UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, et al,
Plaintiffs,

v. **Case No. 24-CV-940**

ANDREW R. LAFONTAIN, et al,
Defendants.

ORDER

Plaintiffs, the Prudential Insurance Company of America ("Prudential") and Pruco Securities LLC ("Pruco"), have filed a motion for a temporary restraining order to maintain the status quo pending resolution of an arbitration proceeding between Prudential and defendants Andrew LaFontain, Nicholas Clemence, Sean Delaney, and Nathan Verbeten with the Financial Industry Regulatory Authority ("FINRA"). The parties' dispute arises from the alleged misappropriation of confidential information and solicitation of Prudential clients by defendants.

I. BACKGROUND

Defendants are financial advisors and former employees of Prudential. As a condition of their employment, defendants each entered into Statutory Agent Agreements containing a restrictive covenant that prohibits them from soliciting their former clients for two years following the end of their association with Prudential:

> Upon termination of your association with [Prudential], from any capacity, you agree that for a period of two years following the date of such termination, you will not, directly or indirectly, as to any product or service of the type issued or marketed by [Prudential]:
>
> (i) solicit from or attempt to solicit from; or

(ii) sell to or attempt to sell to

> any person, company or organization that was sold to or serviced by any agency to which you were assigned, whose name became known to you, or to whom you have sold, or for whom you were named Agent of Record, or servicing representative, on any product or service issued, marketed or sold by [Prudential], during the course of your association with [Prudential] in any capacity.

ECF No. 5-2 at 6 (LaFontain Statutory Agent Agreement). Defendants also agreed that, upon termination of association with Prudential, they must immediately return to Prudential all Confidential and Proprietary Information, including "the names, addresses and phone numbers of any account, customer, client, customer lead or prospect, and/or all items provided by, provided to, or prepared for Prudential, and/or relating to or connected with the business of Prudential." *Id.* at 5–6.

On July 3, 2024, defendants resigned from their employment with Prudential and subsequently affiliated with Ameriprise Financial Services ("Ameriprise"), a competitor of Prudential. Plaintiffs allege that since their departure, defendants have solicited Prudential clients, and made negative and inaccurate comments about Prudential to induce clients leave Prudential and join them at Ameriprise. Plaintiffs further allege that defendants have retained and misappropriated confidential Prudential information. Plaintiffs allege that defendants' misconduct has resulted in numerous Prudential clients transferring approximately $47 million in assets to Ameriprise. Plaintiffs seek an injunction to maintain the status quo until Prudential can appear before an arbitration panel convened by FINRA Dispute Resolution Services. Plaintiffs contend that unless defendants' conduct is immediately enjoined, other Prudential agents will be encouraged to engage in the same improper conduct, which would disrupt Prudential's

ability to maintain goodwill with its customers, enforce company policy applicable to its representatives and protect its business and customers. Defendants deny that they have solicited clients and state that they have returned all confidential client information to Prudential.

II. DISCUSSION

A. Temporary Injunctive Relief

FINRA generally requires arbitration if the dispute "arises out of the business activities of" a member or associated persons. FINRA Arb. Proc. R. 13200(a).[1] This arbitral forum is governed by its own pleading, discovery, evidentiary, and other standards set out in FINRA Code of Arbitration Procedure for Industry Disputes. It is undisputed that the merits of plaintiffs' claims are subject to arbitration before a panel of arbitrators assembled by FINRA Dispute Resolution Services.[2] The parties to such a dispute, however, are expressly permitted to seek temporary injunctive relief from a court of competent jurisdiction while a FINRA arbitration hearing is pending. FINRA Arb. Proc. R. 13804(a)(1). If the court orders such relief, an expedited arbitration hearing before FINRA on the request for permanent injunctive relief must begin within 15 days of the order. FINRA Arb. Proc. R. 13804(b)(1). If the court declines to issue preliminary injunctive relief, FINRA will resolve the matter in its ordinary, non-expedited manner.

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[1] FINRA Code of Arbitration Procedure for Industry Disputes, *available at* https://www.finra.org/rules-guidance/rulebooks/finra-rules.

[2] As required, Prudential filed a Statement of Claim with FINRA simultaneously with this action on July 25, 2024. *See* FINRA Arb. Proc. R. 13804(a)(2) ("A party seeking a temporary injunctive order . . . must, at the same time, file with the Director [of FINRA Dispute Resolution Services] a statement of claim requesting permanent injunctive and all other relief with respect to the same dispute[.]").

Pursuant to Rule 13804, plaintiffs ask the court to enjoin defendants from soliciting business from former Prudential clients and from using, disclosing, or transmitting confidential Prudential information. ECF No. 3.

Determination of whether a movant is entitled to preliminary injunctive relief involves a multi-step inquiry. As a threshold matter, the party seeking relief must demonstrate "(1) some likelihood of succeeding on the merits, and (2) that it has 'no adequate remedy at law' and will suffer 'irreparable harm' if preliminary relief is denied." *Cassell v. Snyders*, 990 F.3d 539, 544–45 (7th Cir. 2021) (quoting *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992)). If the movant makes this showing, the district court must then consider two additional factors: (3) "the irreparable harm the non-moving party will suffer if preliminary relief is granted, balancing that harm against the irreparable harm to the moving party if relief is denied" and (4) "the public interest, meaning the consequences of granting or denying the injunction to non-parties." *Id.* at 545 (quoting *Abbott Labs.*, 971 F.2d at 11–12). If a party fails to show a likelihood of success on the merits, the court need not address the remaining elements. *The Bail Project, Inc. v. Commr., Indiana Dept. of Ins.*, 76 F.4th 569, 575 (7th Cir. 2023). The movant bears the burden of showing that preliminary injunctive relief is warranted. *Harlan v. Scholz*, 866 F.3d 754, 758 (7th Cir. 2017) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)).

The parties agree that communications by defendants to former clients merely announcing their new affiliation with Ameriprise does not amount to solicitation. *See* Br. in Opp. of TRO at 6–7, ECF No. 23; Reply in Supp. Of TRO at 4, ECF No. 29; *see also Edward D. Jones & Co., L.P. v. Kerr*, 415 F. Supp. 3d 861, 843 (S.D. Ind. 2019) (noting

that "the majority of courts [ ] analyzing this issue within the context of the financial broker/dealer industry reject the theory that an 'announcement,' . . . qualifies as a solicitation, even where an employment agreement prohibits both indirect as well as direct solicitations"). The parties also agree that retention or use of Prudential's confidential information by defendants would constitute a breach of their Statutory Agent Agreements. The parties' dispute is purely factual.

In support of their allegations of improper solicitation, plaintiffs rely on the Declaration of Jeffrey Martinath, the Managing Director of the Greater Wisconsin Financial Group of Prudential. ECF No. 5. Specifically, Mr. Martinath avers that:

- More than twenty Prudential clients informed Prudential that they received calls from the defendants soliciting their business in the weeks after defendants resigned. *Id.*, ¶ 35.

- "[N]umerous clients" informed Prudential that they received follow up emails from the defendants "even though they had not indicated that they wanted to move their accounts" to Ameriprise. *Id.*, ¶¶ 36–37.

- A client informed Prudential that LaFontain sent him an email on how to open an Ameriprise account even though the client had not communicated with any of the defendants since they had left Prudential. *Id.*, ¶ 38.

- A client informed Prudential that LaFontain contacted him on or around July 5, 2024, asking him to move his accounts to Ameriprise and though the client declined, LaFontain subsequently sent him an email with instructions to move his accounts to Ameriprise. *Id.*, ¶ 39.

- A client informed Prudential that Clemence told him that he would mail a pre-filled application to move his accounts to Ameriprise, even though the client stated that he intends to stay at Prudential. *Id.*, ¶ 40.

- Two clients informed Prudential that Clemence asked them to move their business from Prudential to Ameriprise. *Id.*, ¶ 41.

- Two clients informed Prudential that LaFontain asked them to follow him to Ameriprise. *Id.*, ¶ 42.

- A client informed Prudential that LaFontain "reminded her of a security breach that affected Prudential in February 2024," and claimed that moving her accounts would add security. *Id.*, ¶ 43.

- A client informed Prudential that Delaney wanted to discuss in person transferring the client's accounts, and that LaFontain called him and told him to move his account to Ameriprise because Ameriprise has better options than Prudential. *Id.*, ¶ 44.

- A client informed Prudential that Clemence offered the client a lower fee structure at Ameriprise and told them that he resigned because Prudential is getting out of the investment business. *Id.*, ¶ 46

- A client informed Prudential that Delaney told him that Prudential was selling/closing its investment business, which is why the client decided to move his account to Ameriprise. *Id.*, ¶ 47.

- A client informed Prudential that Verbeten told her that the investment part of Prudential was sold. When a Prudential Financial Advisor informed the client that such information was false, the client cancelled her meeting with Verbeten, and "LaFontain called her almost immediately to try and get her to move her assets to Ameriprise." *Id.*, ¶ 48.

- A client informed Prudential that one of the defendants told them that Prudential was going out of business. *Id.*, ¶ 49.

Plaintiffs do not submit an affidavit or declaration from any of the clients allegedly solicited by defendants. Nor do plaintiffs disclose the identities of these clients. Mr. Martinath states in his declaration that these clients "informed Prudential" of defendants' actions, without naming which Prudential employee the client spoke with. Though I may consider hearsay at the preliminary injunction stage, *SEC v. Cherif*, 933 F.2d 403, 412, n. 8 (7th Cir. 1991), evidence consisting of multiple layers of hearsay is inherently unreliable. As the party seeking preliminary injunctive relief, plaintiffs must demonstrate some likelihood of success on the merits. By presenting only Mr. Martinath's account of what an unnamed client told an unnamed Prudential employee, I conclude that plaintiffs fail to produce evidence demonstrating a likelihood of success on the merits.

Plaintiffs' evidence of defendants' alleged misappropriation of confidential information is no stronger. Plaintiffs infer that defendants retained access to confidential information because they used cell phone numbers and email addresses to contact former clients. But defendants assert in response that they remembered the names of former clients and obtained contact information via public record searches. Plaintiffs also cite their counsel's July 10, 2024, cease-and-desist letter requesting that defendants sign a "Statement Under Oath" that they possessed no Prudential confidential information. Plaintiffs contend that defendants' failure to return these signed statements "strongly suggests that Defendants are soliciting Prudential clients to follow them to their new firm using Prudential information." Br. in Supp. of TRO at 4–5, ECF No. 4. But defendants state in declarations that they have returned all confidential information to Prudential prior to resigning. In view of defendants' denials, the inference plaintiffs ask me to draw from the unreturned statements is more than that evidence will bear.

In sum, plaintiffs fail to produce evidence showing some likelihood of success on the merits. Because plaintiffs have not carried their burden on this threshold element, I need not consider the remaining elements. *Bail Project*, 76 F.4th at 575. Accordingly, I will deny plaintiffs' request for preliminary injunctive relief.

B. Expedited Discovery

Plaintiffs also request expedited discovery. Plaintiffs seek (1) production of documents and records related to defendants' communications with former clients, (2) depositions of defendants, and (3) inspection of defendants' personal electronic devices. Defendants in response argue that plaintiffs' request is overbroad and

inappropriate, noting that FINRA has its own discovery process that will be employed during arbitration.

Under the Federal Rule of Civil Procedure "A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except . . . when authorized by these rules, by stipulation, or by court order." Fed. R. Civ. P. 26(d)(1). Plaintiffs thus may not commence discovery without consent of defendants or a court order. A district court "has wide discretion in managing the discovery process. *Ibarra v. City of Chicago*, 816 F. Supp. 2d 541, 554 (N.D. Ill. 2011) (citing *Merrill Lynch v. O'Connor*, 194 F.R.D. 618, 623 (N.D. Ill. 2000)). District courts within this Circuit generally evaluate a motion for expedited discovery "on the entirety of the record to date and the reasonableness of the request in light of all the surrounding circumstances." *Id.* (quoting *Merrill Lynch*, 194 F.R.D. at 624). This amounts to a requirement that the movant show good cause for the request. *Sheridan v. Oak St. Mortg., LLC*, 244 F.R.D. 520, 522 (E.D. Wis. 2007). Moreover, courts must protect defendants from unfair expedited discovery. *Merrill Lynch*, 194 F.R.D. at 623; *Centrifugal Acquisition Corp. v. Moon*, No. 09-C-327, 2009 U.S. Dist. LEXIS 56170, at *3 (E.D. Wis. May 6, 2009).

As discussed above, plaintiffs have produced little reliable evidence in support of their claims of defendants' wrongdoing. Such evidence is insufficient to support an order of expedited discovery which would, of course, impose a burden on defendants. Accordingly, I find that plaintiffs have not shown good cause warranting expedited discovery.

III. CONCLUSION

THEREFORE, IT IS ORDERED that plaintiff's motion for a temporary restraining order (ECF No. 3) is **DENIED**.

Dated at Milwaukee, Wisconsin, this 9 day of August, 2024.

/s/ Lynn Adelman
LYNN ADELMAN
United States District Judge