STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

ROCKET MORTGAGE, LLC,

Plaintiff/Counter-Defendant,

v.

CHAD KURGAN,
Defendant/Counter-Plaintiff,
And SWIFT HOME LOANS, INC., ANDI NUMAN, BRANDON MURAD, TIMOTHY KASSAB, LARA ZERILLI, CHARLES CHAMI, TIMUR AVANESIAN, MALIK SNAYYAN, SCOTT SCHALLER, AND SHANE DIALS, jointly and severally,

Defendants.

Case No. 22-010849-CB
Hon. Brian R. Sullivan

ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY DISPOSITION AS TO COUNTS I AND II OF PLAINTIFF'S FIRST AMENDED COMPLAINT, NON-COMETITION PROVISIONS

At a session of said court held in CAYMC,
City of Detroit, on 2/14/2025
Present: Hon. Brian R. Sullivan

FACTS

Plaintiff, Rocket Mortgage, LLC, sued several of its former employees ("Former Rocket Employees" or "former employees") and their new employer, Swift Home Loans, Inc. ("Swift"). Counts I and II of Rocket's second amended complaint seeks to enforce non-competition clauses. Those clauses were in agreements executed by the Former Rocket Employees while they were employed at Rocket as retail bankers before they departed to join Swift. As retail bankers, the Former Rocket Employees worked with Rocket prospects and customers to assist them in obtaining mortgages financed by

Rocket. Swift is a mortgage broker that assists home buyers in obtaining mortgages that are financed by outside lenders.

Each of the Former Rocket Employees provided assent to an employment agreement which contained provisions: (i) protecting proprietary/confidential information during and for 1 year after employment at Rocket, (ii) prohibiting raiding of Rocket clients during and for 1 year after employment at Rocket, (iii) prohibiting raiding of employees during and for 18 months after employment at Rocket, and (iv) prohibiting competition during and for 9 months after employment at Rocket, "in the same or similar capacity as [employee] performed during [the Rocket employment]," within select counties in Michigan, Ohio and Arizona.

In addition, certain of the Former Rocket Employees accepted the terms of an agreement that made them eligible for restrictive stock awards ("Award Agreement"). That agreement contained similar restrictive covenants but, with respect to the non-competition provision, the term is 18 months, and the geographic scope covers all geographic areas in which Rocket operates worldwide. The Award Agreement provides for Delaware law to control.

While Rocket's business is providing retail mortgage loans, a Rocket affiliate, Rocket TPO, acts as a wholesale lender and competes with other wholesale lenders including United Wholesale Mortgage (UWM) for mortgage lending opportunities. Those opportunities often arise through referrals from mortgage brokers such as Swift. Swift, for a time after its inception, "partnered" with Rocket. There came a time when Swift entered into an agreement with UWM that precluded Swift from doing business with Rocket. That precipitated Rocket's filing of this lawsuit on September 13, 2022.

The Court concludes any difference between the agreements is not relevant for the reason the non-competition provisions in both agreements are not enforceable because they serve no legitimate business purpose.

STANDARD OF REVIEW

Defendants bring their motion under MCR 2.116(C)(8) and (10). Because both parties rely on materials outside the pleadings, the court applies MCR 2.116(C)(10).

A party is entitled to summary disposition under MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion brought under MCR 2.116(C)(10), a court must consider the "affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties" in the light most favorable to the nonmoving party. *Johnson v VanderKooi*, 502 Mich 751, 761; 918 NW2d 785 (2018).

Under the burden-shifting framework of this court rule:

> "[T]he moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." [*Quinto*, 451 Mich at 362-363.]

DISCUSSION

As a preliminary matter, plaintiff argues that the motion should be denied because discovery was not complete when the motion was filed on February 15, 2024. Defendants' reply brief states that the parties have exchanged over 100 discovery requests, and defendants have deposed 11 Rocket witnesses. This case was filed in September 2022 and discovery closed May 2, 2024. The court presumes discovery has been completed as it has not received a motion to extend discovery. In addition, plaintiff has not sought to supplement its filing. The court notes, and the parties are aware, that the briefs before it in this (Swift) case are almost identical to those presented in the Next Door Lending case. For these reasons, the court concludes that the motion is ripe for decision.

1. Applicable law. MCL 445.774a 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." (Emphasis supplied).

"An employer's business interest justifying a restrictive covenant must be greater than merely preventing competition." *St Clair Med, PC v Borgiel,* 270 Mich App 260, 266 (2006). In *St Clair,* the Court enforced a covenant that prohibited, upon pain of paying a $40,000 stipulated damage award, defendant physician from practicing medicine for one year within 7 miles of any office he worked at while employed at St Clair. The Court held:

> "* * * We conclude, nevertheless, that the restrictive covenant was protecting plaintiff's competitive business interest in retaining patients, that it provided plaintiff with time to regain goodwill with its patients, and that it prevented defendant from using patient contacts gained during the course of his employment to unfair advantage in competition with plaintiff. A physician who establishes patient contacts and relationships as the result

of the goodwill of his employer's medical practice is in a position to unfairly appropriate that goodwill and thus unfairly compete with a former employer upon departure." Id at p. 268.

In *Follmer, Rudzewicz v Kosco*, 420 Mich 394, 402 n 4 (1984), the Michigan Supreme Court enforced restrictive covenants executed by an accountant in favor of an accounting firm and an insurance agent in favor of the agency. The Court stated: "It has been uniformly held that general knowledge, skill, or facility acquired through training or experience while working for an employer appertain exclusively to the employee. The fact that they were acquired or developed during the employment does not, by itself, give the employer a sufficient interest to support a restraining covenant, even though the on-the-job training has been extensive and costly." In enforcing the covenants, the Court stated:

"Both accountants and insurance agents have an opportunity to learn information of a confidential nature in the course of their employment. An accountant establishes a relation of confidence with his clients. Because of the nature of the relationship, an accountant may obtain information concerning the client's personal finances and methods of keeping records. "the business of a certified public accountant is such that the person who actually performs the labor incident thereto acquires an intimate knowledge of the business of the client, preparing audits of the business, income tax returns and other matters very confidential in their nature, and vital to the business itself * * *. [A]s the client learns to know the accountant the desire of a client to have the particular accountant do his work increases to the point where it is almost impossible to change the accountant, owing to the confidential knowledge he has of all the important and vital matters concerning the business * * *." (Citation omitted). * * * An insurance agent similarly has an opportunity to learn confidential information regarding the customer's special needs and desires, the expiration dates of his insurance policies, and other valuable information. * * *." Id. at pp. 404-405.

In *Northern Michigan Title Co v Bartlett*, 2005 WL 599867 (Mich App), plaintiff sued two former presidents of the company and a title examiner. One of the former presidents and the title examiner had signed employment agreements which contained non-compete and confidentiality covenants. The non-compete provisions prohibited the former

employees from engaging in the title insurance business in Charlevoix county for five years.

The Court of Appeals held that the covenants were not enforceable and quoted the above language from *Follmer* regarding "general knowledge, skill, or facility acquired through training or experience* * *." The Court also observed:

> "In this case, the noncompete clause completely prohibits Dohm and Snabes from engaging in the title insurance business. It does not narrow the focus of the prohibition to prevent unfair competition. Under these circumstances, Dohm and Snabes would not be permitted to obtain referrals from sources that had never had a relationship with plaintiff. Nor would they be permitted to offer title insurance services to clients who never had or never would have given business to plaintiff in the first place. In any event, according to the record, there are seldom repeat clients in the title insurance business. The business itself is mainly developed through referral sources, of which there are many and which are readily identified in any given community. But any referral source should be free to choose a title insurance company. Even if the noncompete agreement specifically prohibited Dohm and Snabes from soliciting business from referral sources with which plaintiff had developed relationships, the agreement between plaintiff and Dohm and Snabes could not prevent the referral sources from contacting Dohm and Snabes."

2. Application of law to facts.

The Former Rocket Employees argue that the non-compete provision does not, by its terms, apply to them because their jobs with a mortgage broker (Swift) are not "in the same or similar capacity" as their employment at Rocket. The Former Rocket Employees point out differences between the two positions, and differences between Rocket's retail mortgage operations – where customers are applying for a mortgage financed by Rocket – and Swift's mortgage broker operations - which involve efforts to obtain customers and investigation of various lenders and placement of the customer with one of them. However, as Rocket argues, and the Court concludes, both jobs are within the covenant's broad language of "similar capacity" as, ultimately, both jobs involve

providing mortgages to customers. It also appears there is at least an overlap of the base of knowledge required for both positions – including passage of the SAFE exam.

The flip side of that finding is that Rocket's broad non-compete covenant prohibits the Former Rocket Employees from obtaining another job in the mortgage industry for which they have obtained training and experience. That fact makes this case similar to *Northern Michigan Title, supra.* This case also is similar to *Northern Michigan Title* in that mortgage loans, like title insurance, seldom have repeat customers within the limited time span of the non-compete provisions at issue here. In sharp contrast to these facts, the accounting/business insurance clients in *Follmer*, and the patients in *St. Clair,* where the Courts upheld restrictive covenants, had long term relationships with the defendants' former employers. The former employees' long-term relationships with such clients/patients were the key facts upon which the Courts relied to uphold the restrictive covenants. The basis of those decisions was the fact that those relationships would naturally result in the clients/patients seeking out the former employees at their new employment, which would allow the former employees to unfairly compete and poach those clients. Rocket has made no showing that any such concern is present here, and the nature of the mortgage lending business does not support any such concern on this record.

Rocket argues that the extensive training it provided to the Former Rocket Employees supports the non-compete covenants. But while Rocket's brief references *Follmer*, it does not distinguish nor persuasively address *Follmer's* holding that training cannot support a non-compete "even though the on-the-job training has been extensive

and costly." That language and holding of *Follmer* is dispositive of Rocket's training argument.

Rocket also argues that the non-compete provisions are supported by confidential and proprietary information to which the former Rocket Employees had access. Rocket cites a lengthy list of allegedly confidential and proprietary information to support its claim. However, much of that information relates to Rocket's internal operations for providing retail mortgage loans financed by Rocket. Others relate to such things as interest rate and market forecasts, much of which is publicly available. It is uncontested that literally thousands of Rocket's employees – many of whom are now former employees - had access to the allegedly proprietary and confidential materials.

Rocket also cites the fact that while employed at Rocket, the former Rocket Employees had access to lists of Rocket employees and customers/prospective customers. Courts have held that protection of such information can be a legitimate business interest which supports restrictive covenants. However, Rocket has not provided any specific admissible evidence which would create a genuine issue of material fact to show that the former Rocket Employees either did or, in view of applicable non-solicitation and confidentiality covenants, would have been in a position to, use any of the allegedly confidential or proprietary information concerning customers, prospects or employees, for the purpose of unfairly competing with Rocket during the terms of the non-competition provisions. The court concludes that Rocket has made no showing that the non-competition provisions are necessary to protect Rockets' legitimate business interests.

Several out-of-state cases also support this conclusion of the Court. The

Former Rocket Employees cite several cases which stand for the proposition that where the employer's legitimate business interests are adequately protected by non-solicitation and confidentiality provisions, the court will not enforce a broad non-compete. The first case (cited at page 18 of the former employees' brief) is *Veramark Techs v Bouk*, 10 F Supp 3d 395, 403 (WDNY 2014). In *Veramark*, the Court denied preliminary injunctive relief and stated: "Plaintiffs' customer goodwill is more than adequately protected by the Agreement's broad non-solicitation provisions, and there is no basis for the conclusion that additional protection is required in the form of a broad non-compete."

Rocket argues that the case "[applies] New York law to a non-compete case where the plaintiff failed to offer any evidence that customer goodwill was implicated by the breach of the non-compete." That Court, however, addressed that ground:

> "Plaintiffs correctly argue that a threat to customer goodwill constitutes a threat of irreparable harm for which preliminary injunctive relief is appropriate. However, Plaintiffs offer no evidence that Mr. Bouk's employment by Cass threatens Veramark's customer relations. Rather, *any notion that Mr. Bouk's employment will threaten Veramark's customer goodwill is specifically undermined by the evidence offered by Mr. Bouk and Cass that Mr. Bouk will not solicit Veramark customers as part of his duties with Cass*. Plaintiffs have offered no evidence indicating otherwise and in fact, the complaint does not allege that Mr. Bouk has violated or intends to violate the non-solicitation provisions." (Emphasis supplied).

Similarly, in this case, the Former Rocket Employees concede that reasonable non-solicitation and confidentiality provisions are appropriate. Moreover, Rocket has not presented any admissible evidence to show that the former employees violated those provisions. Accordingly, the legitimate interest Rocket has in protecting its customer and employee relationships was adequately protected by the non-solicitation covenants.

Rocket also contends that *Veramark* was decided under New York law. The relevant language from the case states:

> "In other words, where an employer proffers protecting customer goodwill as the legitimate interest it seeks to protect with a restrictive covenant, the covenant must actually protect that interest. A broad non-compete that baldly prevents competition will not be enforced, particularly where the employer is already protected by a non-solicitation agreement. This is the standard set forth by the New York Court of Appeals in *BDO Seidman v. Hirshberg,* 93 N.Y.2d 382, 690 N.Y.S.2d 854, 712 N.E.2d 1220 (1999). There, the court explained that **a restraint will only be considered reasonable if it is "*no greater* than is required for the protection of the *legitimate interest* of the employer...."** * * *." Id at p. 402, emphasis added.

Importantly, the emphasized language of *Veramark* is consistent with Michigan law: "An employer's business interest justifying a restrictive covenant must be greater than merely preventing competition." *St Clair Med, PC v Borgiel,* 270 Mich App 260, 266 (2006). In this case, the confidentiality and non-solicitation provisions adequately protect Rocket. The only purpose of the broad non-compete provisions are to prevent competition.

It is important to contrast the facts of this case with the facts of *Follmer* and *St. Clair Medical* where the former employees developed relationships with longstanding clients/patients. In those cases, it was clearly foreseeable that non-solicitation and confidentiality provisions alone, without a non-compete, would not adequately protect the former employer's legitimate business interests. That is because in those cases, it was highly likely that the former employers' patients/clients would search out their former accountant or doctor without any solicitation by the former employee. But in any case, the non-solicitation and confidentiality were insufficient to protect the employer's legitimate business interest, especially where the employee had direct access and interaction with the clients. Mortgage loans, unlike medicine and accounting, tend to be one-time transactions. Rocket has presented no evidence to suggest that Rocket customers, or

prospective customers, have or would search out, a former Rocket mortgage banker rather than proceed with Rocket.

Rocket has not cited any persuasive authority to support its argument that the non-competes are enforceable. The lead case (cited at page 11 of its brief) of *Rooyakker & Sitz PLLC v Plante & Moran, PLLC*, 276 Mich App 146 (2007) is similar to *Follmer* where the accounting firm was protecting its established clients. In upholding the non-compete covenant, the Court observed:

> "This Court [in *St. Clair Medical*] held that the covenant was reasonable in relation to the situation because the doctor was not completely prevented from practicing medicine, he was *merely unable to see patients of his former clinic within seven miles of the plaintiff's clinic for one year.* Similarly, in this case, the clause merely prevents the individual plaintiff's [sic] from *acting as accountants for former clients* of Plante Moran; it does not preclude them from performing accounting services." Id at p. 158. (Emphasis supplied).

CONCLUSION

The Court concludes the non-compete provisions do not protect Rocket's legitimate business interests and, therefore, are void and unenforceable. Defendants' motion is granted and counts 1 and 2 of plaintiff's first amended complaint are dismissed with prejudice, and

IT IS SO ORDERED.

/s/ Brian R. Sullivan
February 14, 2025

Hon. Brian R. Sullivan, Circuit Judge

This is not a final order and does not close the case.