

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN)	FIFTEENTH JUDICIAL CIRCUIT
EDWARD D. JONES & CO., L.P.,)	Civil Action No. 2012-CP-22-01252
)	
Plaintiff,)	
)	
vs.)	ORDER
)	
JEFFREY WILDES,)	
)	
Defendant.)	
)	

On May 16, 2013, this Court heard argument on Plaintiff Edward Jones & Co., L.P.'s motion to compel arbitration and request to stay adjudication of the motion for recovery under bond. Following argument on Plaintiff's motion, this Court heard Defendant Jeffrey Wildes's ("Wildes") motion for recovery under the security bond paid into this Court in connection with Plaintiff's previously sought and received preliminary injunction. William S.F. Freeman appeared on behalf of Plaintiff and A. Mattison Bogan appeared on behalf of Wildes.

After hearing argument on whether the matter should be compelled to arbitration and orally denying the motion, this Court conducted a half-day hearing at which testimony was taken from Wildes concerning his damages. The Court also issued a Form 4 Order on May 16, 2013 denying the motion to compel arbitration and request to stay. Following the hearing, this Court has undertaken consideration of exhibits placed in the Record supporting Wildes's damages claim. Having considered all arguments and submissions from both parties, as detailed herein, and as contained in the Record and transcript from the May 16, 2013 hearing on these motions, through this Order fully addressing both motions, this Court **DENIES** Plaintiff's motion to compel arbitration and **GRANTS** Wildes's motion for recovery under the security bond. Wildes is entitled to payment of \$219,665.11 from the bond stemming from damages arising out of the

preliminary injunction. Payment from the bond should be made to Wildes within 15 days of this Order. Any ground raised in Plaintiff's motion to compel arbitration not specifically addressed in this Order has been considered by this Court and rejected.

FINDINGS OF FACT

The present motions are before this Court because the Plaintiff commenced this civil action requesting a preliminary injunction. Plaintiff, after filing this action, also filed an arbitration proceeding before the Financial Industry Regulatory Authority ("FINRA"). The arbitration proceeding remains pending and a final hearing has not been set.¹ As noted herein, this Court finds that the remaining portion of the pending arbitration proceeding has no bearing on the issues concerning the bond now before this Court.

Wildes previously worked for Plaintiff. Wildes now works for Raymond James. After his departure, Plaintiff commenced this action trying to prevent Wildes from communicating with clients that he previously represented while employed with Plaintiff. This Court, by and through Judge Culbertson, previously heard Plaintiff's motion for preliminary injunction and granted the requested relief. In doing so, Judge Culbertson required Plaintiff to post a \$10 million bond to protect Wildes from any damage that may result from the issuance of the injunction. (See Judge Culbertson's December 7, 2012 Preliminary Injunction Order and Form 4 Order.) In connection with the injunction proceedings in this Court, Judge Culbertson found that should the arbitration panel conclude that the injunction should not be extended on a permanent basis, Wildes would return to this Court seeking damages arising out of the Court's issuance of the injunction. (See Transcript of December 7, 2012 Hearing on Motion for

¹ The FINRA panel anticipates reaching Plaintiff's claims pending in arbitration in late February 2014. As indicated in this Order, the FINRA panel has already denied Plaintiff's request for a permanent injunction thereby finally deciding that portion of the proceeding and resulting in dissolution of this Court's preliminary injunction.

Preliminary Injunction before the Honorable Benjamin H. Culbertson at pp. 43-44.) After 115 days, the injunction was dissolved through the efforts of Wildes and his counsel arguing that the injunction should not issue against him on a permanent basis. While Wildes did not succeed in having Judge Culbertson deny the motion for preliminary injunction, he was able to gain its dissolution through the FINRA arbitration panel by defeating the request for a permanent injunction. (See March 25, 2013 Order from FINRA panel denying Plaintiff's request for a permanent injunction, provided to the parties on April 1, 2013.) Thus, the injunction should not have issued against Wildes and he is entitled to damages for the entire period during which the temporary injunction was in place and those damages necessarily intertwined therewith.

In filing an action with this Court, Plaintiff Edward Jones affirmatively invoked the jurisdiction of this Court by relying upon an exception to the arbitration provision governing the parties to this action. The arbitration provision provides:

The parties hereto agree that any controversy arising under this Agreement relating to money damages shall be submitted to arbitration before the National Association of Securities Dealers, Inc. or the New York Stock Exchange, Inc. and be resolved in accordance with the rules then in effect, of such entities. *This provision shall in no way affect or impair Edward Jones' right under any other provision of this Agreement to obtain equitable relief from a court of competent jurisdiction, which relief may remain in full force and effect pending the outcome of the arbitration proceedings.*

(December 23, 1998 Employment Agreement of Jeffrey Wildes) (emphasis added). In filing this action within this Court's jurisdiction and by utilizing the emphasized exception to arbitration, Plaintiff gained an order from Judge Culbertson granting it a preliminary injunction. Plaintiff now seeks to employ the same arbitration provision as a shield to prevent this Court from entertaining Wildes's request for recovery under the bond.

Plaintiff filed the present motion to compel arbitration because Wildes seeks relief from this Court for the monies incurred and lost as a result of the injunction issued by this Court in the form of damages as provided by Rule 65(c) of the South Carolina Rules of Civil Procedure. As noted above, this Court's preliminary injunction was issued for a period of 15 days. The FINRA arbitration panel, however, extended the preliminary injunction for an additional 100 days until the panel issued a final order on Plaintiff's request for the injunction to stand on a permanent basis. (December 14, 2012 email directive from FINRA panel extending preliminary injunction.) Thus, 115 days after the issuance of the injunction by this Court, the FINRA panel denied Plaintiff's motion for a permanent injunction finally dissolving the injunction and informed the parties of that decision on April 1, 2013. (See March 25, 2013 Order from FINRA panel denying Plaintiff's request for a permanent injunction, provided to the parties on April 1, 2013.) This Court, however, expressly reserved jurisdiction over the issue of damages arising out of the injunction and bond. The Court did so in recognition of the fact that if the FINRA panel determined that no injunction should be had, Wildes will have suffered damage due to this Court's issuance of the injunction in the first instance. Now that the injunction issue has been finally decided by the FINRA panel and is dissolved, the issue of damages stemming from this Court's preliminary injunction is ripe for adjudication by this Court.

Wildes's motion for recovery arises from the injunction issued by Judge Culbertson.

Judge Culbertson, in ruling on the motion for preliminary injunction, properly framed this issue:

We're going to have a bond in place that's going to compensate the Defendant [Wildes] for any damages he sustained if I was in error in issuing this injunction.

(See Transcript of December 7, 2012 Hearing on Motion for Preliminary Injunction before the Honorable Benjamin H. Culbertson at pp. 43-44.) Judge Culbertson, consistent with the above

rulings in the record of this matter, issued a Form 4 Order with his written order. (See Judge Culbertson's December 7, 2012 Preliminary Injunction Order and Form 4 Order.) The Form 4 Order clearly indicates that "This Order . . . does not end the case." (*Id.* at Form 4 Order Page 1.) Through his motion for recovery under the bond, Wildes asks for the very relief that Judge Culbertson forecast would be back before the Court given his indication that the preliminary injunction order did not end the case before him. Hence, based on the conclusions below, this Court finds that the issue of recovery under the bond is not before the FINRA panel and should not be decided in that forum. Accordingly, Wildes is entitled to the payment of damages stemming from the issuance of the injunction as envisioned by Rule 65(c).

CONCLUSIONS OF LAW

The determination of damages flowing from the issuance of the injunction is not before the arbitration panel as this Court has previously determined that the issue would be decided in circuit court based on Plaintiff's decision to affirmatively request relief from this Court. The issue of damages under Rule 65(c) is not subject to the arbitration provision in Wildes's Employment Agreement. Therefore, the issue of damages can properly be decided by this Court. This Court finds that Wildes has suffered damage due to the injunction and is entitled to payment under the bond as directed herein.

I. This Court cannot set aside the prior ruling of Judge Culbertson by compelling this matter to arbitration.

Plaintiff seeks to proceed in contravention to the directives of Judge Culbertson by asking this Court to compel the issue of damages arising out of the issuance of the injunction to the FINRA arbitration panel. This Court cannot overturn the prior findings of Judge Culbertson. This Court can only, as a sequel to the issuance of the injunction and the posting of the security

bond, determine the damages amount to which Wildes is entitled stemming from costs and losses incurred because of the injunction.

It is well established that one circuit judge may not overrule another. *See Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) (holding that “[o]ne Circuit Court Judge does not have the authority to set aside the order of another.”); *Cook v. Taylor*, 272 S.C. 536, 252 S.E.2d 923 (1979) (same). This rule exists to prevent a party from trying to obtain a subsequent favorable ruling upon an issue already decided simply because that party did not like the first ruling. *Dukes & Dukes, Inc. v. Hygrade Food Products Corp.*, 236 S.C. 69, 74-75, 113 S.E.2d 254, 256 (1960) (noting where a party believes he is aggrieved by a ruling not in harmony with the law, the party should appeal instead of asking a different circuit judge for the same relief previously denied).

In his Order granting Plaintiff’s motion for a preliminary injunction, Judge Culbertson ordered as follows:

Having fully considered each of the parties’ arguments, *for the reasons stated herein and for such other reasons as appear in the record of this case*, the Plaintiff’s Motion for Preliminary Injunction is hereby granted as described above for a period of 15 days and Edward Jones is ordered to pay into the registry of the Court funds sufficient to satisfy a bond of ten million dollars (\$10,000,000.00) on or before Wednesday, December 12, 2012 at noon.

(*See* Judge Culbertson’s December 7, 2012 Preliminary Injunction Order and Form 4 Order at p. 2) (emphasis added). Included in the Record from this Court is the following directive from Judge Culbertson:

We’re going to have a bond in place that’s going to compensate the Defendant [Wildes] for any damages he sustained if I was in error in issuing this injunction.

(See Transcript of December 7, 2012 Hearing on Motion for Preliminary Injunction before the Honorable Benjamin H. Culbertson at p. 43.) Based on this finding, Judge Culbertson explained the next issues that this Court would entertain with respect to the bond:

Well, I've got to find out, I mean, from the, from your argument, I mean, I understand the argument to be if I issue a – if I did not issue it at temporary injunction then your people [Plaintiff] stood to lose \$45 million in damages, if I issued it in error [the injunction] then he [Wildes] stood to lose \$45 million in damages; and so, I've got to determine what are the damages going to be for this next 15 days if I did it in error?

(*Id.* at p. 44.)

This Court concludes that the case of *Tisdale v. American Life Ins. Co.*, 216 S.C. 10, 56 S.E.2d 580 (1949) demonstrates that Plaintiff cannot seek to avoid the ruling issued by Judge Culbertson. Judge Culbertson determined he had jurisdiction over the present issue and that determination cannot be set aside. In *Tisdale*, the defendant filed and served its answer to the complaint without any reservations or exceptions. *Id.* at 512, 56 S.E.2d at 580. After having answered, the defendant then moved the presiding circuit judge for an order transferring venue to another county. *Id.* The presiding judge refused the motion and found that the defendant had submitted himself to the jurisdiction of the court. *Id.* The defendant then moved a second circuit court judge to vacate the prior judge's order and again moved to transfer venue. *Tisdale*, 216 S.C. at 12-13, 56 S.E.2d at 580-581. The second circuit judge denied the motion on the basis that he was bound by the first judge's determination that jurisdiction existed and that the matter should not be transferred to another venue. *Id.* The South Carolina Supreme Court affirmed and held that “[i]t is axiomatic (1) that an order not appealed from is the law of the case², and (2) a

² Had Plaintiff wished to challenge the Judge Culbertson's requirement that it post a \$10 million bond or take issue with any directive concerning damages arising in connection with the issuance of the injunction, Plaintiff should have noticed an appeal. Like the holding in *Tisdale* demonstrates, any unappealed ruling becomes the law of the case. See *ML-Lee Acquisition*

Circuit Judge does not have the power to reverse the ruling of another Circuit Judge.” *Id.* at 13, 56 S.E.2d at 581.

Just as in *Tisdale*, Judge Culbertson, based on Plaintiff’s affirmative invocation of the Court’s jurisdiction, determined that he had the power to issue the preliminary injunction and the authority to require Plaintiff to post a security bond. Judge Culbertson further determined that any issue regarding damages arising from an erroneous issuance of the injunction would be determined by this Court. Despite this directive, Plaintiff has moved to compel the issue of damages flowing from the injunction to the FINRA panel. Plaintiff cannot proceed in the fashion it desires based on Judge Culbertson’s prior exercise of jurisdiction over the issues raised in Wildes’s motion.

Instead, the proper course at this stage in the action is for this Court to determine the amount of damages and costs to which Wildes is entitled. Addressing the damages issue is consistent with Judge Culbertson’s prior ruling in this matter. Thus, the issue of damages is merely a sequel to his Order granting the injunction and setting the bond amount. *See National Bank of South Carolina v. Transouth Fin. Corp.*, 280 S.C. 126, 311 S.E.2d 98 (Ct. App. 1984) (holding that the second judge’s order setting the amount of the deficiency judgment arising in connection with a foreclosure action was properly issued as a “sequel” to the first judge’s order granting foreclosure).

II. The determination of issues arising out of Plaintiff’s prior request for equitable relief in the form of an injunction are not governed by the arbitration provision and the issues surrounding Wildes’s damages are not before the arbitration panel.

The issue of recovery by Wildes under the security bond is not governed by any arbitration provision and the issue is not before the FINRA panel. Plaintiff invoked this Court’s

Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling becomes the law of the case).

jurisdiction to gain the injunction and this Court is the proper forum for addressing Wildes's damages stemming from the injunction.

An injunction is an equitable form of relief. *Insurance Financial Services, Inc. v. South Carolina Ins. Co.*, 271 S.C. 289, 247 S.E.2d 315 (1978). Plaintiff commenced this action for the sole purpose of enjoining Wildes. Plaintiff did not seek any additional relief from this Court. South Carolina law recognizes that damages incurred by a party subjected to an improperly issued injunction are necessarily intertwined with the injunction request as provided by Rule 65(c) of the South Carolina Rules of Civil Procedure. Rule 65(c) states:

No . . . temporary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by an party who is found to have been wrongfully enjoined or restrained.

Rule 65(c), SCRCP. Thus, seeking damages in an action on an injunction pursuant to Rule 65 is also a form of equitable relief and a court sitting in equity can award damages without altering the nature of the action. *See, e.g. Alderman v. Cooper*, 257 S.C. 304, 185 S.E.2d 809 (1971). Moreover, where an action seeks only injunctive relief, the resolution of the issue of the right to injunctive relief is not "merely ancillary to the main issue." *Id.* at 278, 186 S.E.2d at 918. Here, the injunction was the only relief sought before this Court by Plaintiff at the time the bond was posted and the injunction issued making it the "main issue."

In this case, Plaintiff filed this equitable action with this Court. Plaintiff invoked this Court's jurisdiction and moved for an injunction. The Court granted the injunction. The Court's injunction has now been dissolved by the FINRA arbitration panel when it denied Plaintiff's request for a permanent injunction. (See March 25, 2013 Order from FINRA panel denying Plaintiff's request for a permanent injunction, provided to the parties on April 1, 2013.)

Consistent with Judge Culbertson's Order and rulings contained in the Record in this case, Wildes now seeks damages and costs incurred in obtaining the dissolution of the injunction.

Plaintiff attempts to shield itself from having the damages determination made by this Court by again invoking Paragraph 14 of Wildes's Employment Agreement. But this time for the opposite purpose. Plaintiff now portrays this action and the damages Wildes seeks as being governed by the general language in the arbitration provision providing:

[A]ny controversy arising under this Agreement relating to money damages shall be submitted to arbitration before the National Association of Securities Dealers, Inc. or the New York Stock Exchange, Inc. and be resolved in accordance with the rules then in effect, of such entities.

(December 23, 1998 Employment Agreement of Jeffrey Wildes at p. 3.) The damages sought by Wildes through his motion for recovery are not covered by this provision, however, as Wildes does not seek "money damages" as contemplated by the agreement. Rather, Wildes seeks a form of equitable relief under Rule 65 for damages intertwined with and stemming from the losses and costs of having to defend the injunction and in gaining its dissolution from the FINRA panel. Hence, the arbitration provision is not implicated by the motion for recovery and the Court cannot compel the issue to arbitration given the plain language of the agreement because the damage arising from the injunction were not within the contemplation of the parties. *See, e.g., Partain v. Upstate Auto. Group*, 386 S.C. 488, 494-495, 689 S.E.2d 602, 605 (2010) (refusing to compel claims to arbitration because they were not contemplated by the language of the parties' agreement.)

Further, Plaintiff contends that Wildes has waived his right to have this Court decide damages by participating in the arbitration before the FINRA panel (*i.e.*, attempting to gain dissolution of the injunction). Wildes has not waived any right to have this Court determine the damages arising out of Judge Culbertson's injunction. Wildes had to appear before the FINRA

panel to argue that the injunction should not issue on a permanent basis. Judge Culbertson was aware of that fact and this reason underlies the basis for Judge Culbertson requiring Plaintiff to post a bond with this Court sufficient to protect Wildes from harm. Plaintiff filed this action with this Court. Wildes appeared before this Court to contest the preliminary injunction motion. Plaintiff commenced an arbitration proceeding before FINRA. Wildes appeared to defend the allegations raised in the arbitration. Absent from either of these two parallel events is Wildes affirmatively invoking the jurisdiction of either this Court or the FINRA panel. Wildes was defending the Plaintiff's claims and was attempting to gain dissolution of the injunction. The FINRA panel has concluded the injunction should not issue and a determination as to Wildes' damages is now ripe for adjudication.

III. Wildes has suffered damage as a result of the issuance of the injunction and is entitled to damages incurred during and intertwined with the 115 day period during which the injunction was in place.

As forecast by Judge Culbertson and contemplated by Rule 65(c) of the South Carolina Rules of Civil Procedure, a party that has been wrongfully enjoined is entitled to damages stemming from the injunction. The FINRA panel has determined that the injunction should not be extended on a permanent basis. As a result, this Court concludes the preliminary injunction should not have issued for the original period of 15 days and that the FINRA panel should not have extended it for an additional 100 days. The issuance of the injunction, and its extension, were wrongful as the FINRA panel has ruled in favor of Wildes on Plaintiffs' request for a permanent injunction. Wildes prevailed on that issue, the panel's decision is final with regard to that portion of the arbitration proceeding, and Wildes is now entitled to a determination of damages by this Court. The FINRA determination that the injunction should not have issued is final and has not been challenged by Plaintiff and this Court is bound by that determination.

The Rules of Civil Procedure permit a party to recover damages arising out of the issuance of an injunction. Rule 65(c) states:

No . . . temporary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by a party who is found to have been wrongfully enjoined or restrained.

Rule 65(c), SCRPC. Our Supreme Court has recognized that “[t]he damages recoverable in an action on an injunction bond [under Rule 65] include all actual damages sustained by reason of the wrongful issuance of the injunction, that is, such damages as are the direct, natural, and proximate result of the injunction.” *Hylar v. Wheeler*, 240 S.C. 386, 392, 126 S.E.2d 173, 175 (1962). “[T]he obligation is to pay any damages that the defendant may sustain by reason of the issuance of the injunction.” *Id.* at 395, 126 S.E.2d at 177. The Supreme Court has also held that this measure of damages includes legal fees incurred in accomplishing the dissolution of the injunction. *See Walker v. Oswald*, 181 S.C. 278, 186 S.E.2d 916, 918 (1936) (“[A reasonable sum as counsel fees for procuring the dissolution of an injunction may be allowed as damages to be recovered on the injunction bond, provided the injunctive relief is not merely ancillary to the main issue.”). Where an action seeks only injunctive relief, the resolution of the issue of the right to injunctive relief is not “merely ancillary to the main issue.” *Id.* at 278, 186 S.E.2d at 918. The recoverable damages include the entire period during which the injunction was in place. *See Martin v. Anderson and Galante*, 348 S.C. 379, 384-85, 559 S.E.2d 348, 351 (Ct. App. 2001) (permitting damages under Rule 65(c) for the damages incurred during the period of the injunction).

This Court concludes that Wildes has suffered damage as a result of the issuance of the injunction which has been dissolved with finality by the FINRA panel. The injunction was in place for a period of 115 days, encompassing December 7, 2012 through April 1, 2013 (the date

on which the parties were informed the request for a permanent injunction had been denied). In connection with the injunction, Wildes has suffered various categories of damage: 1) having to hire attorneys to fight the issuance of the injunction and gain its dissolution; 2) having to pay his staff to attend hearings in connection with the injunction and in providing lodging for himself and his staff in connection with the injunction hearings; 3) having to pay attorneys' fees for the defense of his current employer, Raymond James, in connection with Plaintiff's request for relief before FINRA, including the request for a permanent injunction; 4) having to pay fees associated with the FINRA panel's consideration of Plaintiff's request for injunctive relief; and 5) in suffering new business losses due to his inability to undertake certain actions relating to his new business operation with Raymond James because of the injunction.

Through testimony and as evidenced by documentary submissions to the Court, including Wildes's affidavit and the affidavit of Mr. Cory Manning, counsel for Wildes, this Court concludes that Wildes incurred the following damages over the 115 day period:

- 1) Attorneys' fees paid to the Nelson Mullins law firm (\$117,809.22).**

Wildes has paid a total \$121,681.72 in attorneys' fees and costs to his attorneys as testified to by Wildes on May 16, 2013 and as demonstrated by invoices dated December 12, 2012, January 10, 2013, February 12, 2013, March 5, 2013, April 5, 2013, and May 7, 2013. This Court heard the testimony of Wildes and reviewed the submitted invoices which also account for time and fees not attributable to gaining defeat of the permanent injunction and resultant dissolution of the preliminary injunction (these entries are noted by highlighting and/or redaction of those entries). In considering this item of damage, this Court concludes that \$117,809.22 in fees and costs are attributable to the services rendered in gaining dissolution of the injunction. As indicated herein, the time entries on

the invoices that were noted as being associated with matters not arising in connection with the injunction have been subtracted from the total fee and cost number.a

“In determining a reasonable attorney’s fee, the court should consider the following six factors: 1) the nature, extent, and difficulty of the case; 2) the time necessarily devoted to the case; 3) the professional standing of counsel; 4) the contingency of compensation; 5) the beneficial results obtained; and 6) the customary legal fees for similar services.” *Taylor by Taylor v. Medenica*, 331 S.C. 575; 503 S.E.2d 458; 1998 (citing *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997)). The Court has considered each of the six factors that a court must evaluate in awarding attorneys’ fees as detailed herein. Based on the affidavit of Mr. Manning and having heard argument and reviewed the invoices, the Court concludes the award of \$117,809.22 to be reasonable. This is a complex case. Plaintiff has alleged serious misconduct on the part of Wildes and sought to curtail his new business relationship with Raymond James. The allegations raised by Plaintiff in connection with the injunction required evaluation and consideration of issues related to alleged trade secrets and propriety business information. The case also involves injunction proceedings and hearings before the FINRA arbitration panel on the same to reach a final determination on whether an injunction should issue. The issues in this matter are therefore sufficiently difficult when considering the various moving parts and issues raised by Plaintiff. The invoices from Nelson Mullins reflect 361.9 hours devoted to this case to date. 350 of these hours were attributable to gaining dissolution of the injunction which resulted in fees and costs of \$117,809.22 in this

effort.³ Plaintiff has placed into issue Wildes's livelihood and leveled serious allegations at him in their request for an injunction. This Court finds that Wildes's attorneys devoted the necessary time to the action given the high stakes Plaintiff has alleged in connection with this action. The Court has also considered the professional standing of Wildes's attorneys. The Nelson Mullins attorneys engaged in this matter are in good standing with the Bar and have significant experience in litigation involving broker-dealer matters. The fees in this matter are not based on a contingency arrangement but are based on hourly rates billed monthly. Further, Wildes's attorneys gained dissolution of the injunction by defeating Plaintiff's request for a permanent injunction before the FINRA panel. Therefore, Wildes ultimately prevailed in defeating the injunction request and his attorneys obtained this beneficial result on his behalf. Finally, the legal fees and rates charged to Wildes in connection with this matter are customary and reasonable. As demonstrated by the affidavit of Mr. Manning, the hourly rates contained on the invoices are the customary fees charged to clients involved in similar litigation and are appropriate and reasonable based on experience and knowledge of what other attorneys charge. Hence, having considered the evidence and testimony and applying each of the above factors under South Carolina law, the Court finds that Wildes is entitled to payment of \$117,809.22 in fees and costs incurred in having to hire attorneys to gain dissolution of the injunction and represent his interests in connection with the same.

³ 11.9 hours of work have been noted by Wildes as not related to the gaining defeat of the request for the permanent injunction and the resultant dissolution of the preliminary injunction. This work accounts for \$3,872.50 of fees not included in the award to Wildes in this Order.

2) Out-of-pocket expenses associated with attendance at injunction proceedings and payment to staff for attendance at those hearings (\$1,069.59).

Wildes testified that he incurred \$1,069.59 in out of pocket expenses in having to pay his staff to testify at injunction hearings and for costs associated with lodging for himself and his staff during the course of those proceedings. This number is comprised of \$537.55 for lodging and meals associated with the injunction hearing and \$524.04 in wages paid to employee Elizabeth Radcliffe for her time in attending the hearing to provide testimony. This Court heard the testimony of Wildes and reviewed his affidavit and the documents supporting the amount testified to in this regard. Having done so, this Court concludes that Wildes is entitled to the payment of \$1,069.59 attributable to his effort to gain final dissolution of the injunction.

3) Attorneys' fees paid by Wildes on behalf of his current employer, Raymond James (\$9,856.30).

Wildes testified that his current employer, Raymond James, by the terms of his employment contract, has required him to pay its attorneys' fees associated with the FINRA proceedings, including the request for that forum to issue a permanent injunction against Wildes and Raymond James. To date, Wildes has paid \$15,996.30 in attorneys' fees and costs to Raymond James. This Court heard the testimony of Wildes regarding his paying amounts on behalf of Raymond James and the Court has reviewed the invoices submitted to the Court regarding this item of damage. Having done so, this Court concludes that Wildes is entitled to payment from the security bond for this category of damage for the fees associated with defeating the permanent injunction and gaining dissolution of the preliminary injunction. The submissions to this Court note, through highlighting and/or redaction, the time entries for work that was not completed in

defeating the injunction. The time entries not devoted to this effort amount to a total of \$6,140. Because his current employer, Raymond James, has required him to pay for its cost in defending Plaintiff's claims, including the request for a permanent injunction, this Court finds that, as a result, Wildes has suffered damage in the amount of \$9,856.30 (\$15,996.30 - \$6,140) for the payments to his employer in this amount arising from Plaintiff's quest for injunctive relief.

4) FINRA fees and costs paid by Wildes (\$7,900).

Wildes further testified that he has incurred damage in having to pay fees and costs associated with the FINRA panel's hearing Plaintiff's request for a permanent injunction. This Court heard the testimony of Wildes and reviewed the documentary submissions to the Court related to FINRA fees and costs. Having done so, this Court notes that Wildes is responsible for one-half of the fees charged by the three member FINRA panel that heard the request for a permanent injunction and resulted in dissolution of the injunction and those fees amount to \$1,900 meaning his half is \$950. Wildes is also responsible for half of the \$2,400 cost associated with the injunction hearing before FINRA that resulted in the denial of the permanent injunction and dissolution of the preliminary injunction which Wildes' half equates to \$1,200. Further, this Court notes that \$5,750 in member processing fees for the hearing must be paid by Wildes. Based on those numbers, this Court finds that Wildes has demonstrated that a total \$7,900 (\$950 + \$1,200 + \$5,750) in fees and costs paid to FINRA are attributable to his effort to gain a defeat of the request for a permanent injunction and the dissolution of the injunction before the FINRA panel.

5) Business losses (\$83,030).

Wildes also testified regarding the effect the injunction had on his effort to start his new business relationship with Raymond James. Wildes offered calculations to the Court during the course of his testimony which support the conclusion that he suffered \$83,030 in lost business opportunities in the course of the 115 day period during which the injunction was in place. This testimony was consistent with his affidavit that was previously submitted to the Court. Wildes, a competent businessman who has expansive knowledge of his historic revenue figures while in the employ of Plaintiff, provided the following testimony to the Court:

- Revenues he generated for Edward Jones during the prior year amounted to \$485,892;
- The injunction was in place for 115 days or 32% of a year;
- The injunction prevented him from having contact with 60% of the households he represented at Edward Jones;
- The costs and expenses for starting new accounts is 11% which would result in recognition of only 89% of the revenue generated to properly account for expenses and costs associated with transferring clients;

Based on these figures, Wildes testified that he would have been able to generate \$83,030 in additional revenue in his new business operation with Raymond James had the injunction not issued. Wildes arrived at this figure by taking his prior year's revenue \$485,892 and discounting it by 11% to properly include costs and expense with transferring accounts. Stated otherwise, Wildes factored in that the revenue realization number would only be 89% factoring in costs and expenses. Wildes next factored in the fact that the injunction only included the number of households he was not permitted to contact due to the injunction which was 60% of the households he represented at Edward

Jones (as 40% had already moved with him to Raymond James). Next, Wildes accounted for the percentage of the year during which he was enjoined which was 115 days of the year or 32% of the year. Using these numbers the following calculation resulted:

$$\$485,892 \times 89\% \times 60\% \times 32\% = \$83,030$$

This Court finds that Wildes is competent to testify as to his lost business opportunities resulting from the injunction. This Court further finds that the revenues and percentages used by Wildes are accurate. When Plaintiff cross-examined Wildes on these numbers, Plaintiff offered an alternative calculation and its own damages model but did not challenge, directly, the revenue number used by Wildes. Under Plaintiff's own calculation at the hearing, Wildes would have suffered \$42,090 in damages from lost business operations based on profit numbers (\$366 per day for 115 days). Having considered the competing calculations from both sides, this Court finds that Wildes's testimony is credible and a proper measure of his lost business opportunities prevented by the injunction. Under South Carolina, damages stemming from lost new business opportunities can be determined to a reasonable certainty and the use of lost revenues is an acceptable means for properly measuring such damages. *See Drews Company, Inc. v. Ledwith-Wolfe Assoc.*, 296 S.C. 207, 213-14, 371 S.E.2d 532, 536 (1988) (noting that numerous proof techniques have been discussed and accepted in different factual scenarios, including the use of lost revenues). Therefore, for this category of damages, the Court finds Wildes is entitled to payment of \$83,030.

Totaling each of the above detailed categories, this Court concludes that Wildes suffered \$219,665.11 in total damages arising out of the wrongfully issued injunction. These itemized and readily ascertainable damage figures were proven by competent evidence by Wildes through

in court testimony, affidavit, and documentary submissions, all of which are part of the Record in this case.

CONCLUSION

Based on the above, Wildes is entitled to the relief requested in his motion for recovery under the security bond and this issue is not subject to arbitration. This Court is vested with jurisdiction to decide the issues presented by Wildes's motion because the bond is paid into this Court. Accordingly, Plaintiff's motion to compel arbitration is **DENIED** and Wildes's motion for recovery under bond is **GRANTED**.

As a result, Wildes is entitled to payment of **\$219,665.11** from the security bond based on the evidence before this Court. Payment under the bond should be made to Wildes within 15 days of this Order.

IT IS SO ORDERED.


Paul M. Burch
Circuit Court Judge
South Carolina Court of Common Pleas

June 24, 2013
Georgetown, South Carolina