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EDWARD D. JONES & CO., L.P. Plaintiff, vs. JAMES P. FARRELL, Defendant.	**SUPERIOR COURT OF NEW JERSEY** LAW DIVISION: BERGEN COUNTY DOCKET NO. C-116-19 CIVIL ACTION

DEFENDANT JAMES P. FARRELL'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF EDWARD JONES'S MOTION FOR AN ORDER TO SHOW CAUSE GRANTING TEMPORARY RETRAINTS AND A PRELIMINARY INJUNCTION

PRELIMINARY STATEMENT

Defendant James P. Farrell ("Defendant" or "Mr. Farrell") hereby submits his opposition to Plaintiff Edward D. Jones & Co., L.P.'s ("Plaintiff" or "Edward Jones") Motion for Temporary Restraints and Preliminary Injunction. Mr. Farrell is a registered financial advisor formerly employed by Edward Jones.[1] On March 1, 2019, Mr. Farrell resigned from Edward Jones to join a new firm, Ameriprise Financial Services, Inc. ("Ameriprise"). *Id.*, ¶ 18.[2]

Nearly two months later, on April 25, 2019, Edward Jones commenced an arbitration before the Financial Industry Regulation Authority ("FINRA") against Mr. Farrell and his new financial firm, Ameriprise Financial Services, Inc. ("Ameriprise") in accordance with the terms of his Financial Advisor Employment Agreement with Edward Jones (the "Employment Agreement").[3] With no basis in fact whatsoever, Edward Jones alleges that Mr. Farrell took trade secrets or other confidential information from Edward Jones and solicited his former clients, clients that Mr. Farrell introduced to Edward Jones, to join him at Ameriprise.

The following day, on April 26, 2019, Edward Jones commenced this action for the sole purpose of seeking the extraordinary relief of temporary restraints and a preliminary injunction to restrain Mr. Farrell from conducting business as a financial advisor at Ameriprise and servicing his long-time clients that naturally followed him there. By FINRA rule, applications for emergency relief must be brought in a court of competent jurisdiction. *See* Pl. Mem. at pp. 9-10 (*citing* FINRA Rule 13804(b)(1)). Again, with no basis in fact whatsoever, and a full ***56 days*** after Mr. Farrell resigned, Edward Jones alleges that it will suffer immediate and irreparable

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[1] *See* Affidavit of James Paul Farrell, sworn to on May 1, 2019, hereinafter "Farrell Affidavit," ¶¶ 2, 18.

[2] Farrell Aff., ¶ 18. *See also* Plaintiff's Memorandum of Law in Support of Temporary Restraints and Preliminary Injunction filed with the Court on April 26, 2019, hereinafter "Plaintiff's Memorandum," pp. 9-11.

[3] *See* Edward Jones' Statement of Claim, dated April 25, 2019, in the matter *Edward D. Jones & Co., L.P. v. James Paul Farrell (CRD # 5828077) and Ameriprise Financial Services, Inc.*

damage unless this Court enters a temporary restraining order and a preliminary injunction pursuant to New Jersey Rule 4:52-1(a) to, *inter alia*, restrain Mr. Farrell from conducting business at Ameriprise and servicing his long-time clients while the FINRA arbitration is litigated. For the reasons set forth herein, the extraordinary relief sought by Edward Jones from this Court should be denied.

First, the fact that Edward Jones seeks emergency injunctive relief from this Court nearly ***two months*** after Mr. Farrell resigned from Edward Jones, purportedly took confidential information, and solicited clients is fatal to its motion for emergency relief. As a matter of law, Edward Jones cannot demonstrate that it would suffer "immediate and irreparable damage" if the Court does not grant its motion. N.J. Rule 4:52-1(a). Indeed, the conduct Plaintiff alleges should be restrained occurred "***[w]ithin four days of his employment by Ameriprise***" and specifically from March 1 to March 4, 2019, Mr. Farrell "had called the majority of his former Edward Jones clients and sent voluminous packages of account transfer forms and solicitation materials to former Edward Jones clients he had serviced, encouraging and directing them to open accounts with Ameriprise." Pl. Mem. at p.2. *See also id.* at p. 6. Since the conduct that Edward Jones seeks to enjoin allegedly occurred in the "four days" after he resigned from Edward Jones on March 1, 2019, it is simply unconscionable for Edward Jones to ask this Court to grant it emergency relief enjoining this exact conduct now, ***eight weeks later***. Notably, Edward Jones does not explain the reason for its two-month delay in seeking emergency relief or what purpose an injunction could possibly serve at this late date if the "majority" of Mr. Farrell's clients allegedly were contacted within "four days" of his resignation on March 1, 2019.

Second, the injunction sought by Edward Jones would greatly and unjustly impair Mr. Farrell's ability to earn a living. The temporary restraining order and injunction proposed by

Edward Jones spans six pages and includes more than 20 paragraphs with subparts. It is extremely overbroad and in no way focused to prevent any discernable immediate and irreparable harm to Edward Jones (which Edward Jones has failed to allege in any event). To the contrary, Plaintiff appears to be asking this Court to stop Mr. Farrell and anyone he works with at Ameriprise from having contact with any client "with whom [he] had contact, involvement, or responsibility [for] during [his] employment with Edward Jones and/or about whom [he] learned Edward Jones' proprietary or trade secret information . . ." Order to Show Cause with Temporary Restraints Pursuant to Rule 4:52, pp. 1-3. If such an Order were entered, Mr. Farrell would not be able to service his longtime clients who rely on him to manage their day-to-day finances. He also would not be able to generate revenue for the business that he has built. Notably, Mr. Farrell is the primary source of income for his wife, two children, and a baby on the way. Farrell Aff., ¶¶ 2-3. Thus, the balance of hardships on this motion for injunctive relief unquestionably tips in his favor.

It bears emphasis that by this application, Edward Jones is seeking to improperly impede Mr. Farrell from servicing any and all clients at his new firm that he previously serviced at Edward Jones even though those clients have the absolute right to leave Edward Jones. *See* Order to Show Cause with Temporary Restraints Pursuant to Rule 4:52, pp. 1-3. Indeed, in most instances, clients who had been with Mr. Farrell for years expressed their very strong desire to continue working with him at his new firm. Farrell Aff., ¶ 21-22. Edward Jones seeks to do this in order to keep these clients for itself and to minimize the assets under management that it loses as a firm as a result of Mr. Farrell's decision to leave Edward Jones as is his right.

Moreover, Edward Jones' attempt to impede Mr. Farrell's business months after he resigned from the firm is particularly unjustified because, like many local, individual financial

advisors who live and work in their communities, Mr. Farrell built up his book of business though his own individual marketing efforts. As detailed in his Affidavit, he has built up his client base through family, friends, neighbors, his longtime memberships in civic groups, volunteer positions, church membership, and activities that he participates in with his children such as Boy Scouts and soccer. Farrell Aff., ¶¶ 3-16. Mr. Farrell has cultivated these client relationships in his community during his nearly ten years as a trusted financial advisor. In fact, no one else at Edward Jones has ever even spoken with these clients. *Id.*, ¶ 5, 7.

Third, although Edward Jones seeks the extraordinary relief of an injunction and temporary restraints to stop Mr. Farrell from conducting business at his new firm, Edward Jones has not submitted a shred of credible evidence to this Court to support its allegations of misappropriation and solicitation. Thus, Edward Jones fails to satisfy the requirement of Rule 4:52-1(a) to present "specific facts shown by affidavit or verified complaint that immediate and irreparable damage" will occur. N.J. Rule 4:52-1(a). In the absence of this required evidence, Edward Jones submits Certifications by no less than five Edward Jones' employees which consist almost entirely of inadmissible hearsay and contain inappropriate inferences by the affiants based upon what they appear to have been told by Edward Jones to say. Notably, as set forth below, the Certifications contradict one another on key points and therefore are inherently unreliable. Moreover, it is beyond dispute that the Edward Jones' representatives have a vested interest in keeping Mr. Farrell's clients for themselves. For example, the new financial advisor assigned to Edward Jones' Englewood Cliffs, New Jersey branch, Todd A. Claytor ("Mr. Claytor"), appears to have less than six months of experience as a financial advisor and joined Edward Jones in October 2018.[4] Therefore, he is highly incentivized to pick off Mr. Farrell's

[4] A copy of Mr. Claytor's LinkedIn page obtained by undersigned counsel on April 29, 2019, which is annexed to the Affidavit of James E. Heavey, sworn to on May 2, 2019, as **Exhibit A**.

clients to start to build his own client base if he can convince them not to leave Edward Jones to follow Mr. Farrell to Ameriprise. Other employees are biased because, among other things, Mr. Farrell declined their request to join him at Ameriprise after he left Edward Jones. *Id.*, ¶ 28.

Most significant, however, is the fact that none of the five Edward Jones' employees that signed Certifications in support of the injunction has made a single statement attesting to immediate and irreparable harm that will befall Edward Jones now if its motion for an injunction nearly two months after Mr. Farrell resigned from the firm is denied. Obviously, these witnesses did not swear to any purported harm because none exists.

Fourth, the extraordinary relief of a preliminary injunction is not warranted here because the purported harm that Edward Jones claims it will suffer without an injunction indisputably can be redressed by monetary damages. Indeed, by its own claims, Edward Jones is seeking an injunction because it has allegedly already "[lost] client relationships representing over **$18 Million** in client account assets" and "[w]ithout the injunctive relief requested herein, Edward Jones stands to lose additional clients, accounts and assets, as well as the confidence and good will of its clients." Pl. Mem. at p. 2. This statement could not be clearer proof that the harm alleged by Edward Jones in this case is purely monetary and therefore an injunction is inappropriate pursuant to governing law. Surely, the purported loss of "confidence and good will" of clients previously serviced by Mr. Farrell is far outweighed by the fact that Edward Jones is a huge, well-known, national financial services company with hundreds of offices and thousands of employees.

Accordingly, for the reasons set forth herein, Edward Jones' motion for the extraordinary relief of a temporary restraints and/or a preliminary injunction that would restrain Mr. Farrell from conducting business as a financial advisor at his new firm, Ameriprise, must be denied and

the lawsuit that Edward Jones has commenced solely for this purpose should be terminated. There is no immediate and irreparable harm requiring an order from this Court and Edward Jones is already pursuing the same claims in the FINRA arbitration that it commenced against Mr. Farrell and Ameriprise last week.

SUMMARY OF RELEVANT FACTS

Mr. Farrell has had a nearly 10-year-career in the securities industry. Farrell Aff., ¶¶ 2-4. Since November of 2010, Mr. Farrell has successfully built strong client relationships through his individual marketing efforts throughout his community. *Id.*, ¶ 6. He resides in Ringwood, New Jersey with his wife, two children, and a baby on the way. *Id.*, ¶ 2-3. He has been the primary source of income for his family for seven (7) years. *Id.*

Mr. Farrell's marketing efforts have been ongoing for nearly a decade and have consisted of identifying prospective clients from family, friends, various local community organizations and not-for-profit groups that he is personally affiliated with, and local business owners. *Id.*, ¶ 6-7. As a result of his efforts, Mr. Farrell grew his business to approximately $62 million in assets under management for about 140 households. *Id.*

Mr. Farrell began his career in 2010 when he was sponsored by a firm named AXA Advisors, LLC to get his Series 7 License. *Id.*, ¶ 4. During this time, Mr. Farrell was approached by an Edward Jones representative and recruited to join the firm, which he did in or about April of 2011. *Id.* Edward Jones business model, unlike many competitors in the industry, consists of small individual offices, such as Mr. Farrell's former office in Englewood Cliffs, New Jersey, where advisors work with their clients exclusively. *Id.*, ¶ 5.

As a direct result of his personal network and reputation in the community, with little input or assistance from Edward Jones, Mr. Farrell expanded referral sources through family and

friends and his longtime participation in various social organizations, community groups, volunteer positions in not-for-profit grounds, and referrals from people in complementary industries, such as local accountants, which contributed to significant growth of his business. *Id.*, ¶¶ 7-18. Indeed, no other advisors worked with Mr. Farrell's clients while he was at Edward Jones. *Id.*, ¶ 6. Mr. Farrell built his client base through organizations to which he has belonged to for many years and which have led to the development of his local client base. They include: (i) Mr. Farrell's church, which he has been a member of for the past sixteen (16) years (*id*, ¶ 16); (ii) his wife's church of which she has been a member for the past ten (10) years (*id.*, ¶ 17); (iii) community groups that he joined approximately five (5) years earlier to follow in his father's footsteps, such as the Rotary Club, Lions Club, and the Englewood Chamber of Commerce (*id.*, ¶¶ 10-12); (iv) volunteer positions such as joining the Board of Directors for the Flat Rock Brook Nature Center, a 150-acre nature preserve and environmental education center in Englewood, New Jersey (*id*., ¶ 13) and (v) his children's activities such as the local chapter of the Boy Scouts of America and his son's soccer team (*id.*, ¶¶ 14-15).

As a result of his substantial efforts over the last nine years, Mr. Farrell has created a substantial book of business in his community without the benefit of referrals, introductions, team arrangements or succession agreements from Edward Jones. *Id.*, ¶ 8. During the time he was employed by Edward Jones, however, Mr. Farrell was a loyal and profitable producer for Edward Jones who generated significant revenue for the firm due to his own diligent marketing efforts in his community. *Id*., ¶¶ 8, 19. Indeed, Edward Jones has very little knowledge of Mr. Farrell's client base. *Id.*, ¶¶ 8,

On March 1, 2019, Mr. Farrell resigned his employment with Edward Jones to join Ameriprise as a financial advisor with his office located in Paramus, New Jersey. *Id.*, ¶ 18.

Prior to his resignation, Mr. Farrell did not discuss his upcoming transition to Ameriprise with his Edward Jones clients. *Id.*, ¶ 19. Furthermore, Mr. Farrell did not print, download or retain client information from Edward Jones or rely on information developed at Edward Jones to assist him after his resignation from Edward Jones. *Id.*, ¶¶ 25-26.

After his resignation, Farrell contacted his clients in order to announce his new affiliation with Ameriprise (the "Announcement"). *Id.*, ¶ 21. This Announcement is a standard industry practice across the financial services world. *Id.,* ¶ 22. Edward Jones itself participates in the practice when they recruit experienced advisors who join the company with their clients. *Id.* A copy of the Telephone Script for Notifying Clients of Move to Edward Jones is annexed to Mr. Farrell's Affidavit. *Id.* at Ex. A. As Mr. Farrell attests, the Edward Jones' script is the sum and substance of the contacts he made with his clients to give his Announcement when he moved to Ameriprise. *Id.,* ¶ 22.[5] Furthermore, when contacting former Edward Jones clients, Mr. Farrell only contacted individual clients whose information he could obtain from publicly available sources such as www.whitepages.com and Google. *Id.*, ¶ 19.

After Mr. Farrell's resignation, Edward Jones sent a FINRA notice called an Informed Investor Communication to his clients to notify them of what to do when a financial advisor changes firms and specifically encouraging them to consider a FINRA flier to help them decide where to keep their assets. *Id.*, ¶ 23. The flier is required to be sent by FINRA when an advisor changes firms. *Id.* The FINRA flier instructed clients to contact Mr. Farrell and ask various questions regarding his new firm and the impact of the transition on the client relationship. *See* Sample FINRA Flier annexed to Mr. Farrell's Affidavit as Exhibit "B." In the FINRA flier,

[5] Indeed, Edward Jones is well-known within the financial services industry for being an aggressive recruiter of advisors from other broker dealers. See https://www.thinkadvisor.com/2018/01/03/edward-jones-seeking-seasoned-fas-gets-a-recruitin/. A copy of this article is annexed to the Heavey Affirmation as **Exhibit B** for the Court's reference.

Edward Jones advises Mr. Farrell's clients "as a courtesy" that he was now employed by Ameriprise. *Id.* As a result, clients called Mr. Farrell at Ameriprise to ask if he could continue to act as their financial advisor. Farrell Aff., ¶ 24. Therefore, Edward Jones itself made Mr. Farrell's clients aware of where they could find him if they wanted to continue to work with him.

Edward Jones also took several actions to try to stop Mr. Farrell's longtime clients from following him to his new firm, Ameriprise. These efforts include its regular practice of assigning a "Transitional Financial Adviser" to the branch that the advisor left. In this case, Edward Jones assigned Mary-Frances Damico. *See* Certification of Mary-Frances Damico in Support of the Motion for Temporary Restraints and a Preliminary Injunction, sworn to on April 8, 2019 (hereinafter the "Damico Certification"), ¶ 2. Ms. Damico appears to be an Edward Jones' financial advisor from Grand Rapids, Michigan.[6] She had no prior contact with any of Mr. Farrell's longtime client base in New Jersey before his resignation from Edward Jones. Farrell Aff., ¶ 30. According to her Certification, Ms. Damico arrived at Mr. Farrell's former branch on the next business day after his resignation, which was March 4, 2019, and proceeded to contact his clients to notify him that he left Edward Jones and to advise them that their accounts will be serviced during the transition. Damico Certification, ¶¶ 2-3. As Ms. Damico concedes in her Certification, on the first day that she contacted clients, "most" of Mr. Farrell's clients had not heard that he left Edward Jones. *Id*, ¶ 4. Of course, Mr. Farrell's longtime clients would certainly have inquired of Ms. Damico, a stranger, where Mr. Farrell went after she contacted them. They would also learn that Mr. Farrell went to Ameriprise from the FINRA flier that Edward Jones was sending to all of his clients after he left. *See* Sample FINRA Flier at Ex. B to Farell Aff.

[6] A copy of Ms. Damico's webpage obtained by undersigned counsel on April 29, 2019 from the Edward Jones' website is annexed to the Heavey Affidavit as **Exhibit C**.

Edward Jones also assigned a permanent financial adviser to replace Mr. Farrell at the Englewood Cliffs branch. *See* Certification of Todd A. Claytor in Support of the Motion for Temporary Restraints and a Preliminary Injunction, sworn to on April 10, 2019 (hereinafter the "Claytor Certification"), ¶ 2. Of course, Mr. Claytor would have no personal knowledge about Mr. Farrell's clients or relationships with them prior to his assignment to the branch. Indeed, according to his LinkedIn page, Mr. Claytor's experience is in trading commodities.[7] He apparently has approximately six months of experience as a financial adviser since joining Edward Jones in October of 2018. *Id.*

Not surprisingly, after Mr. Farrell's clients received calls from Ms. Damico and Mr. Claytor, whom they had never spoken with before, many of them contacted him at Ameriprise as directed by the FINRA flier to determine the status of their investments and to and/or request the opportunity to continue to work with Mr. Farrell. Farrell Aff., ¶ 35. As Mr. Farrell states, several of his clients advised him that they had spoken with or met with the new financial representative, Mr. Claytor, and asked to continue to work with Mr. Farrell. *Id*., ¶ 36.

On each occasion that Mr. Farrell spoke with clients, he provided at the clients' request truthful information regarding their choices and ability to continue to work with him as their financial advisor. *Id.* Mr. Farrell did not, under any circumstances, solicit any clients that he originated while employed with Edward Jones. *Id.*, ¶ 37. Instead, he simply informed his former clients about his transition to Ameriprise according to the same Announcement script used by Edward Jones (*see* Ex. A to Farrell Aff.) and answered their questions as accurately as he could. *Id.*, ¶¶ 35-37. He did not disparage Edward Jones or its employees to anyone, including to

[7] A copy of Mr. Claytor's LinkedIn page obtained by undersigned counsel on April 29, 2019 is annexed to the Heavey Aff. as **Exhibit B**.

former clients. *Id.*, ¶ 38. He also did not send information to clients unless they specifically requested that information from him. *Id*., ¶ 21.

Nonetheless, a full ***eight weeks*** after his resignation, Edward Jones now brings this action against Mr. Farrell. At all times, Mr. Farrell has complied with his post-employment to Edward Jones. Mr. Farrell is simply at a loss as to why, some two months after his resignation, Edward Jones has opted to seek emergency relief via TRO, particularly since none of the representatives that submitted Certifications attest to any immediate and irreparable damage as required by New Jersey Rule 4:52-1(a) for the injunctive relief that it seeks. Indeed, they all concede that the conduct that they complain of occurred in the days after Mr. Farrell resigned on March 1, 2019. None of them allege that the alleged use of confidential information (which has become stale at this point at any rate) or the purported solicitation is ongoing. Indeed, the new financial advisor that has replaced Mr. Farrell at the Englewood Cliffs branch specifically says that "[e]ffectively all clients who've discussed Farrell said they have been contacted by him." Claytor Cert., ¶ 3.

Specifically, in support of its application, Edward Jones submits the following certifications from its representatives: (i) the Certification of Melanie Boehne in Support of the Motion for Temporary Restraints and a Preliminary Injunction, sworn to on April 25, 2019 (hereinafter the "Boehne Certification"). She is a "General Partner" of Edward Jones who has zero knowledge of any confidential information supposedly misappropriated by Mr. Farrell or any clients that have been purportedly solicited by Mr. Farrell. *See* Boehne Cert., ¶¶ 2-16; (ii) the Damico Certification discussed above; (iii) the Puentes Certification discussed above; (iv) the Claytor Certification discussed above; and (v) the Mangano Certification discussed above. Again each of these representatives all concede that the conduct that they complain of occurred in the days after Mr. Farrell resigned on March 1, 2019 and none of them allege that the alleged

use of confidential information (which has become stale at this point at any rate) or the purported solicitation is ongoing.

ARGUMENT

I.

LEGAL STANDARD

When seeking preliminary injunctive relief, "the movant bears the burden of demonstrating: (1) irreparable harm is likely if the relief is denied; (2) the applicable underlying law is well-settled; (3) the material facts are not substantially disputed and there exists a reasonable probability of ultimate success on the merits; and (4) the balance of the hardship to the parties favors the issuance of the requested relief." *Blue Tower (USA), LLC v. IMEX Trading, Inc., et al.*, BER-C-231-06, 2006 WL 21296771, at *4 (N.J. Super. Ch. Div., Bergen County, July 28, 2006) (citing *Crowe v. De Gioia*, 90 N.J. 126, 132-134 (1982)); *see also Am. Employers' Ins. Co. v. Elf Atochem N.A., Inc.*, 280 N.J.Super. 601, 610–11 n. 8, 656 A.2d 58 (N.J. App.Div.1995). Indeed, extraordinary relief of a preliminary injunction "should not be entered except when necessary to prevent substantial, immediate and irreparable harm" that cannot be redressed by money damages. *Subcarrier Commun., Inc. v. Day*, 691 A.2d 876, 878–79 (N.J. Super. App. Div. 1997) (citing *Citizens Coach Co. v. Camden Horse R.R. Co.*, 29 N.J. Eq. 299, 303–04 (E. & A. 1878)). Furthermore, each of the four elements must be met by the movant, or the claim will fail. *P.C. Yonkers, Inc. v. Celebrations the Party & Seasonal Superstore, LLC*, 428 F.3d 504, 508 (3d Cir. 2005) (citation omitted) (injunctive relief will not be granted unless the movant establishes "every element in its favor"). Clearly, Edward Jones cannot meet this heavy burden in the instant action, and injunctive relief should be denied. Edward Jones cannot satisfy the stringent requirements for obtaining such extraordinary relief. Moreover, as set forth below, where the material facts are heavily disputed, as is the case here,

many courts will not issue a preliminary injunction. See e.g., *AT&T Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 (3d Cir. 1994); *Crowe v. De Gioia*, 447 A.2d 173, 180 (N.J. 1982).

New Jersey courts have long recognized that where an employer, through superior bargaining power, extracts a deliberately unreasonable and oppressive non-competitive covenant, he may not seek, and should not receive, equitable relief from the courts. *Solari Indus., Inc. v. Malady*, 264 A.2d 53, 56 (N.J. 1970); *Ingersoll-Rand Co. v. Ciavatta*, 524 A.2d 866, 868 (N.J. Super. Ct. App. Div. 1987), aff'd, 452 A.2d 879 (N.J. 1988) (noting that post-employment restrictive covenants are subject to scrutiny by the courts in recognition of the difference in bargaining power between the parties).

II.

EDWARD JONES CANNOT SHOW "IMMEDIATE AND IRREPARABLE" HARM

It is undisputed that Mr. Farrell resigned from Edward Jones to join Ameriprise on March 1, 2019. *See* Pl. Mem. at p. 6 (*citing* the Boehne Certification, ¶ 14); Farrell Aff., ¶ 20. Edward Jones did not commence this lawsuit seeking a temporary restraining order and a preliminary injunction until nearly ***two months later*** on April 26, 2019. Having waited ***exactly eight weeks*** to make an application to this Court for a temporary restraining order and preliminary injunction, Edward Jones cannot, as a matter of law, demonstrate that it will suffer "immediate and irreparable damage" if the Court does not grant its motion and in and of itself bars the injunctive relief that it seeks. N.J. Rule 4:52-1(a). Not surprisingly, Edward Jones attempts to quickly skate over this fatal flaw in its brief and can only cite to a "partial collection" of unpublished New Jersey decisions granting injunctions in completely distinguishable circumstances. Pl. Mem. at pp. 9-11.

Plaintiff Edward Jones in this case inexplicably waited two months before making the instant motion for temporary restraint, despite purportedly having knowledge of Farrell's alleged conduct mere days after he left Edward Jones's employ. *See* Damico Cert. at 4-5; Claytor Cert. at 3-4; Mangano Cert. at 4-5. Tellingly, four out of the five Certifications submitted in support of Plaintiff's motion are dated over two weeks before this motion was filed. *See* Damico Cert. (signed April 8, 2019); Claytor Cert. (signed April 10, 2019); Mangano Cert. (signed April 9, 2019); Puentes Cert. (signed April 10, 2019). Indeed, by its own motion papers, the alleged solicitation and purported misuse of confidential information occurred "[w]ithin a few business days" of Mr. Farrell's resignation on March 1, 2019. (*See* Pl. Mem. at 6, stating "[w]ithin a few business days of his resignation, Mr. Farrell had called the great majority of the larger accounts") (*citing* Damico Cert., ¶ 4, Mangano Cert., ¶ 4.) Then, "[o]ver the following week, he worked his way down the list to the smaller and less active accounts." (*Id.*) (*citing* Claytor Cert., ¶ 4.) Moreover, the new financial advisor assigned to Mr. Farrell's former Edward Jones' branch office, Todd Claytor, explicitly states that "[e]ffectively all clients who've discussed Farrell said they have been contacted by him." Claytor Cert., ¶ 4.

Therefore, by its own account, "[e]ffectively all clients" of Mr. Farrell's clients were contacted eight weeks ago. Therefore, Edward Jones is completely estopped from arguing ***eight weeks later*** that it will suffer "immediate and irreparable damage" if the Court does not grant its motion seeking to enjoin Mr. Farrell from "[s]oliciting his former Edward Jones clients to open accounts with him at Ameriprise." Pl. Mem. at p. 2.

Inexcusable delay is routinely held to be dispositive on the issue of irreparable harm, as relatively long delays are incompatible with claims that harm is both immediate and irreparable. *See, e.g.*, *Graceway Pharm., LLC v. Perrigo Co.*, 697 F. Supp. 2d 600, 603 (D.N.J.

2010) (one month delay inexcusable and precludes finding of irreparable harm); *Smart Vent Products, Inc. v. Crawl Space Door System, Inc.*, CV 13-5691 (JBS/KMW), 2016 WL 4408818, at *12 (D.N.J. Aug. 16, 2016) (two month delay "in seeking injunctive relief undercuts the urgency that forms the cornerstone of preliminary injunctive relief–and indeed, indicates a lack of immediacy"); *Comms. Workers of Am. v. Alcatel-lucent USA Inc.*, 15-CV-8143, 2015 WL 7573206, at *3 (D.N.J. Nov. 25, 2015) (two month delay precludes finding of irreparable harm); *Ultimate Trading Corp. v. Daus*, CIV. A. 07-4203 (JLL, 2007 WL 3025681, at *3 (D.N.J. Oct. 15, 2007) (unexcused three month delay precludes finding of immediate irreparable harm); *Chaves v. Intl. Boxing Fedn.*, CV 16-1374 (JLL), 2016 WL 1118246, at *2 (D.N.J. Mar. 22, 2016) (denying preliminary injunction for lack of irreparable harm due to four month delay).

Notably, none of the Edward Jones' representatives attest to any "immediate and irreparable harm" in their Certifications. Certainly, this is because there is none - eight weeks after Mr. Farrell left Edward Jones. Indeed, by now, most of clients have either decided to stay with Edward Jones or followed him to Ameriprise, which is their right. For this reason alone, Plaintiff's request for a TRO and preliminary injunction must be denied.

II.

THE MATERIAL FACTS OF THIS CASE ARE IN DISPUTE AND EDWARD JONES FAILS TO ESTABLISH PROBABLE SUCCESS ON THE MERITS OF ANY OF ITS CLAIMS

As an initial matter, it should be noted that the Certifications submitted by Edward Jones do not comply with statutory law and therefore must be rejected by this Court. Courts have made clear that if a witness submits a certification in lieu of a sworn and notarized affidavit, the certification must strictly adhere to the requirements of Rule 1:4-4(b) of the Rules Governing the Courts of the State of New Jersey (the "Rules"). The certifications must include the precise

language quoted in the statute which is "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment." *Id.* Here, each of the certifications omit the second recitation of statements "made by me" and therefore are deficient as a matter of law.

Additionally, Rule 1:4-4(a) requires that statements made by witnesses outside New Jersey State can only be taken "by a person authorized to take depositions under R. 4:12-2 and R:12-3." N.J. R. 1:4-4(a). Even though at least two of the certifications submitted by Edward Jones are signed by Ms. Damico who is from Michigan and Ms. Boehne, an executive of Edward Jones that in all likelihood is based out of its headquarters in St. Louis, Missouri, neither of these Certifications are properly authenticated by a person authorized to take depositions in their home states in accordance with Rule 1:4-4(a). Accordingly, these Certifications should be rejected by this Court as fatally defective.

In addition to their procedural defects, the Certifications are substantively insufficient to support injunctive relief. Not one of the five witnesses can identify a shred of information that Mr. Farrell supposedly misappropriated from Edward Jones or that he directly solicited any clients. To prevail upon its a claim for misappropriation of trade secrets, Edward Jones must conclusively establish that: "(1) a trade secret exists; (2) the information comprising the trade secret was communicated in confidence by plaintiff to the employee; (3) the secret information was disclosed by that employee and in breach of that confidence; (4) the secret information was acquired by a competitor with knowledge of the employee's breach of confidence; (5) the secret information was used by the competitor to the detriment of plaintiff; and (6) the plaintiff took precautions to maintain the secrecy of the trade secret." *Rycoline Products, Inc. v. Walsh*, 756 A.2d 1047, 1052 (N.J. Super. App. Div. 2000). Here, Edward Jones cannot even establish that

Mr. Farrell took any "secret information" from Edward Jones and therefore cannot demonstrate that it has a meritorious claim of misappropriation.

Indeed, in its brief, Edward Jones argues that Mr. Farrell took "customer files containing customer contact information, social security numbers, produce preferences" and "Customer lists" based on nothing more than the assertion by a temporary employee, Ms. Puentes, that she asked Mr. Farrell for the "illustrations for five term life policies" that she obtained and which she claims Mr. Farrell "did not return [] to the Branch either before or after his resignation." Puentes Cert., ¶ 3. *See* Pl. Mem. at pp. 11-14. The incredulity of the inference made by Edward Jones to even attempt to argue that Mr. Farrell took confidential or trade secret information from Ms. Puentes' statement regarding five "illustrations" that she cannot locate cannot be over-emphasized. As Mr. Farrell states in his Affidavit, the five "illustrations" that Ms. Puentes refers to in her Certification were generated for two families that were clients of Mr. Farrell. Farrell Aff., ¶___. The first family could not purchase the proposed policies because the mother of the family was diagnosed with a pre-existing condition during the process, breast cancer. *Id*., ¶___. The second family rejected the proposed policies because they were too expensive. *Id*. Since there was no opportunity for viable business for Edward Jones from any of these "illustrations," they were destroyed prior to Mr. Farrell's resignation on March 1, 2019 in accordance with Edward Jones' policy. *Id.,* ¶ ____. From these five dead files, Edward Jones extrapolates in its brief that Mr. Farrell must have taken other customer contact information and "Customer lists" in order to get in touch with clients after he resigned from Edward Jones. Pl. Mem. at pp. 14-15.

The allegation that Mr. Farrell misappropriated confidential information from Edward Jones in order to contact clients and send them information about Ameriprise is not just "disputed fact" that precludes injunctive relief in this case; it is an unjustified assumption with no

basis in fact. As Mr. Farrell makes clear in his Affidavit, after his resignation from Edward Jones, he made the standard "Announcement" that is used by Edward Jones itself to announce to his clients that he changed firms. Farrell Aff., ¶ ___. Also, not surprisingly, many of his clients reached out to him after they were notified by Edward Jones that he had left the firm and to request information about his new firm. *Id.*, ¶ __. In fact, the evidence before this court establishes that Edward Jones itself notified Mr. Farrell's clients that he left to join Ameriprise both in writing by sending form letters and in discussions that its representatives had with his clients after they contacted them in an effort to retain the accounts. *See* Ex. ___ to Farrell Aff.; Claytor Cert., ¶¶ 3-4; Damico Cert., ¶ 4; Mangano Cert., ¶¶ 3-5. Therefore, the injunctive relief sought by Edward Jones is unwarranted because there is proof that directly refutes the alleged improper solicitation of clients.

Moreover, courts around the country ruling in financial services cases have held that informing customers of a change of affiliation like Mr. Farrell did in this case is not an improper solicitation requiring protection. See *ING Life Ins. and Annuity Co. v. Gitterman*, No. 10-4076 (DMC)(JAC), 2010 U.S. Dist. LEXIS 85040, at *10 (D.N.J. Aug. 18, 2010) ("Merely being in contact with former clients does not constitute solicitation"); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Brinkman*, No. CV-08-1751-PHX-FJM, 2008 U.S. Dist. LEXIS 84751, at *4-5 (D. Ariz. Oct. 3, 2008) (defendants "should have advised the customers that they were leaving, and that the customers would be free to stay with Merrill Lynch or go with them to their new firm. We reject Merrill Lynch's contention that they could not at least do this"); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. O'Connor*, 194 F.R.D. 618, 620 (N.D. Ill. 2000) (a prohibition against advising customers of departing broker's new affiliation would be "unlawful, as well as unreasonable"); *Getman v. USI Holdings Corp.*, No. 05-3286-BLS2, 2005 Mass. Super. LEXIS

407, at *11-12 (Mass. Super. Ct. Sept. 1, 2005) (providing notice to clients that one is leaving their current employ and going elsewhere – providing new address, telephone number, and email address – "Such notice is common courtesy.").

Additionally, on their face, the Certifications must be rejected as nothing more than inadmissible hearsay from self-interested witnesses about what Mr. Farrell's long-time clients told them when they were contacted by them. The transitional financial advisor, Ms. Damico, came to Mr. Farrell's office for the first time on March 4, 2019 and began contacting his clients in an effort to keep them at Edward Jones. *See* Damico Cert., ¶¶ 3-4. The representative subsequently assigned to take over Mr. Farrell's office after he resigned, Mr. Claytor, does not even provide critical information like when contacted these clients and what they specifically told him. Notably, although the timing of the alleged statements made by clients to Mr. Claytor is critical evidence of whether or not Edward Jones will be irreparably harmed if an injunction is not granted by this Court, Mr. Claytor does not disclose the date upon which he became the "permanent replacement" for Mr. Farrell, the date of his "arrival at the Branch," the date(s) upon which he and Ms. Puentes began "reaching out to the clients," or the date of a single conversation that he had with a client that Mr. Claytor claims told him they had already been contacted by Mr. Farrell. Claytor Cert., ¶¶ 2-4. These statements fall far short of the requirement of Rule 4:52-1 for "specific facts shown by affidavit or verified complaint" to support a motion for injunctive relief. Moreover, the omission of these critical dates completely eviscerates Edward Jones' assertion of "immediate harm" that will result if an injunction sought eight weeks after Mr. Farrell's resignation is not granted.

In addition to the fact that Ms. Damico's and Mr. Claytor's statements regarding what clients may or may not have told them about their conversations with Mr. Farrell are nothing

more than inadmissible hearsay, their statements are inherently unreliable because they contradict each other. For instance, Ms. Damico says that "[c]ertain clients with small or inactive accounts have not been contacted by Farrell. Damico Cert., ¶ 4. Mr. Claytor, however, says the opposite. Two days later, Mr. Claytor signed a Certification in which he says that he was told that "[w]hile I have been informed that before my arrival, client responses had indicated that Farrell had not spoken to many of the smaller and less active accounts, that has changed since I stated working in the Branch. Effectively all clients who've discussed Farrell said they have been contacted by him." Claytor Cert., ¶ 3.

Even worse, Mr. Claytor willingly admits that he is making his own personal inferences about what clients purportedly told him about purported contacts that Mr. Farrell had with them. He claims that one unidentified client told him that Mr. Farrell asked to meet with her for "personal" reasons and "no business." Claytor Cert., ¶ 4. He goes on to state that "[i]n relating that description to me, one of the clients remarked – 'of course I'm not an idiot' ***or words to that effect***, ***indicating that she understood that he wanted her to move her account from Edward Jones***." *Id.* Plainly, Mr. Claytor, who has a vested self-interest in convincing Mr. Farrell's longtime clients not to leave Edward Jones to follow him to Ameriprise, cannot even recall what specifically this unidentified client actually said to him. He freely admits that Mr. Farrell did not actually say "he wanted her to move her accounts from Edward Jones," but that that was what this unidentified client "understood" from his purported request to meet with her about something "personal." *Id.* Mr. Claytor's claim about what this mystery client "understood" from what Mr. Farrell purportedly told her goes beyond hearsay into pure fabrication of facts.

Incredibly, Mr. Claytor further states that it "***appears*** that part of Mr. Farrell's approach to at least some of these [unidentified] clients is to discuss the turn-over in Edward Jones

Financial Advisors at the branch" and that he has "***infer[red]***" this to be "a point raised by Mr. Farrell" in these purported conversations with clients. Again, these statements of purported "facts" are not only unreliable hearsay but highly suspect. It is apparent that Mr. Claytor has been told by Edward Jones what clients supposedly said when the Transitional Advisor, Ms. Damico, called them before he arrived (although he can't keep it straight), and that he is now making unjustified assumptions about what customers "understood" from conversations that he claims they had with Mr. Farrell. *Id.*

Even if Edward Jones could establish that Mr. Farrell actually took any "secret information" (which, as set forth above, it cannot), Edward Jones cannot proffer even a scintilla of evidence to support its allegation that Mr. Farrell actually used this supposedly "secret information" to improperly solicit clients. Contrary to its allegation that Mr. Farrell used these imaginary "Customer lists" that he purportedly took to conduct an "outreach campaign" to induce his clients to leave Edward Jones (Pl. Mem. at pp. 7-8), the evidence establishes that Mr. Farrell made the standard announcement to clients that he had cultivated and serviced for years that he changed firms. Edward Jones itself instructs incoming brokers to make this same announcement once they join the firm. *See* Ex. ___ to Farrell Aff.

Additionally, while Edward Jones tries to make much hay out of a packet of information sent to Mr. Farrell's clients in an attempt to support an inference that he sent these packets out to a list of clients that he misappropriated from Edward Jones, it cannot even identify any list allegedly taken by Mr. Farrell prior to his resignation. *See* Pl. Mem. at pp. 7-8. Moreover, Edward Jones itself sent out a FINRA flier which announced to all of Mr. Farrell's clients that he now worked at Ameriprise. *See* Farrell Aff., ___. Once those clients – many of whom Mr. Farrell had worked with for years and knew personally through his many connections in the

community – reached out, Farrell answered their questions and provided them with information at their request. In his Affidavit, he confirms that he only sent information to clients that requested it and that he kept contemporary notes of this. Farrell Aff., ¶ ___. Nothing about this natural process could possibly be said to constitute improper solicitation. The letter and packet submitted by Edward Jones itself in an attempt to support its allegation that Mr. Farrell "evidently prepared" the letter and packets "before his resignation" on March 1, 2019 (*see* Pl. Mem. at p. 8), contradict this allegation. *See* Pl. Mem. at pp. 6-8 (*citing* Ex. A to _____ Cert.) Although the letter is dated March 1st, the date of Mr. Farrell's resignation, the UPS envelope indicates that it was not sent until April 4th, which was more than a month later. *Id.*

In sum, Edward Jones has failed to present any credible evidence that Mr. Farrell misappropriated confidential information and used such information to solicit clients. Accordingly, its application for injunctive relief must be denied.

III.

THE BALANCE OF HARDSHIPS CLEARLY FAVOR THE INDIVIDUAL DEFENDANT IN THIS CASE

When determining whether to issue a preliminary injunction, the Court "is required to balance the potential hardships that either side will endure as a result of the injunction." *Pharmacia Corp. v. Alcon Laboratories, Inc.*, 201 F. Supp. 2d 335, 385 (D.N.J. 2002) (citing *Opticians Ass'n of Am. v. Ind. Opticians of Am.*, 920 F.2d 187, 197 (3rd Cir. 1990)). Here, the relief Edward Jones seeks will greatly impair Mr. Farrell's ability to earn a living because clients that he has developed during his nearly 10-year-career in the securities industry will not be able to freely transfer their business to him, as is their absolute right and, in most instances, their very strong desire. Farrell Aff., ¶ 2. Further, if the relief Edward Jones seeks is granted, Mr. Farrell will not be able to generate the revenue for my business that he has in the past. *Id.* Notably, Mr.

Farrell is the primary breadwinner for his wife and two children, with a baby on the way. *Id.*, ¶ 3.

If Mr. Farrell is enjoined from doing business with his clients, it would destroy the career that he has worked so hard to build. It also would financially cripple him and his ability to support himself and his family. See Coskey's T.V. & Radio Sales v. Foti, 253 N.J. Super. 626, 639 (N.J. Super. Ct. App. Div. 1992) ("the preliminary injunction in this case had obvious devastating effects upon Foti, and only limited (and mainly financial) effects upon plaintiff").

By comparison, Edward Jones is a Fortune 500 company with over $7.5 billion in annual revenue that attempts to intimidate former advisors through baseless litigation such as the instant action. Just as Edward Jones cannot demonstrate irreparable harm from Mr. Farrell's alleged conduct, it cannot show that it will suffer hardship should this injunctive relief not issue. On the other hand, should Mr. Farrell be subjected to this injunction, he will be at the mercy of Edward Jones, who will have the opportunity to march into court to "enforce" the terms of the injunction at every turn. The chilling effect on Mr. Farrell, who could be accused of violating the injunction for casual or social communications with former clients or any number of innocent actions, will undoubtedly have a detrimental effect on his livelihood. Edward Jones, however, has tolerated Mr. Farrell's alleged conduct for nearly two months without so much as sending Mr. Farrell a cease-and-desist letter, and cannot demonstrate any damages stemming from said conduct. The hardship from this injunction to Mr. Farrell far outweighs that to Edward Jones, and accordingly, this factor too weighs against Edward Jones.

IV.

THE EXTRAORDINARY RELIEF OF A PRELIMINARY INJUNCTION IS NOT WARRANTED HERE SINCE EDWARD JONES FAILS TO DEMONSTRATE ANY HARM THAT CANNOT BE REDRESSED BY MONTARY DAMAGES

The extraordinary relief of a preliminary injunction "should not be entered except when necessary to prevent substantial, immediate and irreparable harm" that cannot be redressed by money damages. In its motion papers, Edward Jones concedes that the supposed potential harm it would suffer in the absence of injunctive relief is that it could lose more than the "over $18 Million in client account assets" that it claims to have lost since Mr. Farrell left Edward Jones. Pl. Mem. at p. 2.

Harm is not irreparable because Edward Jones could be adequately compensated by a monetary award at the FINRA arbitration to the extent that Edward Jones can establish that customers that actually transferred to Mr. Farrell at Ameriprise were solicited in violation of a post-employment restrictive covenants. Any such accounts can be monetized via review of trailing twelve-month revenue records. Every dollar earned by Mr. Farrell doing business with those customers who follow Mr. Farrell can be traced precisely. Every trade Mr. Farrell executes with his clients is documented, and every dollar in commission he earns from his clients is documented. Hence, injunctive relief is not permissible. The United States Supreme Court has repeatedly held that where money damages provide an adequate remedy, irreparable harm cannot be found:

> [I]t seems clear that the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury . . . . `The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.' (emphasis in original).

Sampson v. Murray, 415 U.S. 61, 90 (1964) (quoting *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

New Jersey courts similarly have held that harm is irreparable only if it cannot be addressed adequately through money damages. *Beilowitz v. Gen. Motors Corp*., 233 F. Supp. 2d 631, 644 (D.N.J. 2002)("It is almost axiomatic that purely economic injury, compensable in money, cannot satisfy the irreparable injury requirement). See also *Frank's GMC Truck Ctr., Inc. v. Gen. Motors Corp*., 847 F.2d 100, 102 (3d Cir. 1988) ("the availability of adequate monetary damages belies a claim of irreparable injury"). Here, Edward Jones has the burden of demonstrating that it has no adequate remedy at law. See *Subcarrier Commc'n Inc. v. Day*, 691 A.2d 876, 878 (N.J. Super. Ct. App. Div. 1997).

Courts are clear that purely economic damages, like those alleged by Edward Jones here, cannot constitute "irreparable harm" sufficient to sustain a motion for preliminary injunction. *See, e.g.*, *Sampson v. Murray*, 415 U.S. 61, 90, 94 S.Ct. 937, 952–53, 39 L.Ed.2d 166 (1974) ("The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.") (quotation omitted); Ace Am. Ins. Co. v. Wachovia Ins. Agency Inc., 306 Fed. Appx. 727, 731 (3d Cir. 2009)(unpublished) ("a preliminary injunction must be the only way of protecting the plaintiff from harm and may not be granted to relieve purely economic harm.") (citing *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989); *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994) ("Economic loss does not constitute irreparable harm"); *Commun. Workers of Am. v. Alcatel-lucent USA Inc.*, 15-CV-8143, 2015 WL 7573206, at *2 (D.N.J. Nov. 25, 2015) (finding no irreparable harm where plaintiffs' claim rested on the potential loss of one source of retirement funds).

Because Edward Jones cannot demonstrate that it will be irreparably harmed should the injunction not issue, its emergency Motion must be denied.

CONCLUSION

For the foregoing reasons, Defendant respectfully submits that this Court should deny Edward Jones's motion for temporary restraining order and/or preliminary injunction and grant such other and further relief as this Court deems just and proper.

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