STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

DROUILLARD GROUP, INC.,
Plaintiffs,

v.

Case No. 19-172088-CB
Hon. James M. Alexander

JOSEPH P. FOY, JR.,
and PAUL S. LEONARD,
Defendants,

_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants' motion for summary disposition.

According to Plaintiff's Complaint, Plaintiff is a management company owned by Mark Drouillard with whom Defendants had a business relationship. Defendants Foy and Leonard signed Confidentiality and Non-Competition Agreements on April 1, 2015 and April 22, 2015 respectively. Plaintiff claims that on or about November 12, 2018, Defendants left their relationship with Plaintiff and immediately began servicing Plaintiff's customers in violation of the Agreements. Plaintiff filed suit to enforce the liquidated damages clause under the Agreement for 2.5 gross sales during the highest prior year of the Agreement for each account or customer taken.

Although not specifically identified, Plaintiff filed its Complaint on, what appears to be, a claim for breach of contract.

As stated, Defendants now move for summary of Plaintiff's Complaint under MCR 2.116(C)(8), and (C)(10). A (C)(8) motion tests the legal sufficiency of the complaint. *Maiden v*

Rozwood, 461 Mich 109, 120; 597 NW2d 817 (1999).[1] And a (C)(10) motion tests the factual support for a plaintiff's claims. *Id.* at 120.[2]

Defendants argue that they are entitled to summary disposition because (1) Defendants did not take any customers from Plaintiff; (2) the customers belonged to Ameriprise Financial, not Plaintiff; (3) Plaintiff is not a party to the agreement; (4) the agreement to not compete is unenforceable as a matter of law; and (5) the liquidated damages clause is unenforceable.

In support of their motion, Defendants attach (in relevant part): (1) Department of Licensing and Regulatory Affairs reports; (2) the Defendants' affidavits; (3) Defendants' Confidentiality and Non-Compete Agreements, (4)Ameriprise Associate Financial Agreements with Addendums; and (5) Ameriprise 2018 Franchise Disclosure Document.

According to Defendants' motion, Plaintiff is a company owned by Mark Drouillard, and is a management service for a finance firm. Drouillard, individually, is a financial advisor who was affiliated with Ameriprise Financial Services, Inc. (Ameriprise). Further, Defendants claim that in November 2018, Drouillard resigned from Ameriprise and immediately joined a competing finance firm.

Defendant Leonard began working as a financial advisor with Ameriprise in August 2010 and Foy joined Ameriprise as a financial advisory in August 2012. Defendants both claim that

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[1] Such a motion may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade v Dept of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). When considering such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade*, 439 Mich at 162-163. Additionally, when considering such motions, the court considers only the pleadings. MCR 2.116(G)(5).
Further, "[w]hen an action is based on a written contract, it is generally necessary to attach a copy of the contract to the complaint. Accordingly, the written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8)." *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007); citing MCR 2.113(F) and *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003).

[2] In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Maiden, 461 Mich* at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

they brought clients with them to Ameriprise and spent their careers acquiring more clients. In or around April 2015, the Independent Advisor for the Ameriprise franchise changed to Drouillard, individually.

As previously stated, in April 2015, both Defendants signed a Confidentiality and Non-Competition Agreement. The Agreement provides in relevant part:

> The UNDERSIGNED acknowledges that during the course of his relationship with Kelof & Associates, Inc. and/or Mark Drouillard or any business owned by Mark Drouillard (herein after collectively "Mark Drouillard") he has and will acquire access to Mark Drouillard's Trade Secrets and Confidential Information . . .
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> * * *
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> The UNDERSIGNED also agrees that during the term of his relationship with Mark Drouillard and for a period of at least three (3) years after the termination of such relationship with Mark Drouillard not to solicit or service any customers of Mark Drouillard, whether directly or indirectly, (including joining another Ameriprise practice) including hiring any of Mark Drouillard's employees, agents, or salespeople.
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> * * *
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> The UNDERSIGNED acknowledges that the damages for breach of this agreement are hard or difficult to determine, and therefore agrees to a liquidated damages clause of 2.5 gross sales during the highest prior year of this agreement for each account or customer taken, or actual damages, whichever is higher.

The Court will first address Defendants' argument that Plaintiff is not a party to the contract.[3] As stated above, the recital of parties in the Agreement is very broad and includes "Mark Drouillard or any business owned by Mark Drouillard (herein after collectively "Mark Drouillard)." (Defendants' Exhibit E). And both parties agree that Plaintiff is owned by Mark Drouillard. As such, under the broad language of the Agreement, Plaintiff is a party to the

[3] The Court will note that it ordered Supplemental Briefing on June 11, 2019, for the parties to submit argument and evidence related to this issue. Specifically, the Court ordered the parties to address whether Plaintiff was Defendants' employer, and in turn, whether Plaintiff is the proper plaintiff with standing to bring and maintain the current action.

contract. However, being a party to a contract does not necessarily mean Plaintiff is the proper party that has standing to sue.

In order to establish standing, Plaintiff must be able to demonstrate that he has a "legally protected interest that is in jeopardy of being adversely affected." *Dep't of Treasury v. Comerica Bank*, 201 Mich App 318; 506 NW29 283 (1993). In its supplemental brief, Plaintiff attaches Employee Earnings Records that list Plaintiff as Defendants' employer. As such, the Court is satisfied that Plaintiff does have standing to bring suit as it has a "legally protected interest" in the matter.

Next Defendants argue that they did not breach the Agreement because they did not take any customers from Plaintiff because all customers belonged to Ameriprise pursuant to the Associate Financial Advisor Agreement. As agents for Ameriprise, Defendants were required to sign the Associate Financial Advisor Agreement. These agreements were signed in March and April of 2015 and provide (in relevant part):

> 1. C. "Client" means a person or entity who (i) purchases or holds a Product or Service acquired from or through Ameriprise Financial or an Affiliate or one of their financial advisors with consent of Ameriprise Financial or the Affiliate, or (ii) authorized Ameriprise Financial, and Affiliate or one of their Advisors to make personal financial planning presentations to it or its employees or members, or (iii) is a member of a Client's household.
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> * * *
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> 2. B. Ameriprise Financial appoints you to act as an agent of Ameriprise Financial in connection with your activities as an Associate Financial Advisor for an Independent Advisor but only in accordance with this Agreement, and you accept that appointment . . .
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> * * *
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> 5.G. All Clients with whom you interact or otherwise provide Products or Services are Clients of Ameriprise Financial. Clients transferred to you by the Independent Advisor employing or contracting you, or that are otherwise obtained by you, will remain or become Clients of Ameriprise Financial following the

> termination of your association with Ameriprise Financial or your relationship with the Independent Advisor. (Defendants' Exhibit F).

Further, Defendants cite to Section 19 K of the Ameriprise 2018 Franchise Disclosure Document, which provides (in relevant part) "[i]n accordance with Section 10 of this Agreement, all Clients shall be deemed Clients of Ameriprise Financial and not any individual Independent Advisor.

Based on the agreements with Ameriprise, Defendants argue that all clients belonged to Ameriprise, not Plaintiff. Further, Defendants argue that Plaintiff cannot legally have clients because it is not FINRA licensed, licensed with the SEC, or licensed with any stated securities regulatory authority. Therefore, Defendants argue that Plaintiff cannot service the clients it claims Defendants are servicing. Beyond that, Defendants argue that it was Plaintiff who terminated his relationship with Ameriprise to work for a competitor. Defendants remained with Ameriprise servicing Ameriprise's clients. As such, Defendants argue they could not have breached their non-compete agreement with Plaintiff.

In response, Plaintiff states that "[a]ctually 'clients' are not owned by anyone or any entity. Clients are free to move their account wherever they want, any time they want for no reason and anyone in the securities chain is required to recognize this right." (Plaintiff's Response at 5). Plaintiff further states, "[a]ll sales and purchases must go through a broker dealer so the broker dealer lists the 'clients' as their clients." *Id.* In the instant case, Ameriprise is the brokered dealer. As such, the clients are "listed on Ameriprises (sic) books as 'clients.'" *Id.*

Despite this, Plaintiff argues that the clients "are in reality 'clients' of the operating entity." *Id.* The operating entity here is Plaintiff. Plaintiff argues that if the clients were clients of Ameriprise, a franchisee would not be able to transfer their book of business to another broker

dealer. Plaintiff further argues that if the client belonged to Ameriprise, Ameriprise would be objecting to the transfer of clients to Securities America, Plaintiff's new venture. Plaintiff claims that Ameriprise has not objected to the same.

Based on the same, Plaintiff argues it is entitled to summary disposition pursuant to MCR 2.116(I)(2) and request that the Court to enter judgment against Foy in the amount of $417,500, and against Leonard in the amount of $533,750. Plaintiff also seeks attorney fees and costs.

In support of its argument, Plaintiff attaches: (1) Mark Drouillard's affidavit; (2) the Confidentiality and Non-Compete Agreements; and (3) and "Agreement" between Drouillard and Leonard.

In order to prove breach of contract, a plaintiff must establish: (1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from that breach. *Stoken v JET Electronics & Technology, Inc*, 174 Mich App 457, 463; 436 NW2d 389 (1988).

Although Plaintiff alleges that Ameriprise is not objecting to his transfer of clients to Securities America, there is no evidence before the Court regarding the issue. Further, Plaintiff provides not evidence or authority as to why the agreements with Ameriprise designating all clients as clients of Ameriprise should not be enforced. Here, Defendants include four signed written contracts with Ameriprise that explicitly state that all clients belong to Ameriprise, not the Independent Advisor. Defendants also include an unsigned Franchise Agreement which also indicates that any clients belong to Ameriprise.

To the contrary, Plaintiff does not provide any evidence that the contracts with Ameriprise are not valid contracts. Further, Plaintiff does not provide any evidence that despite the express terms in the Ameriprise contracts, the clients belong to Plaintiff and not Ameriprise. Beyond that, Plaintiff admits that the clients do not belong to anyone or any entity. Additionally,

Plaintiff does not provide any evidence, or even assert that it is FINRA licensed, and could, therefore, have and service clients.

Based on the foregoing, Plaintiff does not provide any evidence to create a question of fact that Plaintiff had clients that Defendants are not servicing. The uncontroverted evidence is (1) any clients acquired by or through the Independent Advisor (Plaintiff) are clients of Ameriprise, not Plaintiff, or (2) as Plaintiff stated the clients do not belong to any person or entity. Regardless, there is no question that the clients do not belong to Plaintiff. As such, Defendants cannot be in violation of the non-competition agreement.

As an additional argument, Defendants argue that the non-competition clause is unreasonable because it does not contain a geographical area. In response, Plaintiff argues that it:

> is [not] attempting to enforce the non-compete portion of the contract. Plaintiff is not prohibiting or attempting to prohibit Defendants from competing with Plaintiff. Plaintiff is not seeking an injunction. Plaintiff is not preventing or attempting to prevent Defendants from providing any services to its clients. Plaintiff is trying to collect on a portion of the contract providing for payments due to Plaintiff for taking and servicing its clients. Therefore, the provisions complained of by Defendants are not relevant to this lawsuit. (Plaintiff's Response at 9).

Assuming arguendo the clients belonged to Plaintiff, the Court would find that the non-competition clause does not comport with MCL 445.774a(1), as it does not provide a geographical area, the type of employment, or line of business. MCL 445.774a(1) provides:

> An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the

circumstances in which it was made and specifically enforce the agreement as limited.

Plaintiff's argument that the non-competition clause is not relevant fails. Plaintiff is trying to enforce the liquidated damages clause seeking "damages for breach of this agreement." Plaintiff's entire suit is predicated on the theory that Defendants breached the non-competition clause by servicing Plaintiff's clients. As such, the non-competition clause is certainly relevant to this lawsuit and the present motion. Since the non-compete does not comply with the statutory requirements, the Court would find that the provision is unreasonable and not enforced the same.

Based on the foregoing, Defendants' motion for summary pursuant to MCR 2.116(C)(8) and (C)(10) is GRANTED and Plaintiff's Complaint is DISMISSED.[4] Plaintiffs' motion pursuant to (I)(2) is DENIED.

However, as previously stated, and as argued by the parties, Mark Drouillard, individually, may have standing to bring a claim against Defendants. Based on the same, Plaintiff has fourteen days to amend its Complaint to assert the same.

IT IS SO ORDERED.

July 3, 2019 /s/ James M. Alexander
Date Hon. James M. Alexander, Circuit Court Judge

[4] Based on the Court's ruling that (1) the clients at issue are not Plaintiff's, and (2) the covenant to not compete is unreasonable, the Court does not need to address any additional arguments made to further support their respective motions.