Morgan claims $280M advisors violated non-solicit. Judge doesn't buy it

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Morgan Stanley suffered a setback in its latest legal attempt to stop two advisors who joined a rival firm from speaking with clients.

A judge denied Morgan's request for a temporary restraining order against the advisors whom it accused of violating non-solicitation agreements. Since leaving the Broker Protocol in November 2017, Morgan Stanley has filed similar lawsuits against other advisors, with mixed results.

Morgan's claims in this case are similar to those in other TRO fights. The firm said advisors Brett Diamond and Jason Bottenfield violated non-solicitation agreements and misappropriated company information, according to documents filed in a Texas state court.

Diamond and Bottenfield had left the wirehouse on March 15 for Steward Partners, a fast-growing independent firm founded by former Morgan Stanley managers and which is affiliated with Raymond James. Diamond and Bottenfield managed more than $280 million in client assets and generated more than $2 million in annual revenue, according to Morgan Stanley's lawsuit which was filed March 22, a week after the duo resigned.

Prior to the lawsuit being filed, Diamond and Bottenfield told *On Wall Street* they moved for the greater freedom, resources and ability to do financial planning at Steward Partners and Raymond James. "I felt the flexibility was a little bit constrained prior [while at Morgan]," Bottenfield said.

They also rejoined their former branch manager, Chris Barton, who left Morgan Stanley a year ago to serve as divisional president at Steward.

Morgan Stanley, meanwhile, says that Diamond and Bottenfield had a one-year non-solicitation agreement and claims that clients have contacted the firm saying they were solicited by the advisors. Morgan Stanley did not name the clients in its court filing.

The firm also says that printer records show that in the month prior to their departure Bottenfield printed 79 documents (878 pages) and Diamond printed 14 documents (49 pages) containing confidential information about Morgan Stanley clients. The firm did not specify what these documents were used for or if the advisors had taken them when they resigned.

Morgan further claims that, following the departure of Diamond and Bottenfield, employees discovered that files on a shared drive containing confidential client information had been deleted.

Diamond and Bottenfield "have deleted or otherwise made unavailable digitally-stored sensitive information regarding Morgan Stanley customers and have been improperly soliciting Morgan Stanley customers," the company says.

A temporary restraining order was necessary to protect Morgan Stanley's business, the firm claims. Plus, the advisors had benefited from years of investment in their practice, the company says. Diamond and Bottenfield "had access to Morgan Stanley's extensive support services, including sales and administrative support and they benefited from Morgan Stanley's advertising campaigns and its reputation in the industry," the firm said in court documents.

But the judge didn't buy it. Bridgett Whitmore, a Texas state district judge, ruled that Morgan Stanley failed to present a case justifying a temporary restraining order and denied the firm's request. She did not explain her ruling.

There will be an evidentiary hearing on April 25.

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Morgan Stanley has filed separate claims with FINRA.

Spokespersons for Morgan Stanley and Steward Partners declined to comment on the case.

Neither Bottenfield nor Diamond responded to a request for comment. Michael Bonomo, who served as their branch manager at Morgan Stanley and submitted an affidavit supporting his employer's lawsuit, could not be reached for comment.

Why Morgan Stanley filed this lawsuit in state rather than federal court is unclear.

Tom Lewis, an attorney with Stevens & Lee and who is not affiliated with this case, suggests the firm made a tactical decision it would have greater odds of success in state rather than federal court.

"Obviously, in this situation Morgan Stanley took a chance filing in state court and lost," he says.

James Eccleston, an attorney at Eccleston Law who is not affiliated with the case, notes that Morgan's lawsuit relies in part on Texas law, which "seems to give Morgan Stanley a better argument that a customer list is protected, as confidential information or even as a trade secret."

The firm appears to be filing somewhat fewer lawsuits against departing advisors than it did in early 2018, when Morgan won full or partial victories in some cases. However, it has lost some TRO requests and other cases have been drawn-out fights. In September 2018, Morgan sued a $660 million team that moved to Stifel. A judge initially denied the firm's request, but finally granted a temporary restraining order in December.

"I think it's surprising Morgan Stanley is losing some of these TRO matters," says Ross Intelisano, an attorney at Rich, Intelisano & Katz and who is not affiliated with the Bottenfield and Diamond case.

Filing requests for temporary restraining orders can be very expensive due to the manpower involved, Intelisano adds.

In cases involving non-protocol member firms, much hinges on the actions of advisors and the contractual agreements they have with their employers. The Broker Protocol is an industrywide trade agreement that permits brokers moving between member firms to take basic client contact information with them. Morgan Stanley and UBS left the pact in 2017.

"The protocol got you out of whatever agreements you had with the firm," Intelisano says. "Without being a member of the protocol, you are stuck with what your employment agreement says or all these other types of agreements that the firms have — and a lot of these have non-competes or non-solicitations."