UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MORGAN STANLEY SMITH BARNEY LLC, a Delaware limited liability company,

Plaintiff,

vs.

SCOTT MALOY,

Defendant.

NO. C14-5388 RBL

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR INJUNCTION

Noted for hearing: May 22, 2014

I. INTRODUCTION AND RELIEF REQUESTED

Scott Maloy joined Morgan Stanley Smith Barney ("Morgan Stanley") after working for A.G. Edwards for many years. Maloy signed a Special Compensation Agreement ("the Contract") when he joined Morgan Stanley in 2008 that specifically excluded his existing clients from a one-year non-solicitation clause that applied only to clients that he developed at Morgan Stanley. When Maloy left Morgan Stanley, 90% of his clients were clients he brought to Morgan Stanley from A.G. Edwards, who were expressly excluded from the Contract's non-solicitation clause. The remaining 10% of Maloy's clients were subject to the non-solicitation provision, but they were also subject to the Protocol for Broker Recruiting (the "Protocol"), because Morgan Stanley and Maloy's new company, LPL, are both signatories to the Protocol. Under the Protocol, firms agree to waive

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1 enforcement of non-solicitation clauses, so long as the departing representative takes
2 nothing more than a list with customer names and contact information as expressly
3 allowed by the Protocol. That is exactly what Maloy did.

4 Upon leaving Morgan Stanley, in accord with the Protocol , Maloy gave his branch
5 manager a copy of the list he was taking and it included only the client information
6 permitted by the Protocol. Maloy took no other client information with him. Maloy was
7 already permitted to solicit 90% of his clients under the terms of his Morgan Stanley
8 Contract, and he was now permitted to solicit the remaining 10% pursuant to the
9 Protocol. In short, Maloy followed the rules, and the rules clearly and unequivocally allow
10 him to solicit **all** of his clients after he left Morgan Stanley.

11 Unfortunately for him, Maloy also attempted to follow Morgan Stanley's rules and
12 instructions with respect to destruction of duplicative paper files in advance of an office
13 remodel, which has resulted in Morgan Stanley attempting to play a cynical game of
14 "gotcha" in this matter. In connection with an office remodel and longstanding
15 instructions to maintain client files electronically so that the office could be "paperless,"
16 Maloy put many duplicative paper files in shredding bins as he vacated his office for the
17 remodel. Morgan Stanley now pretends to be shocked that the paper files that it told him
18 to shred no longer exist, and has seized on the empty file cabinet in his office as the
19 basis to unilaterally rescind its contractual agreement that Maloy can solicit 90% of his
20 clients (that he brought from A.G. Edwards), and seek to deny Maloy the protections of
21 the Protocol that allow him to soliciting the remaining 10% of his clients.

22 Morgan Stanley never addresses these issues, preferring to paint an alarmingly
23 inaccurate picture of events in its zeal to portray Maloy in a negative light and to focus
24 attention elsewhere. Many of the "facts" that are referenced in Morgan Stanley's papers

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are not at all substantiated, are speculation or are asserted on "information and belief." Others are based on nothing more than conjecture or Morgan Stanley's "belief" that certain things occurred although it has no proof that, in fact, they did. This entire case is premised on that empty file cabinet and Morgan Stanley's conclusion, over Maloy's denial and absent any evidence to the contrary, that Maloy stole the files in the cabinet and took them with him to his new employer. Like a house of cards Morgan Stanley's entire case collapses, because it cannot rely on speculation and conjecture to establish the truth of this key allegation. Maloy has not materially breached any obligation to Morgan Stanley and its attempts to excoriate him for any perceived errors he made fall far short of the required standards for injunctive relief.

When Morgan Stanley sought the TRO in this matter, it failed to tell the Court that its 2008 Contract with Maloy expressly provides that he is allowed to solicit all of the clients that he brought over to Morgan Stanley from A.G. Edwards, which is 90% of his client base. Accordingly, Morgan Stanley's allegation that Maloy did not comply with the Protocol that it asserted as the basis for the TRO only applied to the remaining 10% of Maloy's clients. Morgan Stanley, apparently fearing more of its financial advisors want to leave, is essentially using this litigation as a sword hoping the threat of expensive litigation will keep them in place. Morgan Stanley's motion should be denied, its bully tactics stopped, and it should be ordered to return Maloy's Protocol list to him.

II. FACTUAL BACKGROUND

After an initial four-year stint in the financial services industry working as a financial advisor with Shearson/Lehman following his graduation from PLU in 1988, Maloy left the industry for graduate school and the lure of commercial fishing. Maloy Dec. ¶¶2-3. Maloy reentered the financial industry in 1993, working to start a private hedge

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fund in Tacoma that was ultimately sold. *Id*. at ¶4. In 2000 Maloy decided to return to the financial services industry and joined A.G. Edwards, a financial services firm that was a successor to the Shearson/Lehman entity he had worked at some years earlier. *Id*. at ¶5. At A.G. Edwards, Maloy had to undergo training obtain his Securities and Insurance licenses again since so many years had passed since his work at Shearson/Lehman. *Id*. at ¶6. He underwent significant training at A.G. Edwards and ultimately obtained the coveted Certified Financial Planner qualification. *Id*.

Maloy was not provided a book of business at A.G. Edwards and he developed his client base on his own. Maloy Dec. at ¶7. Maloy did not put his clients into investments with big up front commissions, but took a long term approach to success building trust and allowing the business to generate more referrals and fee revenue over time. *Id*. In late 2007 Wachovia acquired A.G. Edwards and Maloy decided to look for another company. Maloy was successful and was contacted by numerous recruiters for various firms, including Smith Barney, Merrill Lynch and Morgan Stanley. He ultimately chose to join Smith Barney[1], and, after providing it with a Production Report documenting the revenues he generated, he started on April 25, 2008, the same day he left A.G. Edwards,. *Id*. at ¶¶8-9.

Upon joining what was then Smith Barney, Maloy signed a Contract that provided in relevant part: "Employee will not solicit or contact any clients that Employee learned of during employment with Smith Barney, **other than those clients which Employee may have brought with Employee and for whom the Employee was the broker of record at Employee's prior employer**." *Dkt #5* at Ex A (emphasis added). Pursuant to this Contract

[1] Morgan Stanley acquired Smith Barney in 2009, becoming Morgan Stanley Smith Barney. For ease of reference the firm is referred to throughout as "Morgan Stanley" but it was actually only Smith Barney at the outset and became Morgan Stanley Smith Barney about a year after Maloy came on board.

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1 provision, if Maloy ever left Morgan Stanley he was free to solicit all of the customers he
2 brought with him to Morgan Stanley from A.G. Edwards.
3 However, Morgan Stanley is also a signatory to the Broker Recruitment Protocol,
4 as is Maloy's current company LPL Financial LLC ("LPL"). *Dkt #5* Ex. B; Gillies Dec. The
5 Protocol was developed to "further the clients' interests of privacy and freedom of choice"
6 when their representatives move from one signatory firm to another. *Dkt #5-1* p. 4. The
7 Protocol expressly provides as follows:
8

> 9 When [Registered Representatives] move from one firm to
> 10 another and both firms are signatories to this protocol, they may
> 11 take only the following account information: client name,
> address, phone number, email address and account title of the
> 12 clients they serviced while at the firm ("the Client Information")
> and are prohibited from taking any other documents or
> 13 information. Resignations will be in writing delivered to local
> branch management and shall include a copy of the Client
> 14 Information that the [Registered Representative] is taking with
> him or her.
>
> 15 * * *
>
> 16 [Registered Representatives] that comply with this protocol would
> 17 be free to solicit customers that they serviced while at their
> former firms, but only after they have joined their new firms. A
> 18 firm would continue to be free to enforce whatever contractual,
> statutory or common law restrictions exist on the solicitation of
> 19 customers to move their accounts by a departing [Registered
> Representative] before he or she has left the firm.

20 *Dkt #5* Ex B. Thus, Morgan Stanley expressly agrees that if Maloy departs taking only the
21 customer information allowed by the Protocol, he can solicit **all** of the customers he
22 serviced at Morgan Stanley, not just the 90% he brought with him from A.G. Edwards
23 which he was allowed to solicit even absent the existence of the Protocol.
24 Maloy transitioned his A.G. Edwards clients into Smith Barney accounts. Morgan
25 Stanley acquired Smith Barney around 2009 and both were in difficult financial straits.
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1 Maloy Dec. at ¶¶9-11. At about that time the financial crisis also hit full force. As a
2 result, Maloy's client base did not expand, and revenues declined. *Id.* As financial
3 pressures on Morgan Stanley mounted, it elected to remove and reduce various elements
4 of revenue from financial advisors' compensation schedules, effectively cutting their pay.
5 Maloy found this significantly demoralizing and began to seriously countenance leaving
6 the company. *Id*. at ¶ 11.

7 At Morgan Stanley, as at A.G. Edwards, Maloy was called routinely by recruiters. In
8 late 2013 Maloy began to consider leaving, and a recruiter put him in contact with LPL in
9 January 2014. Maloy Dec. at ¶12. Maloy was considering Independent Model firms like
10 LPL as well as some other quality Wirehouse Model firms. *Id*. Similar to the process
11 when he joined Morgan Stanley, Maloy provided LPL with a Production Report
12 documenting his revenue generation and planned to resign from Morgan Stanley and join
13 LPL immediately after resigning. *Id.* at ¶18. However, because of his son's medical
14 issues, Maloy ended up postponing his departure from Morgan Stanley. Maloy was then
15 going to leave in March 2014, but decided to wait until after the April 15th tax filing date
16 and his anniversary date because he would qualify for forgiveness of a substantial sum
17 owed Morgan Stanley if he stayed past April 28, 2014. *Id.* at ¶¶14-18. Maloy accepted
18 employment with LPL in late April 2014 and formally resigned and moved to LPL on May
19 2, 2014. *Id.* At the time of Maloy's departure 90% of his clients were people he had
20 brought over from A.G. Edwards, not clients developed at Morgan Stanley. *Id.* at ¶9.

21 The Production Report Maloy shared with LPL included no client names or
22 confidential information. Maloy Dec. at ¶15. Sharing this type of report is expressly
23 allowed by the Protocol for Broker Recruiting (*Dkt #5 Ex. B)* and Morgan Stanley required
24 the same information from Maloy to document his production at A.G. Edwards before it

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hired him. It is standard practice for financial advisors to give notice and leave immediately. Maloy Dec. at ¶13. This was the same practice followed when Maloy joined Morgan Stanley, and exactly what Morgan Stanley expected. *Id*.

In the weeks leading up to Maloy's departure the Morgan Stanley Tacoma office was undergoing a three-phase remodeling project. The first phase began at one end of the office, then the second phase moved to the middle section of the office where Maloy was located. Maloy Dec. at ¶19. To prepare Maloy was required to box up everything in his office and move it out, then the furniture was moved out. After the carpet was replaced and the office was repainted, the furniture was to be moved back into the office, along with boxes, and then Maloy would have to unpack all the boxes. *Id.* at ¶19-20.

Because of the effort involved in packing, moving and unpacking documents in everyone's desks, the remodel was treated as a "spring cleaning". Employees were encouraged to discard obsolete or duplicative documents, in accord with Morgan Stanley's "clean desk" policy and move to a paperless office. Maloy Dec. at ¶19-20. Because of the office-wide discarding of paper documents, in addition to the two gray bins with locks referred to as "Shredder Bins" that were normally on site for discarding confidential or sensitive information, additional Shredder Bins had to be brought in. *Id*. Because of this mass discarding of sensitive documents management eventually sent an email telling employees to stop discarding documents in the Shredder Bins until more bins could be brought on site. *Id.*

In late April 2014, the second phase of the remodel was beginning and Maloy had to pack up his office. Maloy Dec. at ¶20. Knowing he was leaving in a week or so, and mindful of Morgan Stanley's clean desk and paperless office recommendations, he discarded virtually all of the paper documents in his office. Maloy knew he was not taking

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1 any of the documents to LPL, knew that the information was entirely duplicative of the
2 electronic records Morgan Stanley kept. Therefore, in accord with Morgan Stanley rules,
3 Maloy discarded the redundant paper client files in the Shredder Bins, while sales
4 brochures and other non-sensitive papers were discarded in routine recycling bins. *Id.*
5 Maloy understood that with a paperless office it was not unusual to have only electronic
6 files on clients, and he had been told when he asked for paper files for a few clients he
7 was assigned when another financial advisor left Morgan Stanley, that everything he
8 needed would be found in electronic records. *Id.* Maloy concluded that it would be a
9 waste of time to pack up duplicative paper files when the Shredder Bins were available.
10 It is also noteworthy that the file credenza, with four file drawers, had less than one
11 drawer of client paper files. Maloy Dec. ¶22. The others had personal or former client
12 information that was no longer active. *Id.*
13
14 Maloy tendered his resignation to his Branch Manager, Tim Truebenbach, on
15 Friday May 2, 2014. Maloy told Truebenbach that he was resigning, gave him a
16 resignation letter, and provided Truebenbach with a list of client contact information that
17 Maloy was permitted to take in compliance with the Protocol. Maloy Dec. at ¶¶21-22.
18 Under the Protocol, Maloy was allowed to take specified client contact information
19 including the clients' names, addresses, phone numbers, email addresses, and account
20 titles. *Dkt #5* Ex. B (*Dkt #5-1* p. 4) and Maloy Dec. at ¶22. Truebenbach did not protest
21 or otherwise tell Maloy that he was not permitted to take the list in accord with the
22 Protocol, and Morgan Stanley has not disputed that the list Maloy took complied with the
23 Protocol. *Id.* The only other documents Maloy took with him from the Morgan Stanley files
24 were a handful of personal mementos from clients that had followed him from A.G.
25 Edwards including a few funeral programs and a few Christmas cards. *Id.* The rest of the
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paper documents in Maloy's office were either shredded or recycled when he packed up the office or remained in the office when he left. *Id.* To Maloy's knowledge, he had no documents with non-public client information in his possession at the time he left.[2]

At the time he left Morgan Stanley, **90% of Maloy's clients were clients he brought over from A.G. Edwards in April 2008**. Maloy Dec. at ¶23. Under Maloy's Contract with Morgan Stanley, Maloy is expressly permitted to solicit and contact these clients: "Employee will not solicit or contact any clients that Employee learned of during employment with Smith Barney, other than those clients which Employee may have brought with Employee and for whom Employee was the broker of record at Employee's prior employer." *Dkt 5* Ex. A.

Shortly after Maloy left Morgan Stanley, John Davis of Morgan Stanley contacted LPL Vice President and associate counsel Peter Gillies regarding Maloy's departure and the "missing" paper client files from Maloy's office. Gillies Dec. Gillies contacted Maloy, who explained the remodeling and shredding or duplicative client documents in secure shredder bins. Maloy Dec. at ¶24. Gillies relayed the information to Davis, who subsequently told Gillies that Morgan Stanley did not believe Maloy's explanation. Morgan Stanley then proceeded with this lawsuit without any more "facts" other than its refusal to believe the same information that Maloy has submitted in his declaration to this Court. *Id.* Maloy, who had been working to contact clients he previously serviced at A.G. Edwards and Morgan Stanley to transfer them to LPL, as is expressly permitted under Maloy's Contract with Morgan Stanley and the Protocol. *Dkt 5* Exs. A and B.

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[2] As Maloy discovered in reviewing old emails to respond to discovery, there were a handful of emails from late 2012 or early 2013 that had some limited non-public client information. He had not accessed these, was not aware he had them but located them in his efforts to respond fully to Morgan Stanley's Requests for Production. Maloy Dec. ¶27. He has not deleted the information due to the TRO and litigation pending.

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However, after Morgan Stanley obtained the TRO it demanded that Maloy return the list and cease soliciting all clients – including those A.G. Edwards clients that he is expressly permitted to solicit and contact pursuant to the SCA. Maloy Dec. at ¶25. Maloy's clients from A.G. Edward are continuing to call him, but he has been forced to stand down pending dissolution of the TRO and the resolution of the pending motion for injunction. *Id.* Pursuant to the TRO and at the request of Morgan Stanley, Maloy returned both the hard copy of the Protocol customer information along with a printout of the electronic version on or about May 14, 2014, and he has not accessed the electronic copy of the Protocol customer information for any other purpose. *Id.*

III. LEGAL ANALYSIS

In order to demonstrate that it is entitled to a preliminary injunction, Morgan Stanley must demonstrate (1) a likelihood of success on the merits; (2) that it is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of hardships tips in its favor; and (4) that the public interest favors an injunction. *Winter v. Natural Resources Defense Council,* 555 U.S. 7, 20 (2008). A party can also satisfy the first and third elements of the test by raising serious questions going to the merits of its case and a balance of hardships that tips sharply in its favor. *Alliance for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1135 (9th Cir. 2011) (Ninth Circuit's "sliding scale" approach continues to be valid following the *Winter* decision). "A preliminary injunction is an extraordinary remedy never awarded as of right." *Cottrell,* 632 F.3d at 1131. Morgan Stanley fails to meet any of the required elements and its request for a preliminary injunction must be denied.

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A. Morgan Stanley is Unlikely to Succeed on any of its Legal Theories Because Maloy's Contract Allows Him to Solicit Customers He Brought to Morgan Stanley and the Protocol Allows Maloy to Take and Use Limited Customer Information to Solicit All Morgan Stanley Customers.

Plaintiff Morgan Stanley alleges Maloy breached his obligation not to solicit certain clients under the Contract, misappropriated its proprietary and confidential client information in violation of Washington's Trade Secrets Act and violated his duty of loyalty. However, there is no evidence to support these allegations in the records, save photographs of an empty file cabinet and unsupported conclusory and speculative accusations. Morgan Stanley allows employees to take limited information under the Protocol, expects financial advisors who join it to bring over the same information, and this client information is not entitled to trade secret protection. Essentially if Maloy did not breach the Protocol, then no preliminary injunction is necessary. *Merrill Lynch, Pierce, Fenner, & Smith v. Reidy,* 477 F. Supp. 2d 472, 477 (D. Conn. 2007) (denying motion for preliminary injunction where Merrill Lynch was unable to show that the defendants violated the Protocol).

Morgan Stanley's Contract allows Maloy to solicit clients he serviced at A.G. Edwards, who comprised 90% of his client base as of the date of his resignation. Dkt. #5 Ex A. Morgan Stanley's own Protocol allows Maloy to take certain customer information and to solicit all Morgan Stanley customers he served after he leaves. Dkt. #5 Ex B. Maloy took nothing beyond what was contemplated by the Protocol and the picture of an empty file cabinet does not change that fact. There is no evidence submitted to show that Maloy possessed or used of non-Protocol information, or improperly solicited Morgan Stanley clients before he left.

In obtaining the TRO with one day's notice (by voice mail) to Maloy, Morgan Stanley failed to acknowledge that Maloy is expressly permitted to solicit the customers

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1 he serviced and brought with him from A.G. Edwards. Morgan Stanley failed to inform the
2 Court that approximately 90% of Maloy's customers accompanied him to Morgan Stanley
3 from A.G. Edwards. Morgan Stanley provides no evidence whatsoever to support that
4 Maloy used or took any protected information, other than the fact that his file credenza
5 was empty when he left. Morgan Stanley failed to tell the Court about the remodeling and
6 spring cleaning going on in its Tacoma Branch in the weeks approaching Maloy's
7 resignation and the Shredder Bins that had to be added to deal with the excess paper
8 documents being discarded. As Maloy explained through LPL Vice President Peter Gillies
9 before it filed this lawsuit, Maloy had not taken any client information beyond that
10 permitted by the Protocol and the "missing" files had been disposed of in conjunction
11 with the office remodel and were duplicative of the information in Morgan Stanley's
12 electronic files. Gillies Dec.

13 A party requesting a TRO ex parte without a response from the opposing party,
14 assumes an obligation of utmost candor in informing the court of the facts justifying
15 immediate relief. *See, e.g.*, *Campbell v. Rice*, 408 F.3d 1166, 1175 (9th Cir. 2007) ("In
16 particular, in an ex parte proceeding, a lawyer shall inform the tribunal of *all material*
17 *facts known to the lawyer* which will enable the tribunal to make an informed decision,
18 whether or not the facts are adverse.") (quoting ABA Model Rule of Professional Conduct
19 3.3(d)) (emphasis in Campbell); Wash. RPC 3.3(f) (same). Morgan Stanley did not fulfill
20 its obligations. It failed to tell the Court that Maloy had explained that he had shredded
21 the documents in question during the remodel when extra Shredder Bins were provided
22 for this purpose. It further failed to highlight for the Court the fact that Maloy is expressly
23 permitted by the Contract to solicit customers he brought to Morgan Stanley from A.G.
24 Edwards. Morgan Stanley presented an order to the Court that went far broader than the

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relief it was entitled to and prevented Maloy and his long time clients from moving forward with LPL as the Contract expressly permits.

Morgan Stanley contends, on information and belief, that Maloy took a drawer of missing client files to LPL and used that information to solicit Morgan Stanley customers whom he did not service before joining Morgan Stanley. Morgan Stanley fails to proffer any facts to support the basis of its "information and belief" other than photographs of an empty file drawer that once held files. Morgan Stanley also fails to explain why Maloy would need or want to take such information when he had the list of clients he served with their contact information as permitted by the Protocol.

1. The Client Contact Information Allowed Under the Protocol is Not a Trade Secret and Maloy Took No Other Information.

The Gramm Leach Bliley Act ("GLB") and Regulation SP prohibit Morgan Stanley from disclosing any client's nonpublic personal information without notice. Yet Morgan Stanley signed the Protocol, which allows registered representatives to take a customer contact list when they go to work for another Protocol signatory. *Dkt #5* Ex. B. The Protocol addresses GLB and Regulation SP by allowing registered representatives to take only a customer contact list; it does not allow registered representatives to take monthly account statements, account numbers, or other information that would constitute non-public personal information. *Id.* By definition the client contact information included under the Protocol cannot be considered "non-public" or the brokerage firms would be in violation of GLB and Regulation SP by allowing it to be shared without client consent. Also, "[t]o ensure compliance with GLB and Regulation SP, the new firm will limit the use of the Client Information to the solicitation by the RR of his or her former clients and will not permit the use of the Client Information by any other RR or for any other purpose." *Id.*

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Protocol signatories like Morgan Stanley have essentially acknowledged that customer contact information shared under the Protocol is not a trade secret.

By allowing departing financial advisors to leave with client contact information, signatory firms acknowledge a difference between contact information and other client information, such as assets under management or specific investments. In other words, by allowing departing registered representatives to leave with contact information contemplated by the Protocol, Morgan Stanley "is effectively declaring that it does not consider this Client Information to be nonpublic personal information under the federal Gramm-Leach-Bliley Act. . . . If client information is not fairly characterized as 'nonpublic personal information,' then it can be fairly characterized as public personal information, and, if so characterized, it can hardly be viewed as confidential." *Smith Barney v. Griffin*, 23 Mass. L. Reptr. 457, 2008 WL 325269 *7 (Mass. Super. Ct. 2008). Thus, by signing the Protocol, Morgan Stanley has acknowledged that client contact information is not a trade secret. *Smith Barney v. Burrow*, 558 F. Supp. 2d 1066, 1081 (E.D. Cal. 2008) (identities of clients not a trade secret where registered representative brought clients to Smith Barney and built up the clientele more through his own efforts).

2. Maloy has Not Used the Client Contact List Other than as Contemplated by the Protocol and the Contract and Has Not Breached His Duty of Loyalty.

A trade secrets act violation requires the use or disclosure of trade secret information. Morgan Stanley offers no evidence to show that Maloy has used or disclosed any trade information because Maloy has nothing other than the customer information governed by the Protocol. Maloy reasonably believed he was entitled to take a Protocol list, and his branch manager did not object. When Morgan Stanley obtained the TRO, Maloy returned the hard copy of the list and has not accessed the electronic copy (he is

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prohibited from deleting it by virtue of the terms of the TRO). He has no other information and as the Contract expressly notes, Maloy can solicit the clients he serviced before joining Morgan Stanley are there is no credible argument that the identities of Maloy's A.G. Edwards clients are Morgan Stanley trade secrets. *Dkt. #5* Ex. A. To Maloy's knowledge he had nothing else and used nothing other than the Protocol list information.

Morgan Stanley has offered no evidence of any solicitation of clients by Maloy for LPL **before** he left Morgan Stanley, or offered anything other than the existence of an "empty file cabinet" as proof of some improper contact by Maloy. In light of Maloy's explanation and the simple truth that he did not knowingly take client information with him other than the list permitted by the Protocol, Morgan Stanley is not likely to succeed on the merits of any of its various theories. Morgan Stanley offers no explanation as to why Maloy would have any interest in taking client files, when he had the Protocol list of all of his clients with the information needed to contact them.

B. The Party Suffering Irreparable Harm is Maloy Who Is Enjoined from Contacting Clients He Brought to Morgan Stanley that He Has Every Right to Contact.

"A plaintiff who seeks preliminary injunctive relief must show 'that irreparable injury is ***likely*** in the absence of an injunction.'" *M.R. v. Dreyfus,* 697 F.3d 706, 728 (9th Cir. 2012) (quoting *Winter,* 555 U.S. at 22); *Alliance for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1131 (9th Cir. 2011) ("plaintiffs must establish that irreparable harm is likely, not just possible, in order to obtain a preliminary injunction.") "Speculative injury does not constitute irreparable injury." *Goldie's Bookstore v. Super. Ct.,* 739 F.2d 466, 472 (9th Cir. 1984). Morgan Stanley cannot prove irreparable harm in this case because any injury it may suffer is compensable by the award of money damages. The United States Supreme Court has held repeatedly that a "temporary loss of income, ultimately to be

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recovered, does not usually constitute irreparable injury. The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough." *Sampson v. Murray,* 415 U.S. 61, 90 (1974).

Morgan Stanley argues that Maloy's conduct is similar to a variety of *Merrill Lynch* cases where departing employees took documents and client information and used it to solicit customers in violation of their employment agreements. It is noteworthy that these cases long predate the enactment of the Protocol in 2004, and offer little insight as to how the transfer of customer information operates under the Protocol. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, 999 F.2d 211 (7th Cir. 1993) (reversing extensions of TRO and injunction where departing broker allegedly took customer information and solicited clients); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048 (4th Cir. 1985) (affirming injunction where departing broker allegedly took customer records and solicited clients in violation of contract); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Stidham*, 658 F.2d 1098 (5th Cir. 1981) (affirming injunction on nondisclosure, reversing injunction on noncompete where departing brokers took customer records and solicited clients in violation of contract).

Here, the facts are quite different. Maloy was not trained by Morgan Stanley, the training and certifications necessary for his work were obtained at A.G. Edwards. Maloy is also expressly permitted by Contract to solicit 90% of his clients whom he serviced before he joined Morgan Stanley. Morgan Stanley accuses Maloy of taking a drawer of files, which he denies taking. Maloy has explained how and why the information was properly shredded and discarded while he was at Morgan Stanley. Maloy had no need to take anything beside the list allowed under the Protocol. He is allowed to solicit his A.G.

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Edwards clients and he knows who they are and knew their contact information long before joining Morgan Stanley. Rather than demonstrating that it will suffer irreparable harm, Morgan Stanley through the TRO and proposed injunction is causing irreparable harm to Maloy by preventing him from contacting clients that he has every right to contact and denying him the opportunity to earn a living. Maloy Dec. ¶26.

In contrast, this case bears a striking resemblance to *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Brennan*, 2007 WL 632904 *2 (N.D. Ohio 2007). In *Brennan*, Merrill Lynch sought a TRO against several employees who left to move to Bear Stearns. Like Maloy, the defendants all had contracts with Merrill Lynch with confidentiality provisions and a one-year non solicitation provision and Merrill Lynch was also a signatory to the Protocol. The District Court in Ohio refused to issue a TRO to prevent solicitation, noting that by signing the Protocol Merrill Lynch understands "the fluid nature of the industry; brokers routinely switch firms and take their client lists with them. By setting up such a procedure for departing brokers to take client lists Merrill tacitly accepts that such an occurrence does not cause irreparable harm." *Id.*

Other courts have recognized that "damages in these types of cases are calculable because 'the securities industry is highly regulated,' 'each individual transaction is monitored electronically,' 'every customer transfer ... is documented,' and '[e]very dollar earned in fees by Defendant ... doing business with those customers that [the plaintiff] considers its own can be traced precisely.'" *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Baxter*, 2009 WL 960773 *4 (D. Utah 2009) (quoting *Morgan Stanley Dean Witter, Inc. v. Frisby & Lovell,* 163 F. Supp. 2d 1371, 1376 (N.D. Ga. 2001)).

The very existence of the Protocol belies Morgan Stanley's claims of "irreparable harm." "If there truly was a significant risk of substantial irreparable harm from departed

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financial advisors soliciting their former clients, one would not expect Smith Barney to have entered into a Protocol permitting precisely that." *Smith Barney v. Griffin*, 23 Mass. L. Rptr. 457, 2008 WL 325269 *7 (Mass. Super. Court 2008). "If customer confidence is not undermined when a departing broker leaves for another Protocol firm, it is difficult to comprehend why customer confidence constitutes irreparable harm when a departing broker goes to a non-Protocol firm." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Baxter*, 2009 WL 960773 *6 (2009). "Merrill's signature indicates that they understand the fluid nature of the industry; brokers routinely switch firms and take their client lists with them. By setting up such a procedure for departing brokers to take client lists, Merrill tacitly accepts that such an occurrence does not cause irreparable harm. ... Specifically, given the existence of the Protocol, it appears that Merrill and industry peers are well aware of, and content with, the idea that brokers will leave and take client lists with them. Such an agreement significantly undercuts the notion that such behavior destroys customer goodwill." *Merrill Lynch v. Brennan*, 2007 WL 632904 *2 (N.D. Ohio).

Morgan Stanley also suggests that Maloy cannot claim he has complied with the Protocol because it firmly believes (without evidence) that Maloy took some additional client information. In *Credit Suisse Securities, LLC v. Lee,* 2011 WL 6153108 (S.D.N.Y. 2011), the district court rejected a request for injunctive relief when a broker transitioned between two Protocol signatory firms. One of the departing brokers had after his resignation, one of the defendant brokers had client portfolio information on his computer that was technically against the terms of the Protocol. The district court found that this did not eliminate the protection of the Protocol and declined to enter an injunction, noting that the existence of the material did not show bad faith by the departing broker and concluded:

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> The issue of whether the respondents complied with the Protocol goes to the issue of whether Credit Suisse will suffer irreparable harm absent an injunction. If the respondents did not breach the Protocol, then the conduct Credit Suisse seeks to enjoin would, even in Credit Suisse's view, be permissible. It is hard to conclude that a party will suffer irreparable harm when the conduct sought to be enjoined is concededly permissible.

Id. at *4. This is virtually identical to the situation presented in this case. Maloy had a few email items that were old and contained some outdated client account numbers that he was not even aware he had. Maloy Dec. ¶27. In a normal world, that information would have never been access or used, or would have been deleted if found. Here, there is a TRO and Maloy produced the documents to Morgan Stanley. This technical violation is not material and should not enable Morgan Stanley to brush aside the protocol and avoid its obligations.

In other words, "courts have become disinclined to find irreparable incalculable harm from financial advisors' departures." *Smith Barney v. Burrow*, 558 F. Supp. 2d 1066, 1083 (E.D. Cal. 2008), accord *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Callahan*, 265 F. Supp. 2d 440, 444 (D. Vt. 2003); *Morgan Stanley DW, Inc. v. Frisby*, 163 F. Supp. 2d 1371, 1376 (N.D. Ga. 2001). Especially in light of the facts in this case, where 90% of Maloy's clients were brought to Morgan Stanley from A.G. Edwards and by Contract Maloy had every right to solicit them, the Court should deny injunctive relief, and send this case to FINRA arbitration, where three experienced arbitrators can evaluate whether Morgan Stanley is entitled to any equitable or legal remedy.

C. The Balance of Hardships Unequivocally Favors Maloy.

The balance of hardships, far from tipping in Morgan Stanley's favor, clearly tips in favor of Maloy and his customers. Imposing restraints on Maloy would cripple his career. Without access to his long term customers, Maloy will have absolutely no business, and

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will be unable to support himself and his family. Maloy Dec. ¶26. Before an injunction may be imposed, the movant must demonstrate that the balance of equities tips in its favor. *Winter,* 55 U.S. at 20. Morgan Stanley argues that the equities weigh in its favor, as it only seeks to compel Maloy to comply with the terms of the Contract and Washington's Trade Secrets Act. However, there is no evidence that Maloy has materially breached terms of his Contract, materially violated the Protocol, misappropriated trade secrets from Morgan Stanley and no evidence he has breached his duty of loyalty to Morgan Stanley.

Not surprisingly, many courts have found that brokerage firms can survive the denial of an injunction far more readily than a departing employee could survive the issuance of an injunction:

> If an injunction was granted, [the broker] may be prevented from serving the customers for whom he has worked for over the last two years. It would leave him with no client base in a business that thrives on commissions from regular clients. If an injunction were to issue, damage to [the broker] while he waited ultimately to prevail would be catastrophic as a result of the loss of most of his income. Because the effect of the loss of income pending the outcome of this dispute would, by reason of the differing financial strength of a large brokerage firm and an individual broker, bear far more heavily on [the broker] than on Merrill Lynch, that disparity of effect supports denial of an injunction.

Merrill Lynch v. de Liniere, 572 F. Supp. 246, 249 (N.D. Ga. 1983); *see also Prudential Securities v. Plunkett,* 8 F. Supp. 2d 514, 519-20 (E.D. Va. 1998) (finding the balance of equities favors broker when compared to risk of harm to "a leading securities industries firm with hundreds of offices and thousands of agents"). Put bluntly, there are "powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood." *Plunkett*, 8 F. Supp. 2d at 516 (citation omitted).

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The equities therefore do not favor the imposition of an injunction where, as here, the need for one has not been established and the imposition of the requested injunction, like the TRO, goes far beyond the limited relief Morgan Stanley could be entitled to under the Contract and the Protocol. In contrast, enjoining Maloy from contacting his clients will have a devastating effect on his ability to support himself and his family and completely deprive him of serving his loyal clients whom have followed him over the years and want to continue with him as their trusted advisor.

D. There is No Public Interest In Preventing Maloy from Contacting His Customers Who Can Move to LPL if They Choose.

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter,* 555 U.S. at 24 (quoting *Weinberger v. Romero–Barcelo,* 456 U.S. 305, 312 (1982)) (quotation marks omitted). A broker client relationship is personal and based on personal trust, much like that of a lawyer, doctor or other relationships based on personal trust.

As the Protocol recognizes, clients should be free to deal the financial advisor of their choice. In *Smith Barney v. Burrow*, 558 F. Supp. 1066 (E.D. Cal. 2008), the district court considered whether injunctive relief was justified where, as here, a financial advisor left Smith Barney to join another firm. In denying the requested injunction, the *Burrow* court's analysis of the public interest element is instructive. After noting that Smith Barney was a giant in the securities field, the court found "the public interest is better served with open competition in the securities field and in access to advisors of clients' choice. The balance of equities and public interest factors weigh in defendants' favor." *Id.* at 1084. Here, the public interest is not served by enjoining Maloy from conduct

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expressly permitted by the Contract and the Protocol and Morgan Stanley has not shown any improper conduct has or is likely to occur. Thus, the final *Winter* factor also weighs against entering a preliminary injunction.

IV. CONCLUSION

By moving for injunctive relief, Morgan Stanley is seeking to limit competition and to enjoin Maloy from engaging in a perfectly lawful business. Clearly customer contact information, *i.e.,* names, addresses, phone numbers and email addresses of the customers serviced by Maloy at Morgan Stanley, is routinely shared under the Protocol and is not a trade secret. Maloy has no other client information. Thus injunctive relief is not available to enjoin use of the Protocol list by Maloy. Nor is it appropriate for Morgan Stanley to enjoin Maloy from contacting the clients that he serviced before and after joining Morgan Stanley.

Based on the evidence before the Court, Morgan Stanley is not likely to succeed on the merits of any of its claims and is not likely to suffer irreparable harm. Morgan Stanley willingly permits employees to take client contact lists following the same procedures that Maloy invoked and expected Maloy to do the same and bring A.G. Edwards client information when he joined Morgan Stanley. This is an overt concession that the harm that results from its employees taking lists of clients is not irreparable. More importantly, Morgan Stanley fails to show it has any likelihood of refuting Maloy's testimony that he shredded the "missing" files while still at Morgan Stanley and Morgan Stanley has no evidence that Maloy possessed or used anything other than the Protocol list. The TRO should be dissolved, the motion for injunction should be denied and the Protocol list returned to Maloy.

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