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.	NO. 2:24-cv-01675-BJR **DEFENDANT DOUGLAS KENOYER'S OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER**

Defendant Douglas Kenoyer ("Kenoyer") opposes Plaintiff Ameriprise Financial Services, Inc.'s ("Ameriprise" or "Plaintiff") Motion for Temporary Restraining Order (the "Motion"). Ameriprise is not likely to succeed on the merits, and the balance of harms weight against issuing an injunction. Plaintiff has an adequate remedy at law.

I. CONTEXT OF THIS DISPUTE

Before addressing the facts of this particular dispute and the legal analysis as to why Ameriprise's Motion should be denied, it is important to appreciate the broader background and context of this lawsuit. This claim is just the latest salvo in an economic war Ameriprise is attempting to wage against its competitor, LPL Financial, LLC ("LPL"), and its former financial advisors for electing to resign from the company and move their practices to LPL.

This lawsuit/FINRA arbitration is at least the fifth Ameriprise has filed in the past six months against financial advisors who have resigned and transferred to LPL. The allegations in

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each action are largely the same without any regard to the truth Simply put, Ameriprise is filing baseless cases as a tool of corporate warfare. Individual advisors like Kenoyer (and their clients, if the Motion is granted) are caught in the crossfire.

The retail financial services industry is very competitive, and for the executives at broker/dealer firms, it all comes down to the numbers. How many financial advisors (and their associated client revenue) has the firm been able to recruit? How do the firm's compensation arrangements, product offerings, technology and customer service compare to its competitors? How many financial advisors (and their associated client revenue) has the firm lost to its competitors because of deficiencies in those areas? Firms closely monitor their financial advisor headcount and the revenue they generate because it is the lifeblood of their profitability.

Ameriprise is losing the financial advisor recruiting battle and falling behind its better managed and more sophisticated peers.[1] Indeed, just this month Ameriprise forced out its national head of financial advisor recruiting.[2] There is nothing nefarious about this—it is simply the labor market working as it should. Over the past year—for whatever reason—financial advisors at Ameriprise have grown increasingly discontent working for the company and are voting with their feet. This lawsuit is just the latest development in Ameriprise's business strategy of punishing departing advisors, intimidating those advisors who remain into not doing

[1]https://www.investmentnews.com/rias/advisor-recruiting-getting-irrational-says-ameriprise-ceo/252586. (last visited Oct. 17, 2024) (Attached as App'x A).

[2]https://www.financialadvisoriq.com/c/4643824/619173/ameriprise_head_advisor_recruiting_resigns?referrer_module=emailMostPopular&module_order=7&login=1&code=YlhSbGNuSmhibUZBZEdWeWNtRnVZV2R5YjNWd0xtTnZiU3dnTXpBek5USXpNU3dnTVRFeU5UUXlOREEyT1E9PQ&utm_content=bufferd1a2d&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer (last visited Oct. 17, 2024) (Attached as App'x B).

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the same, and discouraging its competitors from welcoming its departing advisors. Ameriprise's anticompetitive conduct must not be rewarded.

As discussed in greater detail below, the Motion should be denied for one simple reason. The linchpin of Ameriprise's argument is that Kenoyer is not entitled to the protections of the Protocol for Broker Recruiting (the "Protocol")—which allows advisors to retain certain client contact information and to solicit their clients to follow to a new firm even if their contract contains a non-solicitation clause—because Kenoyer violated the Protocol by pre-soliciting his clients while still at Ameriprise. Ameriprise's argument fails because, while Kenoyer did notify clients about his dissatisfaction and likely departure from Ameriprise, he did so with the ongoing knowledge, and implicit consent, of Ameriprise Vice President David Call over a period of five months. As such, Ameriprise ratified Kenoyer's actions, Kenoyer reasonably relied on Ameriprise's consent, and Ameriprise should now be estopped from relying on these client discussions as a basis for asserting he negated his protections under the Protocol.

II. FACTUAL BACKGROUND

A. The Parties.

Plaintiff is a financial advisory firm that provides investment services to customers. As of the end of 2023, it had 10,367 financial advisors[3] who collectively had approximately $1.36 trillion in client Assets Under Management ("AUM").[4]

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[3] https://ir.ameriprise.com/news-events/news-releases/press-release/2024/Ameriprise-Financial-Reports-Fourth-Quarter-2023-Results/default.aspx#:~:text=Advisor%20headcount%20was%2010%2C367%2C%20reflecting,business%20growth%20and%20market%20appreciation. (last visited Oct. 17, 2024) (Attached as App'x C).

[4] https://www.ameriprise.com/microsite/2023-annual-report#/ (last visited Oct. 17, 2024) (Excerpt attached as App'x D).

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Defendant Kenoyer is a registered representative (commonly referred to as a "financial advisor") currently registered with firm Defendant LPL. From 2006 until September 2024, Kenoyer was registered with Plaintiff, the vast majority of which was spent as an independent contractor.

Defendant LPL is a financial advisory firm that provides investment services to customers. As of the end of 2023, it had more than 22,000 financial advisors[5] with $1.35 trillion in AUM.

B. Kenoyer Joins Ameriprise and Eventually Affiliates With Franchise Owner Gerards

Kenoyer became a registered representative registered with Ameriprise in May 2006. (Declaration of Douglas Kenoyer in Support of Opp. To Mot. for TRO, ("Kenoyer Decl."), ¶2). Kenoyer was initially an employee of Ameriprise, but switched to its independent contractor channel in 2008. (*Id.*) After that, Kenoyer was associated with several different Ameriprise franchise owners until 2019. (*Id.*)

On September 11, 2019, Kenoyer became affiliated with Ameriprise franchise owner Jan Gerards. (*Id.* ¶3). A third financial advisor, Tearle Wysocki, joined their team in December 2019. (*Id.*) Under the Ameriprise independent contractor channel model, Jan Gerards was the Franchise Owner, while both Kenoyer and Wysocki held the title of Assistant Financial Advisor ("AFA"). (*Id.* ¶3). However, each of them had their own separate client bases whom they serviced independently of one another. (*Id.*).

Part of Kenoyer's purpose in associating with Gerards' franchise was their mutual desire for Kenoyer to purchase the right to service Gerards' client base (commonly referred to in the

[5] https://investor.lpl.com/news-releases/news-release-details/lpl-financial-announces-fourth-quarter-and-full-year-2023 (last visited Oct. 17, 2024) (Attached as App'x E).

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retail financial services industry as a “book of business”), and to receive the fees and income generated by doing so, in connection with Gerards’ anticipated retirement. (*Id*. ¶4). In order to effectuate the sale of the practice, Gerards and Kenoyer took several steps.

C. Kenoyer Purchases Gerards’ “Book of Business” in 2019.

Kenoyer purchased Gerards’ book of business gradually over the course of several transactions. Kenoyer paid for each of the partial purchases, which took place between 2019 and 2022, either by personal check or through a commercial loan he obtained from Byline Bank (*Id*. ¶¶ 5, 6, 8, 9). The total amount Kenoyer paid for Gerards’ book was approximately $1.2 million dollars. (*Id*. ¶9, Ex. 1).

Kenoyer also entered into a separate contract with his third colleague Wysocki that served as a “contingency succession plan” which would be triggered only in the event of the death of a financial advisor. (*Id*. ¶ 10). In September 2021, Mr. Wysocki died suddenly. (*Id*. ¶11). Kenoyer purchased Mr. Wysocki’s book of businessfor a price of $400,000. (*Id*.). Kenoyer financed this purchase through a commercial loan provided to him by Byline Bank. (*Id*. ¶12).

D. Kenoyer Becomes Dissatisfied As an Ameriprise Franchise Owner and Notifies His Supervisor.

During 2023, Kenoyer rapidly became dissatisfied with the economics of being an Ameriprise franchise owner. (*Id*. ¶13). He did not fully comprehend the fees and charges Ameriprise imposes upon franchise owners before acquiring Gerards’ franchise and discovered them to be much higher than expected. (*Id*.) He also noticed over time a substantial decline in the quality of Ameriprise’s internal practice support. (*Id*.) Combined with the debt service he was facing in paying off the loan he used to purchase Gerards’ practice, he became increasingly

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concerned that it was not viable economically to stay at Ameriprise as a franchise owner over the long term. (*Id.*)

In the first quarter of 2024 Kenoyer began holding exploratory discussions with several other broker/dealer firms about transferring his practice to a different institution. (*Id.* ¶14). In approximately March 2024, he also began telling some of his clients that he was not sure whether he would be staying at Ameriprise permanently, and that he was beginning to explore other affiliation options. (*Id.*)

In April 2024, Kenoyer also shared his concerns about his long-term viability as an Ameriprise franchise owner with David Call, an Ameriprise Vice President, and his immediate supervisor. (*Id.* ¶15). He also told Call that he was starting to explore other job options. (*Id.*) Because Kenoyer knew he owned his book of business, he was not worried about Mr. Call or Ameriprise terminating him for looking at other job opportunities. (*Id.*)

E. Kenoyer Notifies Ameriprise That He Is Discussing His Job Situation With Clients.

During his discussions with Call in April 2024, Kenoyer also told Call that he was sharing with his clients the concerns he had about staying at Ameriprise. (*Id.* ¶16). Kenoyer specifically told his supervisor that he was letting his clients know that he was investigating potential job opportunities. (*Id.*)

Mr. Call had no negative reaction to this notification whatsoever. Call did not direct Kenoyer to stop having such discussions with his clients. (*Id.* ¶16). Call did not tell Kenoyer that his Franchise Agreement with Ameriprise prohibited him from having such conversations with his clients; or that doing so violated any other contract Kenoyer had with Ameriprise; or that it violated any Ameriprise compliance or procedure manual; or that it breached legal duties he owed to Ameriprise. (*Id.*) If Call had done so, Kenoyer would have ceased having those

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discussions immediately. (*Id.* ¶17). However, because Call did not do so, Kenoyer reasonably believed conversations with his clients were permissible, and that he was not violating any duty he owed to Ameriprise in doing so. (*Id.*)

Call did not discipline Kenoyer in April 2024 after learning that Kenoyer was telling his clients he was considering leaving Ameriprise to go to a different firm. (*Id.* ¶18). Instead, Call led an active effort to negotiate a retention package of economic concessions, a six-figure retention bonus, and other incentives to convince Kenoyer to keep his practice and his clients at Ameriprise. (*Id.*). Those discussions continued well into the summer of 2024, but ultimately terminated because mutually acceptable terms could not be reached. (*Id.*)

By approximately July 2024, Kenoyer had intensified his job search, narrowing to two the number of firms he was negotiating with in earnest about joining. (*Id.* ¶20). He also began updating his clients about the status of his situation at that time, telling them that he was planning to resign from Ameriprise; that he had narrowed his search down to two (unnamed) firms; and that he anticipated changing firms in the fall of 2024. (*Id.* ¶21).

In July 2024, Kenoyer provided Call the same update he had been providing his clients regarding the status of his job search due diligence. (*Id.* ¶22). Kenoyer was very clear with Call that it was not a question of whether he was resigning from Ameriprise, but when. (*Id.*). Kenoyer also notified Call that he had been providing his clients the same update on his job search. (*Id.* ¶23). Once again, Call had no negative reaction to Kenoyer's notification. Call did not direct Kenoyer to stop telling clients that he was definitely leaving Ameriprise. (*Id.* ¶24). Call did not tell Kenoyer at that time that his Franchise Agreement with Ameriprise prohibited him from doing so; that doing so violated any other contract he had with Ameriprise; that Kenoyer was violating any Ameriprise compliance or procedure manual; or that Call was breaching legal

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1 duties he owed to Ameriprise. (*Id.*) As Kenoyer's direct superior and a Vice President at
2 Ameriprise, if Call had done so, Kenoyer would have stopped doing so immediately. (*Id.* ¶25).
3 However, because Call did not do so, Kenoyer reasonably believed that there was nothing
4 improper about his having these conversations with his clients, and that he was not breaching any
5 duty he owed to Ameriprise in doing so. (*Id.*)

6 **F. Kenoyer Resigns From Ameriprise and Joins LPL.**

7 Kenoyer tendered his notice of intent to resign to Ameriprise on September 5, 2024,
8 effective September 19, 2024 (the "Notice Period"). (*Id.* ¶26). During the Notice Period,
9 Kenoyer advised some clients that he had tendered his resignation from Ameriprise, and that he
10 would be starting at LPL on September 20, 2024. (*Id.*).

11 During the notice period, Kenoyer notified Mr. Call that he was letting clients know that
12 he was resigning from Ameriprise and joining LPL shortly. (*Id.* ¶27). Yet again, Call had no
13 negative reaction to this update. Call did not direct Kenoyer to stop telling clients that he had quit
14 Ameriprise and that he was joining LPL. (*Id.*) Call did not advise Kenoyer that doing so was a
15 violation of his Franchise Agreement or any other contracts he had with Ameriprise; that he was
16 breaching any Ameriprise compliance or procedure manual; or that Kenoyer was breaching any
17 duty he owed to Ameriprise. (*Id.*) Again, if Call had done so, Kenoyer would have stopped
18 doing so immediately. (*Id.* ¶28). However, because Call did not do so, Kenoyer reasonably
19 believed that there was nothing inappropriate or improper about his having these conversations
20 with his clients. (*Id.*) Throughout his dealings with Mr. Call during 2024, Kenoyer relied on
21 Call, as a Vice President of Ameriprise, and concluded that his communications with his clients
22 about the status of his tenure with Ameriprise were not prohibited and were, in fact, permissible.
23 (*Id.* ¶29).

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G. The Protocol for Broker Recruiting.

When Kenoyer tendered his resignation to Ameriprise, he invoked the protections of the Protocol. The Protocol is essentially a treaty amongst financial advisory designed to reduce recruiting and customer non-solicitation litigation. Originally conceived by a few of the nation's largest broker/dealers, the Protocol's adoption has become prevalent throughout the retail financial services industry and there are now nearly 2,500 signatory firms. Both Ameriprise and LPL have been members of the Protocol at all times relevant to this dispute.

The Protocol, a copy of which is attached as Exhibit D to Plaintiff's Complaint (Dkt. No. 1-4), provides financial advisors working at Protocol signatory firms who resign and transfer to another Protocol signatory firm with a core baseline of protections so long as they follow those procedures set forth therein. Paramount among those protections is the right for financial advisors moving from one Protocol signatory to another to bring with them a specified basic list of contact information for the clients they serviced at their old firm, and the right to solicit those same clients to transfer the management of their investment account to the new firm. This right exists even if the advisor had a non-solicitation agreement with the old firm.

In order to be entitled to the Protocol protections, transitioning financial advisors must follow a particular procedure, and refrain from engaging in certain prohibited conduct. At the time of resignation, such advisors must provide the firm they are quitting the contact list of the clients they serviced at the firm which also includes the clients' account numbers at the firm. The advisor is also permitted to retain a copy of their client contact list, but one that has the account numbers deleted. Advisors are also, among other things, not permitted to solicit their clients while still registered with the firm they are quitting.

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Some firms, including Ameriprise, have also published Protocol "carveout letters" exempting certain categories of their financial advisors from Protocol protection. For the reasons discussed below, Ameriprise's contention in its Motion (Motion, p. 2) that Kenoyer is barred from invoking his Protocol rights because he falls within the exceptions in Ameriprise's Protocol carveout letter is simply wrong. Although Kenoyer discussed his plans to depart with his clients while still at Ameriprise, Ameriprise should now be estopped due to its own conduct from asserting that Kenoyer voided his Protocol rights.

III. ARGUMENT

A. Factors for Determining Right to Temporary Restraining Order.

A temporary restraining order is "an extraordinary and dramatic remedy." *Lopez v. Brewer,* 680 F3d 1068, 1072, (9th Cir. 2012) (citation omitted.) The applicable requirements for issuance of a temporary restraining order are well settled. They are the same as those for issuing a preliminary injunction. *Dawson v. Asher*, 447 F. Supp. 3d 1047, 1049 (W.D. Wash. 2020). The proper legal standard for preliminary injunctive relief requires a moving party to demonstrate (1) that it is likely to succeed on the merits, (2) that it is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that an injunction is in the public interest. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (internal quotation marks omitted). For the reasons set forth below, Ameriprise cannot satisfy these requirements and its Motion must be denied.

B. Ameriprise Cannot Show a Substantial Likelihood of Success on the Merits.

1. Ameriprise Ratified Kenoyer's Conduct.

Ameriprise's primary argument in its Motion is that, by pre-soliciting his clients, Kenoyer violated the Protocol and voided his Protocol rights. Ameriprise then argues, that as a result Kenoyer has breached restrictions in his Franchise Agreement against soliciting his clients

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1 post-transition, and against retaining confidential information about his clients. Ameriprise's
2 argument fails because it acquiesced and ratified the conduct it now points to as violating the
3 Protocol. Contrary to Ameriprise's disingenuous assertion in its Complaint (¶35) that
4 "Ameriprise learned that Kenoyer began contacting his clients to inform them that he would be
5 leaving Ameriprise months prior to his resignation," in fact, **Ameriprise knew all along that**
6 **Kenoyer was doing this, and never once objected, instructed him to cease his conduct, or**
7 **issue any form of reprimand or discipline.**

8 Ratification means that one affirms that which he has a right to repudiate. Once
9 ratification has been clearly established, there is no need for the court to look further; this is the
10 rule even though the ratification is implied from the circumstances rather than expressly
11 declared. 17 Am. Jur. 2d Contracts § 489; *Poweroil Mfg. Co. v. Carstensen*, 69 Wash.2d 673,
12 678-680, 419 P.2d 796 (1966); *Peterson v. Eritsland*, 69 Wash.2d 586, 419 P.2d 332 (1966).

13 Kenoyer repeatedly and fully disclosed to an officer of Ameriprise, Vice President David
14 Call, the conversations that he was having with his clients about his job status at Ameriprise. He
15 did so in April 2024, he did so again in July 2024, and he did it a third time in September.
16 (Kenoyer Decl., ¶¶16, 23, 27). The only thing Call did in response was to try to incentivize
17 Kenoyer to stay at Ameriprise. (*Id*., ¶18).

18 At each of these several junctures, over the space of five months, Ameriprise Vice
19 President Call could have taken action in response to Kenoyer's notifications. Call could have
20 directed Kenoyer to stop sharing this information with his clients. He could have taken
21 disciplinary action. And, most importantly here regarding ratification, he could have notified
22 Kenoyer that his actions were prohibited by Ameriprise's contracts, policies and/or procedures.
23 Instead Call, and Ameriprise, did **nothing**. (Kenoyer Decl., ¶29). Having known of Kenoyer's
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1 client communications and having done nothing to object or demand that they cease, Ameriprise
2 has ratified and affirmed that Kenoyer's conduct was acceptable to it. It therefore has no
3 likelihood of success on the merits of its argument that Kenoyer's conduct voided his rights
4 under the Protocol. Simply put, Ameriprise cannot sit by silently for six months with full notice
5 from Kenoyer about what he was doing and now, *ex post facto*, assert that he has waived his
6 Protocol rights. For this reason alone, the Motion should be denied.

7 Even if, for the sake of argument, Ameriprise's inaction in the face of the information
8 Kenoyer shared with it does not constitute outright ratification, at a minimum it constitutes
9 implied ratification. Implied ratification occurs:

10 > [I]f the corporate principal, with full knowledge of the material facts (1)
11 > receives, accepts, and retains benefits from the contract, (2) remains silent,
> acquiesces, and fails to repudiate or disaffirm the contract, or (3) otherwise
> exhibits conduct demonstrating an adoption and recognition of the contract
12 > as binding.

Barnes v. Treece, 15 Wash. App. 437, 443, 549 P.2d 1152 (1976). The key question is
13 whether the principal's acts demonstrate an intent to affirm the contract (or conduct). *Id.* at 443-
14 44; *Lockwood v. Wolf Corp*., 629 F.2d 603, 609 (9th Cir. 1980). *Ratification can be inferred from*
15 *the principal's silence* if the circumstances are such "that, according to the ordinary experience and
16 habits of men, one would naturally be expected to speak if he did not consent . . . ." Restatement
17 (Second) of Agency § 94, comment a, at 244. (Emphasis added). *Smith v. Hansen, Hansen &*
18 *Johnson Ins.*, 63 Wash. App. 355, 369, 818 P.2d 1127 (1991). That is most certainly the situation
19 here, vis-à-vis Kenoyer's interactions with David Call, a Vice President of Ameriprise.

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21 2. Ameriprise's Reliance on the ICT Form Is Based on Non-Existent Terms.

22 Ameriprise's second argument for why Kenoyer cannot rely on Protocol protections and
23 therefore is violating his post-employment non-solicitation obligations is that any clients Kenoyer
24 acquired through the "Internal Client Transfer" ("ICT") process are excluded from Protocol

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1 protection and that he is not allowed to solicit them regardless of the Protocol. (Motion, p. 5-6).
2 Ameriprise's argument reads terms into the ICT form which are not there. It also misapplies the
3 Ameriprise Protocol Carveout Letter.

4 **a. Nothing in the ICT Form Negates Protocol.**

5 While Ameriprise might *wish* that the ICT form (Complaint, Ex. C) (Dkt. No. 1-3),
6 excludes from the Protocol clients acquired though this method, that is not what the document
7 says. Notably, nowhere in its Motion does Ameriprise quote language in actual support of its
8 position. What the ICT form actually says in relevant part ("Acknowledgements and
9 Authorization" section, p. 4) is:

> 10 Acquiring Advisor acknowledges that any relief from the Franchise Agreement's restrictive covenants contained in Addendum 3 {V, T or R) 11 shall not be effective for a period of three (3) years for clients acquired pursuant to this Client Transfer. In other words, **clients acquired under this Client Transfer will be subject to the one-year non-solicitation 12 provision found in Franchise Agreement Section 19 for a period of three years following the Client Transfer.**

13 The fatal flaw in Ameriprise's argument is, of course, that the non-solicitation provision in
14 Section 19 of the Franchise Agreement *is exactly what is negated by the operation of the Protocol*.
15 All this provision does is place clients acquired through the ICT process on the same footing and
16 with the same status as the rest of any franchise owner's pre-existing client base, other than
17 extending the non-solicitation period to three years *if the departing advisor moves to a non-*
18 *Protocol firm*.

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20 This reading of the ICT form is reinforced by another provision in the same section:

> 21 Transferring advisor represents that, within the 90 days following the client 22 transfer, he/she does not intend to leave Ameriprise Financial and either attempt to solicit, or provide financial services or products to, the 23 transitioned clients.

24 This clause makes clear that Ameriprise recognizes that, at least under some
25 circumstances, when an Ameriprise franchise owner resigns from the firm, they are immediately

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1 free to solicit clients obtained through the ICT process—so long as the client transfer occurs
2 more than 90 days prior to the advisor resigning from Ameriprise. The most obvious scenario
3 where this would apply: when a franchise owner transitions to a new firm under the Protocol.
4 **Nothing in the ICT form states that clients acquired through that process are not**
5 **covered by Protocol.** Had Ameriprise wanted the ICT process to exclude such clients from the
6 Protocol, it was incumbent on the company to include that provision in its standard ICT Form.
7 Kenoyer purchased Ms. Geralds' practice on May 31, 2022 (Complaint, Ex. F) (Dkt No. 1-6),
8 approximately eighteen (18) months before he resigned from Ameriprise, and so the exception set
9 forth on page 4 of the ICT form clearly does not apply. Ameriprise's argument fails on its face.
10 **b. None of the Protocol Exceptions in Ameriprise's Carveout Letter**
11 **Apply.**
Ameriprise's Motion (p. 9) vaguely asserts that "Ameriprise expressly except clients
12 acquired through internal transfers from Protocol treatment" in its Protocol Carveout Letter.
13 Notably, Ameriprise fails to specify which section of its Protocol Carveout Letter (the "Carveout
14 Letter") applies to Kenoyer. But it is irrelevant because once again Ameriprise is reading into a
15 document terms which do not exist.
16 Attached as Exhibit D to Call's Declaration is a copy of the current version of the
17 Ameriprise Protocol Carveout Letter. Several categories of Ameriprise advisors excluded from
18 Ameriprise's Protocol joinder are clearly inapplicable. (See, Call Declaration Ex. D, Section 1,
19 4) (Dkt. No. 3-4). The only sections of the Ameriprise Carveout Letter which even vaguely
20 resemble the fact pattern in this case are Sections 2 and 3. But a close reading of both sections
21 also show they do not say what Ameriprise claims they do, and therefore do not apply to Mr.
22 Kenoyer.
23 Section 2 of the Carveout Letter provides:
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> Second, in some instances, **AFS may pay to acquire a group of accounts from an independent financial advisor and then receive payments from an affiliated employee or independent financial advisor**, under the terms of a written agreement, for the ability to service the acquired group of accounts. Like continuing commissions agreements, the termination, damages and remedies provisions of these written agreements will apply to the acquired accounts during the finite period that payments are still due to AFS.

(*Id*. Section 2) (emphasis added).

This section clearly does not apply to Kenoyer. Ameriprise did not purchase Geralds' book of business and then sell it to Kenoyer. Rather, Kenoyer purchased Geralds' book of business directly. (Kenoyer Decl., ¶¶ 5, 6, 9). To the extent Ameriprise contends Section 2 of its Carveout Letter excludes the Geralds accounts from Protocol protection, it is wrong.

Section 3 of the Ameriprise Protocol Carveout Letter provides:

> Third, **AFS provides significant resources and assistance to help independent financial advisors acquire accounts from advisors who are not affiliated with Ameriprise**, from AFS, or from AFS independent financial advisors, for value paid, pursuant to the terms of a written agreement, succession planning agreement, asset purchase agreement or similar agreement. Like continuing commission and partnership agreements, and supported by valuable consideration, the Protocol will not apply to such acquired accounts for a period of three years following acquisition, or as otherwise designated in the controlling documents.

Call Declaration. Ex. D, Section 3. (Dkt. No. 3-4) (emphasis added).

A plain reading of Section 3 of Ameriprise's Carveout Letter also shows it is inapplicable to Mr. Kenoyer and his acquisition of the Geralds' book of business. Section 3 relates to situations where Ameriprise lends money to an existing Ameriprise financial advisor to help the advisor purchase a book of business from another financial advisor who is **not** associated with Ameriprise—so as to further the company's goal of increasing its overall AUM and the fees generated by them. That obviously does not pertain to the facts in this case, where Kenoyer purchased a book of business from an existing Ameriprise franchise owner in connection with her retirement. (Kenoyer Decl., ¶¶ 5, 6, 9). And, in any event. Mr. Kenoyer partially paid out of

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1 pocket and then obtained third-party financing for the balance of the purchase, rather than
2 borrow the money from Ameriprise. (*Id.*)

3 **C. Ameriprise Has Not Demonstrated Irreparable Harm.**

4 Irreparable harm is "harm for which there is no adequate legal remedy, such as an award
5 of damages." *Ariz. Dream Act Coalition v. Brewer,* 757 F.3d 1053, 1068 (9th Cir. 2014)
6 (citation omitted). The possibility that adequate compensation or other corrective relief will be
7 available at a later date weighs heavily against a claim of irreparable harm. *Sampson v. Murray,*
8 415 U.S. 61, 90 (1974). Ameriprise must demonstrate that irreparable harm is likely to occur in
9 the absence of a TRO. *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008). It
10 cannot rely on unsupported and conclusory statements regarding harm it might suffer, it must
11 proffer evidence of irreparable harm. *Herb Reed Enter. LLC v. Florida Enter. Mgmt. Inc.,* 736
12 F.3d 1239, 1249-50 (9th Cir. 2013). Ameriprise has not, and cannot, make that evidentiary
showing.

13 Even if Ameriprise has a likelihood of prevailing on its argument—which it does not—
14 that Kenoyer violated the Protocol and therefore breached his post-employment restrictive
15 covenants, any such harm can be compensated by money damages, and are calculable with a
16 high degree of certainty. *Los Angeles Mem'l Coliseum v. NFL*, 634 F.2d 1197, 1202 (9th Cir.
17 1980) (monetary harm is not "irreparable" injury.)

18 Each of Kenoyer's clients has generated revenue for Ameriprise through the services
19 Kenoyer performs for them, for which they are charged a consistent fee. Ameriprise has
20 granular data about the revenue Kenoyer's book of business generates, and what its net profit is
21 on that revenue after remitting to Kenoyer his share of the revenue generated. Even if
22 Ameriprise were entitled to damages—which it is not—determining what its damages are is

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simply a matter of calculating how much income Ameriprise has lost as a result of Kenoyer moving his practice to LPL, and determining for how long Ameriprise is entitled to reimbursement of that lost revenue stream as compensation. Because Ameriprise's damages can be compensated by money damages, and because the amount of those money damages, if any, are calculable, the Motion must be denied.

D. The Balance of the Equities Favor Defendant Kenoyer.

In addition to failing to demonstrate a likelihood of success on the merits, and failing to demonstrate that it has suffered irreparable harm, Ameriprise also loses on the third factor in determining its entitlement to a TRO: weighing the equities of the parties.

As of the end of 2023, Ameriprise had over 10,000 financial advisors who collectively had approximately $1.36 *trillion* in client AUM. By contrast, Kenoyer is a sole proprietor of his financial advisory practice, with approximately $140 *million* in AUM. The departure of Kenoyer and his clients, even if every single one elects to leave Ameriprise, is barely a drop in Ameriprise's bucket from a headcount, AUM, and revenue standpoint.

By contrast, if the TRO is granted, it will cut off Kenoyer's livelihood and effectively put him out of business. The first 90 days after an advisor transition between firms is a critical time, when clients are trying to decide whether to keep their accounts at their existing firm, move their accounts with their transferring advisor, or move their investments to a new financial advisor wholly unrelated to either firm. If Kenoyer is barred from continuing to work with or solicit his own clients, clients that he paid over $1.5 million to acquire, his personal finances will be in ruin along with his career. While he will be enjoined from contacting his clients, they will be aggressively solicited by Ameriprise's replacement financial advisors assigned to Kenoyer's book. And, meanwhile, Kenoyer will have to continue to make payments on the seven-figure

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loan he took out from Byline Bank—regardless of whether or not he has the clients and revenue to support the debt service, all while continuing to meet his usual household expenses. Under these circumstances, it is clear that the balance of the equities do not favor Ameriprise and the Motion should be denied.

E. The Public's Interest Requires Denial of the Motion.

Ameriprise contends that the public interest requires that Kenoyer not be permitted to violate his covenants with Ameriprise (Motion, p. 22). However, from a public interest standpoint, there are other contracts and relationships at issue in this case that are much more significant and must be honored.

The public customers and clients' right to work with the financial advisor of their choosing should be paramount. Perhaps other than one's doctor, a person's relationship with their financial advisor involves some of the most sensitive and important decisions one must make--about their money and their financial planning. Kenoyer's clients rely on him for his advice, guidance, and support during the most significant moments in their lives: buying a house, paying for their children's college tuition, retirement, or the death of a spouse. Kenoyer's clients should not be deprived of their right to select their preferred financial advisor and should not be deprived of his advice and services during the pendency of this case.

IV. CONCLUSION

For the reasons set forth above, Ameriprise's Motion should be denied. Following the denial, this matter should be compelled to arbitration as expressly required by the *FINRA Code of Arbitration Procedure for Industry Disputes*.

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1 DATED this 17th day of October, 2024.

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