

Broker Sued by Morgan Stanley Refutes Its Client Ownership Assertions

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The broker Morgan Stanley sued last week to prevent him from contacting customers at his new firm has countered with a declaration that he built his book without the firm's help and that the "barebones" contact information he took is sanctioned industrywide by the Protocol for Broker Recruiting.

Morgan Stanley's weekend rush to court for an order restraining John Fitzgerald from calling former clients while it pursues a permanent injunction and damages in arbitration is being closely watched as a barometer of how fiercely firms will assert client "ownership" claims once they leave the Protocol. Morgan Stanley and UBS in the past few weeks dropped out of the industry pact, which permits brokers to take rudimentary contact information about clients they formerly serviced.

"When I became a Financial Advisor while working at Morgan Stanley, I built my business by working very hard and very long hours," Fitzgerald wrote in a filing on Tuesday with the U.S. District Court in Camden, NJ, opposing the firm's emergency motion for a temporary restraining order. "I found my clients by myself and developed a book of business from cold calls, my family, friends, seminars, networking and referrals. Morgan Stanley handed me absolutely ZERO clients. That is, NO clients were re-assigned to me by Morgan Stanley during my time there."

He also asserted that the rudimentary client information he took to inform them of his new job—names, addresses, phone and fax numbers, account titles and email addresses—was done "pursuant to the Protocol that Morgan Stanley had me follow when I joined it in 2008."

Arguing that a restraining order will hurt clients who will not be able "to freely transfer their business to me, as is their absolute right and, in most instances, their

very strong desire,” he also took an apparent shot at Richard Maratea, a Mt. Laurel, N.J., branch manager who filed an affidavit asserting that Morgan Stanley’s claims were true.

“Beyond anything, I developed these relationships not from the efforts of Morgan Stanley or my former manager (who, respectfully, knows nothing about my clients),” his court filing said.

Several of the clients have been called by Morgan Stanley representatives who appear to be incorrectly insinuating that Fitzgerald “did something wrong and had to quit before I was fired,” his declaration said.

Fitzgerald, 37, who has set up as an independent broker affiliated with Commonwealth Financial Network (and Fidelity’s National Financial Services for custody of advisory assets), did not respond to a request for comment at his firm Fitzgerald Financial Group in the southern New Jersey town of Vineland.

A Morgan Stanley spokeswoman declined to comment on the broker’s arguments.

In a response to Fitzgerald’s declaration, Morgan Stanley outside counsel Joseph Gehring told the court on Tuesday that the Broker Protocol cited by the advisor is irrelevant because neither the wirehouse nor Fitzgerald’s new firm and affiliated broker-dealers are currently in the pact. Even if the Protocol did apply, Gehring wrote, the broker would have violated it because he has not indicated that he provided Morgan Stanley with a copy of the client information he took as required by the pact.

Ross Intelisano, a plaintiffs’ securities lawyer in New York who is not involved in the case, said Morgan Stanley’s Protocol arguments and the employment agreement present “tough” facts for Fitzgerald but extra-legal “equity” arguments could help him.

“It’s a complete career killer to forbid an advisor from contacting his clients,” Intelisano said in an email. “It’s also terrible for the clients who most often just want to follow their advisor. It will be a good test of whether these types of MS agreements will be enforced by courts.”

Fitzgerald joined Morgan Stanley as a sales assistant in 2008 from Merrill Lynch and signed an employment agreement in 2010 when he became a broker, according to his declaration. Morgan Stanley has asserted that the employment agreement

affirms the firm’s ownership of “trade secrets” and “company records” and prohibits Fitzgerald from soliciting customers for one year after leaving.

Anthony Paduano, a lawyer for Fitzgerald, acknowledged in a court filing on Tuesday that Morgan Stanley has withdrawn from the Protocol. Paduano did not respond to requests for comment.

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