IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHARLES SCHWAB & CO., INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 14 cv 08843
	)	
CAROLYN KITZEL,	)	
	)	
Defendant.	)	

RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

Defendant Carolyn Kitzel ("Kitzel"), submits this Response in Opposition to Plaintiff Charles Schwab & Co., Inc.'s ("Schwab") Motion for Temporary Restraining Order and states:

INTRODUCTION & BACKGROUND

Plaintiff, Schwab employed Kitzel as a financial consultant in Schwab's Michigan Avenue, Chicago, Illinois office. (See Plaintiff's Complaint at ¶2). Kitzel joined Schwab in 2007, and worked until May 23, 2014 when Kitzel gave Schwab four weeks notice of her resignation. (Plaintiff's Complaint at ¶8). More than five months later, on November 5, 2014, Schwab filed a three count complaint against Kitzel alleging breach of contract, a claim under the Illinois Trade Secrets Act and tortious interference with business relationships. Schwab also filed a motion for preliminary injunction and a motion seeking expedited discovery. The impetus for Schwab's filing is a mailed announcement of Kitzel's new place of employment which Schwab alleges was mailed "in or around late September or early October 2014." (Plaintiff's Complaint at ¶67). The announcement was sent to JPMorgan customers (See Declaration of Carolyn Kitzel attached to Kitzel's previously filed Response in Opposition to

Plaintiff's Request for Preliminary Injunction as Ex. A at ¶8), which according to Plaintiff's allegations, are also Schwab customers. Schwab has also filed an arbitration demand against Kitzel before the Financial Industry Regulatory Authority ("FINRA") asserting exactly the same claims as contained in this lawsuit. (*See* Schwab's Statement of Claim filed with FINRA, attached to Kitzel's previously filed Response as Exhibit B and see Plaintiff's Complain at ¶90).

With respect to Schwab's previously filed pleadings, Kitzel has filed a pending Motion to Dismiss and Opposition Briefs to both the request for expedited discovery and request for preliminary injunction. As set forth in those briefs, Schwab does not satisfy the requirements for injunctive relief and Schwab is obligated to arbitrate the claims asserted against Kitzel before FINRA and pursuant to FINRA discovery rules. (See Plaintiff's Complaint at ¶87). Despite its requirement to arbitrate through FINRA (See FINRA Rule 13200), and despite FINRA's significant limitations on depositions and written discovery, Schwab has renewed its request (this time attempting a TRO as opposed to a preliminary injunction) before this Court seeking expedited discovery and injunctive relief in an attempt to circumvent FINRA's limitations on discovery. *See* FINRA Rules 13510 and 13506; *see also Banc of America Securities LLC v. Independence Tube Corp.*, No. 09 C 7381, 2010 WL 1780321 at *8 (N.D. Ill. May 4, 2010)(holding that the Seventh Circuit has frowned upon a claimant proceeding in what has been called a "heads I win, tails you lose," approach to litigation where a party forum shops, taking a case to the courts and then, if things go poorly there, abandoning their suit in favor of arbitration).

Schwab now has filed a Motion for TRO relying solely on its own employee's declaration. That declaration contains hearsay within hearsay about an alleged conversation with an un-named customer about that un-named customer's purported conversation with Kitzel. The

declaration does not even contain any information as to when Kitzel purportedly spoke with this un-named client. As set forth below, Schwab's employee's self serving declaration, which is refuted by Kitzel's attached declaration (See Exhibit A), falls far short of demonstrating any emergency and falls far short of satisfying any of the other elements required before a TRO should issue.

ARGUMENT

A. Plaintiff Has Not Demonstrated Any Emergency Sufficient to Justify The Extraordinary Relief of A TRO

Plaintiff has failed to establish any of the necessary elements to obtain the issuance of an "emergency" injunction. A preliminary injunction is an extraordinary remedy which is to be used only where an extreme emergency exists. *Mora v. Genova,* No. 97 C 7765, 1998 WL 544405 *6 (N.D. Ill. 1998). "A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing,* carries the burden of persuasion." *Goodman v. Illinois Dept. Fin. & Profess. Reg*., 430 F.3d 432, 437 (7th Cir. 2005) (*emphasis* in original). Since the grant of a temporary restraining order is the exercise of an extremely far-reaching authority, such a motion is not to be indulged in, except in a case clearly warranting it. *Schwinn Bicycle Co. v. Bicycles, Inc.,* 870 F.2d 1176, 1181 (7th Cir. 1989); citing *Roland Machinery Co. v. Dresser Industries,* 749 F.2d 380, 389 (7th Cir. 1984). This extraordinary remedy is not available unless the plaintiff demonstrates an urgency which necessitates such action and meets the burden of persuasion with respect to all of the factors to be considered in such a motion. *Shaffer v. Globe Protection, Inc.,* 721 F.2d 1121, 1123 (7th Cir. 1983).

Here, plaintiff cannot meet the test for emergency relief. There is no extreme emergency present to invoke the Court's equitable injunctive power. Plaintiff completely fails to

demonstrate any emergency requiring entry of a TRO. While Plaintiff now has filed a motion for TRO, seeking emergency and extraordinary relief, Plaintiff's pleadings (as explained below and in Kitzel's previously filed Opposition Briefs), including its recently submitted declaration, contain no valid evidentiary support for any of the allegations. The sole supporting declaration contains self-serving double hearsay statements from a Schwab employee about an alleged conversation on an undisclosed date and with an undisclosed person. Further, Plaintiff's declaration does not specify Kitzel's social relationship with the alleged customer, does not specify if this customer is also a customer of JPMorgan, and completely ignores whether the customer or some other factor or person was the motivating force for that customer contact with Kitzel. In any event, the negative implications attempted to be made in that hearsay filled declaration of Schwab employee Hargrove are refuted by Kitzel's declaration (Ex. A). While Kitzel did call a Schwab and JPMorgan joint customer, that customer is a person she invited to her fifty-person wedding who had previously contacted Kitzel, and who she had delayed contacting because she was busy working on her defense in the lawsuit filed by Schwab. (Ex. A at ¶4). Kitzel did not solicit this person for business, but out of courtesy called the person to respond to that person's initial request to talk so that the person did not think Kitzel was ignoring them or simply being rude. (Ex. A at ¶5-6).

Plaintiff simply has failed to present any evidence that any violation has occurred, let alone one of the nature that would require such extraordinary emergency relief. Plaintiff's pleadings, including the recent Motion for TRO, simply contain no facts of imminent or irreparable injury. Vague, general and conclusory and hearsay based statements such as those in Schwab's employee's declaration are simply insufficient as a matter of law to warrant a TRO. *See Allstate Amusement Co. of Ill., Inc. v. Pasinato,* 96 Ill. App. 3d 306, 308 (1st Dist. 1981)

("Allegations of mere opinion, conclusion, or belief are not sufficient to show a need for injunctive relief."); *Nagel v. Gerald Dennen & Co.*, 272 Ill. App. 3d 516, 522 (1st Dist. 1995) (no emergency shown due to lack of facts showing immediate and irreparable harm). Thus, on this basis alone Plaintiff's motion should be denied.

B. Plaintiff Fails To Meet The Other Requirements For A TRO

Aside from not establishing any emergency, Plaintiff also has not met the other requirements for a TRO. To obtain a TRO, the moving party must show that: (1) they are reasonably likely to succeed on the merits; (2) no adequate remedy at law exists; (3) they will suffer irreparable harm which, absent injunctive relief, outweighs the irreparable harm the respondent will suffer if the injunction is granted; and (4) the injunction will not harm the public interest. *Chicago United Industries, Ltd. v. City of Chicago*, 445 F.3d 940, 946 (7th Cir. 2006); *Joelner, Fish v. Village of Washington Park*, 378 F.3d 613, 619 (7th Cir. 2004). If the movant can meet this threshold burden, then the inquiry becomes a "sliding scale" analysis where these factors are weighed against one another. *Id*. The movant bears the burden of persuasion with regard to each factor, and if the movant *fails to meet just one of the prerequisites* for a preliminary injunction, the injunction must be denied. *Cox v. City of Chicago*, 868 F.2d 217, 222 (7th Cir. 1989).

1. Plaintiff's Complaint Is Unverified, and Its New Declaration, Just Like its Original Declaration, Relies on Hearsay and Speculation

In determining whether to grant or deny a request for injunctive relief, courts are guided by the principle that injunctive relief is an extraordinary use of the courts' power. *Mora v. Genova*, No. 97 C 7765, 1998 WL 544405 *6 (N.D. Ill. 1998). Such relief is an extraordinary and drastic remedy, and one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion. *Goodman v. Illinois Dept. Fin. & Profess. Reg.*, 430 F.3d 432, 437 (7th Cir. 2005). Thus, the plaintiff must demonstrate an urgency which necessitates such

action and meets the burden of persuasion with respect to all of the factors to be considered in such a motion. *Shaffer v. Globe Protection, Inc.,* 721 F.2d 1121, 1123 (7th Cir. 1983). Since the grant of an injunction constitutes the exercise of an extremely far-reaching authority, such a motion should not be granted, except in a case clearly warranting it. *Schwinn Bicycle Co. v. Bicycles, Inc.*, 870 F.2d 1176, 1181 (7th Cir. 1989).

While Plaintiff attempts to now assert a Motion for TRO, the claims in its complaint filed in November against Kitzel, for purportedly breaching a non-solicitation agreement and for allegedly misappropriating purported confidential information, do not contain any valid evidentiary support to justify a TRO. Instead, Plaintiff's complaint contains unverified allegations which speculate as to Kitzel's actions. Further the statements in the declarations attached to Plaintiff's original motion for preliminary injunction (filed in November) and the declaration filed with the current Motion for TRO rely upon hearsay. The speculative allegations and the hearsay statements in those declarations are rebutted by Ms. Kitzel's previously filed declaration and her current declaration. (See Ex. A). In her current declaration Kitzel specifically denies soliciting any business from this person and also reveals that this person had initially contacted Kitzel and was a social friend invited to Kitzel's wedding. (Ex. A). Kitzel's declaration also demonstrates that she contacted this person so that the person did not think that Kitzel was ignoring them or being rude in response to the initial contact by the person. (Ex. A.)

With respect to the latest hearsay filled declaration by Schwab employee Hargrove, there are no specific allegations (or evidence) identifying: 1) the specific person allegedly contacted; 2) the date when this person was allegedly contacted; 3) whether that person had a social relationship with Kitzel; 4) whether the person initially contacted Kitzel and Kitzel was simply returning their call; 5) whether this undisclosed person actually took some action to the detriment

of Schwab; 6) whether this person is a customer of Kitzel's new employer; and 7) whether this person's actions, were anything but voluntary actions by a customer. As set forth in Ms. Kitzel's original declaration, the customers who received the announcement of Ms. Kitzel's new employment, while they are purportedly Schwab customers, are also JPMorgan customers. *See* Kitzel Declaration attached to Kitzel's previously filed Opposition Briefs as Ex. A at ¶8; *See, also U.S.A. Glas, Inc. v. Webb*, 94 C 0958, 1995 WL 59252 (N.D. Ill. Feb. 11, 1995) (customer information is not protectable where it was known by persons in the trade, could easily be duplicated by reference to telephone directories or industry publications, and when the customers on such lists did business with more than one company.). Moreover, Courts have refused to enforce a restrictive covenant when the allegedly solicited person changed relationships voluntarily. A defendant must have caused the termination of the relationship to be held liable. *Riad v. 520 S. Mich. Ave. Assocs*., 2000 U.S. Dist. LEXIS 7646 (N.D. Ill. May 22, 2000); *Hi-Tek Consulting Serv's, Inc. v. Bar-Nahum*, 218 Ill. App. 3d 836 (1st Dist. 1991); *Poth v. Paschen Contractors, Inc*., 1986 U.S. Dist. LEXIS 16253 (N.D. Ill. Dec. 18, 1986).

The type of unsupported and false allegations submitted by Plaintiff in Plaintiff's latest Motion and employee declaration constitute pure speculation and are completely insufficient to support an order for injunction. *Maas v. Cohen Associates, Inc.*, 112 Ill. App. 3d 191, 196 (1st Dist. 1983); *Ajax Eng'g Corp. v. Sentry Ins.*, 143 Ill. App. 3d 81, 83 (5th Dist. 1986) (a movant's right to an injunction must be clear—not based upon conclusory allegations or speculative beliefs). Plaintiff simply has failed to present any evidence that any violation has occurred, let alone one of the nature that would require such extraordinary relief. Such speculative, hearsay-based and conclusory statements are simply insufficient as a matter of law. *Allstate Amusement Co. of Ill., Inc. v. Pasinato*, 96 Ill. App. 3d 306, 308 (1st Dist. 1981) ("Allegations of mere

opinion, conclusion, or belief are not sufficient to show a need for injunctive relief."); *Nagel v. Gerald Dennen & Co.,* 272 Ill. App. 3d 516, 522 (1st Dist. 1995) (no emergency shown due to lack of facts showing immediate and irreparable harm). Plaintiff cannot simply rely upon vague and conclusory hearsay allegations to obtain a TRO. Thus, this is another basis that Plaintiff's Motion for TRO should be denied.

2. Plaintiff Cannot Succeed on the Merits

To obtain a preliminary injunction, the movant must demonstrate a likelihood of success on the merits. *AM Gen. Corp. v. Daimlerchrysler Corp*., 311 F.3d 796,804 (7th Cir. 2002). Plaintiff in this case falls far short of demonstrating a likelihood of success on the merits. Aside from the vague hearsay statements in Schwab's new declaration, Plaintiff's entire Complaint is based on an announcement that Kitzel has changed employers. Such announcements however are not actionable. In *Charles Schwab & Co., Inc. v. Carr*, Case No., 2:11-cv-00184 (M.D. Fl, May 17, 2011), the Court found that where defendants merely contacted Schwab clients to notify them of their departures, such conduct did not amount to solicitation. The court reasoned, "these mere announcements, which allowed the clients to make informed decisions as to the future management of their finances, do not give rise to impermissible solicitations because there is insufficient evidence that the announcements were made with an intent to divert the clients' business. *Id*. at *4 (citing *Neuberger Berman, LLC v. Strochak*, Case No. 9:05-80112-cv-Ryskamp/Vitunak, at Doc. 57 * 8 (S.D. Fla. March 11, 2005) ("Merely announcing that a financial planner has joined a new firm is not solicitation")).

With respect to the new declaration, as set forth above, Plaintiff has no valid evidence of solicitation by Kitzel. Instead, Schwab relies solely upon its own employee's sparse, non-specific, double hearsay statements in a declaration that does not even disclose the date of the alleged phone call nor the identity of the alleged customer. It is important to note that Schwab

secured no declaration from this alleged customer. Plaintiff's latest allegations do not give rise to any actionable conduct, are refuted by Kitzel's declaration (See Ex. A), and in any event do not constitute an emergency warranting a TRO.

3. Plaintiff Has Adequate Legal Remedies and Has Not Pled Any Irreparable Injury

Plaintiff's new request for a TRO based on its new declaration also fails because Plaintiff has, by its own pleading, established that it has adequate legal remedies. In every case in which the plaintiff seeks injunctive relief, the plaintiff must show that it will suffer "irreparable harm" if the injunction is not granted." *Roland Mach. Co. v. Dresser Indus. Inc.*, 749 F.2d 380, 386 (7th Cir. 1984). Plaintiff's Motion for TRO should be denied because monetary damages would be a complete remedy. Irreparable harm is harm which cannot be repaired or retrieved and the injury must be of a particular nature, so that compensation in money cannot atone for it. *Graham v. Medical Mutual of Ohio*, 130 F.3d 293, 296 (7th Cir. 1997). An injury is irreparable for purposes of granting injunctive relief only if it cannot be remedied through a monetary award after trial. *E. St. Louis Laborers' Local 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 704 (7th Cir. 2005) (citing *Graham v. Med. Mut. of Ohio*, 130 F.3d 293, 296 (7th Cir. 1997)). Courts have refused to grant injunctions to brokerage firms in cases like this one because lost income, if any actually occurs, can be determined with precision from the account records of the customers at issue. *Merrill Lynch, Pierce, Fenner & Smith v. O'Connor*, 194 F.R.D. 618, 619 (N.D. Ill. 2000); *Merrill Lynch, Pierce, Fenner & Smith v. Bishop*, 839 F. Supp. 68, 74 (D. Me. 1993). So while Schwab has not alleged even one client having switched its accounts away from Schwab, if such a loss of business ever occurred, it would be easily quantified. In fact, Schwab's agreement *actually provides a specific formula to calculate damages*. Since damages can be

easily measured and would provide an adequate remedy at law, Plaintiff cannot satisfy the "irreparable harm" factor and therefore its Motion for TRO should be denied.

4. Defendants Would Suffer Severe Harm if a TRO Were Granted; Whereas Plaintiff's Harm in the Event of Denial is Minimal and Compensable

If a party seeking a TRO cannot establish some likelihood of success and irreparable injury, the court's inquiry is at an end and the Motion should be denied; however, if the applicant meets those threshold requirements, the court will consider the balance of hardships to the moving and nonmoving parties, from the denial or grant of injunctive relief respectively. *Coronado v. Valleyview Pub. Sch.*, 537 F.3d 791, 795 (7th Cir. 2008) S*ee also, Chicago Dist Council, Carpenters v. K&I Const*, 270 F.3d 1060, 1064 (7th Cir. 2001).

In the instant action, the harm to Kitzel greatly exceeds any minimal harm that could be suffered by Plaintiff, who is seeking money damages. Plaintiff seeks injunctive relief to stop Kitzel from working with existing JPMorgan customers and from otherwise earning a living in the face of unverified, unsupported and conclusory allegations that have been fully rebutted by her declarations and answer to Plaintiff's Complaint. Plaintiff on the other hand, if no injunction is granted, still will have its right to seek monetary compensation for any alleged wrong and to pursue all of its rights, as it is already doing, under FINRA. The balance of the hardships is clearly in favor of Ms. Kitzel and warrants denial of Plaintiff's Motion for TRO.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court deny Plaintiff's Motion for Temporary Restraining Order, and for such other and further relief as this Court deems just and proper.

Dated: March 12, 2015.

Respectfully submitted,

Carolyn Kitzel

By: /s/James G. Argionis
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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on **March 12, 2015** a copy of the **RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER,** was filed electronically with the Clerk of the Court using the CM/ECF system. The parties may access this filing through the Court's electronic filing system, and notice of this filing will be sent to the following parties by operation of the Court's electronic filing system.

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