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

PRESENT: Freedman Justice

PART 39m

United States Trust Company

INDEX NO. 602908/07

MOTION DATE

- v -

MOTION SEQ. NO. 001

MOTION CAL. NO.

Cheryl Maclachlan

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: January 3, 2008

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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UNITED STATES TRUST COMPANY, N.A.,

Plaintiff,

Index No. 602908/07

-against-

CHERYL MACLACHLAN,

Defendant.

----------X

HELEN E. FREEDMAN, J.

Plaintiff United States Trust Company, N.A. ("United States Trust"), an affiliate or subsidiary of United State Trust Corporation and other corporate entities (collectively, "U.S. Trust"), moves by order to show cause to preliminarily enjoin its former employee Cheryl Maclachlan from soliciting or accepting business from U.S. Trust's clients and prospective clients, and from disclosing or retaining any confidential information belonging to U.S. Trust. Maclachlan cross-moves to compel arbitration before FINRA (f/k/a/ "NASD"), claiming that she was employed as a FINRA registered broker with one of the affiliates, U.S.T. Securities Corp., which is a FINRA member firm. In the underlying action, plaintiff seeks a permanent injunction against Maclachlan and monetary damages for breach of contract, conversion and misappropriation of trade secrets, breach of duty of loyalty and fiduciary duty, and tortious interference with contract and prospective economic advantage.

On September 6, 2007, the court granted plaintiff's application for a temporary restraining order enjoining Maclachlan from soliciting or initiating contact with any U.S. Trust's client or prospective client with whom she had dealt, and from retaining any confidential

information. For the reasons set forth below, a preliminary injunction is granted to the limited extent that defendant is enjoined from soliciting business from U.S. Trust's clients and prospective clients with whom she has dealt while employed by plaintiff, using or disclosing trade secrets and confidential customer lists, and retaining any confidential information that belongs to plaintiff. Defendant's cross-motion to compel arbitration is denied.

Background

United States Trust is a financial services company that provides investment management, planning and trust services to affluent and ultra-high net worth clients. In June 1999, United States Trust hired Maclachlan as Senior Vice President and Relationship Manager. In connection with her employment, Maclachlan signed an agreement containing non-solicitation and confidentiality provisions that last for one year after termination of Maclachlan's employment. The non-solicitation clause provides as follows:

> [a]s a condition of your employment with U.S. Trust Corporation or any of our affiliates (collectively, "U.S. Trust"), as well as of your eligibility to receive performance compensation, sales incentives, and other benefits, you agree that you will not, individually or through an agent, for yourself or on behalf of another, as an employee, director, owner, partner, sole proprietor, consultant, agent, representative, shareholder, or in any other manner or capacity whatsoever, either during your employment with U.S. Trust or at any time during the one year period immediately thereafter, either solicit or induce any client of U.S. Trust, or accept any business from, or enter into any business relationship with, (i) any client of U.S. Trust with whom you have dealt, or (ii) any prospective client of U.S. Trust whom you have actively pursued, unless such acceptance or relationship is approved by U.S. Trust in writing in accordance with our Business Ethics Policy.

The confidentiality provision prohibits Maclachlan from using for her own benefit or

disclosing for the benefit of another person or firm "any confidential or proprietary information of U.S. Trust or of any client or prospective client of U.S. Trust."

In July 2007, Bank of America acquired United States Trust. On August 15, 2007, Maclachlan resigned from her employment with United States Trust and commenced employment at Morgan Stanley & Co. Incorporated ("Morgan Stanley"), a competitor of plaintiff. On August 16 or 17, 2007, Maclachlan called John J. Hayes, an employee of United States Trust and former colleague, mistakenly believing she had called another individual named John Hays, and informed him that she was now working at Morgan Stanley along with other former United States Trust employees. Mr. Hayes testifies in an affidavit that during that phone conversation Maclachlan made several disparaging comments about United States Trust and the recent acquisition, stating that "anyone with half a brain and any talent" had left the company. In her affidavit, Maclachlan states that she intended to call her friend John Hays and denies making any disparaging comments about United States Trust or that she was soliciting or attempting to solicit business from one of her former United States Trust clients. Plaintiff then commenced the underlying action on August 29, 2007, seeking, *inter alia*, an injunction enforcing the non-solicitation and confidentiality provisions in Maclachlan's employment agreement.

U.S. Trust's Contentions

Plaintiff maintains that Maclachlan has breached her employment agreement by soliciting the business of U.S. Trust's clients and unfairly competed with U.S. Trust by misappropriating and disclosing trade secrets and confidential information. It contends that enforcing the non-solicitation and confidentiality provisions in the agreement is necessary to prevent irreparable harm to plaintiff's business. Such irreparable harm will include loss of profits from clients that

would remain with plaintiff if not solicited and loss of trust and confidence of plaintiff's clients resulting from discovering that their financial information has been disclosed.

In opposition to Maclachlan's motion to compel arbitration, plaintiff furnishes "employee earnings records" showing that Maclachlan was employed by United States Trust. It argues that Maclachlan's FINRA registration with UST Securities Corp. is only evidence that she was associated with that firm and not necessarily that she was employed by it.

Maclachlan's Contentions

Maclachlan contends that she was employed by UST Securities Corp. and not by United States Trust, the plaintiff in this action. Thus, she maintains that United States Trust has no right to enforce the restrictive covenants in the agreement and that this dispute should be subject to arbitration before FINRA. Maclachlan contends that she did not engage in solicitation of plaintiff's clients or used plaintiff's client lists to unfairly compete, but that she should be allowed to advise her former clients that she has left her employment with plaintiff and provide her new contact information.

Preliminary Injunction

In the instant case, Maclachlan has signed an agreement containing non-solicitation and confidentiality provisions as a condition of employment with any of the U.S. Trust affiliates, including United States Trust, the plaintiff in this case.

Granting preliminary injunctive relief requires a clear showing of a likelihood of ultimate success on the merits, irreparable harm absent the equitable relief, and a balancing of the equities. *See Scotto v. Mei,* 219 A.D.2d 181 (1st Dep't 1996). Generally, "restrictive covenants relating to employment are not favored, and will be deemed unenforceable unless reasonable in

scope, duration and geographical area and either necessary to protect the employer from unfair competition that stems from the employee's use or disclosure of trade secrets or confidential customer lists, or related to an employee whose services are unique or extraordinary." *Chernoff Diamond & Co. v. Fitzmaurice, Inc.*, 234 A.D.2d 200, 201-02 (1st Dep't 1996). Such a restraint has been held to be enforceable by the court if it (1) is not greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public. *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382 (1999). However, an agreement containing restrictive covenants should be enforced only to the extent necessary to protect the employer's legitimate interest. *Id.* at 394.

New York courts have generally upheld covenants prohibiting solicitation of former clients and disclosure of trade secrets or confidential customer lists in the context of employment disputes involving financial services companies and their employees. *See, e.g., Leake v. Merrill Lynch, Pierce, Fenner & Smith*, 213 A.D.2d 155, 156 (1st Dep't 1995) (finding that the trial court had erred in not entertaining and granting petitioner's application for a preliminary injunction, "due to the likelihood of the respondent's success on the merits, given the nature of the employment and non-solicitation agreements, the waiver signed by the petitioner, and the prejudice which would flow from denying this relief."); *Merrill Lynch v. Fishman*, Index No. 121006/00 (Sup. Ct. N.Y. Co. 2000) (enjoining defendant from soliciting business of former clients or accepting business resulting from improper solicitation, and disclosing confidential information). Contacting former clients to advise them of one's new business contact information constitutes solicitation. *See Chernoff, Diamond & Co., supra, at* 201-02; *see also Alliance Capital Mangement L.P. v. McCool*, Index No. 107804/04 (Sup. Ct. N.Y. Co. 2004) .

Here, however, Maclachlan cannot be enjoined from accepting business from U.S. Trust's clients or prospective clients with whom she had dealt that initiate contact with her voluntarily and unsolicited. A restraint of that nature would be unduly burdensome on the defendant and injure the public by preventing investors from freely choosing the financial advisor with whom they wish to entrust their assets. *See Pace Securities, Inc. v. Pollack,* 157 A.D.2d 557, 558 (1st Dep't 1990) (affirming an injunction which specifically provided that "defendants shall not be enjoined from opening and servicing accounts of customers of [plaintiff] who have not been solicited by defendants and who voluntarily approach defendants").

Given the fact that the employment agreement appears to be reasonable in scope, duration and geographical area, and to be enforceable except for the portion prohibiting acceptance of business from unsolicited former clients, plaintiff has sufficiently demonstrated its likelihood of success on the merits. *See BDO Seidman, supra,* at 394 (partial enforcement of restrictive covenants may be justified where the employer has in good faith sought to protect a legitimate business interest). Plaintiff has also shown that it would suffer substantial harm should its clients terminate their relationship with it as a result of Maclachlan's solicitation. Finally, plaintiff has demonstrated that the balance of the equities lies in its favor.

Cross-Motion To Compel Arbitration

Even though it appears that at least one of the affiliates of U.S. Trust is a FINRA member firm and Maclachlan was a FINRA registered representative with that firm, defendant's motion must be denied at this juncture because the evidence before the court is insufficient to establish that Maclachlan was employed by that firm. The plaintiff in this action cannot be compelled to arbitrate before FINRA because the employment agreement does not contain an arbitration clause

and plaintiff is not a FINRA member firm. Thus, it is not clear that FINRA would be an appropriate arbitration forum.

Accordingly, it is hereby

ORDERED that defendant's cross-motion to compel arbitration is denied; and it is further

ORDERED that pending a determination of this action a preliminary injunction is granted as follows:

1. Defendant is enjoined and restrained, whether alone or in concert with others, including any officer, agent, employee, or representative of defendant's current employer, including but not limited to Morgan Stanley, from:

(a) Soliciting or otherwise initiating contact with any U.S. Trust client with whom the defendant dealt or any prospective client of U.S. Trust whom the defendant actively pursued (excluding members of defendant's family);

(b) Using, disclosing, or transmitting for any purpose, any records, documents, or information relating in any way to the clients, business or marketing strategies, or business operations of U.S. Trust, whether in original, copied, computerized, handwritten, or any other form.

2. Defendant shall return to plaintiff any records, documents, or information relating in any way to the clients, business or marketing strategies, or business operations of U.S. Trust, whether in original, copied, computerized, handwritten, or any other form.

Dated: January 3, 2008

ENTER:

Helen E. Freedman, J.S.C.