IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

AMERIPRISE FINANCIAL SERVICES, INC., Plaintiff, vs. DOUGLAS VANDER WEIDE, Defendant.	**No. 4:09-cv-00035-JEG** **ORDER ON PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER**

This matter comes before the Court on a Motion by Plaintiff Ameriprise Financial Services, Inc. (Ameriprise Financial). for Temporary Restraining Order against Defendant Douglas Vander Weide (Vander Weide). The Court has considered the Motion, brief, supporting declarations, affidavits and exhibits, arguments of counsel, and all of the files, records, and proceedings herein. The matter is fully submitted and ready for disposition.

I. BACKGROUND

For limited purposes of the temporary relief sought in this motion only, the Court accepts as true the following facts set forth by Ameriprise Financial in its pleadings.

Ameriprise Financial is engaged in the business of providing a variety of financial services to persons and entities nationwide. Vander Weide operated as an Ameriprise Financial representative under a franchise agreement (Franchise Agreement), which became effective on or about March 22, 2000, and was terminated on or about June 17, 2008. By virtue of his affiliation with Ameriprise Financial, Vander Weide gained access to Ameriprise Financial's confidential books and records, including the identity, addresses, and account information of numerous Ameriprise Financial clients whose accounts he serviced. Vander Weide was the primary contact with clients that he serviced while an Ameriprise Financial advisor. On June 17, 2008, Vander Weide terminated his Franchise Agreement by executing an Agreement and Release (Termination Agreement), which contained a non-solicitation provision. Ameriprise Financial alleges that from June 17, 2008, and continuing to the present, Vander Weide has solicited business from Ameriprise Financial clients in violation of the Termination Agreement. Ameriprise Financial

alleges Vander Weide has also damaged the good will of Ameriprise Financial with its clients and submits affidavits detailing Vander Weide's attempts to encourage some of Ameriprise Financial's clients to assist Vander Weide in concealing his conduct from Ameriprise Financial. Through this practice, Vander Weide has gained unauthorized access to confidential client information maintained by Ameriprise Financial on its computer system, information protected by Ameriprise Financial contracts, its privacy policy, and federal law. Vander Weide's conduct includes (1) using a remote computer to access confidential online account information for thirty-three (33) clients between July 1, 2008, and December 8, 2008; (2) unauthorized attempts to access client online account information; and (3) attempts to change password information by impersonating various Ameriprise Financial clients during telephone conversations with Ameriprise Financial's customer support department.

Ameriprise Financial additionally argues that as an associate of Financial Industry Regulatory Authority (FINRA), Vander Weide is aware that his conduct is wrongful.[1] Ameriprise Financial will seek additional recourse against Vander Weide available through FINRA.

Ameriprise Financial, a Delaware corporation with its principal place of business in Minneapolis, Minnesota, filed this diversity action against Vander Weide, an Iowa citizen, pursuant to 28 U.S.C. § 1332, alleging claims of unfair competition and tortious interference, as well as damages in excess of $75,000. Ameriprise Financial moves for a temporary restraining order alleging it has been injured because of Vander Weide's conduct and that its injury will continue unless Vander Weide is restrained from his improper conduct. Ameriprise Financial asserts under FINRA Rule 13805, should this Court issue a temporary restraining order, an

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[1] FINRA Rule 2510(b) states,

(b) Authorization and Acceptance of Account

> No member or registered representative shall exercise any discretionary power in a customer's account unless such customer has given prior written authorization to a stated individual or individuals and the account has been accepted by the member, as evidenced in writing by the member or the partner, officer or manager, duly designated by the member, in accordance with Rule 3010.

expedited hearing must be held before FINRA within 15 days, and all proceedings will transfer to FINRA.[2] The Court assumes for purposes of the current motion that Ameriprise Financial is contemporaneously proceeding before FINRA.

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[2] FINRA Rule 13804 sets forth the procedure for seeking injunctive relief and states in pertinent part,

(a) Temporary Injunctive Orders

(1) In industry or clearing disputes required to be submitted to arbitration under the Code, parties may seek a temporary injunctive order from a court of competent jurisdiction. Parties to a pending arbitration may seek a temporary injunctive order from a court of competent jurisdiction even if another party has already filed a claim arising from the same dispute in arbitration pursuant to this paragraph, provided that an arbitration hearing on a request for permanent injunctive relief pursuant to paragraph (b) of this rule has not yet begun.

(2) A party seeking a temporary injunctive order from a court with respect to an industry or clearing dispute required to be submitted to arbitration under the Code must, at the same time, file with the Director a statement of claim requesting permanent injunctive and all other relief with respect to the same dispute in the manner specified under the Code. The party seeking temporary injunctive relief must also serve the statement of claim requesting permanent injunctive and all other relief on all other parties in the same manner and at the same time as the statement of claim is filed with the Director.

(3) Filings and service under this rule must be made by facsimile, overnight delivery service or messenger. Service must be made on all parties at the same time and in the same manner, unless the parties agree otherwise. A party obtaining a court-issued temporary injunctive order must notify the Director and the other parties of the issuance of the order within one business day.

(b) Hearing on Request for Permanent Injunctive Relief

(1) Scheduling of Hearing

If a court issues a temporary injunctive order, an arbitration hearing on the request for permanent injunctive relief will begin within 15 days of the date the court issues the temporary injunctive order. If the 15th day falls on a Saturday, Sunday, or FINRA holiday, the 15-day period shall expire on the next business day. Unless the parties agree otherwise, a hearing lasting more than one day will be held on consecutive days when reasonably possible. The Director will provide to all parties notice of the date, time and place of the hearing at least three days prior to the beginning of the hearing.

II. DISCUSSION

Federal Rule of Civil Procedure 65 in pertinent part provides as follows:

> (1) Issuing Without Notice. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:
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> (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
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> (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

Fed. R. Civ. P. 65(b).[3] In determining whether a temporary restraining order is warranted, the Court must follow the guidance of the seminal case of Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109 (8th Cir. 1981) (en banc). The well-known factors for consideration are "(1) the probability of success on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between this harm and the injury that granting the injunction will inflict on the other interested parties; and (4) whether the issuance of an injunction is in the public interest." Entergy, Ark., Inc. v. Nebraska, 210 F.3d 887, 898 (8th Cir. 2000) (citing Dataphase, 640 F.2d at 114). The "[f]actors are not a rigid formula. . . . '[T]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.'" Branstad v. Glickman, 118 F. Supp. 2d 925, 938 (N.D. Iowa 2000) (quoting Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506-07 (1959)). The standard for consideration of a temporary restraining order is the same as that for a preliminary injunction. See, e.g., Four Rivers Invs., Inc. v. United States, No. 06-598 T, 2007 WL 2193884, at *2 (Fed. Cl. July 27, 2007); Ne. Ohio Coal. for Homeless & Serv. Employees Int'l Union, Local 1199 v. Blackwell, 467 F.3d 999, 1009 (6th Cir. 2006); S. B. McLaughlin & Co. v. Tudor Oaks Condo. Proj., 877 F.2d 707, 708 (8th Cir. 1989); Sports Design & Dev., Inc. v. Schoneboom, 871 F. Supp. 1158, 1162 (N.D. Iowa 1995) ("Courts in this circuit apply the well-established standards set out in Dataphase for

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[3] We are herein advised that Ameriprise Financial has served a copy of the application on Vander Weide and his attorney. Accordingly, Vander Weide appears to have minimal notice but no opportunity for hearing.

consideration of a preliminary injunction in also determining the propriety of issuing a temporary restraining order under [Rule] 65." (citation omitted)). Focusing on no one factor to the exclusion of others, the Court considers all of the factors and determines whether "on balance, they weigh in towards granting the injunction." Dataphase, 640 F.2d at 113; Branstad, 118 F. Supp. 2d at 938 (citing Baker Elec. Co-Op, Inc. v. Chaske, 28 F.3d 1466, 1472 (8th Cir. 1994)). The burden of demonstrating the necessary grounds for the entry of a temporary restraining order is on the party seeking that immediate remedy. Dataphase, 640 F.2d at 113.

Having reviewed the pleadings and supportive documentation, the Court concludes Ameriprise Financial has made an adequate showing of its likelihood of success on this matter. The terms of Vander Weide's non-solicitation agreement are clear; and, Ameriprise Financial has provided an adequate record of affidavits and exhibits upon which the Court can conclude Vander Weide has taken actions inconsistent with his responsibilities and obligations, so that there is a likelihood of success on the merits.

Ameriprise Financial has made a showing of probable irreparable injury without the issuance of the requested order. The record indicates clients are being taken from Ameriprise Financial, confidential materials are being obtained in a fashion that risks damage to goodwill, and these damages may not be later calculated with a sufficient degree of accuracy. Thus the damages Ameriprise Financial may suffer from the ongoing improper solicitation of its clients by Vander Weide cannot be ascertained with precision.

The irreparable harm that would be incurred by Vander Weide would be nominal as he would only be required to abide by the contractual provisions he agreed to by signing the Franchise Agreement and the Termination Agreement. The ten-day duration of this Order necessarily limits the potential for harm imposed on Vander Weide. Further, this matter will be heard by a panel of the Financial Industry Regulation Authority within fifteen days, during which time Vander Weide will be allowed to continue his new business activities, subject to the

terms of the Franchise and Termination Agreements. Thus the balance of harms weighs heavily in favor of Ameriprise Financial at this time.

The public has an interest in the validity and enforcement of contracts, as well as the protection of confidential information. Accordingly, the public interest supports the entry of the injunctive relief requested by Ameriprise Financial.

Based on a weighing of the above factors, the Court concludes that Ameriprise Financial has met its burden of proof for the granting of a temporary restraining order against Defendant Douglas Vander Weide.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for a Temporary Restraining Order (Clerk's No.2) is **GRANTED**.

Commencing on January 30, 2009, at 4:00 p.m., Defendant Douglas Vander Weide is enjoined, for ten days from the date of this Order, or until final judgment is entered in this matter, whichever comes first, provided, however, that it may be dissolved or modified upon appropriate motion after a final or preliminary ruling in the arbitration proceedings before FINRA in this matter, or otherwise upon a showing of good reason to this Court, as follows:

Defendant, whether alone or in concert with or through others, including but not limited to any agents, servants, employees, officers, representatives, successors and assigns, and all persons, firms, and corporations acting in connection or participation with Defendant on his behalf, shall immediately be (and hereby are) enjoined from directly or indirectly engaging in any act of unfair competition or tortious interference with contract or prospective business relation, including but not limited to (a) violating FINRA rules, (b) making false statements to clients, (c) encouraging clients to make false statements to Ameriprise Financial; (d) impersonating Ameriprise Financial clients or otherwise making false statements to Ameriprise Financial, (e) seeking or obtaining unauthorized access to the Ameriprise Financial computer system, and/or (f) engaging in any other unlawful actions related to Ameriprise Financial's

confidential client information or in violation of the non-solicitation covenants in the termination agreement.

Defendant Vander Weide is hereby ordered to immediately segregate and preserve all receipts from, and to maintain separate accounts for all services performed for and products sold to, any person who is or was an Ameriprise Financial client whom Vander Weide served or whose name became known to him while he was affiliated with Ameriprise Financial.[4]

Pursuant to the Termination Agreement signed by Defendant Douglas Vander Weide, Plaintiff is not required to post a bond or deposit funds with the Court.

Pursuant to FINRA Rule 13804, the Court expects this matter will be referred for a preliminary injunction hearing before FINRA in accordance with its Rules.

In compliance with Fed. R. Civ. P. 65, this Order is effective for ten days from the date of this Order and then will automatically dissolve absent further proceedings. The Court expects any further redress of the Court, extension of this order, or hearing, will be sought by motion of the parties.

IT IS SO ORDERED.

Dated this 30th day of January, 2009.

JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT

[4] The Court views this segregation provision as consistent with the Court's duty to preserve the status quo under the provisions of Fed. R. Civ. P. 65. The Court does find the current motion adequate to support a required inventory of past transactions. Such further order may be sought by means of a motion for expedited discovery or other order.