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No. 5-21-0377

IN THE APPELLATE COURT OF ILLINOIS
FIFTH JUDICIAL DISTRICT

ARCHFORD CAPITAL STRATEGIES, LLC	)	From the Circuit Court Twentieth Judicial Circuit
Plaintiff-Appellant,	)	No. 21-MR-89
v.	)	Hon. William D. Stiehl Judge Presiding
WILLIAM P. DAVIS	)	
Defendant-Appellee.	)	

BRIEF OF APPELLANT ARCHFORD CAPITAL STRATEGIES, LLC

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INTRODUCTION

Archford Capital Strategies, LLC ("Archford") is an investment advisory, financial planning, and asset management firm that employed Defendant as a Relationship and Portfolio Manager pursuant to an employment contract beginning in 2015. In 2019, in exchange for additional bonus compensation, Defendant signed an amendment to his employment contract in which he agreed that, following any termination of employment, he would report and pay specified sums to Archford related to revenues received from a specified group of Archford clients that transferred to Defendant during the 24-month period after his employment with Archford ended (the "Transfer Agreement"). When Defendant's employment terminated in 2020, Archford clients transferred, but Defendant refused to comply with the reporting and payment obligations in the Transfer Agreement.

Archford brought this action for declaratory judgment and breach of contract. The Circuit Court for the Twentieth Judicial Circuit, St. Clair County, Illinois (the "Circuit Court") granted Defendant's Motion to Dismiss pursuant to 735 ILCS 5/2-619,

reasoning that the Protocol for Broker Recruiting defeated Archford's claims as a matter of law. Archford appeals from the Circuit Court's judgment dismissing Archford's Complaint with prejudice. The question raised on the pleadings is whether the Circuit Court properly dismissed Counts I and II of the Complaint.

ISSUES PRESENTED FOR REVIEW

1. Whether the Protocol for Broker Recruiting, which allows for the solicitation of certain clients and taking of specified client information under certain circumstances, unambiguously nullifies any of Defendant's revenue-sharing obligations set forth in his Transfer Agreement.
2. Whether the Circuit Court applied the correct legal standard to Defendant's section 2-619 motion to determine that Defendant satisfied his burden of establishing that: (a) he and his new firm followed the Protocol's requirements; and (b) every client that transferred from Archford to Defendant was (i) a client he serviced at Archford and (ii) included on a list provided to Archford at the time of Defendant's termination.

JURISDICTION

Jurisdiction over this appeal exists pursuant to Illinois Supreme Court Rules 301 and 303(a) in that this appeal is from a final judgment of a circuit court and Archford filed a timely notice of appeal in the circuit court.

On April 7, 2021, Archford filed its two-count Complaint in the Circuit Court. C 4. On October 19, 2021, the Circuit Court entered its Order granting Defendant's Motion to Dismiss, dismissing both Counts of the Complaint, and awarding Defendant attorneys' fees and costs. C 183-87. This Order was a final judgment in that it resolved all the claims of all the parties. On November 18, 2021, Archford timely filed its Notice of Appeal in the Circuit Court appealing from the Order. C 205-06.

On November 22, 2021, the Circuit Court entered an order setting the amount of attorneys' fees for which Archford is responsible pursuant to the October 19, 2021 Order. C 207-09. To the extent the October 19, 2021 Order did not become final until November 22, 2021, Archford's Notice of Appeal became effective on November 22, 2021. See Ill. Sup. Ct. R. 303(a)(2).

STATEMENT OF FACTS

I. Archford Capital Strategies, LLC.

Archford is in the business of providing investment advisory services including financial planning and asset management for individuals, businesses, and institutions. (C 11.) In 2015, Archford acquired another broker/dealer, Deschaine & Company ("Deschaine"). (C 154.) As part of this acquisition, Archford purchased Deschaine's book of business for over $350,000 and agreed to pay Deschaine's owner, Marnie Deschaine, a percentage of revenues received from Deschaine's prior clients during the subsequent two years. (*Id.*) The total amount Archford paid for this transferred book of business after the two-year period was $894,700. (*Id.*) As part of the acquisition, Deschaine merged into Archford, with Archford hiring some of Deschaine's employees in the transition. (*Id.*) Defendant was one such Deschaine employee that Archford hired. (*Id.*)

II. Defendant enters the Employment Agreement with Archford.

On August 24, 2015, Defendant and Archford entered into an employment agreement (the "Employment Agreement"). (C 4-5,

11-26.) Defendant was hired as a Relationship and Portfolio Manager to, *inter alia*, "provid[e] services to Archford's clients." (C 11-12.) The 2015 Employment Agreement contained a covenant prohibiting Defendant from taking client information and from soliciting certain Archford clients for a period of time following any termination from Archford. (C 14-16.)

The clients serviced by Defendant can be placed into three separate and distinct categories. First, there were clients Defendant serviced at the commencement of the relationship with Archford, who were identified in Exhibit A to the Employment Agreement. (C 23.) Second, there were Defendant's prospective clients at the commencement of the relationship with Archford, who were identified in Exhibit B to the Employment Agreement. (C 23-26.) Third, there were Archford's "clients and referral sources," all of whom Defendant acknowledged he would not have had access to "but for [his] employment with Archford." (C 16.) This third category of clients included the clients and referral sources that Archford had paid $894,700 to acquire from Defendant's prior employer. (C 154.)

III. Defendant enters the Transfer Agreement with Archford to govern his purchase of Archford's book of business.

On September 15, 2019, Defendant and Archford executed the Transfer Agreement.[1] (C 27-28.) As consideration for the Transfer Agreement, Archford agreed to pay Defendant additional bonus compensation. (C 28.) In exchange, Defendant agreed to a post-termination revenue-sharing arrangement. (*Id.*) Defendant agreed to report and pay certain sums, reduced each year, to Archford over a three-year period for Archford clients that transfer to Defendant within twenty-four (24) months following any termination of Defendant's employment with Archford. (*Id.*) The parties further agreed that such payments constituted Defendant's purchase of Archford's book of business. (*Id.*) Unlike Archford's agreement with Deschaine to purchase its book of business—which required a large up-front payment and a percentage of revenues received from the transferred clients in the following years—Defendant's agreement to purchase Archford's

[1] The Transfer Agreement is an amendment to the Employment Agreement. Archford uses the term Transfer Agreement herein when referring to the obligations, rights, and duties contained in the 2019 amendment to the Employment Agreement set forth in C 27-28.

book of business required no up-front payment and reduced percentages of revenues each year from clients who transfer in the two years following Defendant's employment with Archford, starting with 80%, then 60%, then 40%, as follows:

> "Compensation to Archford for Transferred Clients: Davis acknowledges that Archford shall be entitled to compensation for its work and investment in clients or referral sources that may transfer to Davis within twenty-four (24) months following any termination of his employment with Archford. Davis shall immediately report to Archford any revenue received by or on behalf of Davis (or any person or entity which employs or is otherwise associated with Davis) on account of any clients who transfer from Archford to Davis (or any entity which employs or is otherwise associated with Davis) following termination of Davis's employment with Archford. The amount due from Davis to Archford for its work and investment in clients or referral sources that transfer shall be deemed conclusively to be eighty percent (80%) of the gross revenue earned in the first year following termination of employment starting with the first full quarter after termination or eighty percent (80%) of the gross revenue earned in the last year prior to termination of employment, whichever is greater, sixty percent (60%) of the gross revenue earned in the second year following termination or sixty percent (60%) of the gross revenue earned in the last year prior to termination of employment, whichever is greater, and forty percent (40%) of the gross revenue earned in the third year following termination or forty percent (40%) of the gross revenue earned in the last year prior to termination of employment, whichever is greater. The compensation paid to Archford shall be deemed to be a purchase of this

> 'book of business' from Archford. Payment due to Archford shall be due and payable at the earlier of when revenue is received by Davis (or any person or entity which employs or is otherwise associated with Davis) or on the 5th day of each quarter starting with the first quarter following the transfer of a client. All payments to Archford shall be accompanied by an accurate written report showing how the payment was computed and a true and correct copy of the total revenue earned during the relevant years including entire monthly statements showing advisory fees paid." (C 27-28.)

Archford and Defendant agreed that the Transfer Agreement would not apply to the first two categories of clients described above that he serviced: the approximately 140 clients and prospects who Defendant had previously serviced and who were specifically identified in Exhibits A and B to the Employment Agreement: "Notwithstanding anything herein to the contrary, no payment shall be due from Davis for any clients listed on Exhibit A and Exhibit B of the Agreement should they transfer to Davis after any separation from Archford." (C 28.)

IV. The termination of Defendant's employment with Archford and transfer of clients.

On or around October 22, 2020, Defendant's employment with Archford terminated. (C 6.) Approximately one month later, Defendant began employment with the Private Advisor Group

("PAG"). (*Id.*) Since Defendant joined PAG, several Archford clients have transferred to Defendant and PAG (the "Transferred Clients"). (*Id.*) The Transferred Clients do not include any of the 140 of Defendant's prior clients who were specifically excluded from the Transfer Agreement's scope. (C 7.)

To date, Defendant has not reported revenue received from the Transferred Clients, paid Archford any compensation on account of the Transferred Clients, or provided the calculation and other documents as described in the Transfer Agreement. (*Id.*)

V. The Protocol for Broker Recruiting.

At the time of Defendant's termination, Archford was a signatory to the Protocol for Broker Recruiting ("Protocol"). (C 54.) The Protocol is an agreement between registered firms that sets forth strict procedures for (1) taking client information and (2) soliciting specified clients when a registered representative moves from one Protocol-firm to another Protocol-firm and complies with the Protocol's provisions. (*Id.*)

First, when registered representatives ("RRs") move from one Protocol firm to another Protocol firm, they may only take

limited client information (client name, address, phone number, email address, and account title) of the clients that they serviced while at the firm, so long as they provide a list of that client information, along with account numbers (the "Protocol List"), to the firm they are leaving:

> "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." (C 61.)

The new firm that the RR is joining and any other RR in that firm are prohibited from using the Client Information. (*Id.*) The new firm is also prohibited from receiving any financial information about those clients, including their account numbers,

unless the client first signs an authorization to transfer his or her account to the new firm. (*Id.*)

Second, if there is compliance with the Protocol's procedures, RRs may solicit the customers they have identified on their Protocol List after joining 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." (C 62.)

The Protocol contains other provisions governing the solicitation of clients and taking of information, using the terms "solicit" or "solicitation" ten times and referring to "Client Information" twelve times in its twelve paragraphs, including the following.

> 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.
>
> * * *
>
> 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.

* * *

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 [*sic*]

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." (Emphases added.) (C 61-62.)

The purpose of the strict procedures governing client information and solicitation is "[t]o ensure compliance with GLB [the Gramm-Leach-Bliley Act] and SEC Regulation SP," and "to further the clients' interests of privacy and freedom of choice in connection with the movement of their Registered Representatives ('RRs') between firms." (C 61.)

Finally, the Protocol includes an exculpatory clause that eliminates liability "by reason of" the taking of information or solicitation of clients when there is compliance with the Protocol by the departing RR and his or her new firm:

> "*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." (Emphases added.) (C 61.)

VI. Archford's Complaint.

On March 8, 2021, Defendant advised Archford of his position that Defendant had no obligations under the Transfer

Agreement and that he did not intend to abide by its terms. (C 7.) Archford subsequently filed its Complaint seeking enforcement of the Transfer Agreement. (C 4-30.) Archford alleged that some of its clients had transferred to Defendant following his termination, but that Defendant refused to report and pay the agreed-upon revenue-sharing compensation to Archford on the ground that the Protocol bars enforcement of the Transfer Agreement. (C 4-10.) Archford alleged that the Protocol is inapplicable to the Transfer Agreement in that the Protocol limits liability arising by reason of the *taking of client information* or *solicitation* of former clients on a Protocol List, but it does not undo other contractual obligations, such as the reporting and revenue-sharing obligations in the Transfer Agreement. (C 7-8.) Archford did not seek to enforce the non-solicitation provisions of the Employment Agreement. Instead, Count I of the Complaint sought a declaratory judgment that the Protocol does not invalidate or render unenforceable Defendant's obligations under the Transfer Agreement. (C 7-8.) Count II sought damages for Defendant's breaches of paragraph 3 of the Transfer Agreement. (C 8-9.)

VII. Defendant moves to dismiss pursuant to 735 ILCS 5/2-619.

On May 26, 2021, Defendant filed his Motion to Dismiss Complaint with Prejudice (the "MTD"). (C 44.) Defendant sought dismissal of the Complaint pursuant to 735 ILCS 5/2-619, arguing that the Protocol alone governs Defendant's entire "post-employment relationship with Archford" and, therefore, shields him from all monetary or other liability to Archford related to the Transfer Agreement. (C 44-45.)

Defendant's MTD did not include an affidavit stating that Defendant and his new firm followed the requirements of the Protocol. (C 44-63.) Nor did the MTD include an affidavit or other evidence identifying which Archford clients transferred to him or his new employer since the termination of his employment with Archford. (*Id.*) The MTD also did not include any evidence indicating whether such transferred clients had been included on a Protocol List provided to Archford at the time of the termination of Defendant's employment by Archford. (*Id.*) Defendant's Reply in Support of the MTD likewise included no affidavit or other evidence. (C 166-72.)

VIII. The Circuit Court grants the Motion to Dismiss.

On October 19, 2021, the Circuit Court granted the MTD on the ground that "the Protocol bars enforcement of the parties' employment agreement . . . ." (C 187.) The Circuit Court stated that there was no genuine issue of material fact because "Plaintiff does not allege that Defendant did not comply with the Protocol, and Defendant does not deny that some of Plaintiff's former clients left Defendant [*sic*] and became clients of his after he left Plaintiff's employ." (C 184-87.) The Circuit Court also stated that the Protocol unambiguously bars any enforcement of all reporting and revenue-sharing obligations in the Transfer Agreement because "[t]he only interpretation of this Protocol which is consistent with the expressed intent of the parties is that it shields former employees of a signatory firm from liability for damages both when the employee solicits clients of his or her former employer and when clients transfer to the former employee without having been solicited." (C 186.)

This appeal followed. (C 205.)

STANDARD OF REVIEW

De novo review applies to each issue on appeal. Section 2-619(a)(9) of the Code of Civil Procedure permits a defendant to move for dismissal of a complaint on the ground "[t]hat the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9).[2] "The phrase 'affirmative matter' encompasses any defense other than a negation of the essential allegations of the plaintiff's cause of action." *Kedzie & 103rd Currency Exch. v. Hodge*, 156 Ill. 2d 112, 115 (1993). For purposes of a motion to dismiss under Section 2-619(a)(9), the legal sufficiency of the plaintiff's complaint is admitted. *Id.* at 117. "[I]n ruling on the motion, the trial court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party." *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 383 (2004).

A defendant seeking dismissal pursuant to Section 2-619 bears "the burden of proving the affirmative defense relied upon in

[2] While Defendant did not specify the subsection of Section 2-619 under which he sought dismissal, subsection (a)(9) encompasses Defendant's claim that another affirmative matter, the Protocol, defeats Archford's claims.

the motion to dismiss." *Kirby v. Jarrett*, 190 Ill. App. 3d 8, 12 (1989). "If the 'affirmative matter' asserted is not apparent on the face of the complaint, the motion must be supported by affidavit." *Kedzie*, 156 Ill. 2d at 116. "[A] court should only grant a motion based on [section 2-619] if the record establishes that there are no genuine issues of material fact." *Scheinblum v. Schain Banks Kenny & Schwartz, Ltd.*, 2021 IL App (1st) 200798, ¶ 22.

De novo review applies to the Circuit Court's granting of the MTD. *Kedzie*, 156 Ill. 2d at 116-17. "The appellate court must consider whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." *Id.*

In determining whether a genuine issue of material fact exists regarding the interpretation of a contract, "[a] circuit court must initially determine, as a question of law, whether the language of a purported contract is ambiguous as to the parties' intent." *Quake Constr., Inc. v. Am. Airlines, Inc.*, 141 Ill. 2d 281, 288 (1990). Whether a contract is ambiguous is also subject to de novo review. *Cent. Ill. Light Co. v. Home Ins. Co.*, 213 Ill. 2d 141,

153 (2004). "If the language of an alleged contract is ambiguous regarding the parties' intent, the interpretation of the language is a question of fact which a circuit court cannot properly determine on a motion to dismiss." *Quake*, 141 Ill. 2d at 288-89.

ARGUMENT

To prevail on his MTD, Defendant needed to establish:

(1) that the Protocol unambiguously bars his payment obligations under the Transfer Agreement; and

(2) that he and his new firm followed the Protocol, including that every client who transferred from Archford to Defendant was a client Defendant serviced during his employment at Archford, and that every transferred client was included on a "Protocol List" of clients that Defendant provided to Archford upon termination of his employment.

The Circuit Court erred in concluding that Defendant met these burdens. First, the Circuit Court erred in concluding that the Protocol unambiguously relieves Defendant of his revenue-

sharing obligations under the Transfer Agreement. To the contrary, the Protocol unambiguously does not apply to such obligations. The exculpatory language refers only to liability arising by reason of the *solicitation* of certain clients or the taking of certain *client information*. C 61-63. The Transfer Agreement does not prohibit client solicitation or impose liability by reason of client solicitation or the taking of client information. C 27-28. Nor did the Complaint seek to enforce the covenants in his original Employment Agreement that prohibited post-termination client solicitations or taking of client information. In light of the Protocol's plain language, Illinois law, case law interpreting the Protocol, and the Protocol's purpose, the Protocol's plain exculpatory language does not nullify any of Defendant's revenue-sharing obligations in the Transfer Agreement.

Alternatively, Archford's interpretation of the Protocol's exculpatory language to apply only to covenants that prohibit solicitation or the taking of the client information covered by the Protocol is reasonable. The exculpatory clause being reasonably susceptible to Archford's interpretation renders it, at the least,

ambiguous, making the Circuit Court's summary determination inappropriate.

Finally, to invoke the Protocol in the first instance, Defendant had to provide evidence that he and his new firm complied with the Protocol. C 61. He did not do so. Similarly, even if it is determined that (a) Defendant properly invoked the Protocol and (b) the Protocol unambiguously nullifies Defendant's revenue-sharing obligations in the Transfer Agreement, the Protocol's application, by its own terms, must be limited only to the transferred clients that Defendant serviced during his employment at Archford and which Defendant identified on a "Protocol List" provided to Archford upon his termination of employment. C 61. Defendant did not identify any client who transferred, or which clients were on the Protocol List, thus failing to establish that any of the transferred clients are those clients covered by the Protocol's exculpatory provisions. The Circuit Court erroneously relied on the absence of such facts in the Complaint as sufficiently establishing them, thereby applying the

incorrect legal standard to the section 2-619 motion and improperly shifting Defendant's burden of proof to Archford.

Accordingly, the Circuit Court's granting of the MTD was reversible error.

I. The Circuit Court erred because the Protocol's exculpatory clause unambiguously does not nullify any of Defendant's revenue-sharing obligations under the Transfer Agreement.

The Circuit Court's conclusion that the Protocol unambiguously nullified all payment obligations in the Transfer Agreement was reversible error for multiple reasons. First, this conclusion conflicts with the Protocol's plain language, which nowhere in its exculpatory clause mentions revenue-sharing agreements related to the transfer of clients—a concept separate and distinct from the solicitation of clients. C 61. Second, the Circuit Court departed from Illinois law, which requires such exculpatory clauses to set out the intention of the parties explicitly and with great particularity and, further, to be strictly construed against the party they would benefit. Third, the case law does not support expanding the Protocol's exculpatory clause beyond covenants that prohibit client solicitation or the taking of client

information. Thus, to the extent Defendant may invoke the Protocol, it only exculpates him from liability by reason of his *solicitation* of certain clients or his taking of certain *client information* specified in the Protocol.

The Transfer Agreement, however, does not prohibit (or even address) client solicitation or Defendant's use of specified client information. Instead, it is a contractual agreement creating, in advance, a financial arrangement relating to future *transferred* clients (regardless of whether a solicitation is involved). C 27-28. Moreover, enforcement of the Transfer Agreement does not violate the Protocol's stated purposes of *client* privacy and freedom of choice because the Transfer Agreement does not prohibit Defendant from soliciting or accepting the business of any clients, it does not inherently dissuade any Archford client from transferring to Defendant, and it did not actually dissuade any Archford client from transferring to Defendant.

Accordingly, the Circuit Court erred in concluding that the Protocol unambiguously relieves Defendant of his revenue-sharing

obligations under the Transfer Agreement. To the contrary, the Protocol unambiguously does not apply to such obligations.

A. The plain language of the Protocol's exculpatory clause does not apply to agreements governing solely the transfer of clients.

"The rules of contract interpretation are well settled. In construing a contract, a court's primary objective is to give effect to the intention of the parties. [Citation.] We look first to the language of the contract to determine the parties' intent. [Citation.] We construe the contract as a whole, viewing each provision in light of the other provisions. [Citation.] We do not construe a contract by viewing a clause or provision in isolation. [Citation.] If the language of the contract is facially unambiguous, we interpreted [*sic*] both its meaning and the intent of the parties as a matter of law, solely from the contract itself, without resorting to extrinsic evidence. [Citation.]" *Morningside North Apartments I, LLC v. 1000 N. LaSalle, LLC*, 2017 IL App (1st) 162274, ¶ 15.

The Protocol is an agreement between registered broker/dealers that allows registered representatives of the

broker/dealers who move to another Protocol-firm and comply with the provisions of the Protocol to take certain client information and use that information to solicit their former clients. See, *e.g.*, *Scheffel Financial Services, Inc. v. Heil,* 2014 IL App (5th) 130600, ¶ 15 ("Under the Protocol to which LPL was a signatory, when a registered representative left LPL to join another firm that was a signatory to the Protocol, the registered representative could take a list of clients to his new firm and use that list to solicit those clients on behalf of the new firm.").[3]

The Protocol states that its "principal goal *** is to further the clients' interests of privacy and freedom of choice in connection with the movement of their Registered Representatives ('RRs') between firms." C 61. In order to achieve those goals, the Protocol sets forth strict procedures that when RRs move from one

[3] The Circuit Court criticized Archford's reference to *Scheffel* as being "of limited relevance" and "of little utility." C 186. Case law involving the Protocol is scarce. For example, a February 18, 2022 Lexis search for "Protocol for Broker Recruiting" in all federal and state jurisdictions yielded only 45 results. Of those, *Scheffel* was the only case from an Illinois court. While the facts of *Scheffel* may be different, this Court's description of the Protocol as allowing a registered representative who complies with the Protocol to "take a list of clients and use that list to solicit those clients" is relevant to this case. *Scheffel*, 2014 IL App (5th) 130600, ¶ 15.

Protocol firm to another they may "only take 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." C 61. The RR must also provide a copy of that Client Information to the departing firm together with account numbers. C 61. The firm that the RR is joining is prohibited from receiving any financial information about those customers or their investments, and cannot even receive their account numbers unless the customer first signs an authorization to transfer his or her account to the new firm. C 61.

The reason for these strict procedures is that investment firms are subject to stringent federal requirements under the Gramm Leach Bliley Act, Pub. L. No. 106-102 ("GLB") and SEC Regulation SP, 17 C.F.R. § 248.1 *et seq.*, to maintain extensive policies and procedures to safeguard customer information. As the Protocol itself states: "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." C 61.

The investment firms joining the Protocol have agreed that if there is compliance with its terms by both the departing RR and the new firm, then the RR and new firm will not have liability by reason of the two specific actions governed by the Protocol—taking of client information and solicitation of former clients:

> "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 ***." (Emphases added.) C 61.

While the Protocol uses the term "solicit" or "solicitation" many times (ten times in its twelve paragraphs), including in its exculpatory provision, it does not use the term "transfer" or "transferred" in the exculpatory clause. These terms have distinct meanings. A "solicitation" is "[t]he act or an instance of requesting or seeking to obtain something; a request or petition." Black's Law Dictionary 1398 (7th ed. 1999). See also "Solicit," Merriam Webster Dictionary (Online ed. 2022) ("to make petition

to: entreat").[4] As such, a non-solicitation agreement is "[a] promise usually in a contract for the sale of a business, a partnership agreement, or an employment contract, to refrain, for a specified time, from either (1) enticing employees to leave the company, or (2) trying to lure customers away." *Dent Wizard International Corp. v. Andrzejewski*, 2021 IL App (2d) 200574-U, ¶ 32 (quoting Black's Law Dictionary (10th ed. 2014)). In contrast, to "transfer" means "to convey or remove from one place or one person to another; to pass or hand over from one to another, esp. to change over the possession or control of." Black's Law Dictionary 1504 (7th ed. 1999).

Based on the plain meanings of these terms, the Protocol's exclusion of liability by reason of the *solicitation* of clients means that a registered representative who complies with the Protocol will have no liability by reason of his "requesting or seeking to obtain" his/her former clients identified on the Protocol List. Put differently, the RR will have no liability by reason of his or her

[4] https://www.merriam-webster.com/dictionary/solicit (last accessed March 1, 2022).

breach of a non-solicitation agreement with respect to the clients serviced by the RR at the prior firm. The plain meaning of these terms, however, does not permit this exclusion of liability to apply to the different situation of when a client transfers—moves from one place to another. Here, the Transfer Agreement does not prohibit any client solicitation and involves revenue-sharing that is triggered by the *transferring* of clients from Archford to Defendant regardless of whether Defendant solicited such clients to leave Archford. C 27-28. The Protocol's plain language does not eliminate contractual liability that may exist by reason of the *transfer* of clients and pursuant to a contractual provision that does not prohibit client solicitations.

Moreover, the Protocol does use the term "transfer" (one time), but it is three paragraphs after the exculpatory clause. C 61 ("A client who wants to transfer his/her account need only sign an ACAT form."). The Protocol also uses the term "transferred" one time in the penultimate paragraph. C 62 ("If accounts serviced by the departing RR were transferred to the departing RR pursuant to a retirement program *** 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 ***."). This suggests that the drafters of the Protocol gave the terms "solicit" and "transfer" different meanings, and meanings consistent with the ordinary meanings defined above. Thus, accounts/clients transfer; RRs solicit and take information. Not including "transfers" in the exculpatory clause, but using the term elsewhere in the Protocol, further suggests an intent that the exculpatory clause does not silently exclude liability by reason of revenue-sharing agreements based on the transfer of clients or accounts. *Schultz v. Performance Lighting, Inc.*, 2013 IL App (2d) 120405, ¶ 16 ("[T]he maxim of 'expressio unius est exclusio alterius[ ]' *** means the expression of one thing implies the exclusion of the other.").

Furthermore, Archford and Defendant clearly thought there was a difference between damages for the *solicitation* of clients and revenue-sharing based on the *transfer* of clients, and intended the 2019 Transfer Agreement to cover only the latter. Otherwise, there would have been no need for an amendment to the

Employment Agreement in 2019 that only set forth terms regarding the transfer of clients because the 2015 Employment Agreement already contained non-solicitation provisions. C 15. Thus, reading the Employment Agreement and Transfer Agreement as a whole reveals that the parties recognized the Transfer Agreement was not the same as a non-solicitation agreement.

Finally, nothing in the Protocol's plain language purports to negate other contractual commitments related to compensation entered into while the Protocol was in effect and which may trigger liability "by reason" of other factors. Here, Defendant's liability is "by reason of" the revenue-sharing provision in his Transfer Agreement related to all Archford clients, many of whom Archford had paid a significant sum to acquire from someone else. Defendant's liability is not by reason of taking client information or soliciting clients he serviced at Archford. His obligations under the Transfer Agreement were triggered regardless of whether he took client information or solicited clients.

Accordingly, the Protocol's plain language barring liability for permitted solicitations and the taking of client information does not nullify any of Defendant's obligations under the Transfer Agreement.

B. The Protocol's exculpatory language related to solicitation of clients does not explicitly and with great particularity provide that the Protocol applies to agreements concerning solely the transfer of clients.

Archford's interpretation of the plain language of the Protocol is supported by Illinois' strict construction of exculpatory clauses. The Illinois Supreme Court has explained that contractual limitations of liability "are to be strictly construed against the party they benefit [citation] ***." *Scott & Fetzer Co. v. Montgomery Ward & Co.*, 112 Ill. 2d 378, 395 (1986). Moreover, "[s]uch clauses must spell out the intention of the parties with great particularity and will not be construed to defeat a claim which is not explicitly covered by their terms." *Id.*

The Protocol's exculpatory clause is specific about the solicitations of clients serviced by the RR. But it is silent about revenue-sharing agreements governing the transfer of a firm's

clients. C 61. This silence does not "spell out" any intention that the Protocol should govern such agreements concerning the transfer of clients, much less spell out such intention "explicitly" and with the "great particularity" required by Illinois law. In light of this silence, Illinois law requires that the Protocol be construed against Defendant, who seeks to be exculpated from the revenue-sharing obligations of the Transfer Agreement by the Protocol's terms.

Nor should the exculpatory clause be interpreted to expand exculpation beyond the specific act it identifies: "solicitation," which is "[t]he act or an instance of requesting or seeking to obtain something." Black's Law Dictionary 1398 (7th ed. 1999). For example, if while soliciting a client, an RR made false statements about his prior firm, the Protocol's exculpatory clause might shield him from liability for his act of seeking to obtain the client, but it should not shield him from liability related to his defamatory statements just because they occurred during a solicitation.[5]

[5] The law likewise recognizes that a solicitation is a distinct, independent act that is completed when a person "commands, encourages, or requests another to commit th[e] offense." 720 ILCS 5/8-1

Accordingly, the Protocol may not be construed to nullify the Transfer Agreement's obligations.

C. Case law limits the applicability of the Protocol to agreements regarding taking client information and soliciting those clients.

In accordance with the plain language and narrow interpretation of exculpatory provisions, the few courts addressing the Protocol recognize that it does not "immunize the departing broker from all liability to his former firm." *Credit Suisse Securities (USA) LLC v. Lee*, No. 11 Civ. 08566 (RJH), 2011 U.S. Dist. LEXIS 142307, *9 (S.D.N.Y. Dec. 9, 2011). Rather, the Protocol only immunizes departing brokers from litigation to enforce covenants prohibiting the solicitation of certain clients or the taking of certain information. See *Scheffel,* 2014 IL App (5th) 130600, ¶ 15 (under the Protocol, "the registered representative could take a list of clients to his new firm and use that list to solicit those clients on behalf of the new firm"). Accordingly, contractual obligations in employment agreements other than non-solicitation provisions or those involving the taking of client information are unaffected by the Protocol. See *HA&W Capital*

Partners, LLC v. Bhandari, 346 Ga. App. 598, 604-07 (2018) (termination notice provision not affected by Protocol).

Archford is unaware of any cases holding that the Protocol bars enforcement of any contractual obligations other than those involving client information or solicitations—including the cases relied on by Defendant below. See *UBS Financial Services v. Fiore*, No. 17-cv-993 (VAB), 2017 U.S. Dist. LEXIS 115134 (D. Conn. July 24, 2017) (assessing enforceability of non-solicitation covenants); *Credit Suisse*, 2011 U.S. Dist. LEXIS 142307 at *23-24 ("The issue here is whether the Court should enjoin respondents from continuing to solicit Credit Suisse customers they serviced while at Credit Suisse. Because, as discussed above, that solicitation itself is permissible under the Protocol, the Court finds no reason to issue a preliminary injunction in that regard."); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Reidy*, 477 F. Supp. 2d 472, 474 (D. Conn. 2007) (involving dispute about client information taken or accessed by resigning RRs); *Kwb & Associates v. Marvin*, No. ED CV 18-289-DMG (KKx), 2018 U.S.

Dist. LEXIS 231035 (C.D. Cal. Apr. 18, 2018) (involving claims relating to use of allegedly confidential information).

This action to enforce the Transfer Agreement does not fit into the categories of cases where the Protocol applied. The Transfer Agreement does not prohibit Defendant from soliciting Archford's clients or restrict the taking of any information. C 27-28. It does not prevent clients from transferring from Archford to Defendant. The words solicit or solicitation do not appear anywhere in the Transfer Agreement. Archford had other contractual terms in existence when the Transfer Agreement was signed purporting to restrict post-employment solicitations and the taking of client information. C 14-17, 19. But the Complaint did not seek to impose monetary or other liability (injunctive relief) on Defendant for breaching the separate non-solicitation provision contained in his original Employment Agreement. See C 15.

Moreover, to prove Defendant is liable pursuant to the Transfer Agreement, Archford need not show Defendant solicited any Archford clients or took any information relating to such

clients. All Archford must show is the transfer of Archford clients to Defendant or an entity associated with Defendant. C 27-28. Whether Defendant solicited Archford clients is immaterial to Defendant's obligations under the Transfer Agreement.

Accordingly, the case law limiting the Protocol's applicability to prohibitions on solicitations and taking of client information confirms that the Protocol's plain language does not nullify Defendant's obligations in the Transfer Agreement.

D. Enforcement of the Transfer Agreement does not violate the purposes of the Protocol.

The Circuit Court erred in finding Archford's interpretation of the Protocol's exculpatory clause in direct conflict with the Protocol's expressed intention. C 185. The Protocol's stated purpose is to further the *clients'* interest of privacy and freedom of choice in connection with the movement of their RRs between firms. C 61. A contractual obligation of a *RR* that neither prohibits the solicitation of clients nor restricts the use of client information, such as revenue-sharing per the Transfer Agreement, does not violate these interests of the client. Nothing in the Transfer Agreement restricts a *client's* freedom to choose to move

from Archford to Defendant. Nor did Defendant contend, or present evidence, that he rejected any potential client transfers because of the Transfer Agreement's payment provisions, or that any client choose not to transfer because of the Transfer Agreement (though such claims would involve an evidentiary question of fact). Accordingly, enforcement of the Transfer Agreement does not conflict with the Protocol's purpose of furthering a client's interest in privacy and freedom of choice.

In relying solely on the Protocol's sentence describing a client's freedom of choice, the Circuit Court drastically expanded the scope of the Protocol's exculpatory clause. The Circuit Court found the Protocol shielded "former employees *** from liability for damages both when the employee solicits clients of his or her former employer and when clients transfer to the former employee without having been solicited." C 186. This interpretation renders meaningless the exculpatory clause's actual language, which is limited to excluding liability "by reason of the RR taking the information *** or the solicitation of clients serviced by the RR at his prior firm ***." C 61. The Circuit Court's interpretation

also expands the Protocol's protections, which cover the solicitation of "clients serviced by the RR" (C 61), to something much broader: the solicitation of all "clients of his or her former employer" (C 186). By focusing only on the sentence preceding the exculpatory clause, the Circuit Court departed from the rules of contract interpretation by rendering meaningless the actual language of the exculpatory clause. See *Thompson v. Gordon*, 241 Ill. 2d 428, 442 (2011) ("A court will not interpret a contract in a manner that would nullify or render provisions meaningless, or in a way that is contrary to the plain and obvious meaning of the language used."); *Coles-Moultrie Electric Cooperative v. City of Sullivan*, 304 Ill. App. 3d 153, 159 (1999) ("In interpreting a contract, meaning and effect must be given to every part of the contract including all its terms and provisions, so no part is rendered meaningless or surplusage unless absolutely necessary. *** It is presumed the provisions are purposefully inserted and the language is not employed idly.")

Defendant goes even further in his interpretation, arguing that "the Protocol governs Davis' post-employment relationship

with Archford." C 45. By expanding the exculpatory clause beyond the taking of information and solicitation of the RR's clients, the Circuit Court and Defendant disregard the Protocol's plain language and call into question the enforceability of every preexisting financial arrangement in the industry agreed to by employer and RR, which, though not tied to solicitations or client information, may be tied to client revenues, post-employment conduct, firm clients who are not serviced by the RR, or RRs or clients moving to new firms. Nowhere does the Protocol release any and all liability with respect to the post-employment relationship generally, or for all obligations that are simply related to a RR or client moving from one firm to another.

Furthermore, the Transfer Agreement does not conflict with the goals of preserving client privacy and client freedom of choice. Defendant speculated that some firms might try to impose monetary penalties that would remove any incentive for representatives to solicit or accept clients who desire to transfer. C 50. Defendant does not and cannot argue, however, that this is the case here.

Four years into his employment, Defendant contracted with Archford to receive additional bonus compensation and agreed that future revenue-sharing based on descending percentage payments for transferred clients was acceptable. The Transfer Agreement does not carry any obligations for Defendant with respect to: (1) clients Defendant serviced before joining Archford; or (2) Defendant's prospective clients from before joining Archford. C 28. It only calls for revenue-sharing related to Archford's clients and referral sources. With respect to the clients serviced by Defendant at Archford, Defendant gained access to those Archford clients because they were "assigned to" Defendant by Archford. C 27. Archford would never have assigned the Defendant any of the clients that it paid nearly $900,000 to obtain if the next day Defendant could walk out the door with these clients and pay Archford nothing.

Additionally, the terms Defendant agreed to (80%, 60%, 40% of revenues for clients who transfer within 24-months) are reasonable, particularly in light of the $894,700 that Archford paid for the book of business from Deschaine in the first instance.

C 154. In other words, Defendant clearly did not think he would be dissuaded from accepting transferred clients when he signed the Transfer Agreement, and there is no evidence to the contrary. See *Rootberg v. Richard J. Brown Associates, Inc.*, 14 Ill. App. 3d 301, 304 (1973) ("A contract is to be enforced according to the sense mutually understood by the parties at the time it was made.").

Likewise, Defendant continues to have ample incentive to solicit any clients who he may solicit under the Protocol, as the Transfer Agreement allows him to retain a substantial percentage of the revenue associated with the client accounts and is limited to revenue earned in the three-year period following his termination with Archford. The Transfer Agreement generally provides that Defendant will owe 80% of the gross revenue earned for a transferred client account in the first year following Defendant's termination of employment, 60% of such revenue in the second year, and 40% in the third year. Thereafter, Defendant will retain 100% of the revenue earned with respect to the client, giving him ample incentive to pursue or accept client transfers. C 27-28.

Moreover, Archford and Defendant are in the relationship business, and actual and potential referrals from any client provide significant value in the business. Accordingly, the Transfer Agreement does not remove any incentive for Defendant to seek or accept the transfer of Archford clients. Nor does it *automatically* prevent or disincentive *clients* from choosing to move from Archford to Defendant. And it did not *actually* prevent or disincentive clients from choosing to move, as demonstrated by the undisputed facts in the record that "several Archford clients have transferred" to Defendant and his new firm. C 6. See also C 184 ("Defendant does not deny that some of Plaintiff's former clients left [Archford] and became clients of his ***.")

Simply put, there is no reason or evidence to support the Circuit Court's finding that enforcing the Transfer Agreement would conflict with the Protocol's goal of furthering the client's interest of privacy and freedom of choice.

Finally, the Circuit Court improperly conflated a client's freedom of choice to transfer to a new firm with the RR and employer's freedom to contract regarding such transfers. The

Transfer Agreement was a unique agreement that Archford and Defendant negotiated, and which contained provisions applicable only to Defendant, such as his additional bonus compensation and the exclusion of certain of his clients. C 28-29. Defendant further "acknowledge[d] that the trade and goodwill of Archford with its clients and employees has been established at substantial cost and effort ***." C 11. The Transfer Agreement simply set forth in advance the freely-negotiated price at which Defendant agreed to compensate Archford for purchasing Archford's book of business. C 27-28 ("The compensation paid to Archford shall be deemed to be a purchase of this 'book of business' from Archford."). While employed, Defendant accepted the financial benefits of the Transfer Agreement and of being assigned Archford clients (that it had paid a significant sum to acquire), but now Defendant wants to use the Protocol to eliminate all of his financial obligations from the Transfer Agreement. A court should not overturn the negotiated purchase price years after the fact based solely on *client* freedom of choice in the absence of any evidence that the terms actually restrict any client's freedom of choice.

Accordingly, the Circuit Court erred in concluding that the Protocol unambiguously bars enforcement of the revenue-sharing obligations in the Transfer Agreement. To the contrary, the Protocol's plain language establishes that the Protocol does not nullify the Transfer Agreement's revenue-sharing obligations. This error requires reversal of the Circuit Court's MTD Order.

II. Alternatively, the Protocol's exculpatory clause is reasonably susceptible to Archford's interpretation, rendering its interpretation a question of fact not subject to summary resolution.

As set forth above, the plain language of the Protocol's exculpatory clause, as interpreted under Illinois law, does not negate liability for Defendant's breaches of the Transfer Agreement. At the least, Archford's interpretation that the Protocol's exculpatory clause only applies to agreements that prohibit solicitation is reasonable. Accordingly, the Circuit Court erred in granting the MTD even if Archford's interpretation is not the only reasonable interpretation of the Protocol. *Morningside*, 2017 IL App (1st) 162274, ¶¶ 15, 18 (interpretation of ambiguous agreement is question of fact not subject to summary resolution

and "if the language of the contract is reasonably susceptible to more than one meaning, it is ambiguous").

Despite acknowledging that the Protocol's exculpatory language is silent about obligations such as those in the Transfer Agreement, the Circuit Court nonetheless concluded that the clause unambiguously nullified those obligations:

> "While the Protocol does not specifically address liability if a former client follows the RR without having been solicited, Plaintiff's interpretation of the Protocol leads to a result which is in direct conflict with the expressed intention of the Protocol: 'to further the clients' interests of privacy and freedom of choice in connection with the movement of their Registered Representatives ('RR's') between firms.' (emphasis supplied). Plaintiff has not provided the Court with a satisfactory explanation as to how its interpretation of the Protocol, in which the solicitation of former clients would be protected but the movement of former clients otherwise would not, would further the intent of the Protocol to further clients' freedom of choice in connection with the movement of their RRs. Plaintiff's interpretation would contravene the purpose of the Protocol. The Court will not interpret the agreement in a way that would nullify its provisions or render them meaningless. The only interpretation of the Protocol which is consistent with the expressed intent of the parties is that it shields former employees of a signatory firm from liability for damages both when the employee solicits clients of his or her former employer and

> when clients transfer to the former employee without having been solicited." C 185-186.[6]

While the Protocol seeks to further the clients' interests of privacy and freedom of choice in connection with the movement of their RRs, it does not pursue these goals at all costs. See *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) ("[N]o legislation pursues its purposes at all costs."). Rather, the Protocol's language indicates that it seeks to further these goals by preventing, under certain circumstances, the enforcement of covenants that prohibit the taking of client information and the solicitation of certain clients. C 61. See *Morningside*, 2017 IL App (1st) 162274, ¶ 15 (contract language evidences parties' intent and contract is construed as a whole). Thus, courts acknowledge that the Protocol does not bar enforcement of every contractual agreement that might have some impact on the movement of

[6] Contrary to the Circuit Court's suggestion, Archford does not argue that the Protocol applies to the Transfer Agreement if Defendant solicits Archford's clients but not if the clients transfer without any solicitation by Defendant. Rather, Archford's position is that the Protocol does not apply to the obligations in the Transfer Agreement regardless of whether Defendant solicits the clients that transfer.

clients. See *HA&W*, 346 Ga. App. at 604-07 (Protocol inapplicable to termination notice provisions in employment contract).

Moreover, as set forth above, the Transfer Agreement does not *inherently* negate Archford's *clients'* freedom of choice to move with Defendant. Nor is there evidence that the Transfer Agreement *actually* prevented even one of Archford's client's from choosing to move with Defendant, or that it caused Defendant not to accept a single client transfer. In contrast, the record is clear that Archford clients have transferred from Archford to Defendant. C 6, 184.

Defendant also did not introduce any evidence of industry practice regarding the applicability of the Protocol to agreements like the Transfer Agreement. Instead, Defendant argued in the abstract that Archford *could* impose draconian penalties that *could* create a disincentive for Defendant or other RRs to solicit clients. C 169. Archford, however, introduced evidence demonstrating the reasonableness of the price associated with Defendant's acquisition of portions of Archford's book of business upon the transfer of an Archford client to Defendant. C 154. And

Archford did not seek to enjoin any transfers or solicitations on the basis of the Transfer Agreement. The record here simply lacks any evidence to support a finding that the Transfer Agreement terms are draconian, or that the Protocol should be interpreted based on different hypothetical terms not before the court. Thus, the Circuit Court's concern that Archford's interpretation of the Protocol would render its purpose meaningless was misplaced or, at minimum, premature in view of the undeveloped record.

In summary, the Protocol's exculpatory clause unambiguously does not shield Defendant from liability for breaching the Transfer Agreement. At the least, Archford's interpretation that the clause applies only to covenants that prevent the solicitation of an RR's former clients is reasonable in that it adheres to the Protocol's plain language and the objectives that language seeks to achieve. Thus, the Circuit Court erred in granting the MTD because the language of the Protocol is, at minimum, ambiguous as it is reasonably susceptible to Archford's interpretation. See *Morningside*, 2017 IL App (1st) 162274, ¶¶ 15, 18.

III. The Circuit Court erred by applying the incorrect legal standard to Defendant's section 2-619 motion and improperly shifting Defendant's burden of proof to Archford as to whether (a) Defendant and his new firm followed the Protocol and (b) all transferred clients were serviced by Defendant and included on a Protocol List.

A defendant seeking dismissal pursuant to Section 2-619 bears "the burden of proving the affirmative defense relied upon in the motion to dismiss." *Kirby*, 190 Ill. App. 3d at 12. "If the 'affirmative matter' asserted is not apparent on the face of the complaint, the motion must be supported by affidavit." *Kedzie*, 156 Ill. 2d at 116. "By presenting adequate affidavits supporting the asserted defense [citation], the defendant satisfies the initial burden of going forward on the motion. The burden then shifts to the plaintiff." *Id.* Thus, it is only "[i]f the defendant meets its burden, [that] 'the burden then shifts to the plaintiff to establish that the defense is 'unfounded or requires the resolution of an essential element of material fact before it is proven.'" *Lawson v. Schmitt Boulder Hill, Inc.*, 398 Ill. App. 3d 127, 130, (2010) (quoting *Reilly v. Wyeth*, 377 Ill. App. 3d 20, 36 (2007); *Kedzie*, 156 Ill. 2d at 116).

Here, the Circuit Court applied the incorrect legal standard to Defendant's section 2-619 motion. First, to invoke the Protocol in the first instance, Defendant had to provide evidence that he and his new firm complied with the Protocol. C 61. He did not do so, and the Circuit Court erred by improperly shifting Defendant's burden to Archford. Second, even if it is determined that (a) Defendant properly invoked the Protocol and (b) the Protocol unambiguously bars enforcement of obligations related to client transfers, the Protocol would not apply to every client transfer. Instead, it would only cover clients Defendant serviced while at Archford who were included on a Protocol List. C 61. But Defendant presented no evidence of the clients that transferred or a Protocol List. Thus, the Circuit Court erred in granting the MTD because Defendant failed to establish that the Protocol nullifies his payment obligations with respect to every Archford client that transferred to Defendant.

A. Defendant failed to meet his burden of establishing that he and his new firm followed the requirements of the Protocol, which is required to apply the Protocol's exculpatory clause.

The exculpatory clause of the Protocol is only applicable "[i]f departing RRs and their new firm follow this protocol." C 61. But Defendant provided no affidavit to support a factual finding about his and his new firm's compliance with the Protocol. Instead, Defendant pointed to a prior TRO ruling and the absence of an allegation of non-compliance to argue that he and his new firm in-fact complied with all the requirements of the Protocol. See, *e.g.*, C 44-45, 54-60. However, the findings of a court, or its ruling, on preliminary injunctive relief in a prior case has no *res judicata* effect. See *Electric Design & Manufacturing v. Konopka*, 272 Ill. App. 3d 410, 415 (1995). Moreover, the prior TRO ruling did not address any actions of Defendant's new firm related to the Protocol.[7] Thus, the Circuit Court, rightly, did not adopt any of the findings from the TRO ruling. C 183-84.

[7] The TRO was dissolved shortly after Defendant "accepted an offer of employment with [a new firm]." C 55.

The Circuit Court, however, erred by making a finding of fact based on the absence of an allegation in the Complaint. It determined that Defendant complied with the Protocol because "Plaintiff does not allege that Defendant did not comply with the Protocol." C 184. This finding disregarded the legal standard on a section 2-619 motion and improperly shifted the burden of proof.

As described above, on a section 2-619 motion, the legal sufficiency of the Complaint is admitted. If, as here, the "affirmative matter," (the Protocol, which can only be invoked "[i]f departing RRs and their new firm follow this protocol") is not apparent on the face of the Complaint, the motion must be supported by affidavit.

Here, whether Defendant and his new firm followed the Protocol was not apparent on the face of the Complaint, as recognized by the Circuit Court. Yet Defendant failed to file any affidavit with his MTD or Reply establishing that he and his new firm followed the Protocol. This deficiency meant that Defendant failed to meet his burden of proving the affirmative defense relied upon in the section 2-619 motion to dismiss—namely, that he

could even invoke the Protocol. Because Defendant failed to satisfy his initial burden on this point, the burden never shifted to Archford to establish a contrary fact. Nor was Archford required to plead facts in the Complaint that would negate Defendant's affirmative defense. See *Harwood v. McDonough*, 344 Ill. App. 3d 242, 246 n.1 (2003) ("A plaintiff need not anticipate an affirmative defense.").

It was, therefore, reversible error for the Circuit Court to find that Defendant's burden had been satisfied based solely on the lack of allegations in the Complaint related to his Protocol affirmative defense.

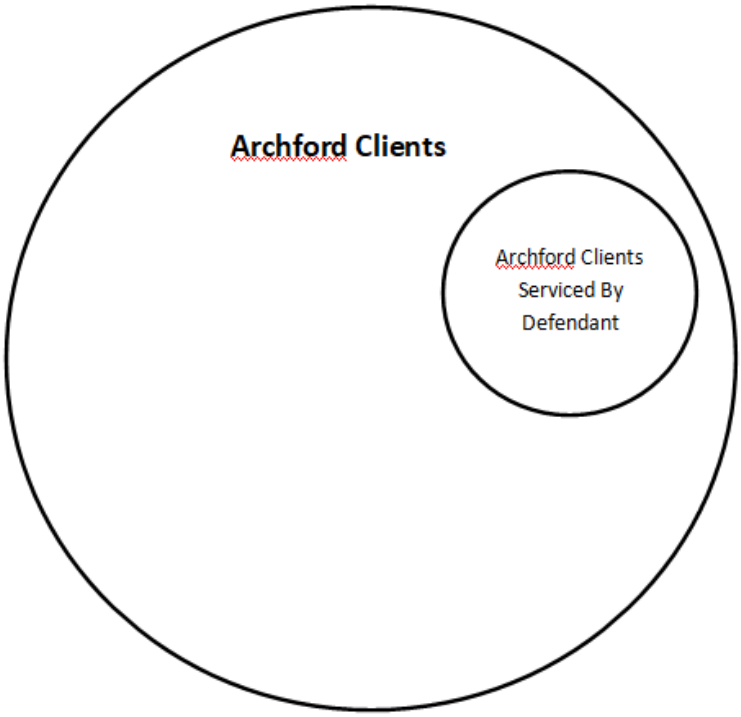
B. Defendant failed to meet his burden of establishing that all transferred clients were serviced by Defendant at Archford and included on a Protocol List.

Likewise, even if it is determined that Defendant could invoke the Protocol, the Protocol's exculpatory language only applies to solicitations of clients *that Defendant serviced* while at Archford. C 61. Moreover, it only applies to the extent that a departing RR and his or her new firm follow the Protocol. *Id.* Among other things, the Protocol requires that a resigning RR

provide his prior firm with a written list of the clients he or she served at the prior firm, including any information the RR is taking with him or her. *Id.* In other words, even if the Protocol is applicable to Defendant's revenue-sharing obligations in the Transfer Agreement, the exculpatory clause of the Protocol would only shield Defendant from liability with respect to the clients he serviced, as identified on a Protocol List.

The Transfer Agreement, however, is not limited to Archford clients Defendant serviced at Archford. It applies to any Archford clients who transfer to Defendant, except the clients or prospective clients Defendant brought with him to Archford. C 27, 23-26.

Accordingly, the group of clients encompassed by the Transfer Agreement is larger than the group of clients covered by the Protocol's exculpatory clause.



It is not apparent on the face of the Complaint whether any of the transferred clients are clients Defendant serviced while at Archford or whether they were included on a "Protocol List" provided by Defendant to Archford upon the termination of his employment. C 4-30. Under these circumstances, Defendant bore the burden of establishing with an affidavit that: (1) every transferred client is a client Defendant serviced while at Archford; and (2) he included all such clients on a Protocol List he provided to Archford upon the termination of his employment. Defendant, however, provided no such affidavit or other evidence. C 44-63. Therefore, as set forth above, the burden never shifted to Archford

to establish a contrary fact. Nor was Archford required to plead such facts in the Complaint related to Defendant's Protocol affirmative defense.

Accordingly, the Circuit Court erred in granting the MTD even if the Protocol is found to unambiguously reach the revenue-sharing obligations in the Transfer Agreement. See *Davis v. Keystone Printing Service*, 111 Ill. App. 3d 427, 441-42 (1982) (circuit court erred in granting section 2-619 motion to dismiss where defendant failed to include affidavit and allegations in Complaint did not establish defense's applicability).

Ultimately, by accepting facts relating to Defendant's affirmative defense as true based solely on silence in the Complaint, the Circuit Court failed to "admit[] the legal sufficiency of the plaintiff's cause of action," *Kedzie*, 156 Ill. 2d at 115, failed to "interpret all pleadings and supporting documents in the light most favorable to [Archford]," *Borowiec*, 209 Ill. 2d at 383, and improperly shifted Defendant's burden of proving the "affirmative matter" to Archford. This was reversible error.

CONCLUSION

For the foregoing reasons, Archford requests that this Court reverse the Circuit Court's granting of Defendant's Motion to Dismiss and award of attorneys' fees to Defendant and remand this matter for further proceedings, and grant such other and further relief as the Court deems just and proper.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 3, 2022, this Brief of Plaintiff-Appellant Archford Capital Strategies, LLC, and the Appendix, was electronically filed using the Odyssey eFileIL "Odyssey File & Serve" website, which delivered copies to all counsel of record. The undersigned further certifies that on March 3, 2022, a copy of this Brief and Appendix were forwarded by electronic mail to counsel for Defendant-Appellee at the email addresses indicated below:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

/s/ Kevin P. Green

CERTIFICATE OF COMPLIANCE WITH RULE 341

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is less than 10,668 words.

/s/ Kevin P. Green