The Honorable Barbara J. Rothstein

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMERIPRISE FINANCIAL SERVICES, LLC, Plaintiff, v. DOUGLAS KENOYER, an individual, and LPL FINANCIAL LLC, Defendants.	Case No. 2:24-cv-01675-BJR **DEFENDANT LPL FINANCIAL LLC'S OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER** NOTE ON MOTION CALENDAR: OCTOBER 17, 2024

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I. INTRODUCTION

Ameriprise provides no factual support for the anticompetitive relief it seeks to impose on LPL.[1] It makes cursory, unsupported, and false allegations that LPL is misappropriating confidential information and trade secrets. Despite including LPL as a Defendant, Ameriprise says almost nothing about it. Ameriprise alleges that financial advisor Douglas Kenoyer violated his contract with Ameriprise by informing customers he was departing for LPL before he resigned and took certain customer information with him. But nowhere does Ameriprise make a *single* specific factual allegation suggesting that LPL in any way encouraged, solicited, or even *knew* of this alleged breach. Mr. Kenoyer declares under penalty of perjury that LPL did *not.* In fact, LPL makes clear to all incoming Ameriprise advisors that they must comply with their contractual commitments, all applicable privacy rules and regulations, and the industry agreement known as the Protocol for Broker Recruiting ("Protocol" or "Broker Protocol"). Ameriprise offers no evidence otherwise.

After engaging in serial, vexatious litigation against LPL—without ever providing any factual support for its meritless claims—Ameriprise here reveals its true goal: to prohibit LPL from "soliciting *any employee of Plaintiff*." Dkt. 2-1 at 2 ¶ 4 (emphasis added). For years, advisors have left Ameriprise for many reasons, including that LPL offers a superior opportunity for them to serve their customers. Frustrated by its failure to compete in the market, Ameriprise has become increasingly desperate to stamp out competition from LPL, and is abusing the courts in an attempt to meet its ends. This includes filing two separate requests for injunctive relief against LPL in two separate courts, forcing LPL to defend itself against meritless allegations in two forums on short notice and at the same time. Here, Ameriprise seeks to prohibit LPL from competing in the market for advisors despite providing zero evidence that LPL has done anything wrong and based on allegations about conduct it has known (and done nothing about) for months. This extraordinarily broad and draconian request to restrict LPL's business operations is not tied to any articulated

[1] "LPL" refers to LPL Financial LLC. "Ameriprise" refers to Ameriprise Financial Services, LLC.

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allegation of misconduct by LPL and would gravely harm advisors, their clients, and the competitive market for advisor services.

Ameriprise's conduct belies its purported need for the extraordinary relief of a temporary restraining order ("TRO"). Its basis for this Motion is the resignation of an Ameriprise financial advisor *more than a month ago*, based on conduct that Ameriprise admits it knew about for *at least six months*, and concerning information it knew the advisor intended to retain for *two weeks before he resigned from Ameriprise.* At no point during those two weeks did Ameriprise raise any concern about the information that Mr. Kenoyer intended to retain upon his departure. In other words, Ameriprise: (i) knew for months the advisor was allegedly soliciting clients prior to his resignation; (ii) knew for weeks the specific information the advisor intended to retain upon resignation; (iii) said nothing and did nothing to stop him; and (iv) then sat on its hands for nearly six weeks. There is no exigency here—only gamesmanship.

Ameriprise seeks to chill lawful competition, intimidate advisors from leaving Ameriprise, and prevent customers from working with their chosen advisors who do leave. Its failure to compete in the market for advisor talent is no basis for the extraordinary relief of a TRO.

II. FACTUAL BACKGROUND

A. LPL Champions the Open Marketplace for Independent Advisors

LPL is the nation's leading independent broker-dealer ("IBD"), providing services to more than 23,000 financial advisors.[2] IBDs generally do not employ financial advisors; rather, advisors like Mr. Kenoyer typically affiliate with the firm as independent contractors.[3] Declaration of Lisa Roth ("Roth Decl.") ⁋ 21. Under this model, the advisors are entrepreneurs free to pursue the opportunities they find attractive. *Id.* ⁋ 23. The IBD typically does not provide prospect lists or referrals, or otherwise assist the advisor with obtaining customers. *See id.* Under this model, the advisor's customers are understood—by the IBD, the advisor, and the industry—to be the

[2] *See* LPL FINANCIAL, https://www.lpl.com/work-with-a-financial-professional/find-an-lpl-financial-professional.html (last visited October 16, 2024).

[3] FINRA-registered financial advisors are known in the industry as "registered representatives" or "RRs." LPL here refers to them as financial advisors.

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advisor's customers. *Id.* ¶ 27. The advisor "owns" the customer relationship as part of their independent financial services business; indeed, many customers are unaware of, or indifferent to, the identity of the IBD with whom their financial advisor is affiliated. *Id.* ¶¶ 27, 29. The IBD space is an open and competitive environment where financial advisors expect to be able to freely move and port customers between IBDs. *Id.* ¶ 26. LPL champions this philosophy of independence. LPL believes advisors should have freedom to choose the business model and technology they need to serve their customers. And LPL has done well in this free market: advisors consistently choose to associate with LPL over its competitors, and over 6,000 advisors have associated with LPL in the past four years alone.

B. The Protocol for Broker Recruiting

Because the advisor marketplace is open and dynamic, about one in seven FINRA-licensed advisors transfers from one firm to another in any given year. Roth Decl. ¶ 10. In the early 2000s, this advisor movement led to a rash of litigation between firms. *Id.* ¶¶ 11-15. These firms would rush to seek TROs stopping departing advisors from taking customer information with them to their new firms. *Id.* To stem the tide of litigation, in 2004, three broker-dealers formed an agreement known as the Protocol for Broker Recruiting ("Broker Protocol" or "Protocol"). *Id.* ¶ 12; *see also* Roth Decl. at Ex. A (Broker Protocol). The Broker Protocol was designed to create a "safe harbor" under which an advisor could leave the firm and retain certain pieces of information to solicit their customers to join them at their new firm without risking litigation. Since its inception, just under 2,500 firms have signed on to the Protocol, which provides:

> When RRs [registered representatives] move from one firm to another and both firms are signatories to this protocol, they may take only the following account information: client name, address, phone number, email address, and account title of the clients that they serviced while at the firm (the "Client Information") and are prohibited from taking any other documents or information. Resignations will be in writing delivered to local branch management and shall include a copy of the Client Information that the RR is taking with him or her.[4]. . . In the event that the firm does not agree with the RR's list of clients, the RR will nonetheless be deemed in compliance with this protocol so long as the RR exercised good faith in assembling the list and substantially complied with the requirement that only Client Information related to clients he or she serviced while at the firm be taken with him or her.

[4] This copy of client information is referred to in the industry as the "Protocol List."

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Ex. A at 1. If a registered representative ("RR") and the firm to which they are transitioning strive to comply in good faith with these requirements, then (a) the RR "would be free to solicit customers they serviced while at their former firms, but only after they joined their new firms" and (b) "neither the departing RR nor the firm that he or she joins would have any monetary or other liability to the firm that the RR left by reason of taking the information identified . . . or the solicitation of the [RR's] clients[.]" *Id.* Importantly, the Protocol requires not perfection but "good faith" and "substantial[] compli[ance]." *Id.* Protocol signatories can exempt certain types of clients from the safe harbor of the Protocol through the joinder letter that every signatory provides. In its letter, Ameriprise states that it "provides significant resources and assistance to help independent financial advisors acquire accounts . . . from AFS independent advisors *for value paid*. . . .," and exempts those accounts from the protections of the Protocol. *See* Call Decl. Ex. E (Dkt. 3-4) (emphasis added). Joinder letters also designate a contact person for Protocol communications. *See id.* (designating Timothy Games).

C. LPL Does Not Tell Incoming Advisors What Customer Information They May Retain and Expects Them to Comply With their Obligations

LPL does not provide incoming advisors legal advice in connection with their transition and does *not* advise an incoming advisor on what customer information they are permitted to retain from their prior firm pursuant to their contractual obligations. Declaration of Candi Sinquimani ("Sinquimani Decl.") ¶ 20. LPL instead expects and relies on the independent advisor to determine what customer information they may bring with them upon their transition. *Id.* ¶ 22. This includes the expectation that the advisor will review any contracts with their prior firm, the prior firm's privacy notice, whether that firm has signed the Broker Protocol, and applicable regulations. *Id.*

To ensure that advisors transition their business in a manner that complies with their valid and binding legal obligations, LPL encourages incoming advisors to consult an attorney ("Outside Counsel") during their transition. *Id.* ¶ 18. Recognizing that some advisors are unfamiliar with attorneys experienced in the transitions space or the securities industry, LPL often introduces advisors to several attorneys who practice securities law and offers to pay for such service. *Id.* ¶ 19. LPL is not in an attorney-client relationship with the Outside Counsel for these transitions,

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does not direct or control the legal advice provided by Outside Counsel, and is not privy to the privileged and confidential legal advice that Outside Counsel provides the advisor. *Id.* Advisors are also free to decline to consult Outside Counsel or to engage their own preferred counsel. *Id.*

While LPL does not provide legal advice to advisors (either directly or through Outside Counsel), it does remind incoming advisors that they must comply with their contracts with their former firms as well as with all applicable regulations. *Id.* ¶ 21. LPL's offer letter to new advisors states they must continue to honor their contractual obligations to their current broker-dealer. Declaration of Jeffrey Carter ("Carter Decl.") ¶ 9.

To be clear, while LPL is unaware of any advisor—including Mr. Kenoyer—departing Ameriprise not "exercising good faith" or "substantially complying" with the Protocol (as the terms of the Protocol require, *see* Roth Decl. Ex. A) when invoked, LPL also does not control or direct these individuals. If an advisor retains other information, they did so without LPL's knowledge or consent. Put simply, LPL requires advisors departing Ameriprise to comply with the Broker Protocol notwithstanding their Ameriprise contracts.

E. Mr. Kenoyer's Transition from Ameriprise to LPL

Mr. Kenoyer's departure from Ameriprise and transition to LPL was no different. Mr. Kenoyer provided Ameriprise with notice on September 5, 2024, that he intended to resign and join LPL effective September 19, 2024. His resignation letter also attached his Protocol List, which appears to have included the very accounts with which Ameriprise now takes issue. *See* Call Decl. (Dkt. 3) ¶¶ 11-13. Upon his decision to leave Ameriprise and join LPL, Mr. Kenoyer worked with Jeffrey Carter, a Regional Transition Partner on LPL's Business Transition Team. Carter Decl. ¶ 26. Mr. Carter ensured that Mr. Kenoyer had engaged Outside Counsel to review his contract with Ameriprise, obligations under the privacy rules and regulations, and what customer information he could retain under the Broker Protocol. *Id.* ¶ 29. Mr. Carter also confirmed with Mr. Kenoyer his understanding that he must comply with the Broker Protocol and retain only Protocol information when transitioning from Ameriprise. *Id.* ¶ 30. Mr. Kenoyer represented to LPL that he was complying with the Protocol. *Id.* ¶¶ 30, 41; *see also* Kenoyer Decl. ¶¶ 10, 15, 16. LPL had no knowledge, or reason to believe, otherwise. Carter Decl. ¶41. LPL did not receive the

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Protocol Information collected by Mr. Kenoyer until after he transitioned his licenses. Declaration of Melaina Baptiste ("Baptiste Decl.") ¶ 19. Upon review of that information by a member of the LPL Transition team, it appeared to contain only Protocol Information. *Id.* ¶ 20. LPL has not used the Protocol Information that Mr. Kenoyer provided. *Id.* ¶ 21.

Contrary to common industry practice, Ameriprise did not contact Mr. Kenoyer or LPL's designated Protocol contact prior to filing this litigation to dispute the Protocol List or raise concerns regarding his intention to take Protocol Information for the clients on the List.

III. AMERIPRISE'S ALLEGATIONS AGAINST LPL ARE FALSE

Ameriprise alleges that on September 5, 2024, Mr. Kenoyer gave two weeks' notice of his resignation, to be effective on September 19. Compl. ¶ 33. It also alleges that he solicited Ameriprise customers "to move their accounts from Ameriprise to LPL" in the months prior to his resignation, and "took notes in Ameriprise's Customer Relationship Manager platform" in the months preceding his resignation that reflect this solicitation. *Id.* ¶ 35. Notably, Ameriprise includes a declaration from another advisor stating she was aware in "March or April 2024" that Mr. Kenoyer was planning to move to LPL and was soliciting customers. *See* Kinney Decl. (Dkt. 4) ¶ 6. Mr. Kenoyer further declares that he informed Ameriprise in April 2024 of his intention to leave. Kenoyer Decl. ¶¶ 4-5. Ameriprise does not explain why, if it was aware of Mr. Kenoyer's conduct six months ago, it waited until now—a month after his resignation and six weeks after being provided his Protocol List—to seek exigent relief. If this action was truly about legal remedies and not a business strategy, Ameriprise would have taken immediate action.

Ameriprise further alleges that Mr. Kenoyer violated the Broker Protocol by retaining customer information that he could not keep under the Protocol or his Franchise Agreement—information that Ameriprise characterizes as "confidential" and a "trade secret." *See* Compl. ¶ 43. But Ameriprise makes *no* specific factual allegations (and includes no evidence) demonstrating that LPL encouraged, directed, or even *knew of* Mr. Kenoyer's conduct. The notes that Ameriprise cites in its Complaint do not even reference LPL. *See id.* ¶ 35; Ex. E to Compl.

Instead, Ameriprise makes only vague and unsupported assertions. Ameriprise alleges that LPL is "misappropriating Ameriprise's private, confidential client information and trade

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secrets[.]" Compl. ⁋ 55. That is false. Since the beginning of 2022, LPL has required that advisors departing Ameriprise comply with the Broker Protocol. *See* Sinquimani Decl. ¶ 47. Mr. Kenoyer confirms, under penalty of perjury, that it did the same here. *See* Kenoyer Decl. ⁋ 15. Ameriprise further alleges that LPL either "failed and refused to properly instruct Kenoyer regarding his obligations pursuant to the Protocol" or "encouraged and participated in" his alleged conduct. Compl. ⁋ 58. This allegation, too, is made without any evidentiary support—and is patently false. *See* Sinquimani Decl. ¶ 47; Carter Decl. ⁋⁋ 29-30, 32-38, 41.

IV. LEGAL STANDARD

To obtain injunctive relief, Ameriprise must establish: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to plaintiff without preliminary relief; (3) that the balance of equities favors it; and (4) that an injunction is in the public interest. *See Access to Advanced Health Inst. v. Soon-Shiong*, No. 24-cv-1253, 2024 LEXIS 155750, at *5 (W.D. Wash. Aug. 9, 2024 (citing *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008)) (noting a TRO is an "extraordinary remedy," awarded only "upon a clear showing that the plaintiff is entitled to such relief.") "Irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction . . . . Accordingly, the moving party must first demonstrate that such injury is likely before other requirements . . . will be considered." *Amylin Pharms., Inc. v. Eli Lilly & Co.*, No. 11-CV-1061, 2011 U.S. Dist. LEXIS 125993, *3 (S.D. Cal. Jun. 8, 2011). Ameriprise has not—and cannot— make such a showing.

V. AMERIPRISE'S MOTION SHOULD BE DENIED

A. Ameriprise Seeks to Disrupt the Status Quo

Review of Ameriprise's requested relief shows that it does not seek to *preserve* the status quo but to *disrupt* it. Ameriprise seeks the "return" of customer information while at the same time admitting that many customers have followed Mr. Kenoyer to LPL and are presently being served by him. *Compare* Dkt. 2-1 at 2 ⁋ 2 *with* Kinney Decl. (Dkt. 4) ⁋ 15 ("[M]any such clients have in fact followed Kenoyer to LPL."). The return of this information would thus *disrupt* these customers' ability to work with their chosen financial advisor. *See, e.g.*, *Wachovia Sec., L.L.C. v. Stanton*, 571 F. Supp. 2d 1014, 1048-49 (N.D. Iowa 2008) (explaining the public interest "favor[s]

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customer choice of brokers and recognizing that the client relationship belongs to the financial consultant, not the firm"); *Carvalho v. Credit Suisse Sec. (USA) LLC*, No. 1:07-CV-2612, 2007 U.S. Dist. LEXIS 80651, at *6 (N.D. Ga. Oct. 31, 2007) ("The public interest weighs in favor of allowing investors to maintain relationships with advisors in whom they have confidence."); FINRA Rule 2140 ("No member . . . shall interfere with a customer's request to transfer his or her account in connection with the change in employment of the customer's registered representative . . . . Prohibited interference includes, but is not limited to, seeking a judicial order[.]").

Moreover, and crucially, Ameriprise seeks to "prohibit[ ]" LPL from recruiting Ameriprise advisors. *See* Dkt. 2-1 at 2 ¶ 4. This wide-reaching request is not only patently anti-competitive, it would also dramatically disrupt the status quo and **bears no relation to the harm it seeks to remedy** – that is, Mr. Kenoyer's alleged retention of information to which he was not entitled. LPL and other IBDs regularly recruit advisors to affiliate with them. Ameriprise does the same. *See Allstate Ins. v. Ameriprise Fin. Servs.*, No. 17-cv-5826, 2023 U.S. Dist. LEXIS 144791, at *15-16 (N.D. Ill. Aug. 18, 2023) (explaining Ameriprise's recruitment procedure for financial advisors). That is how the market works. *See* Roth Decl. ¶ 10. Ameriprise's inclusion of this requested relief reveals its true goal: to stop LPL from out-competing it in the market for advisor talent. Because Ameriprise seeks to disrupt, rather than preserve, the status quo, and because its proposed restraining order is not tailored to the supposed harm, its Motion should be denied. *See Linden v. X2 Biosystems, Inc.*, No. C17-966RSM, 2018 LEXIS 56942, at *6 & n.2 (W.D. Wash., Aug. 3, 2018) ("TROs are generally intended to maintain the status quo until a hearing on the merits is possible. Here, Defendants seek to alter the status quo[.]"); *Bond v. Brown*, No. 6:20-CV-01656-AA, 2021 LEXIS 64482, at *6 (D. Or. Apr. 2, 2021) ("Plaintiff does not seek to maintain the status quo in the face of an impending irreparable harm, but rather seeks a sweeping mandatory injunction which would drastically alter the status quo because of a harm that has already occurred.").

B. Ameriprise Fails to Establish a Likelihood of Irreparable Harm

"Where a plaintiff fails to demonstrate a likelihood of irreparable harm without preliminary relief, the court need not address the remaining elements of the preliminary injunction standard."

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Singleton v. Kernan, No. 16-cv-02462, 2017 U.S. Dist. LEXIS 180549, *7 (S.D. Cal. Oct. 31, 2017) (citing *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1174 (9th Cir. 2011)). Because Ameriprise fails to establish a likelihood of irreparable harm, its Motion should be denied.

First, Ameriprise admits it knew that Mr. Kenoyer intended to retain Protocol Information—including for customers allegedly obtained through an Internal Client Transfer ("ICT")—a full two weeks before he resigned. *See* Call Decl. (Dkt. 3) ⁋⁋ 11, 15. Yet it did nothing during that time to stop its purported "confidential information" from walking out the door. "[S]elf-inflicted wounds are not irreparable injury." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020); *see also Volga Dnepr UK Ltd. v. Boeing Co*., 464 F. Supp. 3d 1238, 1247 (W.D. Wash. 2020) ("In circumstances where parties seeking injunctive relief inflicted the harm upon themselves, courts have declined to find irreparable harm"). Even if the ICT clients were exempted from the Protocol, Ameriprise's inaction when it was provided notice of Mr. Kenoyer's intentions to leave defeats its Motion.[5]

Second, Ameriprise fails to establish why Mr. Kenoyer's alleged conduct irreparably harms it. Ameriprise must explain why it is irreparably harmed by Mr. Kenoyer's contacting customers early or retaining information that he could just as easily obtain by calling them after he transitioned his license—particularly where the great majority of customers freely follow their financial advisors. *See* Roth Decl. ¶¶ 30, 33. This, it cannot do. Instead, it relies on Mr. Call's declaration, which contains the conclusory allegation that Ameriprise will "suffer significant and irreparable harm[.]" Call Decl. (Dkt. 3) ⁋ 21. But "[c]onclusory affidavits are insufficient to demonstrate irreparable harm." *Suzhou Angela Online Gaming Tech. Co. v. Snail Games USA, Inc.*, No. 21-cv-09552, 2022 U.S. Dist. LEXIS 20164, at *19 (C.D. Cal. Jan. 31, 2022) (citing *Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985)); *see also*

[5] Ameriprise's joinder letter exempts from the Protocol those accounts for which it "provided significant resources and assistance to help" an advisor purchase them "for value paid." *See* Call Decl. Ex. E (Dkt. 3-4). But the "Internal Client Transfer" document reflects that Mr. Kenoyer paid "$ 0.00" in exchange for the accounts at issue. *See* Compl. Ex. C.

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Caribbean Marine Servs. Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988) ("Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction.").

Ameriprise also cites 30 and 40-year-old out-of-circuit caselaw suggesting that Mr. Kenoyer's conduct in soliciting his own customers irreparably harms it. *See* Mot. at 18-19. All of these cases were decided decades before the Broker Protocol, which establishes that Mr. Kenoyer *can* solicit his customers upon his transition. More recent decisions, including from courts within this Circuit, have recognized that the mere allegation of departure with customer information and solicitation of those customers does *not* establish irreparable harm. *See, e.g.*, *Morgan Stanley Smith Barney LLC v. Sayler*, No. 1:19-CV-01067, 2019 U.S. Dist. LEXIS 127415, at *16 (D. Or. July 31, 2019) ("While the Court acknowledges that the possibility of irreparable harm may exist, as it would in every case where a former employee leaves and violates confidentiality or non-solicitation clauses, Morgan Stanley has not provided evidence that would rise to the level of a clear showing that it is in fact likely to suffer the kind of harm that warrants 'an extraordinary and drastic remedy' such as a preliminary injunction[.]").

Third, even if Ameriprise could show it is at risk of suffering some injury, it fails to show it is irreparable. "Courts have become disinclined to find irreparable, incalculable harm from financial advisors' departures." *Barney v. Burrow*, 558 F. Supp. 2d 1066, 1083 (E.D. Cal. 2008). That is because "any loss of clients' business to [the former broker-dealer] may be adequately addressed with money damages . . . . The real loss which might be suffered by [the former broker-dealer] comes in the form of commission revenue generated by the [advisor] for the [former broker-dealer], and that can be readily calculated[.]" *Id.* (quotation marks, citation omitted).

Finally, LPL notes that Ameriprise's delay in filing its Motion should counsel against finding that it is at imminent risk of irreparable harm. LPL recognizes that this Court has previously held that delay, standing alone, may be insufficient grounds to deny a request for preliminary injunctive relief. *See Pilchuck Audubon Soc'y v. MacWilliams*, No. C871707R, 1988 WL 159927, at *4 n.4 (W.D. Wash. Jan. 15, 1988). But here, Ameriprise's delay does not appear to be based on a good-faith investigation of the facts—it acknowledges it has known of Mr. Kenoyer's alleged conduct since at least April 2024. This self-inflicted delay—which appears to be based in

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gamesmanship, forcing LPL to defend itself in two forums on short notice[6]—cuts against any claimed "imminent" risk of irreparable harm. *See Plintron Techs. USA LLC v. Phillips*, No. C24-93, 2024 LEXIS 24362, at *9–12 (W.D. Wash. Feb. 12, 2024) (denying TRO when Plaintiff delayed three months in filing action for conversion and theft of trade secrets); *Ozone Int'l, LLC v. Wheatsheaf Grp. Ltd.*, No. 2:19-CV-01108-RAJ, 2019 LEXIS 121803, at *10 (W.D. Wash. July 22, 2019) ("There is nothing before the Court to suggest that Plaintiff could not have sought relief by a motion for a preliminary injunction at an earlier date rather than seeking relief now by way of a temporary restraining order."); *accord Miller v. Norris*, No. 2:19-CV-01638-RAJ, 2019 LEXIS 188839, at *7–9 (W.D. Wash. Oct. 30, 2019); *Garcia v. Google, Inc.*, 786 F.3d 733, 746 (9th Cir. 2015). Here, Ameriprise has been in possession of Mr. Kenoyer's Protocol List for almost six weeks, including two weeks before his resignation became effective. And it was on notice that he intended to leave and called clients at least six months ago. *See* Kinney Decl. (Dkt. 4) ¶ 6. The time to rectify any "imminent harm" has long passed.

C. Ameriprise Will Not Prevail on Its Claims Against LPL

Ameriprise also fails to establish any other factor necessary to obtain injunctive relief against LPL. Ameriprise premises its request for relief against LPL solely on its claims under the Defend Trade Secrets Act of 2016 ("DTSA"), 18 U.S.C. § 1836(b)(1), and Washington Uniform

[6] Ameriprise's decision to wait until October 15 to file the instant Motion requires LPL to respond on October 17—the same day it must respond to *another* motion for preliminary injunction that Ameriprise filed in another case. More than two months ago, Ameriprise filed a Complaint and Motion for Preliminary Injunction against LPL in the Southern District of California. *See Ameriprise Fin. Servs., LLC v. LPL Fin. LLC*, No. 2:24-cv-01333 (S.D. Cal.). Ameriprise has now filed this Motion, conveniently timing its filing to force LPL to respond on the same day that its opposition is due in California. Ameriprise is represented by the same counsel here as in the California action. Yet when the parties met and conferred in that case about briefing deadlines during the week of October 7—including via lengthy videoconference on October 10—Ameriprise's counsel gave no indication it was filing *another* action that would require LPL to respond on short notice and on the same day. *See* Declaration of Cheryl Haas ("Haas Decl.") ¶ 10. Upon the filing of this action on October 15, the undersigned reached out to Ameriprise's counsel via phone and email to ask why Ameriprise had not mentioned its intent to file this action and whether it would stipulate to an extension of time for LPL's response. *Id.* ¶¶ 11-12. Ameriprise's counsel refused. *Id.* ¶ 13. The timing of Ameriprise's filing here does not appear coincidental.

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Trade Secrets Act ("UTSA"), Wash. Rev. Code ch. 19.108.[7] "The elements of a DTSA and UTSA claim are substantially similar." *Traverse Therapy Servs., PLLC v. Sadler-Bridges Wellness Grp., PLLC*, No. 2:23-cv-1239, 2024 LEXIS 18121, at *9 (W.D. Wash. Feb. 1, 2024). To prevail on these claims, Ameriprise must show that: (1) it owned a specifically identified trade secret; (2) LPL misappropriated that trade secret; and (3) the misappropriation damaged Ameriprise. *See AlterG, Inc. v. Boost Treadmills LLC*, 388 F. Supp. 3d 1133, 1144 (N.D. Cal. 2019). Ameriprise has not established *any* of these elements—nor can it.

1. Ameriprise Has Not Identified Any Specific Trade Secret

The threshold task for a plaintiff asserting trade secret misappropriation is to "identify the trade secrets and carry the burden of showing that they exist." *MAI Sys. Corp. v. Peak Comput., Inc.,* 991 F.2d 511, 522 (9th Cir. 1993); *see also Proofpoint, Inc. v. Vade Secure, Inc.*, No. 19-CV-04238, 2020 U.S. Dist. LEXIS 30184, at *4 (N.D. Cal. Feb. 20, 2020) (explaining it is "critical to [a trade secrets] cause of action – and any defense – that the information claimed to have been misappropriated be clearly identified") (quotation omitted)). "[A] plaintiff seeking relief for trade secret misappropriation must identify the trade secret with sufficient particularly to permit the defendant to ascertain at least the boundaries within which the secret lies." *Bombardier Inc. v. Mitsubishi Aircraft Corp.*, 383 F. Supp. 3d 1169, 1178 (W.D. Wash. 2019) (quotation marks, alteration, citation omitted).

Ameriprise fundamentally fails at this threshold task. It accuses LPL of misappropriating "*substantial* Ameriprise confidential information" (Mot. at 8)—but it does not identify this information in any way. Ameriprise does not explain what *specific* information LPL is accused of misappropriating beyond the generic allegation that it relates to Mr. Kenoyer's customers. That is insufficient. *See, e.g.*, *Nat'l-Arnold Magnetics Co. v. Wood*, 46 Fed. App'x 416, 420 (9th Cir. 2002) (affirming district court's denial of injunction on trade secrets claims and finding plaintiff

[7] Ameriprise asserts it will succeed on the merits of its claims against Mr. Kenoyer that he violated the Franchise Agreement and his common law duty of loyalty. *See* Mot. at 14, 18. But those claims are brought only against Mr. Kenoyer, and thus its likelihood of success on them (whatever that may be) cannot form the basis for injunctive relief against *LPL*.

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failed to establish or describe its trade secrets); *accord Imax Corp.*, 152 F.3d at 1164–65; *MAI Systems*, 991 F.2d at 522 (vacating injunction where record included "no declaration or deposition testimony which specifically identifie[d] any trade secrets").

Ameriprise's position appears to be that *all* customer information—including Protocol Information—is a trade secret.[8] But it fails to establish as much. To make a threshold showing that information is a trade secret, a plaintiff must show: (1) reasonable measures to keep specific information secret; and (2) that the specific information has independent economic value. 18 U.S.C. § 1839(3)(A)-(B); Wash. Rev. Code § 19.108.010(4). Ameriprise's own Privacy Notice discloses it shares customers' personal information with affiliates and third parties. *See* Roth Decl. Ex. B (Privacy Notice disclosing that it shares "personal information," including "[s]ocial security number and income, [a]ssets and transaction history; [c]redit history and investment experience; and [b]iometrics, including voice analysis" with "nonaffiliated financial companies," and that customers may not opt out of this sharing). This defeats any claim that the information is kept secret. *See Prostar Wireless Grp., LLC v. Domino's Pizza, Inc.*, 360 F. Supp. 3d 994, 1014 (N.D. Cal. 2018) ("If a party shares information without the protection of a confidentiality agreement, it loses the ability to claim that information as a trade secret.").

Ameriprise also fails to identify *how* such information has "independent economic value." *See Mitigation Techs., Inc. v. Pennartz*, No. CV1401954, 2015 U.S. Dist. LEXIS 194363, at *17 (C.D. Cal. Mar. 13, 2015) (denying motion for preliminary injunction because "[t]he Court simply does not have the information it needs to evaluate whether MTI's putative trade secrets have independent economic value"). That this information has no inherent economic value is confirmed by the fact that customer information can be readily obtained when an advisor contacts the customer after their transition. *See Raymond James & Assocs., Inc. v. Leonard & Co.*, 411 F. Supp. 2d 689, 692, 694 (E.D. Mich. 2006) (denying preliminary injunction where information was readily ascertainable from legitimate channels).

[8] Protocol Information is *not* a trade secret. *See Barney*, 558 F. Supp. 2d at 1081 ("Given the Protocol, [plaintiff] is hard pressed to convince this Court that information regarding clients whom [defendants] serviced qualify as [plaintiff's] confidential trade secrets.").

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Ameriprise is also speaking out of both sides of its mouth. It has elsewhere argued that "customer information is ***not*** a trade secret where, as here, it could easily be duplicated," and advocated for the principle of "client choice" that it abandons here. Ameriprise Memo. of Law, at 19, ECF No. 242, *Allstate Ins., et al. v. Ameriprise Fin. Servs., Inc.*, No. 1:17-cv-05826 (N.D. Ill. Jan. 22, 2021) (emphasis added, quotation marks omitted).[9] Ameriprise's tactical decision to take directly contradictory litigation positions where convenient should trouble this Court, if not lead to outright rejection of its claims.[10] *See Morgan Stanley DW*, 163 F. Supp. 2d at 1378-79 ("When Morgan Stanley hires brokers from its competitors, it takes the completely opposite position as it has in the present case. Morgan Stanley vigorously defends the same hiring practices it challenges here and admits that the client information is not a trade secret").

2. LPL Did Not "Misappropriate" Any Trade Secrets

Ameriprise also cannot show that LPL misappropriated trade secrets. "Misappropriation" consists of either acquisition or disclosure of a trade secret by one who "knows or had reason to know" that it was acquired by improper means. *See* 18 U.S.C. § 1839(5); Wash. Rev. Code § 19.108.010(2)(b)(ii)(B). Ameriprise cannot show misappropriation for at least three reasons.

First, as set forth above, LPL did not misappropriate any information from Ameriprise because it has not established that the information at issue is a trade secret. ***Second,*** even if this information did constitute a trade secret, LPL did not know or have reason to know the information was acquired by improper means. "[M]erely recruiting another company's employees does not meet the knowledge requirement for trade secret misappropriation." *Bombardier*, 383 F. Supp. 3d at 1182. LPL instructs transitioning advisors to comply with their contracts and applicable regulations, and it encourages advisors to consult a lawyer. Ameriprise provides no basis to

[9] In that case, the Court found specifically identified "Allstate-collected information about customers and the policies they hold" to be trade secrets. *See* 2023 U.S. Dist. LEXIS 144791, at *36 (Aug. 18, 2023) (emphasis added). But the facts there were much different, including the specifically identified information at issue and the relationship between Allstate and the advisor.

[10] Fees may be awarded to the prevailing party when a trade secrets claim is brought in bad faith. *See Workplace Techs. Rsch., Inc. v. Project Mgmt. Inst., Inc.*, 664 F. Supp. 3d 1142, 1158 (S.D. Cal. 2023). LPL reserves its right to seek its fees in the appropriate forum at the proper juncture.

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conclude LPL knew or had reason to know that Mr. Kenoyer was allegedly retaining information to which he is not entitled. ***Third,*** a party cannot misappropriate information "readily ascertainable by proper means[.]" *Spice Jazz LLC v. Youngevity Int'l, Inc.*, No. 19-CV-0583, 2020 U.S. Dist. LEXIS 206327, at *3, 15 (S.D. Cal. Nov. 4, 2020) (quoting 18 U.S.C. § 1839(6)). After transitioning to LPL, advisors can and do contact their customers, who provide the information necessary to establish their accounts. *See* Roth Decl. ¶¶ 30, 33.

3. Ameriprise Was Not Harmed

Finally, Ameriprise must show such misappropriation *caused* harm. For the same reasons as in Section V.B, it cannot. The crux of Ameriprise's complaint is that Mr. Kenoyer allegedly contacted customers early and took more customer information than the Protocol allows. But Ameriprise fails to explain how this conduct, rather than strict Protocol compliance, *harms* it. The results would be the same if Mr. Kenoyer had complied with the Protocol: he would have contacted the same customers and obtained the same information through them.

D. An Injunction Would Be Inequitable and Harm the Public

Balancing the equities reaffirms that an injunction should not be granted here. Ameriprise's gamesmanship renders its conduct inequitable. So too does its cynical attempt to play both sides, arguing here that customer information is a trade secret and elsewhere that it is not. An injunction would unjustly harm LPL's reputation without any evidence from Ameriprise substantiating its claims. *See Morgan Stanley DW*, 163 F. Supp. 2d at 1381 ("As have others, this Court holds that the balance of the equities clearly tips in favor of Defendants and their customers. Brokerage firms can survive the denial of an injunction far more readily than their departing employees can survive its issuance."); *Regions Bank v. Raymond James & Assocs.*, No. 6:20-cv-658, 2020 U.S. Dist. LEXIS 221452, at *13 (M.D. Fla. May 15, 2020) ("The Court hesitates to brand Defendants with an insinuation of wrongdoing without more definitive evidence to that effect.").

The requested injunction also harms the public. It severely dampens competition by chilling advisors from freely moving between firms and explicitly from moving from Ameriprise to LPL. This harms not only advisors looking to move to another firm, but also harms their customers, who benefit from competition between firms. If granted, Ameriprise's requested relief

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would also interfere with customers' ability to work with the advisors they choose if the advisor does leave Ameriprise. Courts routinely hold that the public interest would be gravely harmed by an injunction that prevents a customer from working with their chosen financial advisor. *See, e.g.*, *Wachovia Sec*, 571 F. Supp. 2d at 1048-49 (explaining the public interest "favor[s] customer choice of brokers and recognizing that the client relationship belongs to the financial consultant, not the firm"); *Carvalho*, 2007 U.S. Dist. LEXIS 80651, at *6 ("The public interest weighs in favor of allowing investors to maintain relationships with advisors in whom they have confidence.").

VI. CONCLUSION

For the reasons set forth above, Ameriprise's Motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2024, I filed a copy of the foregoing document entitled **DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE** with the Clerk of the Court for the United States District Court, Western District of Washington using the CM/ECF system and served a copy of same upon all counsel of record via the Court's electronic filing system.

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