Fidelity Brokerage Services LLC v. Devin Callinan and UBS Financial Services, Inc.

Suffolk Superior Court Action No. 1884CV02098-BLS1

Memorandum of Decision Regarding Plaintiff's Motion for Preliminary Injunction (Docket Entry No. 4.0):

This is an action in which plaintiff Fidelity Brokerage Services LLC ("Fidelity") seeks a court order preliminarily enjoining its former employee, defendant Devin Callinan ("Mr. Callinan"), from violating the terms of his employment agreements with Fidelity and further enjoining Mr. Callinan and his new employer, defendant UBS Financial Services, Inc. ("UBS" or, collectively with Mr. Callinan, "Defendants"), from utilizing any of Fidelity's confidential information to solicit Fidelity customers whom Mr. Callinan serviced or learned of during his tenure at Fidelity. The parties agree that the merits of Fidelity's underlying claims will be resolved through mandatory, binding arbitration conducted in accordance with the rules and regulations of the Financial Industry Regulatory Authority ("FINRA"). Thus, the only issue to be resolved by this Court is whether Mr. Callinan and UBS's business activities will be restricted in any way while that arbitration proceeding is pending.

After Fidelity filed its Verified Complaint and motion for preliminary injunction on July 6, 2018, the parties agreed to a period of expedited discovery. They thereafter exchanged documents and conducted the depositions of Mr. Callinan and Dominic Collamati ("Mr. Collamati"), the Branch Office Manager of Fidelity's Framingham, Massachusetts investment center (the "Framingham Center"), on an accelerated basis.

On October 3, 2018, the Court conducted a hearing on Fidelity's motion for a preliminary injunction. Both sides appeared. Upon consideration of the Verified Complaint, the affidavits, memoranda, and other materials submitted by the parties, as well as the oral arguments of counsel, the Court issued a written Preliminary Injunction Order on October 10, 2018 (Docket Entry No. 21.0), which the Court subsequently revised on October 16, 2018, in response to a request for clarification submitted by Mr. Callinan (see Revised Preliminary Injunction Order (Docket Entry No. 22.0) (the "Injunction Order")). In its Injunction Order, the Court found that Fidelity had established all of the elements necessary to obtain preliminary injunctive relief, namely, a likelihood of success on the merits, a substantial risk of irreparable harm if an injunction did not issue, a balance of possible harms weighing in its favor, and a demonstration that the public interest would be best served by granting the relief sought. See *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 616-617 (1980); *Brookline v. Goldstein*, 388 Mass. 443, 447 (1983). At the time the Court issued its Injunction Order, it promised the parties a more comprehensive written decision setting forth, in greater

detail, its findings and reasons for granting Fidelity's request for injunctive relief. This decision is provided in fulfillment of that promise.

Factual Findings

The relevant facts, most of which are undisputed, are as follows:

Mr. Callinan joined Fidelity in 2007 shortly after graduating from college. Following a series of promotions, Mr. Callinan became a Vice President, Financial Consultant with Fidelity in 2016. In that capacity, he served approximately 500 "high net worth" clients working primarily out of Fidelity's Framingham Center. The parties agree that, as a general matter, Mr. Callinan did not develop his client base through his own contacts or leads. Rather, Mr. Callinan's clients came to him almost exclusively through reassignments from other Fidelity representatives, referrals from existing Fidelity customers, or leads supplied by Fidelity. Fidelity asserts that it is unique in the retail brokerage field in that it does not have its account representatives make "cold calls" to persons who have no relationship with Fidelity or who have not been referred to Fidelity. Fidelity's Financial Consultants instead serve and maintain a customer base that Fidelity itself has developed at substantial expense.

As usually is the case, Mr. Callinan was required by Fidelity to sign an employment agreement that spelled out his rights and obligations as a Fidelity employee. The most recent employment agreement that Mr. Callinan signed prior to his departure is dated December 21, 2016 (the "Employment Agreement").[1] Paragraph 6 of that Employment Agreement, titled "Non-solicitation," states in relevant part that,

> during [his] employment and for a period of one year following [his] separation from employment by the Fidelity Companies, [Mr. Callinan] will not use any Confidential Information belonging to the Fidelity Companies to directly or indirectly, on [his] own behalf or on behalf of anyone else or any company, solicit in any manner or induce or attempt to induce any customer or prospective customer of the Fidelity Companies to divert or take away all or any portion of his/her/its business from the Fidelity Companies or otherwise cease the relationship with Fidelity Companies. During this

[1] A true copy of Mr. Callinan's Employment Agreement is appended to the Affidavit of Andrew Alvarez (Docket Entry No.15.0) as Exhibit A. Mr. Callinan executed comparable employment agreements with Fidelity in 2007 and in connection with his promotions in 2011 and 2013. True copies of those earlier agreements are appended to the Affidavit of Dominic Collamati ("Collamati Aff.," Docket Entry No. 5.0) as Exhibits D, E and F. Each of the earlier agreements contains a non-solicitation clause similar or identical to the one that appears in Mr. Callinan's 2016 Employment Agreement.

> same period, [Mr. Callinan] also will not, directly or indirectly, on [his] own behalf or on behalf of anyone or any company, solicit in any manner or induce or attempt to induce any customer or prospective customer with whom [he] had personal contact or about whom [he] otherwise learned during the course of [his] employment with Fidelity Companies.

Employment Agreement, ¶ 6.

Early in the morning of June 13, 2018, Mr. Callinan abruptly resigned from his position at Fidelity. Later the same morning, he began his new employment with UBS at UBS's office in Wellesley, Massachusetts. Immediately upon arriving at UBS, Mr. Callinan created a written list of Fidelity clients that he claims to have prepared entirely from memory.[2] Mr. Callinan then gave the list to his new managers at UBS, who proceeded to track down and add contact information for each client on the list using publicly available sources, such as Google**.** Over the next approximately four months, Mr. Callinan utilized the contact information to personally contact many of his former Fidelity clients by telephone. Mr. Callinan asserts that, in each call, he initially did "nothing more" than notify the client that he had left Fidelity and offer to provide the client with his new contact information at UBS, *unless* the client requested additional information about his departure. Devin Callinan's Opposition to Plaintiff's Motion for a Preliminary Injunction ("Defendant's Opp.," Docket Entry No. 17.0) at 4. If the client made such a request, Mr. Callinan used the opportunity to expound on the reasons why he moved to UBS and the advantages that he sees in working at UBS, as opposed to Fidelity. *Id.* Among the things that Mr. Callinan said, if the client made an inquiry, is that he believes UBS has a broader menu of investment options to choose from, and that, at UBS, he will have a smaller group of clients to whom he can offer more personalized services. *Id.* Mr. Callinan also told at least some Fidelity clients that, because "there's a small select group of products at Fidelity … that drive a lot of representatives of Fidelity's compensation," he believes that he had a "real big conflict of interest" at Fidelity between doing what was in his own financial interest and "doing what's right for each and every customer that I worked with." Transcript of Deposition of Devin Callinan, taken Sept. 10, 2018, at 81.[3]

[2] Mr. Callinan maintains that he did not take any client lists or other documents or files with him when he left Fidelity. Fidelity has submitted no evidence to the contrary. Nevertheless, the Court, in an abundance of caution, included a provision in its Injunction Order requiring Mr. Callinan to return any Fidelity documents or files that remained in his possession.

[3] A copy of Mr. Callinan's deposition transcript was submitted to the Court with Fidelity's motion papers.

Fidelity has submitted its own independent evidence concerning the content of some of Mr. Callinan's calls to his former Fidelity clients, which suggests that Mr. Callinan also used the calls as an opportunity to persuade those clients to transfer their investment accounts from Fidelity to UBS.[4] Fidelity seeks to prevent Mr. Callinan and UBS from undertaking any further persuasive efforts directed at Fidelity's customers while the parties' FINRA arbitration is being resolved.

Discussion

Massachusetts law holds that non-competition and other restrictive covenants contained in an employment contract "will be enforced if it is reasonable, based on all the circumstances." *All Stainless, Inc. v. Colby*, 364 Mass. 773, 778 (1974). See also *Marine Contractors Co. v. Hurley*, 365 Mass. 280, 287 (1974) (a non-solicitation provision, like an employee covenant not to compete, "generally [is] enforceable only to the extent that [it is] necessary to protect the legitimate business interests of the employer"). In deciding what is "reasonable," the Court must consider, among other things, the "reasonable needs of the former employer for protection against harmful conduct of the former employee[,]" the "reasonableness of the restraint imposed on the former employee[,]" and the geographic scope of the covenant and its duration, as well as the "public interest" as a whole. *All Stainless, Inc.*, 364 Mass. at 778. See also *Marine Contractors Co.*, 365 Mass. at 287 (non-solicitation provision must be reasonable in its time, space, and scope).

Massachusetts law also permits the enforcement of a restrictive covenant contained in an employment contract, in appropriate circumstances, by means of a preliminary injunction. As in most cases involving preliminary equitable relief, a party seeking a preliminary injunction "must show that (1) success is likely on the merits; (2) irreparable harm will result from denial of the injunction; and (3) the risk of irreparable harm to the

[4] Fidelity's evidence includes notes and excerpts of telephone conversations between certain Fidelity customers who were contacted by Mr. Callinan and other Fidelity personnel taken from Fidelity's "Salesforce" client management system. Fidelity's notes and call excerpts are appended to the Affidavit of Andrew Alvarez, the Assistant Branch Manager of Fidelity's Framingham Center (Docket Entry No. 15.0), as Exhibits B and C. Mr. Callinan objects to the submission of most, if not all, of Fidelity's notes and call excerpts on the grounds that the communications constitute "wobbly totem pole hearsay." Defendant's Opp. at 2. Fidelity has attempted to address Mr. Callinan's objection, at least in part, by providing the Court with an audio recording of the relevant portions of one of the client telephone calls. The Court is persuaded that the notes and call excerpts provided by Fidelity, to the extent that they are not admissible as statements of a party opponent, are authentic, relevant, and reasonably reliable and, therefore, exercises its discretion to consider this evidence solely as it pertains to Fidelity's request for preliminary injunctive relief. See *Planned Parenthood League of Mass., Inc. v. Operation Rescue*, 406 Mass. 701, 711 n.9 (1990) ("'[I]nasmuch as the grant of a preliminary injunction is discretionary, the trial court should be allowed to give even inadmissible evidence some weight when it is thought appropriate to do so in order to serve the primary purpose of preventing irreparable harm before a trial can be had.'"), quoting 3 C.A. Wright & A.R. Miller, Federal Practice and Procedure Section 2949, at 471 (1973 ed. & 1989 Supp.).

moving party outweighs any similar risk of harm to the opposing party." *Cote-Whitacre v. Dep't of Pub. Health*, 446 Mass. 350, 357 (2006), citing *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 616-617 (1980).

The positions of the parties with respect to Fidelity's motion for a preliminary injunction directed to Defendants' conduct are relatively straightforward. Fidelity asserts that it is likely to succeed on the merits because the facts show that Mr. Callinan, aided and abetted by UBS, violated the terms of his Employment Agreement by utilizing "Confidential Information" concerning the identity of Fidelity's clients for the purpose of "soliciting" those clients to transfer their Fidelity investment accounts to UBS. Fidelity further asserts that it will be irreparably harmed if Defendants' conduct is not enjoined and that the balance of harms weighs heavily in its favor.

Mr. Callinan, in turn, asserts that Fidelity is unlikely to succeed on the merits because the information he retained in his memory regarding his former Fidelity clients does not constitute "Confidential Information" for purposes of his Employment Agreement and because he was legally entitled to "announce" his departure from Fidelity to his former clients irrespective of the terms of his Employment Agreement.[5] Mr. Callinan also alleges that the balance of harms actually weighs in his favor because granting Fidelity's requested injunction "would impair his ability to earn a living" while the parties' dispute is pending. Defendant's Opp. at 19.

Thus, the primary points of contention between the parties effectively boil down to three issues, namely:

(1) Is the identity of Fidelity's clients "Confidential Information"?

(2) If so, did Mr. Callinan's conduct in reaching out to his former Fidelity clients constitute impermissible "solicitation"?

(3) Does the risk of irreparable harm to Fidelity outweigh the risk of harm to Mr. Callinan?

The Court separately addresses each of these questions below. The Court also takes the opportunity presented by this case to address, more generally, the question of how these parties, and any similarly situated parties, potentially can avoid similar entanglements in the future.

[5] UBS has appeared in this action but has chosen not to actively participate in briefing and/or oral argument concerning Fidelity's motion for a preliminary injunction.

1. Is the Identity of Fidelity's Clients "Confidential Information"?

Mr. Callinan and UBS argue that the information Mr. Callinan retained in his memory regarding the identity of his former Fidelity clients is not confidential and, therefore, that their use of such information to reach out to those clients following Mr. Callinan's departure is not prohibited by the terms of his Employment Agreement. The Court disagrees for at least two reasons.

First, although the parties have devoted considerable attention to the question of whether Mr. Callinan improperly utilized Fidelity's "Confidential Information" in reaching out to his former Fidelity customers after he joined UBS, the issue is something of a red herring given that the second sentence of Paragraph 6 of that Agreement expressly precludes Mr. Callinan from "directly or indirectly … solicit[ing] in any manner or induc[ing] or attempt[ing] to induce any customer or prospective customer with whom [he] had personal contact or about whom [he] otherwise learned" while he was employed by Fidelity irrespective of whether he were to use Fidelity's "Confidential Information" in doing so. Employment Agreement, ¶ 6. Thus, *any* "solicitation" by Mr. Callinan of his former Fidelity clients within a year of his departure would constitute a violation of his Employment Agreement.

Second, to the extent that it remains significant, Paragraph 1 of Mr. Callinan's Employment Agreement expressly defines "Confidential Information," in part, as "all information pertaining to the business of any of the Fidelity Companies that is not generally known to the public at the time [it is] made known to [the] Employee," including, without limitation, "customer, prospect, vendor, and personnel lists…." Employment Agreement, ¶ 1. Fidelity contends, and Defendants do not dispute, that the *identity* of Fidelity's customers is not publicly available information. As explained by Fidelity,

> Fidelity's trade secret customer data includes the names of and contact information for Fidelity customers, and includes financial information relating to those customers, such as customer financial statements, investment goals, investment history, assets, income, and net worth. Although certain information might be publicly available -- such as an individual's name or published home telephone numbers -- only a limited number of Fidelity employees know who among the general public are Fidelity customers, and therefore have a specific need for investment services.

Collamati Aff., ¶ 12.

Fidelity also contends, and Defendants do not dispute, that Mr. Callinan only became aware of the particular Fidelity clients he served through his work at Fidelity. *Id.* ("It is only by servicing these individuals on behalf of Fidelity that [Mr. Callinan] was able to learn that these customers have significant investable assets and were interested in investment services."). Thus, the identity of Mr. Callinan's former Fidelity clients falls squarely within the definition of "Confidential Information" set out in Mr. Callinan's written Employment Agreement.

This result is not changed by the fact that Mr. Callinan walked out of Fidelity's offices with the names of most, if not all, of his former clients stored only in his memory, as opposed to written on a piece of paper or saved to a computer flash drive. The manner in which confidential information is retained by a former employee does not affect whether the information itself is, in fact, confidential. If the identity of Fidelity's clients constitutes "Confidential Information" when the information is embodied in written form, such as a customer list, it remains confidential when it resides in the memory of a former employee, such as Mr. Callinan. As clearly stated by the Massachusetts Supreme Judicial Court ("SJC"), "the fact that no list or paper was taken does not prevent the former employee from being enjoined if the information which he gained through his employment and retained in his memory is confidential in nature."[6] *Jet Spray Cooler, Inc. v. Crampton*, 361 Mass. 835, 840 (1972). The Court therefore finds that the identity of Fidelity's clients is, in fact, "Confidential Information" for purposes of Mr. Callinan's Employment Agreement regardless of the form in which the information exists or the manner in which it is stored.

2. <u>Did Mr. Callinan's Conduct in Reaching Out to His Former Fidelity Clients Constitute Impermissible "Solicitation"?</u>

Mr. Callinan and UBS further argue that Mr. Callinan's efforts to reach out to his former Fidelity clients after he joined UBS did not violate the terms of his Employment

[6] The Court finds unpersuasive Mr. Callinan's citations to other contrary (or allegedly contrary) Massachusetts cases, including *Fidelity Brokerage Services LLC v. Moore*, No. 1584CV00609-BLS1 (Mass. Super. March 18, 2015) (Kaplan, J.) ("*Moore*"); *ABM Indus. Groups, LLC v. Palmarozzo*, No. 1784CV00819-BLS2 (Mass. Super. March 30, 2017) (Salinger, J.); and *The Gillette Co. v. Provost*, No. 1584CV00149-BLS2 (Mass. Super. June 9, 2017) (Salinger, J.). For example, the Court did not hold in *Moore* that, once confidential information is memorized, it no longer is eligible for legal protection. Rather, the Court held that the defendant's (that is, Mr. Moore's) "memory of the names of the customers with whom he had relationships while at Fidelity" was information that "cannot be protected in perpetuity, which is, no doubt, why Moore's employment agreement contains a one year solicitation provision" (as does Mr. Callinan's Employment Agreement). *Moore,* slip op. at 4. *ABM Indus.* and *Gillette*, in turn, cite and rely upon the SJC's decision in *American Window Cleaning Co. of Springfield, Mass. v. Cohen*, 343 Mass. 195 (1961), which was impliedly, if not expressly, called into question by the SJC's more recent decision in *Jet Spray Cooler*, 361 Mass. at 840.

Agreement because Mr. Callinan was legally entitled to "announce" his departure from Fidelity. This Court has explicitly recognized in numerous prior cases that a financial advisor may notify a client that he or she has left his or her former employer and will continue to provide advisory services through a new employer without such notice being deemed a "solicitation." See, e.g., *Getman v. USI Holdings Corp.*, 2005 WL 2183159, at *4 (Mass. Super. Sept. 1, 2005) (Gants, J.) ("It is not solicitation when an insurance agent, prior to or immediately after his termination, notifies his clients … that he is leaving his insurance company and joining another insurance company, and provides them with his new address, telephone number, and email address."); *Fidelity Brokerage Services LLC v. Djelassi*, No. 1584CV02337-BLS1, slip op. at 6 (Mass. Super. Aug. 11, 2015) (Leibensperger, J.) ("*Djelassi*") (observing that, had defendants "sent a mere announcement of their new employment and location [to their former Fidelity customers], it is unlikely that Fidelity could obtain an injunction"). See also *Smith Barney Div. of Citigroup Glob. Markets Inc. v. Griffin*, 2008 WL 325269, at *3-4 (Mass. Super. Jan. 23, 2008) (Gants, J.) ("*Griffin*"); *Moore*, slip op. at 5-6. As then Superior Court Judge, now SJC Chief Justice, Ralph D. Gants explained in *Griffin*,

> the enforcement of the confidentiality and non-solicitation provisions [of an employment contract] punishes the clients of the departing financial advisors, many of whom have relied upon the advice of their financial advisor for many years in deciding how to invest their life savings. If these provisions are enforced to the letter, as is generally sought by the jilted financial services company, the clients' financial advisor one day simply disappears without warning. The financial advisor cannot inform her clients by telephone, letter, or email of her impending departure before she resigns because the financial services company deems this a misuse of confidential customer information. The financial advisor cannot inform them by telephone, letter, or email of her departure after she has resigned because she is not allowed to take with her the client information that would allow her to know each former client's telephone number, home address, or email address. If a client were to call the financial advisor's former telephone number at the company looking for her, the client generally is simply told that she has left the company, without explaining why she left or where she has gone. A more sinister firm might imply that the financial advisor had been fired or forced to resign or otherwise left under a cloud. If the client succeeds in tracking down where his former financial advisor has gone

> and reaches her at her new firm, the financial advisor must be extremely cautious in what she says, lest she be found to have solicited the client's business in violation of her non-solicitation agreement. This is hardly the way any client would wish to be treated, especially by a trusted financial advisor, yet it is precisely how these clients would be treated by financial services companies if their motions for preliminary injunctions were granted.

Griffin, 2008 WL 325269, at *3.

Fidelity argues that the reasoning and holding of *Griffin* no longer should apply in this internet-saturated world where, "'when a customer learns that a financial consultant is no longer at Fidelity, it likely takes a matter of seconds for such customer to find the financial consultant at his new location.'" Plaintiff's Supplemental Memorandum in Support of its Motion for a Preliminary Injunction (Docket Entry No. 12.0) at 16, quoting *Djelassi*, slip op. at 7 (added emphasis omitted). This argument, however, assumes a level of internet savvy that not all passive investors may possess, and it ignores the potential false implication of wrongdoing concern identified by Judge Gants in *Griffin*, *supra*. The Court therefore concludes, in keeping with prior Business Litigation Session precedent, that a financial advisor's simple "announcement" to his or her former clients of a change in the advisor's place of employment is not, by itself, a "solicitation." *Getman*, 2005 WL 2183159, at *4; *Djelassi*, slip op. at 6.

The challenge in this (and any other) case then becomes discerning a permissible "announcement" from an impermissible "solicitation." That line may be a difficult one to draw in certain instances, but not here. In this case, the Court finds that Mr. Callinan's conduct in reaching out to his former Fidelity customers went well beyond "merely announcing" his move to UBS. Indeed, the manner in which Mr. Callinan reached out to his former clients (*i.e.*, primarily by telephone), the extended period of time during which he did so (*i.e.*, approximately four months), the relatively low level of interest that his former clients needed to show when contacted in order to elicit an immediate sales pitch for UBS from Mr. Callinan (*i.e.*, merely "ask[ing] why Mr. Callinan had left Fidelity"), and the actual content of Mr. Callinan's client communications as reflected in Fidelity's "Salesforce" system notes and interview excerpts, as well as in Mr. Callinan's own deposition testimony (*e.g.*, that Mr. Callinan was proactively soliciting meetings with former clients and telling them, among other things, that he felt he "had a conflict of interest at Fidelity because [he] had to sell certain products") leads the Court to believe, by a preponderance of the evidence, that Mr. Callinan's client calls were effectively solicitations wrapped in the thin veneer of an announcement. The calls were not intended simply to "provide [Mr. Callinan's former Fidelity clients] with his new contact information" as he suggests (Defendant's Opp. at 4) but rather to create an almost

certain opportunity for Mr. Callinan to persuade them to transfer their investment accounts to UBS regardless of whether they had a genuine interest in doing so. Accordingly, it is fair and appropriate to characterize Mr. Callinan's calls to his former Fidelity clients as "solicitations" for purposes of Mr. Callinan's Employment Agreement.[7]

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[7] The Court notes that this is not the first case of this kind to be filed in the Business Litigation Session of the Superior Court, nor is it likely to be the last. More than seventeen years ago, Judge Allan van Gestel, sitting in this session, said,

> [t]his Court has heard many of these kinds of cases. The pattern is similar in all cases. A stock broker, or person seeking to become a stock broker, joins a brokerage house, signs a non-solicitation agreement and also agrees to keep certain information confidential. After a period of time, the broker, often solicited by a competing brokerage, decides to leave his employing-brokerage for the competition down the street. Without prior warning, the broker resigns at the end of the day on Friday and is up and running at his new employer by Monday morning. These brokers move around with astounding frequency, and the whole industry knows it….
>
> What follows is a race to the Court by the jilted brokerage seeking injunctive relief, all in anticipation of industry-mandated arbitration….

UBS Paine Webber Inc. v. Dowd, 2001 WL 1772856, at *1 (Mass. Super. Nov. 29, 2001). See also *Griffin*, 2008 WL 325269, at *2 (stating that "[judges] in the Business Litigation Session have struggled for many years with various motions, such as this, brought by financial service companies seeking preliminary injunctions that would prohibit their departing financial advisors from taking any client information with them and from soliciting their former clients to transfer their accounts to the new firm.").

The greatest difficulty posed for the Court by these types of cases often involves, as it does here, differentiating between a departing financial advisor's permissible "announcement" of his or her change in employment to his or her former clients on the one hand and an advisor's impermissible efforts to "solicit" his or her former clients to transfer their investment accounts to the advisor's new place of business on the other. As this case makes clear, verbal departure announcements are innately problematic because they are rarely preserved and, thus, fail to provide any assurance to the jilted employer or the Court that the announcement was not, in fact, a solicitation. See *Djelassi*, slip op. at 6 (noting that defendant financial advisors who contacted their former customers by telephone necessarily "[left] what was said to inference and imperfect memory"). Verbal departure announcements also are problematic because they can easily veer into prohibited solicitation. See *id.* ("It is a reasonable inference that the [advisors'] calls likely proceeded beyond 'I am at [a new brokerage firm] and here is my address. Good-bye.'"). Even without explicit prompting, clients are likely to respond to a call from their financial advisor announcing his or her departure in a manner that offers the advisor a convenient excuse to launch into a sales pitch for his or her new employer, as appears to have happened in this case.

The situation is, however, different if the financial advisor makes his or her departure announcement in writing. There can be no doubt in such circumstances of the precise substance of the communication to the advisor's former clients and the presence, or lack, of any impermissible solicitation. Moreover, unlike a telephone call, a written announcement "does not invite further communication with the client unless the client initiates that communication." *Getman*, 2005 WL 2183159, at *4.

3. Does the Risk of Irreparable Harm to Fidelity Outweigh the Risk of Harm to Mr. Callinan?

The Court is further persuaded that Fidelity would suffer irreparable harm if Defendants were permitted to continue their efforts to persuade Fidelity's clients to jump ship to UBS and that the balance of harms tilts in Fidelity's favor. As previously noted, unlike many investment firms, Fidelity develops its own customer base. If preliminary injunctions like the one requested in this case were not granted and Fidelity's non-solicitation prohibition was left unenforced, Fidelity's business model and its customer goodwill would be damaged in ways that are not easily quantifiable. See *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 18-19 (1st Cir. 1996) ("If the plaintiff suffers a substantial injury that is not accurately measurable or adequately compensable by money damages, irreparable harm is a natural sequel.") (internal citations omitted). See also *Kroeger v. Stop & Shop Cos.*, 13 Mass. App. Ct. 310, 322 (1982) ("the task of quantifying the consequences of violating a noncompetition clause is a particularly difficult and elusive one"); *Bowne of Boston, Inc. v. Levine*, 1997 WL 781444, at *5 (Mass. Super. Nov. 25, 1997) (Burnes, J.) ("the loss of goodwill has been recognized as being particularly hard to quantify, giving rise to the need for equitable relief").

This threat of irreparable harm to Fidelity greatly outweighs any harm that Mr. Callinan or UBS may suffer if an injunction enters given that Mr. Callinan remains free, while the parties' dispute is still pending, to work at UBS, to service existing UBS clients, and to pursue new clients whom he had no knowledge of while he worked at Fidelity. By agreement of the parties and the Court's Injunction Order, Mr. Callinan and UBS also remain free, while the parties' dispute is pending, to,

> communicat[e] with or provid[e] financial or investment services to Fidelity customers who have already transferred their accounts to UBS, or who do so or seek to do so completely on their own initiative in the future …. [and] to

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Thus, the Court believes that the best practice for a departing financial advisor to follow is to send his or her former clients a brief letter or e-mail informing the client of the advisor's departure and providing the client with the advisor's new firm, phone number, e-mail address, and physical address. See, e.g., *Fidelity Brokerage Services LLC v. Wilder*, No. 1184CV03729, slip op. at 3 (Mass. Super. Oct. 13, 2011) (McIntyre, J.) (issuing injunction against defendant financial advisor and noting that "[h]ad the defendant[] chosen to use 'wedding style' announcements ... and his clients nonetheless followed him, the outcome here might be different.") (internal citation omitted); *Djelassi*, slip op. at 6 (noting that had defendants "sent a mere announcement of their new employment and their location [to their former clients], it is unlikely Fidelity could obtain an injunction"). Anything beyond a written announcement, however, can and should be viewed by the courts with great suspicion.

> respond to inquiries directed to them by Fidelity customers, on the customer's own initiative, on or after October 3, 2018.

Injunction Order, ¶ 5. Thus, the harm resulting to Mr. Callinan and UBS from Fidelity's requested injunction is negligible, at best, and issuance of the Court's corresponding Injunction Order was warranted.[8]

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Brian A. Davis
Associate Justice of the Superior Court

Date: February 7, 2019

[8] To the extent that an explicit finding is necessary, the Court also finds that issuance of an injunction in the circumstances of this case serves the public interest as the public has a strong interest in ensuring the protection of a company's hard-earned goodwill through the enforcement of confidentiality and non-solicitation agreements. See, e.g., *HealthDrive Corp. v. Chall, D.D.S.*, 2000 WL 33967781, at *5 n.2 (Mass. Super. Feb. 9, 2000) (Burnes, J.) (protection of goodwill is "consistent with public interest").