SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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AJ WEALTH STRATEGIES, LLC and AJWS PARTNER HOLDINGS LP,

Plaintiffs,

- v -

ELIZABETH SMOOSE and CLAYTON COCHRAN,

Defendants.

INDEX NO. 653035/2022

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 004

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 34, 35, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 67, 68, 69, 70, 71, 72, 74, 75, 92, 94, 98, 99, 100, 101, 102, 103, 104

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 76, 93, 95, 105, 106, 107, 108, 109, 110, 111

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, it is

In motion sequence number 001, plaintiffs AJ Wealth Strategies, LLC (AJ Wealth) and AJWS Partner Holdings LP (AJWS) (together AJ) move pursuant to CPLR 6301 and 6311 for a preliminary injunction enjoining defendants, (AJ's former employees), Elizabeth Smoose and Clayton Cochran, from:

1. "retaining, misappropriating, duplicating, using or disclosing any confidential, proprietary, and/or sensitive information of [AJ]"
2. "directly or indirectly soliciting any of AJ Wealth's clients or prospective clients to transact business with a competing enterprise, or to provide similar services to those provided by AJ Wealth"
3. "directly or indirectly competing with AJ Wealth in any business which is engaged in or conducted by AJ Wealth"
4. "directly or indirectly soliciting or encourage [sic] any person employed by [AJ] to leave the employ of [AJ] or terminate any other working relationship with respect to [AJ]"

5. "rendering financial counseling, brokerage, asset management, or other services rendered by AJ Wealth to any client of AJ Wealth"

(NYSCEF Doc. No. (NYSCEF) 32, Order to Show Cause (OSC).)

In motion 004, defendants move by OSC to vacate or modify the temporary restraining order entered on August 28, 2022 (TRO) (NYSCEF 32) by:

A. "delet[ing] clause (3) of the TRO concerning the rendering of financial counseling, brokerage, asset management or other services rendered by AJ Wealth; or, in the alternative;"
B. "Clarifying and/or modifying clause (3) of the TRO so that said clause (3) reads as follows: '(3) rendering financial counseling, brokerage, asset management, or other services rendered by AJ Wealth to any current client of AJ Wealth, provided that this order shall not be construed so as to prohibit Defendants from rendering such services to any client that has already ceased being a client of AJ Wealth and/or transferred such client's account(s) elsewhere;'"

(NYSCEF 66, OSC.)

Background

AJ is a financial planner for people with assets, typically over $50 million, who are located throughout the United States. (NYSCEF 11, Volesko[1] aff ¶ 4 [August 24, 2022]; NYSCEF 12, Cochran Agreement Protecting Company Property (Cochran APCP), § 2(A)(vi); NYSCEF 13, Smoose Agreement Protecting Company Property (Smoose APCP), § 2(A)(vi).) The wealth management industry for ultra-high net-worth individuals is relatively small. (NYSCEF 68, Smoose aff ¶ 4.) AJ's services include: "asset management, estate planning, income taxes, insurance, cash flow management, and other financial matters." (NYSCEF 11, Volesko aff ¶ 5 [August 24, 2022].) AJ Wealth's prized possession is its SalesForce platform. (*Id.* ¶ 7.) Volesko "spent thousands of hours of [his] time and significant money customizing AJ Wealth's

[1] Justyn Volesko is a co-founder and managing partner of AJ Wealth and involved in management of AJWS. (NYSCEF 11, Volesko aff, ¶ 1.)

SalesForce platform, such that the platform offers significant functionality far outstripping that available under the default SalesForce platform available to the public." (*Id.*) Volesko also claims AJ's team approach is unique to the financial planning industry. (*Id.* ¶ 8.) AJ Wealth's clients included Phillip Berney, Frank Loverro, and Sandy Osborne, principals of Kelso & Company, a private equity firm (Kelso), and thus AJ Wealth considered Kelso a referral source. (NYSCEF 98, Volesko aff ¶¶ 5, 14 n.2 [September 20, 2022]; NYSCEF 11, Volesko aff ¶53 [August 24, 2022.)

Cochran joined AJ Wealth in November 2015, while Smoose joined in 2017. (NYSCEF 11, Volesko aff ¶¶ 13, 30 [August 24, 2022]; NYSCEF 67, Cochran aff ¶ 3.) Cochran is a chartered financial analyst and registered investment advisor who had seven years of experience prior to joining AJ Wealth. (NYSCEF 67, Cochran aff ¶ 2.) As Director of Portfolio Management (Director) since 2020, Cochran "was responsible for trading and investments for all of AJ Wealth's clients for whom the company managed funds and investments" and "was the face of the company's investment management efforts." (NYSCEF 11, Volesko aff ¶¶ 26, 27, 29 [August 24, 2022]; *see also* NYSCEF 67, Cochran aff ¶ 3.) Cochran also serviced 70 to 80 clients. (NYSCEF 11, Volesko aff ¶ 29 [August 24, 2022].) By 2021, his compensation was over $650,000. (NYSCEF 98, Volesko aff ¶ 52 [September 20, 2022].)

According to AJ, "[u]pon the commencement of his employment with AJ Wealth, Cochran entered into and signed a confidentiality agreement with AJ Wealth . . ." (NYSCEF 11, Volesko aff ¶¶14 [August 24, 2022].) The court cannot rely on the alleged confidentiality agreement since it was not provided to the court. In any case, for the

prupsoe of this motion, AJ relies on the Cochran APCP, which Cochran did not execute until May 2017. (NYSCEF 12.)

Smoose has both a law degree and master's degree in tax law and worked for Goldman Sachs, where she worked on corporate charitable giving. (NYSCEF 98, Volesko aff ¶¶ 55-56 [September 20, 2022].) She was a financial advisor with 12 years of experience prior to joining AJ. (NYSCEF 68, Smoose Aff ¶¶ 2, 3.) At AJ Wealth, Smoose managed 29 clients, 20 of whom AJ identifies as "most important." (NYSCEF 11, Volesko aff ¶ 33 [August 24, 2022].) Smoose did not originate any client relationships. (*Id.*) By 2021, Smoose's compensation was over $700,000.[2] (NYSCEF 98, Volesko aff ¶ 52 [September 20, 2022].)

The Agreements

In May 2017, defendants agreed to the APCPs. (NYSCEF 12, Cochran APCP; NYSCEF 13, Smoose APCP.) At issue here is Section 7, titled "Non-Solicitation; Notice Period; Non-Interference," which provides:

(A) Non-Solicitation.

> (i) Employee agrees that during the Employment Period (including and Notice Period) and for a period of eighteen (18) months following the Termination Date, Employee will not and, with respect to the Employment Period prior to this Agreement, represents and warrants that Employee has not, whether on Employee's own behalf or on behalf of any other

[2] Smoose claims penury as a basis for denying the preliminary injunction but under the circumstances of this case, a pause in Smoose's career is not determinative. (*See Newmark Partners, L.P. v Hunt*, 200 AD3d 557, 558-59 [1st Dept 2021] ["It is true that the potential losses to defendants from an injunction are significant: they will be forced to pause their careers for a year, with possible long-lasting impacts on their career development. However, defendants were able to take steps to mitigate at least the resulting financial hardships, by, among other things, negotiating signing bonuses, loans, and temporary, noncompeting positions at their new firm. They were also aware of the risks when they made the conscious decision to leave plaintiffs' employ for a competing firm in violation of the noncompetition provision."] [citation omitted].)

> Person (except AJ Wealth Group[3] as expressly authorized by AJ Wealth Group to perform Employee's job duties), either directly or indirectly, Solicit, attempt to Solicit, or threaten to Solicit: (i) any Restricted Client, or (ii) any Person who was a Prospective Client at any time during the twelve (12) months immediately preceding the Termination Date.
>
> (ii) Employee agrees that, during the Employment Period and for a period of eighteen (18) months following the Termination Date, Employee will not, whether on Employee's own behalf or on behalf of any other Person, without the express written consent of AJ Wealth, directly or indirectly, Solicit, attempt to Solicit, or threaten to Solicit any employee of AJ Wealth Group to leave AJ Wealth Group for any reason whatsoever, or hire, engage, or offer employment to any employee of AJ Wealth Group."
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> (C) Prohibited Activities During Employment Period; Non-Competition.
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> (i) During the Employment Period, including the Notice Period, Employee represents and warrants that Employee has not, whether paid or unpaid, Competed or otherwise engaged in any activity for the Employee's own benefit or for the benefit of any other person or entity that is competitive or in conflict with the activities of AJ Wealth Group without the advance written consent of AJ Wealth and Employee shall not, whether paid or unpaid, Compete or otherwise engage in any activity for the Employee's own benefit or for the benefit of any other person or entity that is competitive or in conflict with the activities of AJ Wealth Group without the advance written consent of AJ Wealth."

(NYSCEF 12, Cochran APCP § 7(A)(i)(ii), (C)(i); NYSCEF 13, Smoose APCP § 7(A)(i)(ii), (C)(i).)

As to confidentiality, in Section 3, entitled "Property and Proprietary Information," the APCPs provide in part:

> (C) Employee agrees, [sic] shall cause Employee's Representatives, not to access, take, retain, disclose, duplicate, misappropriate or otherwise use Proprietary Information or Property for Employee's personal benefit, for the benefit of any Representative, or for the benefit of any other

[3] In the agreements at issue, AJ Wealth Group is defined as "AJ Wealth and each of its general partners, affiliates, subsidiaries and managing members…" (See e.g. NYSCEF 12, Cochran APCP at 1; NYSCEF 13, Smoose APCP at 1.)

> Person. Subject to a limitation imposed by applicable law, Employee shall not permit or assist any other Person to use, disclose, copy or reproduce Proprietary Information or Property except in accordance with the exceptions described in this Agreement and except as AJ Wealth may expressly authorize in writing.

(NYSCEF 12, Cochran APCP § 3(C); NYSCEF 13, Smoose APCP § 3(C).)

Section 8 entitled "Media; Publicity;Nondisparagement" provides in part:

> (E) During the Employment Period and at all times thereafter, Employee [sic] not engage in any conduct or communication with the intent and/or that has the effect of Disparaging any member of AJ Wealth Group or any of their respective employees, partners, directors, officers, stockholders and agents, individually or in their official capacities and (z) shall not make any Disparaging, negative, or derogatory comments in public regarding any member of AJ Wealth Group, any Client, any Prospective Client, or and any of their respective employees, partners, directors, officers, stockholders and agents, individually or in their official capacities.

(NYSCEF 12, Cochran APCP § 8(E); NYSCEF 13, Smoose APCP § 8(E).)

"Clients" includes "any Person to whom AJ Wealth Group provides (or is authorized to provide) Services and/or any Person to whom AJ Wealth Group has provided Services . . ." (NYSCEF 12, Cochran APCP at 2[4]; NYSCEF 13, Smoose APCP at 2.)

The "Employment Period" is "the period of time during which Employee is actively employed by AJ Wealth, including, unless otherwise determined in writing by AJ Wealth, any Notice Period." (NYSCEF 12, Cochran APCP at 3; NYSCEF 13, Smoose APCP at 3.)

The "Notice Period," commences "on [sic] date that you notify AJ Wealth of your resignation and the date when AJ Wealth terminates your employment, which period

[4] Page numbers refer to NYSCEF assigned page numbers.

shall be no longer than ninety (90) days." (NYSCEF 12, Cochran APCP at 4; NYSCEF 13, Smoose APCP at 4.)

"'Solicit" or "Solicitation" is "any direct or indirect communication of any kind, regardless of by whom it is initiated, inviting, advising, encouraging, counseling, inducing, interfering with, or requesting any Person in any manner to take or refrain from taking any action." (NYSCEF 12, Cochran APCP at 5; NYSCEF 13, Smoose APCP at 5.)

Defendants agreed in Section 10(A)(ii) that violation of Sections 2 through 9 of the APCP "will cause irreparable injury" for which money damages are not ascertainable and thus "AJ Wealth Group shall be entitled to equitable relief including, without limitation, a temporary restraining order, preliminary injunction, and permanent injunction to be issued by any court or tribunal of competent jurisdiction restraining Employee from committing or continuing any violation of this Agreement." (NYSCEF 12, Cochran APCP § 10(A)(ii); NYSCEF 13, Smoose APCP § 10(A)(ii).)

AJ invited defendants to participate in AJ's Incentive Plan "[i]n exchange for your performance, as an employee of [AJWS], . . .and in recognition of the anticipated positive impact you will make toward Partnership's future success . . ." (NYSCEF 14, Cochran Equity Participation Agreement (Cochran EPA) at 2; NYSCEF 15, Smoose Equity Participation Agreement (Smoose EPA) at 2; *see also* NYSCEF 11, Volesko aff ¶ 35 [August 24, 2022].) Defendants' Equity Participation Agreements with AJWS (the EPAs))[5] as well as Exhibit B to the Limited Partnership Agreement (LPA) entitled

[5] The Court notes that the AJWS Limited Partnership Agreement and Incentive Plan (the EPA Plan) (NYSCEF 99) was not provided until AJ filed its reply.

"Joinder to Limited Partnership Agreement of AJWS Partner Holdings LP" are dated December 17, 2019. (NYSCEF 14, Cochran EPA; NYSCEF 15, Smoose EPA; NYSCEF 16, LPA.) Cochran received a 2.50% limited partnership interest while Smoose received a 0.50% limited partnership interest. (NYSCEF 11, Volesko aff ¶ 36 [August 24, 2022].) However, the interests do not vest until there is a "sale event" of the partnership. (NYSCEF 14, Cochran EPA ¶ 3; NYSCEF 15, Smoose EPA ¶ 3.) The EPA Plan defines a "Sale Event" as:

> the consummation of a merger or consolidation of the Partnership with or into another company or entity whereby voting control of the Partnership is transferred to a person or group of persons that are not controlled by the Partnership or otherwise affiliated with the Partnership; or any reorganization, recapitalization or like transaction or series of related transactions having substantially equivalent effect or purpose, which the Plan Administrator(s) determines prior to such transaction to constitute a Sale Event; or the sale, transfer or other disposition of all or substantially all of the Partnership's assets.

(NYSCEF 99, EPA Plan at 5.)

It is undisputed that no such event has occurred.

Section 6.7 of the LPA sets forth numerous restrictive covenants. (NYSCEF 16, LPA § 6.7.) By executing the EPAs, defendants agreed to abide by those LPA covenants: "throughout the term of your employment or engagement as an employee or independent contractor of [AJWS] and for the applicable period of time specified in the [LPA], you will not directly or indirectly violate any of the covenants set forth therein." (NYSCEF 14, Cochran EPA ¶ 4; NYSCEF 15, Smoose EPA ¶ 4.) Further, the EPAs provide that if defendants violate the non-compete or non-solicitation covenants in the LPA, they "(a) [] will forfeit all Incentive Interests held by [them] and such units thereafter will be deemed to be cancelled and null and void, and (b) the Partnership will be entitled

to recover any payments previously made to [them] pursuant to any provision of the Plan." (NYSCEF 14, Cochran EPA ¶ 3; NYSCEF 15, Smoose EPA ¶ 3.)

The "Non-Competition" provision Section 6.7(b) of the LPA provides:

> Each Limited Partner hereby agrees that during the term of this Agreement and, in the event of the sale of a Limited Partner's Partnership Interests pursuant to the terms hereof, for a period of one (1) year thereafter, such Limited Partner shall not, nor shall he, she or it permit any of his, her or its Affiliates, to engage, directly or indirectly, individually or as a security holder, director, manager, officer, employee, partner, consultant, or agent of any other Person, in or receive any revenue or other compensation in connection with any business which is in [sic] engaged in any business conducted by [AJWS] or any Affiliate . . .

(NYSCEF 16, LPA § 6.7(b).)

Section 6.7(d) of the LPA prohibits solicitation of clients during the term of the LPA, and "in the event of the sale of a Partner's Partnership Interests, for a period of one (1) year thereafter." Under this section, solicitation means to:

> (i) induce or attempt to induce any client or customer of [AJWS] or any Affiliate to reduce the business it conducts with [AJWS] or Affiliate or change the terms of its relationship with [AJWS] or Affiliate to terms that are less favorable to [AJWS] or Affiliate, (ii) provide services similar or related to the business then conducted or proposed to be conducted by [AJWS] to such client or customer or (iii) solicit any client or customer of [AJWS] or Affiliate at any time to provide services similar or related to the business then conducted or proposed to be conducted by [AJWS] or Affiliate.

(*Id.* § 6.7(d))

In Section 6.7(e) of the LPA, defendants agreed to "refer to [AJWS] all corporate and/or business opportunities (including, without limitation, prospective and actual clients and customers) presented or made known to such Limited Partner which relate to any portion of the Business." (*Id.* § 6.7(e).)

"Business" is defined as "(i) the provision of wealth advisory, management, consulting and financial planning services, (ii) any other activities related to or incidental to the foregoing and (iii) any other business determined by the General Partner." (*Id.* at 5.)

The client non-solicitation and non-competition restrictions in Sections 6.7(b) and (d), as well as the employee non-solicitation restriction in Section 6.7(c) of the LPA are not triggered until "the sale of a Limited Partner's Partnership Interests pursuant to the terms hereof." (*Id.* §§ 6.7 (b), (c).)[7] The LPA provides that upon the termination of employment, defendants' interests immediately became subject to "mandatory redemption," the value of which is zero. (*Id.* § 7.4(a), (b).) It is undisputed that there has been no such sale of redemption.

Defendants Resignations and AJ's Investigation

Defendants resigned on March 21, 2022, effective June 17, 2022, (NYSCEF 11, Volesko aff ¶¶ 49-50 [August 24, 2022]), which AJ insists constitutes evidence of improper coordination or employee cross solicitation barred by the LPA. In June 2022, after providing the requisite 90 days' notice, defendants joined non-party Silicon Valley Bank (SVB). (*Id.* ¶ 61.) Plaintiffs contend that Smoose had begun discussions with SVB at the end of July 2021 because she asked for a copy of the LPA. (NYSCEF 101, July 30, 2021 emails.)

Defendants admitted that they received "sizable" loans from SVB in connection with their employment. (NYSCEF 67, Cochran aff ¶ 59; NYSCEF 68, Smoose ¶ 64.)

[7] Under Section 6.7(d) the triggering event is "the sale of a Partner's Partnership Interests . . ." where "Limited Partner" and "Partner" have different definitions under the LPA.

AJ asserts such loans constitute a violation of § 7(b) of the LPA which bars compensation from "any business which is in [sic] engaged in any business conducted by [AJWS]." (NYSCEF 16, LPA § 6.7(b).)

On June 30, 2022, Smoose's AJ Wealth e-mail address received a meeting invitation, also sent to Cochran at his new SVB email address, from a principal at Kelso entitled "SVB/Kelso Discussion," and scheduled a Zoom meeting between Cochran, Smoose, and the Kelso email sender on July 5, 2022. (NYSCEF 11, Volesko aff, ¶ 62 [August 24, 2022]; NYSCEF 21, June 30, 2022 email.) Again, AJ counted three Kelso partners as clients. At an unstated time, AJ allegedly discussed with Kelso the potential to expand its services to other partners of the firm. (NYSCEF 11, Volesko aff ¶ 62 [August 24, 2022].) From the face of the email, it is clear that defendants did not initiate the communication, which identifies the Kelso partner as the organizer, though whether defendants initiated the conversation is another issue of fact. The email prompted AJ's July 12, 2022 notice to defendants and SVB of defendants' non-solicitation and confidentiality obligations. (NYSCEF 11, Volesko aff ¶ 64 [August 24, 2022]; NYSCEF 22, July 12, 2022 Letter.) The cease-and-desist letter is silent as to noncompetition under the LPA. (NYSCEF 22, July 12, 2022 Letter.)

In July 2022, three of AJ Wealth's clients terminated their relationships with AJ Wealth. (NYSCEF 50, Berney aff ¶¶ 3, 7, 8; NYSCEF 51, Loverro aff ¶ 3; NYSCEF 52, Osborne aff ¶ 2.) Defendants deny improper solicitation of these or any other clients, (NYSCEF 67, Cochran aff ¶ 45; NYSCEF 68, Smoose aff ¶ 42), but client Loverro's affidavit suggests otherwise; he learned that defendants "would be" joining SVB. (NYSCEF 70, Loverro aff ¶ 6.) On September 1, 2022, Berney admitted to Volesko that

defendants informed Berney that they had resigned and later informed him that they were at SVB where there was a better technology platform. (NYSCEF 98, Volesko aff ¶¶ 15-16 [September 20, 2022].)

AJ's investigation of defendants' conduct while they were employed by AJ began in August 2022, two months after defendants 90-day notice period expired and defendants began working for SVB, and the month after the three Kelso clients left to join defendants at SVB. (NYSCEF 11, Volesko aff ¶ 52 [August 24, 2022].) AJ allegedly found proof of defendants' plot to solicit. AJ claims that days before her resignation in March, Smoose printed proprietary service reports for twelve of Smoose's "most important" clients. (NYSCEF 98, Volesko aff ¶ 34 [September 20, 2022].) Smoose counters that she prefers to work with paper and has historically printed such reports.[8] (NYSCEF 68, Smoose Aff ¶ 54.) Whether it was an appropriate time for Smoose to print such reports, which AJ challenges, is an issue of fact. Likewise, Smoose's denial that she took the reports with her to SVB three months later is an issue of credibility.

On July 29, 2022, Smoose e-mailed AJ Wealth "requesting documents and information about the accounts of Kelso's principals . . ." (NYSCEF 1, Complaint ¶ 93.) Based on this e-mail, AJ accuses Smoose of improperly accessing AJ Wealth's Schwab Institutional account during the notice period of her AJ Wealth employment to learn how to download Kelso's standing authorizations. (*Id*. ¶ 95.) Presumably, Smoose and her new employer could not use AJ's Schwab authorizations; without more it is unclear how

[8] Smoose's affidavit is contradictory. She complains that AJ's technology stack was dated and erratic, while at the same time complaining that management was constantly updating the technology. (NYSCEF 68, Smoose aff ¶ 53.)

viewing authorizations would violate any agreement or damage AJ. The court rejects this proposition as speculative at this juncture.

AJ filed this action on August 22, 2022. (NYSCEF 1, Summons and Complaint.) AJ alleges: (1) breach of the APCPs, EPAs, and the LPA; (2) breach of fiduciary duty; and (3) misappropriation of trade secrets. (*Id.*) AJ seeks damages and injunctive relief. (*Id.*)

Analysis

"A preliminary injunction may be granted under CPLR article 63 when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor." (*Doe v Axelrod*, 73 NY2d 748, 750 [1988] [citation omitted].) Where a former employer seeks to enforce employment contracts, the issue of whether the covenants are enforceable rests on their reasonableness. (*BDO Seidman v Hirshberg*, 93 NY2d 382, 388 [1999].) "A restraint is reasonable only if it: (1) is *no greater* than is required for the protection of the *legitimate interest* of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public." (*Id.* at 388-89 [citations omitted].) "The legitimate interest of the employer must protect against *unfair* competition, not simply to avoid competition in a general sense." (*Kelly v. Evolution Markets, Inc.*, 626 F Supp 2d 364, 374, n.9 [SD NY 2009], *citing Lazer Inc. v Kesselring*, 13 Misc 3d 427, 432-31 [Sup Ct, Monroe County 2005].)

> "While powerful public policy considerations militate against enforcement of restrictive covenants, at the same time, the employer is entitled to protection from unfair or illegal conduct that causes economic injury. The rules governing enforcement of anticompetitive covenants and the

> availability of equitable relief after termination of employment are designed to foster these interests of the employer without impairing the employee's ability to earn a living or the general competitive mold of society. Acknowledging the tension between the freedom of individuals to contract, and the reluctance to see one barter away his freedom, the State enforces limited restraints on an employee's employment mobility where a mutuality of obligation is bargained for by the parties. Indeed, the modern trend in the case law seems to be in favor of according such covenants full effect when they are not unduly burdensome."

(*Maltby v Harlow Meyer Savage, Inc.*, 166 Misc 2d 481, 485 [Sup Ct, NY County 1995] [internal quotation marks and citations omitted].)

To be successful, AJ must first establish a likelihood of success on its claims for breach of the contracts, the provisions of which must first be assessed as reasonable. As an initial matter, the court finds the restrictive covenants of the LPA overbroad and unenforceable, because they potentially extend in perpetuity. The LPA provides that upon termination of employment, defendants' Incentive Interests immediately became subject to "mandatory redemption." (NYSCEF 16, § 7.4(a).) It is undisputed that the interests have yet to be redeemed albeit at $0. (NYSCEF 68, Smoose aff ¶ 27; NYSCEF 67, Cochran aff ¶ 30.) At argument, AJ asserted that because AJ Partnership has yet to redeem the Incentive Interests, the LPA's "term" has not expired. Restrictive covenants cannot extend in perpetuity. Such covenants are unenforceable under New York law. (*See e.g., Steelite Intl. U.S.A., Inc. v McManus*, 2021 U.S. Dist. LEXIS 80528, at *21 [SD NY Apr. 27, 2021] [covenant that "would restrict [defendant]'s ability to compete…in perpetuity" was so overreaching the Court would not blue-pencil it]; *Crye Precision LLC v Bennettsville Printing*, 755 Fed Appx 34, 37 [2d Cir 2018] [covenant with "no temporal . . . limitation [] could be read to prohibit [defendant] from [competing]

in perpetuity" and "goes far beyond that which New York courts have deemed to be reasonable."])

The servicing and solicitation covenants of the LPA are also overbroad and unenforceable, because they potentially bar defendants from soliciting or providing services to clients with whom defendants had no relationship. (*BDO Seidman*, 93 NY2d at 392.) While non-competition provision in certain circumstances may be modified to apply to only clients serviced by the former employee, the LPA is so broad that it is simply unenforceable.

Likewise, the LPA's non-competition provision is overbroad and thus unenforceable because it prohibits defendants from working "in connection with any business which is engaged in any business conducted by [AJWS] or any Affiliate . . ." (NYSCEF 16, LPA § 6.7(b).) The "broadsweeping language is unrestrained by any limitations keyed to" any particular protectable interest. (*Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.*, 42 NY2d 496, 499 [1977] [invalidating industry-wide non-compete provision].). AJ is in the financial planning business and defendants are financial planners. That the market the parties work in is further narrowed by the type of client served—people with assets over $50 million—is irrelevant since the LPA would bar defendants from the entire financial planning industry. AJ's covenant impermissibly prohibits defendants from working in their chosen profession, not just the over $50 million niche. This is not a provision that the court could blue-pencil by shortening the time or narrowing the geographic scope (*cf. Newmark*, 200 AD3d 557 [1st Dept 2021]), without impermissibly rewriting the provision.

Courts will not enforce "manifestly overbroad" non-compete agreements where less restrictive means will accomplish the same ends. *(Zinter Handling, Inc. v Britton*, 46 AD3d 998, 1000-01 [3d Dept 2007] [The court also noted that "[s]ince the covenant not to compete has now expired as to both defendants, we perceive no legitimate basis upon which to consider partial enforcement.") Since the APCP's specific confidentiality provision is least restrictive, the court's analysis focuses on the APCP.

The APCPs contain non-solicitation, non-competition, and non-disparagement provisions. (NYSCEF 12, Cochran APCP; NYSCEF 13, Smoose APCP.) However, the non-competition provision expired at the conclusion of the 90-day notice period. (NYSCEF 12, Cochran APCP § 7(C)(i); NYSCEF 13, Smoose APCP § 7(C)(i).) The non-solicitation provision expires 18 months after termination (NYSCEF 12, Cochran APCP § 7(A)(i); NYSCEF 13, Smoose APCP § 7(A)(i)), while the non-disparagement is perpetual. (NYSCEF 12, Cochran APCP § 8(C); NYSCEF 13, Smoose APCP § 8(C).) While there is some evidence that defendants told Berney that SVB's technology was superior to AJ's technology, potentially in violation of the non-disparagement provision, plaintiffs do no seek injunctive relief on the non-disparagement covenant. In any case, the urgent issue here is non-solicitation under the APCPs.

The non-solicitation provision of the APCPs is also not enforceable as a matter of fact and law. The APCPs define "Clients" to include "any Person to whom AJ Wealth Group provides (or is authorized to provide) Services and/or any Person to whom AJ Wealth Group has provided Services . . ." (NYSCEF 12, Cochran APCP at 1; NYSCEF 13, Smoose APCP at 1.) Like the LPA, the APCPs have no connection to the clients whom defendants serviced. (*BDO Seidman*, 93 NY2d at 389.) However, unlike the

LPA, which is temporally infinite, the APCP is not unenforceable, as it could be edited to apply to only clients serviced by defendants.

Even if this provision is limited though, AJ has not demonstrated a likelihood of success on its claim of breach of that provision. As to the solicitation of the Kelso clients, there is a difference between the Kelso clients whom defendants were servicing and the potential Kelso clients that AJ was allegedly soliciting. The court sees nothing in this record currently to show that AJ was actually soliciting Kelso for more clients. Rather, AJ's efforts appear aspirational. There is no claim that defendants were aware of such efforts. Indeed, AJ repeatedly insists that defendants brought in no clients, a process reserved to AJ's founders. However, development of a factual record may prove otherwise.

Another reason that AJ cannot establish likelihood of success as to breach of the APCPs , and thus fails to satisfy the third prong of the *BDO Seidman* test, is that the resulting injunction would be injurious to the public. (*See United States Trust Co., N.A. v MacLachlan*, 2008 NY Slip Op 30030[Sup Ct, NY County 2008] [refusing to enforce the servicing restriction that "would be unduly burdensome on the defendant and injure the public by preventing investors from freely choosing the financial advisor with whom they wish to entrust their assets."]) "In addressing whether a restrictive covenant is injurious to the public, the Court must 'take account of any diminution in competition likely to result from slowing down the dissemination of ideas and of any impairment of the function of the market in shifting manpower to areas of greatest productivity.'" (*In re Document Tech. Litig.,* 275 F Supp 3d 454, 468 [SD NY 2017], *quoting* Restatement [Second] of Contracts § 188 [1981].) Here, AJ's delay in investigating and moving for

relief months after defendants started their new jobs and clients moved their business, impacts the clients who are now in an indeterminate state waiting for the outcome of this case when these clients have already chosen their advisors—defendants.

Finally, because money damages are available, the court is not bound by Section 10(A)(ii) of the APCP's, which states that breach will cause "irreparable injury," in the absence of proof of irreparable harm. (*See Devos, Ltd. v Record*, 2015 U.S. Dist. LEXIS 172929, at *22 [ED NY Dec. 24, 2015].) "[U]nless a movant can show an injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages, a motion for a preliminary injunction should be denied." (*Levinson v Cello Music & Film Sys., Inc.*, 199 F3d 1322, at *4-5 [2d Cir Oct. 22, 1999] [citation and quotation omitted].) In *Kanan*, a former employer sought an injunction enforcing a provision which prevented an investor relations professional from performing services for any of the former employer's clients that were retained during the defendant's employment. (*Kanan, Corbin, Schupak & Aronow, Inc. v FD Intl., Ltd.*, 8 Misc 3d 412, 414 [Sup Ct, NY County 2005].) The court denied the injunction because it found that even if the former employer lost clients, the damages were calculable as the lost fees for the provision's 12-month period. (*Id.* at 421; *see also*, *D&W Diesel, Inc. v McIntosh*, 307 AD2d 750, 751 [4th Dept 2003] ["[A]ny loss of sales occasioned by the allegedly improper conduct of defendant can be calculated. Thus, plaintiff has an adequate remedy in the form of monetary damages, and injunctive relief is both unnecessary and unwarranted."])

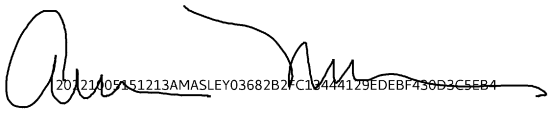
The court has considered the parties' remaining arguments and finds them unavailing without merit or otherwise not requiring an alternate result.

The parties informed the court at argument that pursuant to the agreements, they have agreed to arbitration for resolution of the action including the remaining contract issues e.g. breach of the APCPs' confidentiality provision and noncompetition provision up to the expiration of the notice period; the APCP's nondisparagement provision; the APCP's non-solicitation provision; defendants' receipt of a loan prior to their termination, and cross-solicitation of defendants while still AJ employees. While the court is unwilling to blue pencil the APCP for the purposes of the extraordinary relief of a preliminary injunction, this would not preclude the arbitrator from assessing damages for violation of a blue penciled APCP.

Accordingly, it is

ORDERED that plaintiffs' motion for a preliminary injunction, motion 01, is denied and the TRO is vacated; and it is further

ORDERED that motion sequence number 004 is denied as moot.



10/5/2022
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE