

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

MERRILL LYNCH, PIERCE, FENNER &
SMITH INCORPORATED

Plaintiff,

v.

ERIK BJERKE, JEFFREY CROWELL, CHAD
PIGG FIFE, EMILY FLETCHER, BRITTANY
HARTNETT, KEVIN HIGGINBOTHAM,
JAMES KAUFMAN, JEFFREY NEUMEYER,
STEVEN PREDILETTO, JOSEPH SACCO,
MICHAEL SONTAG, ELIZABETH WHITE,
OPENARC CORPORATE ADVISORY, LLC,
DYNASTY FINANCIAL PARTNERS, LLC and
CHARLES SCHWAB & CO., INC.

Defendants.

Civil Action No.
1:25-cv-05437-VMC

**DEFENDANT DYNASTY FINANCIAL PARTNERS, LLC'S
MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S
EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER**

I. Introduction

Merrill Lynch’s Complaint and Motion were filed without notice to Dynasty or Schwab. The Individual Defendants learned of this Action from the press. Despite at least a weeklong head start, forensic access to its systems, unrestricted access to Individual Defendants’ clients, and the resources of one of the largest financial firms in the world, Merrill Lynch has failed to state a single factual allegation of theft of “trade secrets” or solicitation, come forward with evidence to support this Motion for the extraordinary relief of an “immediate” temporary restraining order and indefinite preliminary injunction, or mount an argument to overcome the Protocol for Broker Recruiting, which Merrill Lynch helped to draft, relies upon every day when recruiting brokers to leave their firms, and knows is an absolute bar to this Motion.

II. Legal Standard

“A preliminary injunction is an extraordinary and drastic remedy not to be granted until the movant clearly carries the burden of persuasion as to the four prerequisites.’ *Northeastern Fla. Chapter v. Jacksonville, Fla.*, 896 F.2d 1283, 1285 (11th Cir.1990). In order to obtain a preliminary injunction, a movant must demonstrate ‘(1) a substantial likelihood that he will ultimately prevail on the merits; (2) that he will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction

may cause the opposing party; and (4) that the injunction, if issued, would not be adverse to the public interest.’ *Zardui–Quintana v. Richard*, 768 F.2d 1213, 1216 (11th Cir.1985); *Gold Coast Publications, Inc. v. Corrigan*, 42 F.3d 1336, 1343 (11th Cir.1994).” *Morgan Stanley DW, Inc. v. Frisby*, 163 F. Supp. 2d 1371, 1374 (N.D. Ga. 2001).

“The plaintiff bears the burden of proof, and it is a heavy one to bear because a preliminary injunction, or temporary restraining order, in advance of trial ‘is a powerful exercise of judicial authority’ that has been called an ‘extraordinary and drastic remedy.’” *Glob. Lab Partners, LLC v. DirectMed DX, LLC*, 2018 WL 889481, at *2 (N.D. Fla. Feb. 14, 2018) (quoting *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990)).

III. Argument

Merrill Lynch has brought nine causes of action against, it appears, all Defendants. Of these, at least three (III, V, VI)¹ do not and cannot state any allegations, including duty, against Dynasty, one states allegations only against Individual Defendants but cannot be brought against Individual Defendants (III),²

¹ Tortious interference with business relations (III), breach of fiduciary duty (V) and breach of contract (VI).

² Tortious interference with business relations with clients. *See Tom's Amusement Co. v. Total Vending Servs.*, 243 Ga. App. 294, 296, 533 S.E.2d 413, 417 (2000) (barring tortious claim against employee based upon his own clients).

one is not a free-standing cause of action (VIII),³ and one is not a cause of action at all (IX).⁴ Regardless, every cause of action is pled on one or more of the same conclusory allegations: (i) unspecified misappropriation and misuse of unidentified “trade secrets”; (ii) solicitation of employees; and (iii) pre- and post- termination solicitation of clients.

Merrill Lynch cannot meet, and has not made a credible effort to meet, its burden under any prong of Rule 65 as to any of its overlapping claims, addressed specifically below.

Two overarching issues are fatal to the Motion. First, Merrill Lynch’s evidentiary submission, consisting of a “verified” Complaint largely alleging conclusory, boilerplate allegations “upon information and belief” and a lone affidavit, without exhibits, sworn by the same branch manager, Michael Nies, who “verified” the Complaint attesting to virtually every conclusory, boilerplate allegation of “misappropriation and misuse,” “solicitation of employees” or “solicitation of clients” not from personal knowledge but understanding or belief. Neither the “verified” allegations of the Complaint nor the affidavit, which is not sufficiently detailed to establish whether the secondhand understanding is even derived from hearsay, would be admissible evidence of fact even if

³ Civil Conspiracy.

⁴ Breach of the Brokerage

Merrill Lynch had stated allegations of fact. Despite Merrill Lynch's failure to notice its motions for "immediate" relief and the emergency briefing schedule, each is rebutted by admissible evidence from personal knowledge by senior Dynasty employees (*see* Exs. 1 (Declaration of Lindsey Strawhecker), 2 (Declaration Elizabeth Cancelosi), as well as Individual Defendants.

Second, most of Merrill Lynch's causes of action are predicated as a matter of law upon the existence and enforceability of a restrictive covenant not to solicit or a restrictive covenant not to disclose confidential information or trade secrets.⁵ Merrill Lynch has alleged restrictive covenants in its Verified Complaint and invoked them generally in support of its Motion, but its brief and lone affidavit are virtually silent on their provisions, applicability and enforceability under Georgia law. Only one contract, the April 2011 Confidentiality Agreement alleged against one of the twelve Individual Defendants, includes a covenant restricting solicitation of employees, the allegation to which Merrill Lynch devotes most of its submission on the Motion. Both the Confidentiality Agreement and the 1997-2002 Financial Consultant Employment Agreement and Restrictive Covenants ("EARCs") alleged against four of the twelve Individual Defendants are void under applicable Georgia law.

The 2018 Agreement for Receiving GCIAS FAs, containing the only

⁵ *See* III *infra*.

restrictive covenants alleged against all twelve Individual Defendants, is a brokerage client succession agreement that transitioned the business of Individual Defendants' former partners to Individual Defendants in exchange for \$22 million. The restrictive covenants are applicable to the group of clients who transitioned and subject to express limitations that, alongside the transaction itself, Merrill Lynch expurgated, sought to redact and flatly misrepresented to the Court. To the extent the restrictive covenants are enforceable under the Georgia Trade Secrets Act, they are expressly subject to the Protocol. More importantly, the transaction and terms Merrill Lynch failed to disclose to the Court on its Motion are, like the Protocol itself, irreconcilable with Merrill Lynch's overriding claim that the GCIAS team's clients were not their clients and their business was not their business. *See* Doc 3-1 (D. Br.) 24, 12 (emphasis added).

A. Evidentiary Submission

To carry its burden, a plaintiff seeking a preliminary injunction must offer proof beyond unverified allegations in the pleadings. Moreover, vague or conclusory affidavits are insufficient to satisfy the plaintiff's burden. Furthermore, affidavits based on personal knowledge are accorded more weight than affidavits based upon mere belief or hearsay. *See* 13 Moore's Federal Practice § 65.23[2] (3d ed.2000).

Palmer v. Braun, 155 F. Supp. 2d 1327, 1331 (M.D. Fla. 2001), *aff'd*, 287 F.3d 1325 (11th Cir. 2002)

B. Restrictive Covenants

In its Complaint, Merrill Lynch alleged employment agreements with four of the twelve Individual Defendants (Doc 1 (Cl) ¶ 61 (“Bjerke (in 1997), Higginbotham (in 1999), Kaufman (in 1998), and Neumeyer (in 2000) each signed a Financial Consultant Employment Agreement and Restrictive Covenants (EARC, attached as Ex. A”)); “a Confidentiality Agreement dated April 1, 2011 [at] Ex. B” with Individual Defendant Fletcher (¶ 63); and “an Agreement for Receiving GCIAS FAs” with each of the Individual Defendants (¶ 65). As set forth below, the restrictive covenants contained in these alleged agreements constitute the sole legal basis Merrill Lynch has alleged for any claim against any Defendant, not merely its breach of contract claim (Count VI), and are generically invoked throughout its Motion. *See* III.A, *infra*; Doc 3 (D. Br.) 2, 11, 12, 14, 17, 18, 19, 23, 24.

In its brief, however, Merrill Lynch devotes two paragraphs, on pages 18 and 19, to its restrictive covenants, which it does not quote, barely describes and cites only to Paragraph 37 of the Nies Affidavit. Doc 3 (D. Br.) 18-19; *see also* 14 (asserting “Individual Defendants knew, pursuant to the agreements and policy acknowledgements signed during the course of their many years of employment, that Merrill’s customer-related information is confidential, valuable, and protected (i.e., trade secret). See Nies Affidavit at ¶ 37.”); 17 (asserting “Merrill had an employer-employee relationship with the Individual Defendants and the other GCIAS employees, which included contractual obligations to properly maintain Merrill’s

confidential information and trade secrets. *See* Nies Affidavit at ¶ 37” as predicate of tortious interference claim). The Nies Affidavit, Merrill Lynch’s lone evidentiary submission, does not quote, describe or exhibit the restrictive covenants either.

Paragraph 37 avers, in its entirety:

Like all Merrill employees, the Individual Defendants knew, pursuant to the agreements and policy acknowledgements they signed during the course of their many years of employment, that Merrill’s customer-related information constitutes trade secrets and proprietary information, not to be used for any purpose other than in the ordinary course of performing duties on behalf of Merrill.

Doc 3-3 (Cl. Ex. B “Nies Aff.”) ¶ 37.

Merrill Lynch leaves it to the Court to find the basic details—parties, dates, (expurgated) terms—in the Complaint and the alleged “agreements and policy acknowledgements” in exhibits to the Complaint. This, again, violates at least the spirit of the Court’s Standing Order III(h) and Local Rule 7.1(A), and Merrill Lynch’s highly unusual decision to effectively omit its restrictive covenants from a motion for a TRO against former employees is explained by the restrictive covenants themselves.

All three are waived under the Protocol, the EARC and Confidentiality Agreement are void under Georgia law and Merrill Lynch has grossly and willfully mischaracterized, misquoted and redacted the Agreement for Receiving GCIAS FAs.

1. Agreement for Receiving GCIAS FAs

In its Complaint, Merrill Lynch represents and (selectively) quotes the Agreement for Receiving GCIAS FAs this way:

65. In 2018, two of the original GCIAS senior leaders, James Wallace and Deborah Howard, signed retirement agreements with Merrill. In connection with Wallace and Howard's retirement, Bjerke, Crowell, Fife, Fletcher, Hartnett, Higginbotham, Kaufman, Neumeyer, Prediletto, Sacco, Sontag, and White executed an Agreement for Receiving GCIAS FAs ("Receiving FA Agreement"), which confirms that Confidential Information "represents a valuable and unique asset of Merrill Lynch and constitutes a trade secret and property belonging exclusively to Merrill Lynch." Ex. C at ¶3. Each of the Individual Defendants agreed "not to disclose Customer Information to any third party, including competitors of the Company, at any time, except for the purposes of conducting business on behalf of Merrill Lynch." Id.

66. Pursuant to the Receiving FA Agreement, the Individual Defendants further agreed that, **in exchange for the opportunity to continue servicing and receiving compensation from the account pools previously captured by Wallace and Howard**, they would not "directly or indirectly solicit, or initiate contact or communication with the 'Eligible Households'" **for one year following termination of employment**. "Eligible Households" was defined to include (i) all clients/accounts serviced by Wallace/Howard; (ii) any clients/accounts househanded with the clients serviced by Wallace or Howard, and (iii) any other client of the Company whose assets/accounts were serviced by Wallace or Howard. Ex. C at ¶2.

Doc 1 (Cl.) ¶¶ 65-66 (emphasis added).

This is a gross misrepresentation of the Agreement for Receiving GCIAS FAs:

Through December 2024, or for one (1) year following the termination of his/her employment for any reason, whichever is later, each GCIAS FA agrees not to directly or indirectly solicit, or initiate contact or communication with, the "Eligible Households." (Eligible Households include the clients/accounts serviced by Wallace/Howard, any clients/accounts househanded with the clients serviced by Wallace/Howard, and any clients whose assets/accounts with the

Company were opened by a client whose assets were serviced by Wallace/Howard). The parties **agree that this Agreement is a "retiring broker agreement" for purposes of the Protocol for Broker Recruiting ("Protocol")**. Accordingly, **if a GCIAS FA's employment terminates before the Payment Period ends, GCIAS FA's agreement not to solicit the Eligible Households applies even if the GCIAS FA resigns from Merrill Lynch and joins a firm that is a signatory to the Protocol**. In other words, by accepting the re-assignment of the Eligible Households, GCIAS FA agrees that **if he joins a Protocol signatory firm during the Payment Period**, he is prohibited from **soliciting, or taking any information pertaining to, the Eligible Households**.

Doc 1-3 (Cl. Ex. C “Agreement for Receiving GCIAS FAs”) at 4 (emphasis added).

Merrill Lynch disclosed none of this in either its brief or its lone evidentiary submission, and willfully truncated the terms in Paragraph 66 of its Complaint in order to misrepresent to the Court that Individual Defendants agreed that they “would not ‘directly or indirectly solicit, or initiate contact or communication with the Eligible Households’ **for one year following termination of employment**”, ignoring that such restriction is waived by the Protocol, and, apparently on that basis, that “Individual Defendants took customer information that they were not permitted to take because such customers were excluded from the Protocol.” Doc 1 (Cl.) ¶¶ 66, 184 (emphasis added). While it submitted the Agreement for Receiving GCIAS FAs as an exhibit to the Complaint, Merrill Lynch redacted—without justification, without moving to seal and in flat violation of the Court’s redaction rules—the entirety of two and a half pages immediately preceding the restrictive covenants it truncated. The redacted pages provide the definition of “Payment Period”:

Each month, beginning January 2020 through **December 2024 (the "Payment Period")**, Merrill Lynch will collect 1/12 of each GCIAS FA's "Annual Share" (reflected on Exhibit A) of the Annual Obligation (defined below).

Id. at 2 (emphasis added).

The restrictive covenants in the Agreement for Receiving GCIAS FAs are the only restrictive covenants Merrill alleges against seven of the twelve Individual Defendants and, as set forth below, the only restrictive covenants alleged against any of the Individual Defendants that are even arguably enforceable under Georgia law. Merrill Lynch willfully misrepresents, and indefensibly redacts, their terms.

This goes beyond simply obfuscating the restrictive covenants Merrill Lynch is moving for a TRO to enforce. Nowhere in its Complaint or brief does Merrill Lynch disclose to the Court the actual transaction embodied by the Agreement for Receiving GCIAS FAs, nor is it readily apparent from the Agreement itself in its redacted form:

Each GCIAS FA is employed as a Merrill Lynch Wealth Management Advisor on the Global Corporate and Institutional Advisory Services team ("GCIAS"), currently led by James Wallace ("Wallace") and Deborah Howard ("Howard"). Wallace and Howard have both elected to separate from Merrill Lynch and stop working on a team with the GCIAS FAs on December 31, 2019 (the "Departure Date"). Additionally, in exchange for payments in retirement that are based on their trailing commissions, Wallace and Howard have both agreed to comply with certain post-employment obligations, including non-competition restrictions through late 2021 and non-solicitation restrictions through 2024.

As of the Departure Date, Merrill Lynch will provide the GCIAS FAs

with the opportunity to **continue servicing and receiving compensation from the account pools** previously captured by Wallace and Howard. As consideration for this **opportunity, the GCIAS FAs are each agreeing to the obligations** described in this Agreement. Each GCIAS FA acknowledges that he/she is receiving adequate consideration from Merrill Lynch in exchange for agreeing to these obligations, which include, but are not limited to, **a downward adjustment of their incentive compensation** for 5 years and **compliance with the post-employment restrictions**.

Each GCIAS FA agrees to comply with any reasonable protocols and requirements that the Company believes are necessary to ensure the **smooth transition of clients/business from Wallace/Howard to the GCIAS FAs**.

Id. at 1 (emphasis added).

The nature of the transaction is, however, readily apparent from the first sentence Merrill Lynch redacted:

The GCIAS Fas shall pay Merrill Lynch **a total of \$22,520,000.00** (the “Payment Obligation”)[2], as follows...

[fn 2] The Payment Obligation equals 65% of the amount **being paid to Wallace and Howard**. Wallace and Howard’s eligible trailing twelve production will be re-evaluated approximately 60 days before the Departure Date. If the eligible trailing twelve increases, **the amount being paid to Howard and Wallace and the GCIAS FAs’ Payment Obligation will increase proportionately**. By signing below and agreeing to the terms of this Agreement, each GCIAS FA agrees to sign any and all amendments necessary to effectuate the intent of the parties.

Id. at 2 (emphasis added).

Omitting this information in its “emergency” submission to the Court is

indefensible. In the first sentence of the first paragraph of its first argument for injunctive relief, Merrill Lynch represents that “[r]ather than seek to acquire Merrill’s GCIAS business **directly from Merrill for consideration** (i.e., by lawful means), the Corporate Defendants, with the aid of the Individual Defendants, are **trying to acquire Merrill’s GCIAS business, without consideration**, through a corporate raid and unfair competition (i.e., by unlawful means).” Doc 3-1 (D. Br.) 12 (emphasis added). This chimerical proposition, on no authority, that another firm could “acquire Merrill’s GCIAS business directly from Merrill” is, together with its bald assertion, on no authority, that “Merrill’s clients are not clients of the Defendants” (*Id.* at 24), the essence of its claim.

Because neither is tethered to the reality of the industry, the Protocol or Merrill Lynch’s own business, Merrill Lynch spends paragraph after paragraph of its Complaint, page after page of its brief and paragraph after paragraph of its lone affidavit suggesting that Individual Defendants are in some way different from every other Merrill Lynch advisor and every other advisor at a Protocol firm. The Individual Defendants are not different from every other Merrill Lynch advisor and every other advisor at a Protocol firm, which is why it is undisputed that the Protocol applies to them in the first place. Individual Defendants have the right to move their business, provided they comply with the Protocol, and their clients have the right to go with them.

What is different from many advisors, at Merrill Lynch and elsewhere, is that Individual Defendants paid for that right: The “Wallace/Howard” “clients/business” transitioned to them pursuant to a succession agreement and, provided they paid \$22,520,000.00 and remained at Merrill Lynch during the Payment Period, they were free to take their business elsewhere under the protections of the Protocol. This is embodied in the payment and payment adjustment terms (*see Id.* at 2-4), the restrictive covenants themselves, which exclude the transferred clients from the Protocol⁶ only during the Payment Period, and the employment termination provision:

(c) **Payment upon Termination.** If any GCIAS FA resigns to **form or join another financial services firm** anytime before **December 31, 2024**, the departing GCIAS FA shall be obligated pay to Merrill Lynch a lump sum equal to the GCIAS FA's Annual Share for the year of departure, less the monthly payments paid by the GCIAS FA between January 1 and the resignation date. Payment of this lump sum shall be made within 60 days of the GCIAS FA's resignation, in the form of a personal or certified check, made payable to Merrill Lynch, Pierce, Fenner & Smith Incorporated, which shall be mailed to the attention of the GCIAS Regional Managing Director (currently Michael Nies).

⁶ Pursuant to the Protocol itself: “If accounts serviced by the departing RR were transferred to the departing RR pursuant to a retirement program that pays a retiring RR trailing commissions on the accounts in return for certain assistance provided by the retiring RR prior to his or her retirement in transitioning the accounts to the departing RR, the departing RR’s ability to take Client Information related to those accounts and the departing RR’s right to solicit those accounts shall be governed by the terms of the contract between the retiring RR, the departing RR, and the firm with which both were affiliated.” Strawhecker Dec. at Ex. A.

Doc 1-3 (Agreement for Receiving GCIAS FAs) (emphasis added).

As important as the “smooth transition of clients/business from Wallace/Howard to the GCIAS FAs” and what Individual Defendants paid for it is who they paid it to. While the \$22,520,000.00 passed through Merrill Lynch, it was “65% of the amount **being paid to Wallace and Howard.**” *Id.* at 2, fn 2 (emphasis added). The amount due tracked the amounts due to Wallace and Howard: “Wallace and Howard’s eligible trailing twelve production will be re-evaluated approximately 60 days before the Departure Date. If the eligible trailing twelve increases, **the amount being paid to Howard and Wallace and the GCIAS FAs’ Payment Obligation will increase proportionately.**” *Id.* at 2, fn 2 (emphasis added).

As Merrill Lynch knows, but did not disclose to the Court, the Individual Defendants moved their business to their own independent RIA, not to Dynasty or Schwab (*see I supra*), and under Merrill Lynch’s own Agreement for Receiving GCIAS FAs, they paid their partners, not Merrill Lynch, \$22,520,000.00 for it. That is because the advisors own the business, not the firm.

Merrill Lynch’s redactions and Motion to Seal are equally indefensible. The only colorable basis to seal is that it is possible for members of the public to deduce that the \$22 million payment expressly made to Merrill Lynch by the Individual Defendants reflects amounts paid to non-party former employees who owned the

business. Even if the dollar amounts paid to Merrill Lynch—for seven year old revenue numbers—were sealable, however, and they are not sealable, and even if Merrill Lynch were genuinely concerned about disclosing them to the public, the only appropriate provisional redaction would be to the dollar figures. Merrill Lynch instead redacted two and a half pages, including self-evidently material terms that, with respect to sealing, are no different from and in some cases are expressly referenced by terms Merrill Lynch did not redact. Merrill Lynch did not, meanwhile, make any effort to protect the identities of the non-party former employees, various terms of its seven year old internal succession agreements or information potentially reflective of its seven year old internal business practices.

The purpose of the improper redactions is clear, as are their effect on public access to the courts in this case. Immediately upon filing its Complaint, and before service or notice to any Defendant, Merrill Lynch sent it to the press, which is where Defendants learned about this case and that Merrill Lynch had moved for a TRO against them. The first allegation of Merrill Lynch's Complaint is "a pre-mediated corporate raid of its Atlanta-based Global Corporate and Institutional Advisory ('GCIAS') business, planned and executed by its form employees and their corporate co-conspirators" Dynasty, a service platform for independent RIAs, and Schwab, a custodian. Doc 1 (Cl) ¶ 1. The first sentence of Merrill Lynch's brief herein is "[t]his action arises out of Defendants' pre-meditated corporate raid of Merrill's

Global Corporate and Institutional Advisory Services (“GCIAS”) business, based in Atlanta.” Doc 3 (D. Br.) 2. Merrill Lynch’s summary of its claims in the first paragraph of its argument section is “[r]ather than seek to acquire Merrill’s GCIAS business directly from Merrill for consideration (i.e., by lawful means), the Corporate Defendants, with the aid of the Individual Defendants, are trying to acquire Merrill’s GCIAS business, without consideration, through a corporate raid and unfair competition (i.e., by unlawful means).” *Id.* at 12.

In paragraph after paragraph of its Complaint and page after page of its papers on this Motion, Merrill Lynch publicly accuses Defendants of variously “plotting,” “colluding” and “conspiring” (16 times); “threatening,” “coercing,” “strong-arm[ing],” “scar[ing],” and “pressuring” (19 times) Individual Defendants’ more junior colleagues, support staff and clients; “misappropriating” (31 times), “misusing” (14 times) and “disclosing” (10 times) unidentified “trade secrets” and “confidential or proprietary information”. Merrill Lynch relentlessly implies, but is careful never to directly allege, unidentified but highly sensitive client information that Merrill Lynch implies, but again never directly alleges, is client identifying, “including client account names, client account numbers...identity of plan participants, non-participant identities, participant and non-participant contact information...customer risk tolerances...individual participant account

balances...customer financial information” (*see, e.g.*, Doc 1 (Cl) ¶ 81; Doc 3 (D. Br.) 2); and “willfully viol[ating] [] federal and state laws.”

These are fighting words anywhere, and they are especially damaging in the securities industry. The two and a half redacted pages of the primary contract at issue show that Individual Defendants paid their former partners \$22 million—over five years of service to Merrill Lynch—for the “GCIAS business” Merrill Lynch is accusing them of “trying to acquire [] without consideration through a corporate raid.” That fact is as material to the public, which includes Defendants’ industry, regulators, partners and clients, as it is to the Court’s consideration of the Motion. By redacting those pages, and only those pages, Merrill Lynch released it to the press without it.

The non-disclosure and non-solicitation of client provisions in the alleged Agreement for Receiving GCIAS are governed by the Protocol. As Merrill Lynch has offered no evidence that Defendants failed to comply with the Protocol, and certainly has failed to meet its burden of persuasion, the provisions are waived by the Protocol and Merrill Lynch cannot show likelihood of success on the merits on its breach of contract claim or any other claim predicated upon those provisions.

2. EARC and Confidentiality Agreement

Merrill Lynch has made materially identical allegations related to the EARC against Individual Defendants Bjerke (1997), Higginbotham (1999), Kaufman

(1998) and Neumeyer (2000) and the April 1, 2011 Confidentiality Agreement against Fletcher. All five agreements predate the May 11, 2011 effective date of the Georgia Restrictive Covenants Act and are therefore subject to strict scrutiny under Georgia's pre-GRCA law. *See Becham v. Synthes USA*, 482 F. App'x 387, 392 (11th Cir. 2012) (GRCA does not apply "in actions determining the enforceability of restrictive covenants entered into before" May 11, 2011"); *Interra Int'l, LLC v. Al Khafaji*, No. 2017 WL 4866266 at *10 (N.D. Ga. Mar. 21, 2017).

"Georgia law applies strict scrutiny to restrictive covenants in employment contracts" and "does not employ the 'blue pencil' doctrine of severability," invalidating the entire agreement where there is any overly broad restrictive covenant. *See Keener v. Convergys Corp.*, 342 F.3d 1264, 1268–69 (11th Cir. 2003) (citing *New Atlanta Ear, Nose & Throat Assocs., P.C. v. Pratt*, 253 Ga.App. 681, 560 S.E.2d 268, 270–71 (2002); *Advance Tech. Consultants, Inc. v. RoadTrac, L.L.C.*, 250 Ga.App. 317, 551 S.E.2d 735, 738–39 (2001) (invalidating entire NCA containing an overbroad restriction). "Restrictive covenants against competition in employment agreements are in partial restraint of trade and, therefore, are enforced only where the restrictions are 'strictly limited, both in time and geographical effect, and when the restrictions are otherwise reasonable, considering the business interests of the employer needing protection and the effect of the restrictions on the employee.'" *Morgan Stanley DW, Inc. v. Frisby*, 163 F. Supp. 2d 1371, 1377–78

(N.D. Ga. 2001) (quoting *Sanford v. RDA Consultants, Ltd.*, 244 Ga.App. 308, 310, 535 S.E.2d 321 (2000)).

In contrast with the Agreement for Receiving GCIAS, Merrill Lynch quoted much, but not all, of the restrictive covenants in the EARC and the entirety of the restrictive covenants in the Confidentiality Agreement (Doc 1 (Cl.) ¶¶ 61-64) and omitted non-solicitation provision of the EARC (*Id.* at Ex. A, 1). The EARC, like the Agreement for Receiving GCIAS, contains no covenant not to solicit employees.

Both covenants are indisputably void under applicable law. In *Frisby, supra*, this Court held:

In this case, the restrictive covenant is overbroad because it prohibits Defendants from contacting not only clients that they have serviced, **but anyone whose names became known to Defendants during their employment with Plaintiff.** The clause does not specify any particular manner in which such names may have become known to Defendants. For example, the restrictive covenant would prohibit the Defendants from soliciting the business of clients of other Morgan Stanley brokers whose names became known to them through casual conversation at the office. Morgan Stanley has no legitimate interest in prohibiting this type of competition. Such a prohibition is an unduly strict restraint on trade, and would not pass the strict scrutiny standard enforced by the Georgia courts...While the clause Morgan Stanley wishes to enforce does not purport to restrict Defendants from contacting any and all clients of Morgan Stanley, it is nonetheless overbroad by prohibiting the solicitation of clients which Defendants did not service as a broker while employed at Morgan Stanley. If the restrictive covenant is unenforceable in Georgia, Plaintiff is unlikely to succeed on the merits of its claim

Frisby, 163 F. Supp. at 1377–78 (N.D. Ga. 2001) (internal citation omitted) (citing *Singer v. Habif, Arogeti & Wynne*, 250 Ga. 376–377(1), 297 S.E.2d 473 (1982);

Orkin Exterminating Co. v. Walker, 251 Ga. 536, 539, 307 S.E.2d 914 (1983) (exterminating company could not restrict former exterminator from contacting customers with whom he had not worked during the time of his employment); *Windsor–Douglas Assocs. Inc., v. Patterson*, 179 Ga.App. 674, 675, 347 S.E.2d 362 (1986) (former employment recruiter could not be prohibited from soliciting any of her employer's client, only those customers she had serviced); *ALW Marketing Corp. v. Drunasky et al.*, 1991 WL 345313, * 5 (N.D.Ga.1991.) (denying temporary restraining order to enforce restrictive covenants where clause prohibited solicitation of business for effectively every client of the employer); *Covington v. D.L. Pimper Group, Inc.*, 248 Ga.App. 265, 269, 546 S.E.2d 37 (2001) (non-solicitation clause was not overbroad where employee was prohibited from soliciting clients or prospective clients with whom employee had contact over two year period).

The void non-solicitation provisions render the entire restrictive covenant agreement unenforceable. *See Frisby*, 163 F. Supp. at 1378 (“Under Georgia law, a single unreasonable provision in a restrictive covenant will void the entire contract, and courts will not ‘blue line’ the covenant to salvage any non-offending parts.”). Regardless, applicable Georgia law also flatly prohibits confidentiality covenants that, like both alleged here, are unlimited in time. *See Cox v. Altus Healthcare*, 308 Ga.App. 28, 31(2)(b), 706 S.E.2d 660 (finding nondisclosure provisions “unenforceable on their face because they are not limited in time”); *Pregler v. C &*

Z, Inc., 259 Ga.App. 149, 151(2), 575 S.E.2d 915 (2003); *Enron Capital & Trade Resources Corp. v. Pokalsky*, 227 Ga.App. 727, 730(3), 490 S.E.2d 136 (1997).

As well as waived by the undisputed provisions of the Protocol, the EARC and Confidentiality Agreement alleged against five of the twelve Individual Defendants are void. At a minimum, Merrill Lynch cannot establish likelihood of success on the merits of its breach contract claim or any other claim for which the restrictive covenants are a predicate.

C. Likelihood of Success on the Merits

Merrill Lynch's breach of fiduciary duty (Count V), tortious interference with business relationships with clients (Count III) and breach of contract (Count VI) claims, like all its claims, do not expressly identify the Defendants against whom they are pled, but there are no allegations stated against Dynasty, nor could there be.

Merrill Lynch's statutory trade secrets claims (Counts I and II) are largely predicated upon the unenforceable confidentiality covenants addressed above, and Merrill Lynch offers no evidence and fails even to allege that Dynasty accessed, induced anyone to access or even received, under any circumstances, any "trade secret" by even the broadest possible definition of that term. Against the Individual Defendants, as well, Merrill Lynch fails to state a single allegation of fact or to offer evidence of any kind. In its Complaint, Merrill Lynch states its statutory trade secret

allegations this way: (i) it relies upon the alleged restrictive covenants to define “confidential information” as effectively everything relating to Merrill Lynch or its clients, relies upon the alleged restrictive covenants to define all such “confidential information” as “trade secret”; (ii) specifically enumerates certain types of information under the header “compilations of client information,” some of which (like limited client contact information or non-identifying information relating to an advisor’s business) are permitted under the Protocol and some of which are not, such as personally identifiable client and prospect financial information, client account numbers, and client risk tolerances; (iii) alleges Individual Defendants had access to these “compilations of client information” defined as “trade secrets” and the conclusory boilerplate that “Defendants intentionally and willfully misappropriated Merrill’s confidential information and trade secrets through improper means”; and finally (iv) alleges “for example” that “upon information and belief” “GCIAS senior leaders, including Fletcher, Kaufman and Higgenbotham, shared with Dynasty, OpenArc, and Schwab sensitive GCIAS **business compilations** stored on a local, limited access hard drive on Merrill’s systems” and “[u]pon information and belief, the GCIAS senior leaders also accessed and repurposed trade secret information on the Merrill system to create “presentations” given to the other Merrill financial advisors and support personnel working with GCIAS, to convince those Merrill employees to jump ship to the competition. *See* Doc 1 (Cl) ¶¶ 81-89 (emphasis

added).

Other than this apparent attempt to conflate “business compilations,” which Merrill Lynch never explains or identifies, with the “compilations of client information,” Merrill Lynch never, in its Complaint, brief or lone affidavit, names single “confidential” or “trade secret” document or other information. It merely repeats variations of this trick.

To the extent the “business compilation” of unidentified documents is standard, non-client identifying information about Individual Defendants’ business, it is protected by the Protocol. Otherwise, Merrill Lynch’s allegations fail even to state a claim for misappropriation of trade secrets, let alone to establish likelihood of success on the merits. *See, e.g., NetRoadshow, Inc. v. Carrandi*, 2024 WL 947802, at *9 (N.D. Ga. Jan. 24, 2024) (finding that “Plaintiff makes no allegation of any specific confidential information it believes Plaintiff has used and disclosed, only that it believes such use or disclosure to be “inevitabl[e.]” and holding that “[t]he only allegations Plaintiff proffers are speculative, unsupported, and insufficient to carry Plaintiff’s burden to obtain injunctive relief”), *vacated in other part on reconsideration* 2024 WL 2158715 (N.D. Ga. Mar. 7, 2024) (vacating that part of its order granting injunction on other claims) *vacated in other part*, 2025 WL 2435411 (11th Cir. Aug. 25, 2025) (vacating that part of order dismissing counterclaim); *Auto. Assurance Grp. v. Giddens*, 2020 WL 10056277, at *5–6 (N.D.

Ga. Dec. 16, 2020) (“Plaintiff’s motion for preliminary injunction and the Verified Complaint suffer from a fatal flaw that forecloses the possibility of substantial likelihood of success on the merits of this claim. Plaintiff fails to provide any factual allegations in support of its contention that Defendant Giddens has used or disclosed its confidential or otherwise protected information. The only allegations Plaintiff proffers are speculative, unsupported, and insufficient to carry Plaintiff’s burden of persuasion to obtain injunctive relief.”).

Merrill Lynch’s tort and unfair competition claims rest on the same “trade secrets” allegations and similarly conclusory allegations of solicitation of employees. Not once, critically, does Merrill Lynch even allege, let alone provide evidence to show, the pre-termination solicitation of a single client. As post-termination solicitation of clients is indisputably protected by the Protocol, and Merrill Lynch fails to allege, and certainly to provide evidence of, any violation of the Protocol that would render it inapplicable—that is, pre-solicitation of clients or taking client identifying information beyond the five pieces permitted in the Protocol List—Merrill Lynch fails to allege, let alone prove, any tortious conduct.

Moreover, both the tort and unfair competition claims are barred under Georgia law in the absence of an enforceable covenant not to solicit or compete. *See, e.g., Tom’s Amusement Co. v. Total Vending Servs.*, 243 Ga. App. 294, 298, 533 S.E.2d 413, 418 (2000) (“These actions do not constitute tortious interference

by Total Vending. An employee is permitted to solicit his former customers on behalf of a new employer. Fair competition is always legal, and absent a valid noncompete or nonsolicit covenant a former employee may go to customers whom he procured for the old employer and endeavor to persuade them to change their trade to his advantage.”) (internal quotation and citation omitted);

D. Irreparable Harm

“Significantly, even if Plaintiffs establish a likelihood of success on the merits, the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper.” *Siegel v. LePore*, 234 F.3d 1163, 1176–77 (11th Cir. 2000)

Merrill Lynch offers nothing to establish irreparable harm but the bald assertion that loss of securities customers to competition cannot be quantified.

This is nonsense:

Second, Morgan Stanley cannot demonstrate irreparable harm because any injury it may suffer due to actions allegedly taken by Defendants is compensable by the award of money damages. The United States Supreme Court has stated that the mere loss of income, no matter how great, does not constitute irreparable harm...:

[I]t seems clear that the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury ... The cognizable injury to brokerage firms such as Plaintiff is lost commissions. Money damages easily compensate Plaintiffs for this type of loss.

The securities industry is highly regulated. Each individual transaction is monitored electronically. Every customer transfer from Morgan

Stanley is documented. Every executed trade is recorded. Every dollar earned in fees by Defendants Frisby and Lovell doing business with those customers that Morgan Stanley considers its own can be traced precisely. Any loss Morgan Stanley might suffer as a result of Defendants' departure is calculable.

Frisby, 163 F. Supp. 2d at 1376 (N.D. Ga. 2001) (internal quotation and citation omitted) (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. de Liniere*, 572 F.Supp. 246 (N.D.Ga.1983) (“[T]he Court finds that any loss of business to Merrill Lynch may be adequately redressed with money damages for breach of contract. The only possible irreparable result would be some vaguely defined loss of business momentum but the Court finds that to be unrealistic in the securities field. The real loss is in commission revenue generated by [the departing broker] from former...customers, and that can be readily calculated from the commissions he and his new firm derived from [those customers].”; *Merrill Lynch, Pierce, Fenner & Smith v. Bennert*, 980 F.Supp. 73, 75 (D.Me.1997) (damages caused by the exodus of multiple brokers to a competing brokerage firm could be calculated by evidence of past history of the earnings on accounts and expert testimony).

E. Balance of Harms and Public Interest

Merrill Lynch’s principal argument that an injunction is in the public interest are the contracts that are generally void as against Georgia public policy and all waived under the Protocol.

Its principal argument that its losses to competition outweigh harm to

Defendants of an injunction is that Defendants will suffer no harm because Merrill Lynch's clients are its own and not the Individual Defendants.

In both respects, Morgan Stanley is wrong:

In its brief in support of its request for a temporary restraining order, Morgan Stanley does not discuss whether and how the harm to it outweighs the damage to the Defendants of the relief requested. As have others, this Court holds that the balance of the equities clearly tips in favor of Defendants and their customers. Brokerage firms can survive the denial of an injunction far more readily than their departing employees can survive its issuance. In *de Liniere*, Judge Shoob noted that if an injunction issued, the broker would be prevented from servicing the customers for whom he had worked for over two years. *de Liniere*, 572 F.Supp. at 249. Defendants in this case would similarly suffer. Prior to beginning employment with Morgan Stanley, Defendant Frisby was not licensed to sell securities. Defendant Lovell had been registered to sell securities for less than a year and, therefore, had limited experience or training. The only client base Defendants *1382 possess is that gained during their employment with Plaintiff. To deprive them of contact with their customers would "leave [them] with no client base in a business that thrives on commissions from regular clients." *Id.* The damage to Defendants Frisby and Lovell of a temporary restraining order would equal almost a complete loss of income. According to Plaintiff's website, on the other hand, Morgan Stanley operates over 700 offices in 28 countries. This year, Morgan Stanley employs over 60,000 people. (<http://www.morganstanley.com/about/index.html>). While this number includes both brokers and other staff, the Court is hesitant to believe that the departure of two brokers will so damage Plaintiff's business as to tip the equities into its favor. The Court holds that balance of the equities clearly favors the denial of Plaintiff's requested temporary restraining order. [***]

Again, Plaintiff Morgan Stanley does not discuss whether issuing a temporary restraining order in this situation would further the public interest. The Court agrees with Defendants that the entry of injunctive relief is not in the public interest. The court in *Prudential Securities v. Plunkett*, 8 F.Supp.2d 514, 520 (E.D.Va.1998) noted that the broker-

client relationship was similar to that of attorney-client or doctor-patient. Personal trust and confidence pervades each of these relationships, and “[c]lients should be free to deal with the broker of their choosing and not subjected to the turnover of their accounts to brokers associated with the firm but unfamiliar to the client, unless the client gives informed consent to the turnover.” *Id.* When considering the public interest factor of a request for equitable relief in this context, Georgia courts recognize the importance of the “public’s ability to choose the professional services it prefers.” *Singer*, 250 Ga. at 377, 297 S.E.2d 473. “The public has little interest in having its choice restricted to brokers other than the one who has served them, pending the resolution of this dispute.” *de Liniere*, 572 F.Supp. at 249 (emphasis in original). In a time of market volatility, the inability of a client to consult a trusted advisor for even a single day could result in enormous financial losses to the client. This danger outweighs any injury to the Plaintiff that may occur due to the disloyalty of its former employees. Issuance of a temporary restraining order in this case is not in the public interest.

Frisby, 163 F. Supp. 2d at 1381–82 (N.D. Ga. 2001)

CONCLUSION

Defendant respectfully requests that the Court deny the Motion in its entirety.

Dated this 26th day of September 2025

Respectfully Submitted,

COUNCILL, GUNNEMANN & CHALLY, LLC

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**Admission Pro Hac Vice Pending
Attorneys for Defendant
Dynasty Financial Partners, LLC*

CERTIFICATION AND CERTIFICATE OF SERVICE

The counsel below certifies that this document has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1(C). I hereby certify that on this date I caused a true and correct copy of the foregoing motion to be filed with the Clerk of Court using this Court's CM/ECF system which will automatically send email notification to all counsel of record.

Dated this 26th day of September 2025

COUNCILL, GUNNEMANN & CHALLY, LLC

/s/ Josh Gunnemann _____

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Exhibit 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

MERRILL LYNCH, PIERCE, FENNER &
SMITH INCORPORATED

Plaintiff,

v.

ERIK BJERKE, JEFFREY CROWELL, CHAD
PIGG FIFE, EMILY FLETCHER, BRITTANY
HARTNETT, KEVIN HIGGINBOTHAM,
JAMES KAUFMAN, JEFFREY NEUMEYER,
STEVEN PREDILETTO, JOSEPH SACCO,
MICHAEL SONTAG, ELIZABETH WHITE,
OPENARC CORPORATE ADVISORY, LLC,
DYNASTY FINANCIAL PARTNERS, LLC and
CHARLES SCHWAB & CO., INC.

Defendants.

Civil Action No.
1:25-cv-05437-VMC

**Declaration of
Lindsey Strawhecker**

Lindsey Strawhecker, makes the following Declaration pursuant to 28 U.S.C. § 1746:

1. My name is Lindsey Strawhecker. I am over the age of twenty-one, and I have personal knowledge of the facts stated in this Affidavit, and the facts stated herein are true and correct to the best of my knowledge, information and belief.

A. Professional Background

2. I have more than twenty years of experience in the financial services industry. I began my career at Raymond James Financial, Inc. in June 2005 and

until November 2016 I held various operations positions. In November 2016 I began working in Raymond James' transitions management department, as a Transition Consultant until February 2019, a Supervisor until July 2020 and a Sr. Regional Manager until January 2025. In January 2025, I became a Director and the Head of Transitions at Dynasty Financial Partners, LLC ("Dynasty").

3. In the financial services industry a "transition" refers to the movement of registered representatives (also known as financial advisors) between financial services firms, such as registered representatives moving from one brokerage firm to another brokerage firm (e.g., from Morgan Stanley Smith Barney to Merrill Lynch, Pierce Fenner & Smith, Inc. ("Merrill Lynch") or vice versa) or, as was the case with the Individual Defendants, from a brokerage firm (Merrill Lynch) to launch their own independent Registered Investment Advisor ("RIA") (OpenArc Corporate Advisory, LLC ("OpenArc")). Oftentimes, teams, i.e., multiple registered representatives and the non-registered representative support staff, transition together.

4. As the Head of Transitions at Dynasty I am responsible for supervising transition managers who engage with the registered representatives (and their team members) who are transitioning to independent RIAs with Dynasty's assistance. In some instances, I also engage with such registered representatives and their team members. With respect to the Individual Defendants' transition to OpenArc, I

supervised the project that involved four transition managers who supported their transition, and I also directly engaged with the Individual Defendants and other of their team members. As the Head of Transitions at Dynasty, I make sure that the transition team understands the Protocol for Broker Recruiting and at all times acts in accordance with its requirements. The Individual Defendants' transition from Merrill Lynch to OpenArc was conducted in compliance with the Protocol for Broker Recruiting and industry standards.

B. Registered Representative Transitions

5. The movement of registered representatives was so prevalent, as was litigation surrounding such movements, that in 2004 Merrill Lynch, Citigroup Global Markets Inc./Smith Barney and UBS Financial Services Inc. entered into an agreement entitled the Protocol for Broker Recruiting (the "Protocol"), to govern the transition of registered representatives between Protocol member firms. A copy of the Protocol is attached as Exhibit A hereto, and can be found at https://jsheld-prod.imgix.net/Copy_of_Broker_Protocol.pdf.

6. Both Raymond James and Dynasty are Protocol member firms. As such, my entire career in transitions has involved both transitions from Protocol member firms ("Protocol Transitions") and transitions from non-Protocol member firms ("Non-Protocol Transitions"). I have extensive knowledge of the requirements and industry standards for both Protocol Transitions and Non-Protocol Transitions.

7. Since 2004 more than two thousand firms have joined the Protocol, including OpenArc. Although Smith Barney's successor, Morgan Stanley, and UBS have since withdrawn from the Protocol, Merrill Lynch has remained a member. As such, OpenArc and Merrill Lynch are both Protocol member firms. A transition between Merrill Lynch and OpenArc is therefore a Protocol Transition.

8. The first paragraph of the Protocol states:

The principal goal of the following protocol is to further the clients' interests of privacy and freedom of choice in connection with the movement of their Registered Representatives ("RRs") between firms. If departing RRs and their new firm follow this protocol, neither the departing RR nor the firm that he or she joins would have any monetary or other liability to the firm that the RR left by reason of the RR taking the information identified below or the solicitation of the clients serviced by the RR at his or her prior firm, provided, however, that this protocol does not bar or otherwise affect the ability of the prior firm to bring an action against the new firm for "raiding." The signatories to this protocol agree to implement and adhere to it in good faith.

(See Ex. A, at 1)

9. The Protocol specifies that:

When RRs move from one firm to another and both firms are signatories to this protocol, they may take only the following account information: client name, address, phone number, email address, and account title of the clients that they serviced while at the firm ("the Client Information") and are prohibited from taking any other documents or information. Resignations will be in writing delivered to local branch management and shall include a copy of the Client information that the RR is taking with

him or her. The RR list delivered to the branch also shall include the account numbers for the clients serviced by the RR. The local branch management will send the information to the firm's back office. In the event that the firm does not agree with the RR's list of clients, the RR will nonetheless be deemed in compliance with this protocol so long as the RR exercised good faith in assembling the list and substantially complied with the requirement that only Client information related to clients he or she serviced while at the firm be taken with him or her.

To ensure compliance with GLB and SEC Regulation SP, the new firm will limit the use of the Client information to the solicitation by the RR of his or her former clients and will not permit the use of the Client information by any other RR or for any other purpose. If a former client indicates to the new firm that he/she would like the prior firm to provide account number(s) and/or account information to the new firm, the former client will be asked to sign a standardized form authorizing the release of the account number(s) and/or account information to the new firm before any such account number(s) or account information are provided.

The prior firm will forward to the new firm the client's account number(s) and/or most recent account statement(s) or information concerning the account's current positions within one business day, if possible, but, in any event, within two business days, of its receipt of the signed authorization. This information will be transmitted electronically or by fax, and the requests will be processed by the central back office rather than the branch where the RR was employed. A client who wants to transfer his/her account need only sign an ACAT form.

(Id., at 1-2)

10. The Protocol protects registered representatives' right to solicit their clients after they join a new firm:

RRs that comply with this protocol would be free to solicit customers that they serviced while at their former firms, but only after they have joined their new firms. A firm would continue to be free to enforce whatever contractual, statutory or common law restrictions exist on the solicitation of customers to move their accounts by a departing RR before he or she has left the firm.

The RR's former firm is required to preserve the documents associated with each account as required by SEC regulations or firm record retention requirements.

(*Id.*, at 2)

11. For partnerships and teams, such as the Global Corporate and Institutional Advisory Services ("GCIAS") team (now OpenArc), the Protocol provides:

If an RR is a member of a team or partnership, and where the entire team/partnership does not move together to another firm, the terms of the team/partnership agreement will govern for which clients the departing team members or partners may take Client Information and which clients the departing team members or partners can solicit. In no event, however, shall a team/partnership agreement be construed or enforced to preclude an RR from taking the Client Information for those clients whom he or she introduced to the team or partnership or from soliciting such clients

In the absence of a team or partnership written agreement on this point, the following terms shall govern where the entire team is not moving: (1) If the departing team member or partner has been a member of the team or

partnership in a producing capacity for four years or more, the departing team member or partner may take the Client Information for all clients serviced by the team or partnership and may solicit those clients to move their accounts to the new firm without fear of litigation from the RR's former firm with respect to such information and solicitations; (2) If the departing team member or partner has been a member of the team or partnership in a producing capacity for less than four years, the departing team member or partner will be free from litigation from the RR's former firm with respect to client solicitations and the Client Information only for those clients that he or she introduced to the team or partnership.

If accounts serviced by the departing RR were transferred to the departing RR pursuant to a retirement program that pays a retiring RR trailing commissions on the accounts in return for certain assistance provided by the retiring RR prior to his or her retirement in transitioning the accounts to the departing RR, the departing RR's ability to take Client Information related to those accounts and the departing RR's right to solicit those accounts shall be governed by the terms of the contract between the retiring RR, the departing RR, and the firm with which both were affiliated.

(Id., at 3-4)

12. In addition to Client Information, the Protocol specifically protects the right of registered representatives to provide non-client identifying information about their business to another firm:

It shall not be a violation of this protocol for an RR, prior to his or her resignation, to provide another firm with information related to the RR's business, other than account statements, so long as that information does not reveal client identity.

(Id., at 2)

13. The information related to the registered representatives business that is routinely provided includes, but is not limited to, the total amount of client assets under management and the revenue generated from those assets for the prior 12 months, the types of products the clients are invested in, including alternative investments and private equity investments that may be difficult to transfer, the extent to which their clients have outstanding lines of credit and the rates charged thereon, the money managers utilized for the registered representatives' clients, and desired future state account structures.

14. I have knowledge from prior experience that requests and accepts the same type of information in recruiting and transitioning registered representatives to join the firm.

15. In my experience, transitions are often the result of years of research and planning prior to execution. This is especially true where the registered representatives are transitioning to an independent RIA that they are establishing. During this time, it is industry standard practice for the registered representatives to remain employed at the firm they will be leaving so as to be able to continue to service their clients' financial needs.

16. In my career, I have been involved with and/or supervised the transition of hundreds of teams. These transitions have involved teams of varying sizes and

have included multiple registered representatives and support staff that work with those registered representatives.

C. Dynasty Financial Partners, LLC

17. Dynasty is a financial services company that offers middle and back office operational support services such as assistance with compliance, marketing, finance, operations and administration to a network of independent registered investment advisers in the investment adviser community. Dynasty is not a broker-dealer or FINRA registered member firm, does not employ registered representatives and does not have any direct investment advisory clients. Although Dynasty provides various services to the registered representative and their team members who transition to their own independent RIAs with the assistance of Dynasty, such as the Individual Defendants, they are not employees of Dynasty.

18. More specifically, Dynasty provides technology-enabled wealth management solutions and business services for financial advisory firms primarily focused on serving high net worth and ultra-high net worth clients. Dynasty provides access to a comprehensive platform of software and technology tools, business services and holistic investment management capabilities through an open-architecture platform delivered via a suite of proprietary and third-party technologies. Dynasty's technology, tools and services provide advisory firms the supported independence to launch their business, scale their operations and grow

their firms while also allowing them to be more focused on and better equipped to serve their clients.

19. Like other support platforms for independent RIAs, Dynasty assists registered representatives who seek to transition to independent RIAs. There are a multitude of tasks that registered representatives have to accomplish in order to transition to a new independent RIA. These tasks are time consuming and complicated and include, but are not limited to, determining the amount of start up financing that the registered representatives will need, securing said financing, forming the RIA business, retaining legal counsel to advise on the transition including the Protocol and drafting legal documents, preparing marketing materials and other public relations related items, locating, leasing and building out office space, selecting and contracting with a broker/dealer, engaging technology specialists, selecting and contracting with a custodial firm and preparing resignation letters. Dynasty guides the registered representatives through this process, helps organize the process, makes introductions to professionals such as attorneys and CPAs, makes introductions to broker/dealers and custodians, trains the registered representatives and any team members on Dynasty's platforms, among other things.

20. Completing all of the tasks prior to transitioning is the only feasible way to transition to a new independent RIA because the business has to be ready to go as soon as the registered representatives resign from their prior firm. If they

waited until after they resigned to undertake these tasks, they would not be able to be registered and service their clients' financial needs, for months and potentially more than a year. In addition, as they would not be joining a firm that was a member of the Protocol at the time of resignation, the registered representatives would lose the protections of the Protocol.

21. Once the registered representatives transition and launch their RIA, Dynasty transition employees offer support, including, but not limited to, answering questions, addressing technology issues, guiding the registered representatives or team members as to documents needed to open client accounts.

E. The Individual Defendants' Transition

22. In supervising Dynasty's transition managers in connection with the Individual Defendants' transition to OpenArc and interacting with the Individual Defendants, I have personal knowledge of their transition to OpenArc, the documents and information requested by Dynasty and/or provided by the Individual Defendants to Dynasty and the communications between the Individual Defendants and Dynasty.

23. GCIAS was a team at Merrill Lynch. While GCIAS was a larger team compared to other transitions I have been involved with or supervised in the past, it was nonetheless a standard team Protocol Transition to an independent RIA, OpenArc.

24. When a team transitions together, it is industry standard practice that the team members talk amongst themselves about the transition. The Protocol not only contemplates discussions among team members, it necessitates them. Team members must learn if the entire team will transition or if there is a situation “where the entire team/partnership does not move together to another firm” so that the transitioning team members know “for which clients the departing team members or partners may take Client Information and which clients the departing team members or partners can solicit.” (*See* Ex. A, at 2). In addition, often, the team members divide the tasks that need to be accomplished and update each other about the status of each open task. Moreover, decisions need to be made by the team members about many aspects of the transition, which requires them to discuss those items.

25. Pursuant to the Protocol, registered representatives in a Protocol Transition can take the five pieces of client information and once they join the new firm, can solicit their clients. The Protocol does, however, contain certain requirements, most notably that the registered representative cannot provide their new firm with client information before they join the new firm, they cannot pre-solicit their clients and they must abide by any team/partnership agreements.

26. Dynasty assisted the Individual Defendants with their transition by acting as a project manager to help them secure their real estate, office set up, IT provider, custodian and various resource partner selections, provide education and

consulting for their future state investment mapping, ensure their legal team has all their documents and contracts ready for launch, among other things.

27. During the transition process, I discussed the requirements of the Protocol, what information the Individual Defendants were and were not allowed to share with Dynasty or take from Merrill Lynch to their new RIA and the importance of not communicating with clients about the possibility of leaving Merrill Lynch, as did the transition managers that I supervised. The Individual Defendants communicated their understanding of the importance of complying with the Protocol, the information they were and were not allowed to share with Dynasty or take from Merrill Lynch to their new RIA and the importance of not communicating with clients about the possibility of leaving Merrill Lynch. The Individual Defendants made clear that they intended to do so. The Individual Defendants were advised by their own legal counsel throughout the transition process.

28. To my knowledge, obtained through management of the transition, including the review of documents and information provided to Dynasty, communications between Individual Defendants and Dynasty, both before and after their resignations from Merrill Lynch, the Individual Defendants adhered to the above-referenced instructions. The Individual Defendants did not disclose or use confidential client information or Merrill Lynch proprietary information, prior to their resignation. The Individual Defendants did not disclose or to my knowledge

use or take confidential client information, Merrill Lynch proprietary information, information that would violate Reg S-P, information that would violate the Protocol, or information that was inconsistent with industry norms in a transition. I have not seen any confidential client information, Merrill Lynch proprietary information, information that would violate Reg S-P, information that violated the Protocol or information that was inconsistent with industry norms in a transition, in any of the documents the Individual Defendants provided to Dynasty. The only information shared by the Individual Defendants prior to resignation was information related to their business which did not reveal client identity, consistent with the Protocol.

29. The only client identifying information that I am aware of the Individual Defendants having provided to Dynasty or taken with them to OpenArc is the five pieces of client information permitted by the Protocol (a “Protocol List”). Likewise, the only client information provided to Dynasty was the Protocol List and only after they resigned, except for any additional information provided by the Individual Defendants’ clients post resignation.

30. I am aware that Merrill Lynch’s Market Executive, Michael Nies, has alleged that “once Dynasty received Merrill’s customer information, Dynasty shared it with Schwab....” (*See Verified Comp.*, Dk. 1, at ¶75). While Dynasty has now been provided with the Protocol List in order to load it into OpenArc’s client relationship management system that Dynasty hosts, so that the OpenArc registered

representatives can contact clients pursuant to the Protocol, because the Individual Respondents' Protocol List was in paper form, which they subsequently scanned and required significant proofing and correction by the OpenArc team, Dynasty has not, and would not share the Protocol List with Charles Schwab & Co. Inc. ("Schwab"). I am not aware of OpenArc doing so either.

31. Schwab is the custodian that will hold OpenArc's clients' assets. Custodians also provide services such as executing trades, performing account administration tasks such as opening accounts, handling asset transfers and cash activities and issuing account statements and tax reporting forms to the RIA's clients.

F. Merrill Lynch's Assertions in Michael Nies' Affidavit

32. I have been provided with and reviewed the Affidavit of Michael Nies, which Merrill Lynch submitted in support of its Motion for Temporary Restraining Order and Preliminary Injunction. With respect to the assertions made by Mr. Nies as to which I have personal knowledge, not only does Mr. Nies fail to provide factual support for those assertions, but they are either false or entirely consistent with industry standard transitions.

33. In paragraph 30, Mr. Nies asserts that he "understands that the Individual Defendants took the following steps – all while still employed with Merrill:" including that they "founded and incorporated wealth management firm

OpenArc (and RIA) to compete with Merrill” and “identified, leased, and began the build out of new office space to house OpenArc.” In connection with every transition I have observed, the transitioning team prepared for the transition before they transitioned from their employer. Each of these steps are necessary and industry standard practice for transitioning registered representatives to independent RIAs. Obviously, in order to provide continuity of service to clients and have any opportunity to maintain their business, transitioning registered representatives must have an RIA established to which they can transfer their licenses so that they can speak to their clients and to have offices to work from. However, prior to the Individual Defendants’ and their other team members’ resignations, OpenArc was not an operating, let alone a competing, business.

34. Mr. Nies also asserts in paragraph 30 that the Individual Defendants “shared confidential and proprietary information concerning...Merrill customers [client information, client lists, client account names and numbers, investment strategies and objectives, risk tolerances, current investments, past revenue and rates of return, existing or forthcoming products and services, and strategic business plans¹]” with Dynasty and in paragraph 38 “that they disclosed and misused Merrill’s [customer-related information]...” The Individual Defendants did not disclose or use confidential client information or Merrill Lynch proprietary

¹ See Affidavit of Michael Nies, ¶ 24-25.

information, prior to their resignation. The Individual Defendants did not disclose or to my knowledge use or take confidential client information, Merrill Lynch proprietary information, information that would violate Reg S-P, information that would violate the Protocol, or information that was inconsistent with industry norms in a transition. I have not seen any confidential client information, Merrill Lynch proprietary information, information that would violate Reg S-P, information that violated the Protocol or information that was inconsistent with industry norms in a transition, in any of the documents the Individual Defendants provided to Dynasty. The only information shared by the Individual Defendants prior to resignation was information related to their business which did not reveal client identity, consistent with the Protocol. The only information shared by the Individual Defendants following resignation are the five pieces of Client Information, consistent with the Protocol.

35. In paragraph 35, Mr. Neis asserts that, again without setting forth a factual basis, that he “understands that GCIAS senior leaders...shared with Dynasty and Schwab sensitive GCIAS business compilations...” The only information the Individual Defendants provided to me or that I am aware they provided to anyone else at Dynasty complied with the Protocol in that it was limited to information related to their business that did not reveal client identities.

36. I declare under penalties of perjury that the foregoing statements are true and correct.

Dated: September 26, 2025



Lindsey Strawhecker

Exhibit A

PROTOCOL FOR BROKER RECRUITING

The principal goal of the following protocol is to further the clients' interests of privacy and freedom of choice in connection with the movement of their Registered Representatives ("RRs") between firms. If departing RRs and their new firm follow this protocol, neither the departing RR nor the firm that he or she joins would have any monetary or other liability to the firm that the RR left by reason of the RR taking the information identified below or the solicitation of the clients serviced by the RR at his or her prior firm, provided, however, that this protocol does not bar or otherwise affect the ability of the prior firm to bring an action against the new firm for "raiding." The signatories to this protocol agree to implement and adhere to it in good faith.

When RRs move from one firm to another and both firms are signatories to this protocol, they may take only the following account information: client name, address, phone number, email address, and account title of the clients that they serviced while at the firm ("the Client Information") and are prohibited from taking any other documents or information. Resignations will be in writing delivered to local branch management and shall include a copy of the Client Information that the RR is taking with him or her. The RR list delivered to the branch also shall include the account numbers for the clients serviced by the RR. The local branch management will send the information to the firm's back office. In the event that the firm does not agree with the RR's list of clients, the RR will nonetheless be deemed in compliance with this protocol so long as the RR exercised good faith in assembling the list and substantially complied with the requirement that only Client Information related to clients he or she serviced while at the firm be taken with him or her.

To ensure compliance with GLB and SEC Regulation SP, the new firm will limit the use of the Client Information to the solicitation by the RR of his or her former clients and will not permit the use of the Client Information by any other RR or for any other purpose. If a former client indicates to the new firm that he/she would like the prior firm to provide account number(s) and/or account information to the new firm, the former client will be asked to sign a standardized form authorizing the release of the account number(s) and/or account information to the new firm before any such account number(s) or account information are provided.

The prior firm will forward to the new firm the client's account number(s) and/or most recent account statement(s) or information concerning the account's current positions within one business day, if possible, but, in any event, within two business days, of its receipt of the signed authorization. This information will be transmitted electronically or by fax, and the requests will be processed by the central back office rather than the branch where the RR was employed. A client who wants to transfer his/her account need only sign an ACAT form.

RRs that comply with this protocol would be free to solicit customers that they serviced while at their former firms, but only after they have joined their new firms. A firm would continue to be free to enforce whatever contractual, statutory or common law restrictions exist on the solicitation of customers to move their accounts by a departing RR before he or she has left the firm.

The RR's former firm is required to preserve the documents associated with each account as required by SEC regulations or firm record retention requirements.

It shall not be a violation of this protocol for an RR, prior to his or her resignation, to provide another firm with information related to the RR's business, other than account statements, so long as that information does not reveal client identity.

Accounts subject to a services agreement for stock benefits management services between the firm and the company sponsoring the stock benefit plan that the account holder participates in (such as with stock option programs) would still be subject to (a) the provisions of that agreement as well as to (b) the provisions of any account servicing agreement between the RR and the firm. Also, accounts subject to a participation agreement in connection with prospecting IRA rollover business would still be subject to the provisions of that agreement.

If an RR is a member of a team or partnership, and where the entire team/partnership does not move together to another firm, the terms of the team/partnership agreement will govern for which clients the departing team members or partners may take Client Information and which clients the departing team members or partners can solicit. In no event, however, shall a team/partnership agreement be construed or enforced to preclude an RR from taking the Client Information for those clients whom he or she introduced to the team or partnership or from soliciting such clients

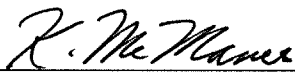
In the absence of a team or partnership written agreement on this point, the following terms shall govern where the entire team is not moving: (1) If the departing team member or partner has been a member of the team or partnership in a producing capacity for four years or more, the departing team member or partner may take the Client Information for all clients serviced by the team or partnership and may solicit those clients to move their accounts to the new firm without fear of litigation from the RR's former firm with respect to such information and solicitations; (2) If the departing team member or partner has been a member of the team or partnership in a producing capacity for less than four years, the departing team member or partner will be free from litigation from the RR's former firm with respect to client solicitations and the Client Information only for those clients that he or she introduced to the team or partnership.

If accounts serviced by the departing RR were transferred to the departing RR pursuant to a retirement program that pays a retiring RR trailing commissions on the accounts in return for certain assistance provided by the retiring RR prior to his or her retirement in transitioning the accounts to the departing RR, the departing RR's ability to take Client Information related to those accounts and the departing RR's right to solicit those ac-


counts shall be governed by the terms of the contract between the retiring RR, the departing RR, and the firm with which both were affiliated.

A signatory to this protocol may withdraw from the protocol at any time and shall endeavor to provide 10 days' prior written notice of its withdrawal to all other signatories hereto. A signatory who has withdrawn from the protocol shall cease to be bound by the protocol and the protocol shall be of no further force or effect with respect to the signatory. The protocol will remain in full force and effect with respect to those signatories who have not withdrawn.

Citigroup Global Markets Inc. ("Smith Barney")

By: 
Name: Kevin McManus
Title: Managing Director and Chief
Administrative Officer, Private
Client Branch System

Merrill Lynch, Pierce, Fenner & Smith Incorporated

By: 
Name: Phil Sieg
Title: Managing Director, Head of Strategic
Leadership and Development

UBS Financial Services Inc.

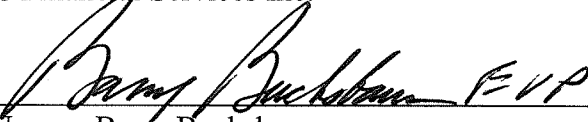
By:  EVP
Name: Barry Buchsbaum
Title: Director of Strategic Development
Executive Vice President

Exhibit 2

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

MERRILL LYNCH, PIERCE, FENNER &
SMITH INCORPORATED

Plaintiff,

v.

ERIK BJERKE, JEFFREY CROWELL, CHAD
PIGG FIFE, EMILY FLETCHER, BRITTANY
HARTNETT, KEVIN HIGGINBOTHAM,
JAMES KAUFMAN, JEFFREY NEUMEYER,
STEVEN PREDILETTO, JOSEPH SACCO,
MICHAEL SONTAG, ELIZABETH WHITE,
OPENARC CORPORATE ADVISORY, LLC,
DYNASTY FINANCIAL PARTNERS, LLC and
CHARLES SCHWAB & CO., INC.

Defendants.

Civil Action No.
1:25-cv-05437-VMC

**Declaration of
Elizabeth Cancelosi**

Elizabeth Cancelosi, makes the following Declaration pursuant to 28 U.S.C.

§ 1746:

1. My name is Elizabeth Cancelosi. I am over the age of twenty-one, and I have personal knowledge of the facts stated in this declaration, and the facts stated herein are true and correct to the best of my knowledge, information and belief.

2. I have more than fourteen years of experience in the financial services industry. My experience in the industry began as an intern in wealth management at Merrill Lynch. After graduating from college, my first full-time position, which I held from 2011 to 2014, was as a Financial Solutions Advisor at Merrill Edge

(Merrill Lynch's platform primarily for self-directed investors). From 2014 to 2019, I worked at Bessemer Trust, first as an Associate Client Advisor, then as a Client Advisor.

3. I joined Dynasty Financial Partners, LLC ("Dynasty") in December 2021. Throughout my time at Dynasty, I have been involved in registered representatives' transitions, from December 2021 to December 2023 as Senior Vice President, Transition Services and since January 2024, as a Senior Vice President, Relationship Management. Transitions refers to the movement of registered representatives between firms or, in the case of Dynasty, from firms to independent Registered Investment Advisors ("RIA").

4. In April 2025 I was selected to be one of the four transition managers assigned to the Individual Defendants transition to a new independent RIA, OpenArc Corporate Advisory, LLC ("OpenArc"). In this role, my primary responsibilities have focused on interacting with OpenArc's custodian, Charles Schwab & Co., Inc. ("Schwab"); assisting with respect to human resources solutions such as payroll and medical insurance issues; interacting with trust companies that OpenArc might use for their clients and interacting with OpenArc's legal counsel. However, I have stayed abreast of the other aspects of the transition and have assisted the other transition managers in many of their primary areas of responsibility.

5. I understand that both Merrill Lynch and OpenArc are members of the Protocol for Broker Recruiting (the “Protocol”) and therefore the Individual Defendants’ transition was a “Protocol Transition.”

6. In connection with the Individual Defendants’ transition to OpenArc I participated in numerous conversations and meetings with the Individual Defendants. I also participated in conversations with the other transition managers who were involved in the Individual Defendants’ transition to OpenArc, and participated in impromptu and regularly scheduled meetings with the other transition managers, during which the Individual Defendants’ transition was discussed. When I became a transition manager on the Individual Defendants’ transition to OpenArc, I reviewed the documents that the Individual Defendants had previously provided to Dynasty. I also reviewed the documents the Individual Defendants provided to Dynasty after I became a transition manager on their transition to OpenArc, at or about the time they time they were received. As such, I have personal knowledge of the Individual Defendants transition to OpenArc, the documents and information requested by Dynasty and/or provided by the Individual Defendants to Dynasty and the communications between the Individual Defendants and Dynasty.

7. During the transition process, I discussed or was present when other Dynasty transition employees discussed with the Individual Defendants the requirements of the Protocol, what information the Individual Defendants were and

were not allowed to share with Dynasty or take from Merrill Lynch to their new RIA and the importance of not communicating with clients about the possibility of leaving Merrill Lynch. The Individual Defendants communicated their understanding of the importance of complying with the Protocol, the information they were and were not allowed to share with Dynasty or take from Merrill Lynch to their new RIA and the importance of not communicating with clients about the possibility of leaving Merrill Lynch. The Individual Defendants made clear that they intended to do so. The Individual Defendants were also advised by their own legal counsel throughout the transition process.

8. To my knowledge, obtained through my involvement in the Individual Defendants' transition, including the review of documents and information provided to Dynasty, communications between Individual Defendants and Dynasty, both before and after their resignations from Merrill Lynch, the Individual Defendants adhered to the above-referenced instructions. The Individual Defendants did not disclose or use confidential client information or Merrill Lynch proprietary information, prior to their resignation. The Individual Defendants did not disclose or to my knowledge use or take confidential client information, Merrill Lynch proprietary information, information that would violate Reg S-P, information that would violate the Protocol, or information that was inconsistent with industry norms in a transition. I have not seen any confidential client information, Merrill Lynch

proprietary information, information that would violate Reg S-P, information that violated the Protocol or information that was inconsistent with industry norms in a transition, in any of the documents the Individual Defendants provided to Dynasty. The only information shared by the Individual Defendants prior to resignation was information related to their business which did not reveal client identity, consistent with the Protocol.


9. The only client identifying information that I am aware of the Individual Defendants having taken with them to OpenArc is the five pieces of client information permitted by the Protocol (a “Protocol List”). Likewise, the only client information provided to Dynasty was the Protocol List and after they resigned, except for any additional information provided by the Individual Defendants’ clients post resignation.

10. While Dynasty has now been provided with the Protocol List in order to load it into OpenArc’s client relationship management system that Dynasty hosts, so that the OpenArc registered representatives can contact clients pursuant to the Protocol, because the Individual Respondents’ Protocol List was in paper form, which they subsequently scanned and requires significant proofing and correction by the OpenArc team, Dynasty has not, and would not share the Protocol List with Schwab. I am not aware of OpenArc doing so either.

11. Based on my involvement in the Individual Defendants' transition, including the review of documents and information provided to Dynasty, and communications between Individual Defendants and Dynasty, both before and after their resignations from Merrill Lynch, the Individual Defendants' transition from Merrill Lynch to OpenArc was conducted in compliance with the Protocol and industry standards.

12. I declare under penalties of perjury that the foregoing statements are true and correct.

Dated: September 26, 2025


Elizabeth Cancelosi