (emphasis added). Section 202.12(c) of the New York Supreme and County Court Rules, specifically provides that the court shall establish "a timetable for the completion of all disclosure proceedings, provided that all such procedures must be completed within the timeframes set forth in subdivision (b), *unless otherwise shortened* or extended by the court depending upon the circumstances of the case . . . ." 22 NYCRR § 202.12(c) (emphasis added).

The trial court's authority and discretion to order expedited discovery is based on the facts and circumstances of each case. *See Hochberg v. Maimonides Med. Ctr.*, 37 A.D.3d 660, 831 N.Y.S.2d 439, 440 (N.Y. App. Div. 2007) (recognizing trial court's discretion to order expedited discovery schedule); *Mayer v. Mayer*, 2005 WL 3742824, at *4 (N.Y. Sup. Ct. Dec. 13, 2005) (unpublished) (granting plaintiff's cross-motion for expedited discovery); *DoubleClick, Inc. v. Henderson*, 1997 WL 731413, at *8 (N.Y. Sup. Ct. Nov. 7, 1997) (unpublished) (ordering expedited discovery in misappropriation of trade secrets case); *State Farm Ins. Co. v. Trezza*, 121 Misc. 2d 997, 1002, 469 N.Y.S.2d 1008, 1012 (N.Y. Sup. Ct. 1983) (ordering expedited discovery in declaratory judgment action to test factual allegations of complaint).

**B. Expedited Discovery Is Appropriate in This Case.**

Courts have frequently permitted expedited discovery in advance of hearings on applications for temporary restraining orders and preliminary injunctions to ensure timely determination of complex factual issues. *See In re Topps Co., Inc. S'holder Litig.*, 2007 WL 5018882, at *1 (N.Y. Sup. Ct. June 8, 2007) (unpublished) (allowing expedited discovery in advance of hearing on preliminary injunction application); *Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 2006 WL 2689705, at *1 (N.Y. Sup. Ct. Sept. 19, 2006) (unpublished) (same); *Arthur Glick Truck Sales, Inc. v. H.O. Penn Mach. Co., Inc.*, 2004 WL 2472475, at *3 (N.Y. Sup. Ct. Nov. 3, 2004) (unpublished) (finding that plaintiff's requested discovery was necessary for preliminary injunction hearing because requested documents "go directly to the issue of Caterpillar and Penn meeting the criteria of the New York Franchised Motor Vehicle Dealers' Act").

This is particularly so where the information sought is within the unique possession of one party. *See Sylmark Holdings Ltd. v. Silicone Zone Int'l Ltd.*, 5 Misc. 3d 285, 302, 783 N.Y.S.2d 758, 774 (N.Y. Sup. Ct. 2004) (granting plaintiff's request for expedited discovery in light of defendant's unique possession of the information necessary to determine the extent of their unlawful conduct); *Bel Geddes v. Zeiderman*, 228 A.D.2d 393, 644 N.Y.S.2d 729 (N.Y. App. Div. 1996) (affirming priority granted to plaintiff's discovery when details of investment arrangement would be known only to defendants). In *Bel Geddes*, the plaintiff alleged that her former financial manager made investment decisions based on the remuneration such investments would produce for the financial manager and his partners, in violation of the defendant's fiduciary relationship with the plaintiff. 228 A.D.2d at 393. The court granted the plaintiff's request for discovery regarding the details of how investment decisions were made,

relying on the fact that the details of the arrangement would be known only to the defendants. *Id.*

In this case, similarly, Defendants Pace and Weissman have asserted that the Restrictive Covenants are not enforceable, because DB constructively terminated them by pressuring them to violate their fiduciary duties to their customers by investing their assets in DB's proprietary products, regardless of the suitability of such products for the customers' accounts. 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*, No. 12-Civ.6792, 2013 WL 113745, *52 (S.D.N.Y. Jan. 13, 2014); *Arkelian v. Omnicare, Inc.*, 735 F. Supp. 2d 22, 41 (S.D.N.Y. 2010) (same). Thus, the question of whether DB pressured the Employee Defendants to violate their fiduciary duties in the manner Pace and Weissman allege is critical in assessing Plaintiff's likelihood of success on its claim for an injunction enforcing the Restrictive Covenants.

To get at that question, HPM seeks documents concerning efforts by DB to pressure the Pace and Weissman's Group to invest client funds in DB proprietary products and concerning the Employee Defendants' complaints about such pressure. HPM is also requesting depositions of three individuals at DB who were alleged to be involved in the pressuring of the Group to invest in DB's proprietary products and/or were the subject of Weissman and Pace's complaints about this pressure and expressions of uncertainty about their jobs if they did not comply. Chip Packard is the Chief Executive Officer of DB's Private Bank and is alleged to have pressured the Group often to sell DB proprietary products and other alternative products to the Group's customers that were not suitable investments. Plourde-Cole Aff., Ex. C at ¶ 15, 23 and Ex. D at ¶ 15, 21, 23, 25. Stephane Farouze is DB's Global Head of Alternative Products and Fund Solutions and, like Packard, is alleged to have pressured the Group to sell DB proprietary

products and is alleged to have sought to create numerical targets for that purpose. Randy Brown was DB's Global Chief Investment Officer. Pace has testified that he expressed concerns to Brown that DB saw the Group's customers as a convenient receptacle for high margin products and felt that he did not have the authority to remove underperforming products. *Id.* at Ex. C at ¶ 33. Weissman also reported to Brown that he felt he was being pressured to sell unsuitable investment products to his customers and felt his job was unsafe if he did not comply. *Id.* at Ex. D at ¶ 39. Both the aforementioned documents and the testimony from DB executives relating to efforts to push DB proprietary products on customers of Pace and Weissman's Group are only available from DB, such that expedited discovery is required if HPM is to have the use of this evidence in opposing DB's preliminary injunction motion.

The same is true of evidence going to whether the Employee Defendants even agreed to the Restrictive Covenants in the first place. The issue of whether and when the agreements were signed, and how the Employee Defendants viewed the DB Code of Conduct is important to HPM's defense because 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 the Code of Conduct. 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.*, No. 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…"). HPM has previously requested this information from Plaintiff in its May 20, 2014 letter and has yet to receive any documents or other information from Plaintiff. These documents are critical to HPM's defense in this action and on the instant motion and, again, are available only from Plaintiff.

### C. The Balance of the Equities Favors Granting Expedited Discovery.

Failure to grant expedited discovery will result in HPM being forced to put forth a defense in its Opposition to Plaintiff's Motion for preliminary injunctive relief with having access to facts that are in the possession of the Plaintiff and that are necessary to presenting its case. At the same time, expedited discovery will not impose a substantial hardship on the Defendants. The information sought by HPM is limited in scope and in time – ten document requests and three depositions – and within Defendants' possession and control. *See Sylmark Holdings Ltd.,* 5 Misc. 3d at 299 ("Expedited discovery … is warranted in light of defendants' unique possession of the information necessary to determine the extent of their unlawful conduct."); *De Divitis v. Int'l Bus. Mach. Corp.*, 228 A.D.2d 963, 964, 644 N.Y.S.2d 594, 595 (N.Y. App. Div. 1996) (rejecting defendant's claims of overbreadth and undue burden when requested discovery was limited in scope and time); *accord Twentieth Century Fox Film Corp. v. Mow Trading Corp.*, 749 F. Supp. 473, 475 (S.D.N.Y. 1990) (expedited discovery would not pose substantial hardship on defendant where documents sought were in defendant's possession and control and requests were not overly broad or burdensome). Moreover, because the requested discovery is relevant to HPM's and the Defendant Employees' defenses in this case, Plaintiff would likely be required to produce the information in the normal course of discovery. As such, any incremental prejudice to producing the requested documents earlier is minimal.

Accordingly, HPM's request for expedited discovery should be granted because the prejudice that it will face if denied expedited discovery – the inability to put forth a fully developed defense against DB's motion – is of far greater significance than any hardship or inconvenience that might be suffered by Plaintiff. *See Fed. Express Corp. v. Fed. Espresso, Inc.*, 1997 WL 736530, at *2 (N.D.N.Y. Nov. 24, 1997) (unpublished) (expedited discovery is appropriate where there is "some evidence that the injury that will result without the requested

expedited discovery looms greater than the injury that the defendant will suffer if the expedited relief is granted").

## CONCLUSION

For the reasons set forth above, this Court should grant Defendant HPM's motion for expedited discovery.

Dated: June 3, 2014
New York, New York

Respectfully submitted,

QUINN EMANUEL URQUHART
& SULLIVAN, LLP

By: _____
Kevin Reed
Haley Plourde-Cole
kevinreed@quinnemanuel.com
haleyplourdecole@quinnemanuel.com
51 Madison Avenue
New York, New York 10010
Tel: 212-849-7000
Facsimile: 212-849-7100

*Attorneys for Defendant HPM Partners LLC*