IN THE CHANCERY COURT, STATE OF WYOMING

2023 WYCH 2

LFP Consulting, LLC, Plaintiff, v. David Edward Leighton, Defendant.	Case No. CH-2022-0000009

Order Granting Motion to Dismiss

[¶ 1] Before the court is Leighton's motion to dismiss, or in the alternative, motion for summary judgment. The motion has been fully briefed and argued before the court. For the reasons stated below, the court grants the motion to dismiss.

FACTUAL BACKGROUND

[¶ 2] The court takes the following facts from the complaint and assumes them to be true for the purposes of the motion to dismiss.

[¶ 3] Plaintiff LFP Consulting, LLC is a North Dakota limited liability company doing business as Legacy Financial Partners with an office in Worland, Wyoming. *Compl.*, ¶ 1. LFP offers private wealth advisory services as a "practice" of Ameriprise Financial. *Id.*

[¶ 4] Defendant David Leighton is a former employee of LFP and a current resident of Park County, Wyoming. *Id.* ¶¶ 2, 10, 15-22.

[¶ 5] LFP hired Leighton in June 2018. *Id.* ¶ 10. When hired, Leighton had no financial advisor license or clients. *Id.* He obtained his licensure during his first year of employment at LFP's expense. *Id.*

[¶ 6] After obtaining his licensure, Leighton entered into an Associate Financial Advisor Agreement with Ameriprise Financial, Inc., which has its principal place of business in Minneapolis, Minnesota. *Id.* ¶ 11, Ex. 1.

[¶ 7] The AFA Agreement acknowledges Leighton may access Ameriprise Financial's commercial information and licenses him to use Ameriprise Financial's name and proprietary marks in his financial planning practice and communications with clients. *Id.* ¶¶ 12, 14, Ex. 1, §§ 6(I), 8(D).

[¶ 8] These rights come with restrictions. *See id.* Ex. 1, § 8. Leighton must not solicit Ameriprise Financial clients or offer services to these clients within one year after his affiliation with Ameriprise Financial ends. *Id.* Ex. 1, § 8(E). Also, he must not divulge Ameriprise Financial's confidential information or use that information in a manner adverse to Ameriprise Financial. *Id.* Ex. 1, § 8(D)

[¶ 9] The AFA Agreement designates Minnesota as both the forum state and the state whose law should be applied. The governing law and forum selection provision states, in full:

> This Agreement is a Minnesota contract. The validity, interpretation, performance and enforcement of this Agreement shall be governed by the laws of the State of Minnesota. You [Leighton] expressly (i) consent to personal jurisdiction in the state and federal courts located in the State of Minnesota, (ii) waive any argument that venue in any such forum is not convenient, and (iii) agree that any action at law, suit in equity, judicial proceeding, or arbitration arising directly, indirectly, or otherwise in connection with, out of, related to or from this agreement or any provision thereof, shall be litigated only in the appropriate state or federal court in the State of Minnesota, County of Hennepin

Id. Ex. 1, § 11(a).

[¶ 10] The AFA Agreement also includes an arbitration provision requiring Leighton to arbitrate any dispute and acknowledging Ameriprise Financial would bring suit to enforce the restrictions section (Section 8) in accordance with the forum selection and governing law section (Section 11). The arbitration section (Section 9) provides, in relevant part:

> Unless otherwise agreed to in writing by both parties, you agree to arbitrate any dispute, claim or controversy that may arise between you and Ameriprise Financial or its Affiliates, or a Client, or any other person, ("Claims"); however, the parties agree that Claims brought by Ameriprise Financial pursuant to Section 8 of this Agreement will not be arbitrated, but shall be subject to the jurisdiction of the courts as provided in Section 11 of this Agreement to the extent consistent with law and the rules, constitutions, or by-laws of FINRA as they may be amended from time to time.

Id. Ex. 1, § 9(A).

[¶ 11] Some three years after he executed the AFA Agreement, Leighton resigned by email. *Id.* ¶ 15. The same day he resigned, Leighton started offering financial planning and wealth management services as Heart Mountain Wealth Management, LLC. *Id.* Days earlier, Leighton had formed Heart Mountain and aligned with Golden State Wealth Management, a California based financial planning company. *Id.* ¶¶ 16-19. Heart Mountain and Golden State offer the same services as LFP and Ameriprise. *Id.* ¶ 17.

[¶ 12] According to the complaint, Leighton also solicited LFP and Ameriprise Financial clients before he resigned. *Id.* ¶¶ 20-21. LFP alleges Leighton misappropriated client files and other confidential proprietary information belonging to LFP and Ameriprise Financial. *Id.* ¶ 22.

[¶ 13] Shortly after Leighton resigned, Ameriprise Financial's corporate counsel demanded return of confidential information. Leighton has not returned information to Ameriprise Financial. *Id.* ¶ 23.

[¶ 14] LFP purports to be an assignee of certain portions of the AFA Agreement originally entered into between Leighton and Ameriprise Financial. *Id.* ¶ 13, Ex. 2.

PROCEDURAL BACKGROUND

[¶ 15] On October 4, 2022, LFP commenced this suit asserting five claims: injunctive relief, breach of contract, misappropriation of trade secrets, interference with contract or prospective advantage, and unfair competition. (FSX NO. 68207408).

[¶ 16] In response to the complaint, on November 4, 2022, Leighton moved this court to dismiss this complaint for failure to state a claim or, in the alternative, to enter summary judgment in his favor. (FSX No. 68352888). LFP filed a response on December 8, 2022 (FSX NO. 68548732), Leighton a reply on January 6, 2023 (FSX No. 68823935), and LFP a supplemental response on February 3, 2023 (FSX No. 69072516). This court heard oral arguments on February 6, 2023 and took the matter under advisement.

LEGAL STANDARD

[¶ 17] A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of claims alleged in the complaint. *Moses Inc. v. Moses*, 2022 WY 57, ¶ 8, 509 P.3d 345, 349 (Wyo. 2022). When deciding such a motion, the court accepts the facts stated in the complaint as true and views them in the light most favorable to the defendant. *Stroth v. N. Lincoln Cnty. Hosp. Dist*., 2014 WY 81, ¶ 6, 327 P.3d 121, 125 (Wyo. 2014). The court does not give legal conclusions the same treatment. *Dowlin v. Dowlin*, 2007 WY 114, ¶¶ 8-9, 162 P.3d 1202, 1204 (Wyo. 2007).

[¶ 18] "[D]ismissal is a drastic remedy." *Moses*, ¶ 8, 509 P.3d at 349. But drastic as it may be, dismissal is warranted if "it is certain from the face of the complaint that plaintiff cannot assert any fact that would entitle him to relief." *Id.*

[¶ 19] If, a party presents, and the court considers, matters outside the pleadings, then the Rule 12(b)(6) "motion must be treated as one for summary judgment under Rule 56." W.R.C.P.Ch.C. 12(d). Here, Leighton attaches outside materials to his briefing. But the court declines to consider these materials. As a result, the Rule 12(b)(6) standard governs.

DISCUSSION

[¶ 20] Leighton's motion takes a shotgun approach, presenting a wide array of arguments for dismissal. But at the hearing on this motion, Leighton's counsel correctly identified two threshold issues. First, is the AFA Agreement assignable? Second, if assignable, does the agreement's forum-selection clause preclude litigation in this court?

A. Minnesota contract law applies.

[¶ 21] The threshold question to these two threshold questions is whose law applies? Minnesota, Wyoming, North Dakota? "Wyoming courts will enforce choice-of-law provisions and apply foreign law when doing so is not contrary to the law, public policy, or the general interests of Wyoming's citizens." *Finley Res., Inc. v. EP Energy E&P Co., L.P.*, 2019 WY 65, ¶ 9, 443 P.3d 838, 842 (Wyo. 2019)(cleaned up). The AFA Agreement identifies the agreement as a "Minnesota contract," to be "governed by the laws of the State of Minnesota." Because Minnesota law on these threshold questions is similar to Wyoming law and is not contrary to our state's public policy, this court applies Minnesota law. *See Ecocards v. Tekstir, Inc.*, 2020 WY 38, ¶¶ 25-28, 459 P.3d 1111, 1119–20 (Wyo. 2020) (applying California law to enforce a forum-selection clause); *Finley Res., Inc*., ¶¶ 8-16, 443 P.3d at 842–44 (applying Texas law to interpret a forum-selection clause). *See also Northland Cap. Fin. Servs., LLC v. Robinson,* 976 N.W.2d 252, 257–58 (S.D. 2022) (applying Minnesota law when evaluating unilateral waiver of a forum-selection clause in a Minnesota contract).

B. The AFA Agreement is assignable.

[¶ 22] As to the first threshold question, Leighton argues LFP cannot state any claims rooted in the AFA Agreement because it is a non-assignable personal services contract.

[¶ 23] As a general rule, a contract silent on assignment may be assigned unless statute or public policy prohibit assignment. Elaine D. Ziff and John G. Deming, *IP Licenses: Restrictions on Assignment and Change of Control*, Practical Law Practice Note 3-517-3249 (citing Restatement (Second) of Contracts § 317(2) (1981); UCC § 2-210(2)). Public policy prohibits assignment of a personal service contract. *Id.* This public policy prohibition honors a service provider's choice to contract with the original party. *HD Supply Facilities Maint., Ltd. v. Bymoen,* 210 P.3d 183 (Nev. 2009). It also recognizes "performance by a particular person is a material term of the contract." *Fransmart, LLC v. Freshii Dev., LLC*, 768 F. Supp. 2d 851, 861 (E.D. Va. 2011).

[¶ 24] Consistent with this general rule, Minnesota law recognizes personal service contracts may be assigned only with consent. *Egner v. States Realty Co.,* 26 N.W.2d 464, 469-70 (Minn. 1947). But it does not draw a definitive line between personal service contracts and non-personal service contracts and no Minnesota court has directly

addressed whether a license agreement, like the one at issue here, is a personal service contract. Generally, though, Minnesota law describes "personal service contract" as a contract "for personal services [that] can be performed ordinarily only by the person who has contracted to render them." *Egner*, 26 N.W.2d at 469-470. A "material factor" of personal service contracts is "the personal qualities of the person who is to render the services, such as his ability, skill, taste, integrity, dependability, and the like." *Id.* This general description is consistent with more specific examples offered by other courts. *See, e.g., Mehul's Inv. Corp. v. ABC Advisors, Inc*., 130 F. Supp. 2d 700, 705 (D. Md. 2001) (giving examples of a "typical personal service contract," including: "a contract to paint a portrait, write a novel, or perform other work requiring 'rare genius' and 'extraordinary skill.").

[¶ 25] Using this framework, a federal court applying Minnesota law determined a similar agreement authorizing a corporation to license or sell computerized hospital information, data processing systems, and software was not a personal service contract. *In re Sentry Data, Inc*., 87 B.R. 943, 949–50 (Bankr. N.D. Ill. 1988). The court reached this conclusion because the agreement did not "involve unique personal services capable of performance only by the [licensee]" and it contained no terms expressly stating the licensee's performance and duties were "unique and special and could be accomplished only by [the licensee]." *Id.*

[¶ 26] This same framework applies to the licensing agreement at issue here. Because the AFA Agreement does not bar assignment by Ameriprise Financial, this court asks whether the agreement is a non-assignable personal service contract. In other words, are Leighton's personal qualities a "material factor" such that he alone can perform any contracted services?

[¶ 27] For his part, Leighton frames Ameriprise Financial's "trust and confidence" in Leighton as the AFA Agreement's linchpin. For its part, LFP focuses on the "services" component of "personal service contract" or—better said—the lack thereof. LFP notes the agreement does not call for services. Rather, it licenses and restricts Leighton.

[¶ 28] Leighton's argument is unpersuasive. Though the AFA Agreement acknowledges Leighton's access to information places him in a position of "trust and confidence," nowhere does the AFA Agreement identify his personal characteristics or

skill as unique and material to performance. And nothing in the agreement suggests performance could be accomplished by Leighton alone. The AFA agreement is a standard license agreement with boilerplate terms and fill-in-the-blank lines for the names of licensees. *See Escandar v. S. Mgmt. & Inv. Corp*., 534 So. 2d 1203, 1205 n.2 (Fla. Dist. Ct. App. 1988) (holding a contract with duties which could be performed by anyone within an organization did not constitute a contract for personal services).

[¶ 29] Leighton cites two Minnesota cases: *Egner v. States Realty Co*., 26 N.W.2d 464 (Minn. 1947) and *W.H. Barber Agency Co. v. Co-operative Barrel Co*., 158 N.W. 38 (Minn. 1916). Neither case involves the type of license agreement at issue here. Instead, both cases involve contracts for services. *Egner*, 26 N.W.2d at 470 (contract to organize and conduct sales); *W.H. Barber Agency Co.*, 158 N.W. 38, 38-39 (Minn. 1916) (contract to sell commercial products).

[¶ 30] Fundamental differences exist between service and license contracts. As its name suggests, a personal service contract calls for services. It defines the scope of services, sets compensation terms, and focuses on the service provider's unique skill. Taking an entirely different focus, a license agreement authorizes a licensee to use names and propriety marks within certain parameters. A license agreement focuses on intellectual property.

[¶ 31] This difference in focus matters. It matters because the public policy of recognizing performance by a particular person as a material term and honoring that person's choice to contract with a certain party does not apply to license agreements. While a provider's unique skill is central to a personal service contract, intellectual property is central to a license agreement. A license—not a unique skill set—is required to use intellectual property within set parameters.

[¶ 32] In sum, LFP makes an intuitive observation: A "personal services contract" by its definition involves services. Yet, Leighton provides no services under the agreement, and he is neither an independent contractor nor an employee of Ameriprise Financial. *See Compl*., Ex. 1 § 5(A). Rather than require services, the AFA Agreement licenses Leighton to use Ameriprise Financial's name and proprietary marks and imposes restrictions on such use. A contract that licenses and restricts without identifying

anything unique about the licensee and without calling for any services is not a non-assignable personal service contract.

[¶ 33] Absent Minnesota law classifying license agreements as non-assignable personal service contracts, this court will not depart from the general rule of free assignability of contracts. Thus, the AFA Agreement was assignable.

C. LFP may not unilaterally waive the forum-selection clause.

[¶ 34] Leighton argues if the AFA Agreement is assignable, its forum selection provision requires dismissal because that provision broadly requires any dispute between the parties to be litigated in Minnesota.

[¶ 35] Resolving this issue begins with interpreting the AFA Agreement. This court's goal in interpreting a Minnesota contract is to determine and enforce the contracting parties' intent. S*torms, Inc. v. Mathy Constr. Co*., 883 N.W.2d 772, 776 (Minn. 2016). To discern intent, this court looks to the contract's plain language. *Metro. Sports Facilities Comm'n v. Gen. Mills, Inc*., 470 N.W.2d 118, 123 (Minn.1991). If unambiguous, the court enforces the plain language. *Dykes v. Sukup Mfg. Co*., 781 N.W.2d 578, 582 (Minn. 2010). Minnesota courts construe contracts "as a whole, attempt to harmonize all of its clauses, and seek to avoid interpretations that render a provision meaningless." *Pexsa v. Disabled Am. Veterans of Minnesota Found.*, No. A19-2041, 2020 WL 4045390, at *2 (Minn. Ct. App. July 20, 2020) (cleaned up).

[¶ 36] A forum-selection clause must be enforced unless enforcement would be unfair or unreasonable. *Gander Mountain Co. v. Lazard Middle Mkt., LLC*, No. A11-221, 2012 WL 118236, at *1 (Minn. Ct. App. Jan. 17, 2012). While a reasonable and fair forum-selection clause must be enforced, it is "widespread and well accepted" that a "party to a contract may waive a provision of the contract that was included for his benefit." *Rizas v. Vail Resorts, Inc.*, No. 08-CV-139-J, 2009 WL 10664834, at *2 (D. Wyo. Oct. 1, 2009) (internal quotation omitted). The waived provision must be included for the waiving party's sole benefit because otherwise waiver would deprive the nonwaiving party of the contracted provision's benefit. *Avicanna Inc. v. Mewhinney*, 487 P.3d 1110, 1113–14 (Colo App. 2019) (citing 13 Williston on Contracts at § 39:24). Minnesota follows this well-established waiver rule. *Dolder v. Griffin*, 323 N.W.2d 773, 778 (Minn. 1982).

[¶ 37] LFP does not contend the forum-selection clause is ambiguous, unfair, or unreasonable. Instead, LFP argues it is entitled to unilaterally waive the forum-selection clause because it was included exclusively for Ameriprise Financial (or its assignee LFP)'s benefit. To establish sole benefit, LFP argues the forum-selection clause is not a mutual requirement. It applies to Leighton alone because the provision uses unilateral language, "**You** [defined as Leighton] expressly . . . agree that any action at law, suit in equity, judicial proceeding, or arbitration . . . shall be litigated only . . in the State of Minnesota," instead of mutual language like the "**parties** agree" or "**each party** agrees."

[¶ 38] To further show the forum-selection clause is not mutually applicable, LFP asserts the AFA Agreement nowhere states Ameriprise Financial would only sue Leighton in Minnesota. LFP is wrong. The arbitration provision explicitly subjects Ameriprise Financial to the forum-selection clause. In pertinent part, the provision arbitration provides:

> [T]he parties agree that Claims brought by Ameriprise Financial pursuant to Section 8 of this Agreement will not be arbitrated, but shall be subject to the jurisdiction of the courts as provided in Section 11 of this Agreement.

Compl., Ex. 1 § 9(A).

[¶ 39] Use of the terms "agree," "any," and "shall" in these provisions challenges LFP's interpretation. "Agree" signals a mutual understanding between the contracting parties about the governing law and choice of forum. *See* Agree, Black's Law Dictionary (11th ed. 2019) (defining "agree" as "[t]o unite in thought; to concur in opinion or purpose" and "[t]o exchange promises; to unite in an engagement to do or not do something."). Minnesota courts give "any" an expansive application. *Am. Fam. Mut. Ins. Co., S.I. v. Progressive Direct Ins. Co.*, 970 N.W.2d 707, 709–10 (Minn. Ct. App. 2022). And "[i]t is a well-worn maxim that use of the term 'shall' reflects a mandatory imposition." *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 272 (Minn. 2004). A plain language reading of these terms in the forum-selection and arbitration provisions reflects a mutual understanding that Ameriprise would bring suit in Minnesota.

[¶ 40] Viewing these provisions in harmony further shows LFP must bring suit in Minnesota. For instance, consider this question: If Leighton must arbitrate, but LFP may

bring suit in any forum of its choosing, then what purpose is served by broadly requiring "any action at law" to be "litigated in the appropriate state or federal court in the State of Minnesota, County of Hennepin"? Accepting LFP's interpretation would render these provisions meaningless—a result the court must avoid. *Stiglich Const., Inc. v. Larson*, 621 N.W.2d 801, 803 (Minn.App.2001) (providing that courts should avoid interpretation of contracts that would render a provision meaningless).

[¶ 41] LFP relies on cases where courts permitted waiver of forum-selection clauses because those clauses evidenced intent to solely benefit the waiving parties. *See Open Text Corporation v. Grimes*, 262 F.Supp.3d 278, 286 (D. Md. 2017). This reliance overlooks the benefits the forum-selection clause offered both Leighton and Ameriprise Financial. The clause offered "a degree of [jurisdictional] certainty" and served to "obviate[e] jurisdictional struggles." *See Hauenstein & Bermeister, Inc. v. Met-Fab Indus., Inc.*, 320 N.W.2d 886, 889–90 (Minn. 1982). This mutual benefit makes this case dissimilar to the cases cited by LFP and similar to cases where courts prohibited unilateral waiver because contractual language evidenced a mutual benefit for the contracting parties. *See, e.g., Northland Cap. Fin. Servs.,* LLC, 976 N.W.2d at 259–61 (applying Minnesota law); *Avicanna Inc.*, 487 P.3d at 1113-15 (Colo. App. 2019).

[¶ 42] While LFP relies on inapposite cases, Leighton makes his own intuitive observation: The provision at issue was not included for LFP's sole benefit because LFP was not a party to the contract. Indeed, it is difficult to see an exclusive benefit to LFP. LFP operates in Wyoming (not Minnesota) and calls North Dakota (not Minnesota) its legal home. LFP has not articulated how the requirement to litigate in Minnesota benefits it—a nonresident—but does not benefit Leighton—a fellow nonresident who agreed to the mutually applicable forum-selection requirements.

[¶ 43] In short, LFP cannot unilaterally waive the forum-selection clause because it cannot establish the clause was included in the AFA Agreement for its sole benefit.

D. The forum-selection clause encompasses each claim.

[¶ 44] Having established the forum-selection clause applies, the court must now determine if Leighton's claims fall within its scope. To define scope, this court returns to the contractual language. The forum-selection clause broadly encompasses "any action at law, suit in equity, judicial proceeding, or arbitration arising directly, indirectly, or

otherwise in connection with, out of, related to or from this agreement." Based on a plain reading of this expansive language, the court concludes the forum-selection clause encompasses all of LFP's claims.

[¶ 45] LFP asserts five claims: injunctive relief, breach of contract, misappropriation of trade secrets, interference with contract or prospective advantage, and unfair competition. Three of these five claims (injunctive relief, breach of contract, misappropriation of trade secrets) rely explicitly on violations of the AFA Agreement. *Compl.* ¶¶ 29, 36, 40. The two remaining claims (interference and unfair competition) relate to the relationship created by the AFA Agreement. *See Gander Mountain Co.*, 2012 WL 118236, at *2–3 (subjecting noncontractual claims to a forum-selection clause because the claims related to the relationship created by the contract). And each claim either "aris[es] directly, indirectly, or otherwise" from the AFA Agreement, is "in connection with" the AFA Agreement, or is "related" to the AFA Agreement. For the purposes of judicial economy and efficiency, each claim should be heard by one court in the forum designated by the agreement. *See Folsom v. MPM Signs L.L.C.*, 2000 WL 1780282, at *5 (Minn. Ct. App. 2000).

CONCLUSION

[¶ 46] Leighton's motion to dismiss is **GRANTED** based on the forum-selection clause contained in the AFA Agreement. Having arrived at this decision, the court need not address the other grounds for dismissal argued in the motion.

[¶ 47] This case is **DISMISSED** without prejudice to LFP refiling in the appropriate jurisdiction.

IT IS SO ORDERED.

Dated: 04/12/2023 /s/ Steven K Sharpe
CHANCERY COURT JUDGE