Nos. 21–CV–115, 21–CV–256, & 21–CV–256 (cons.)
IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

NEWMARK GROUP INC., G&E ACQUISITION COMPANY LLC, and G&E REAL ESTATE INC. d/b/a NEWMARK GRUBB KNIGHT FRANK,

Plaintiffs–Appellants,

v.

AVISON YOUNG (CANADA) INC., AVISON YOUNG (USA) INC., AVISON YOUNG–WASHINGTON, DC, LLC, and MARK ROSE,

Defendants–Appellees.

Appeal from the Superior Court of the District of Columbia, Civil Division, Case No. 2015 CA 1028 B

Hon. William M. Jackson, Judge Presiding

BRIEF OF PLAINTIFFS–APPELLANTS (REDACTED)

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PLAINTIFFS–APPELLANTS' RULE 28(a)(2)(A) STATEMENT

In order for the judges of this Court to consider possible recusal, counsel for Plaintiffs–Appellants Newmark Group Inc., G&E Acquisition Company LLC, and G&E Real Estate Inc. d/b/a Newmark Grubb Knight Frank state, in accordance with District of Columbia Court of Appeals Rule 28(a)(2)(A), that the following parties and counsel have appeared before the superior court and before this Court in this matter:

Plaintiffs

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G&E Real Estate Inc. d/b/a Newmark Grubb Knight Frank
BGC Partners Inc. (substituted by Newmark Group Inc.)

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Dated: January 3, 2022 By: *_/s/ Tina B. Solis_*

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PLAINTIFFS–APPELLANTS' RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Plaintiffs–Appellants Newmark Group Inc. ("Newmark"), G&E Acquisition Company LLC ("G&E Acquisition), and G&E Real Estate Inc. d/b/a Newmark Grubb Knight Frank ("G&E Real Estate"), for their Rule 26.1 Corporate Disclosure Statement, state as follows:

1. Newmark has no parent corporation, and no publicly held corporation owns 10% or more of Newmark's stock.

2. Newmark Partners L.P. is the immediate parent corporation of G&E Acquisition, and Newmark is the ultimate parent corporation of G&E Acquisition, and, other than Newmark as G&E Acquisition's ultimate parent corporation, no publicly held corporation owns 10% or more of G&E Acquisition's stock.

3. Newmark is the parent corporation of G&E Real Estate, and, other than Newmark, no publicly held corporation owns 10% or more of G&E Acquisition's stock.

Dated: January 3, 2022

By: */s/ Tina B. Solis*

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JURISDICTIONAL STATEMENT

Newmark Group Inc., G&E Acquisition Company LLC, and G&E Real Estate Inc. d/b/a Newmark Knight Frank (together, "Plaintiffs") appeal from the final judgment entered in this matter on June 21, 2021, in favor of Avison Young (Canada) Inc., Avison Young (USA) Inc., Avison Young–Washington, DC, LLC (together, "AY"), and Mark Rose ("Rose") (together "Defendants"). The superior court's June 21 order denied Plaintiffs' motion to alter or amend the January 19, 2021, order granting Defendants' motion for summary judgment. (A 7831.) The June 21 order disposed of all the claims at issue before the superior court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

All Claims

1. Did the superior court err by granting summary judgment on Plaintiffs' claims where the court failed to consider the additional facts presented by Plaintiffs in their response to Defendants' statement of facts?

Trade-Secret Misappropriation

2. Did the superior court err by granting summary judgment on Plaintiffs' trade-secret claim where (a) the court concluded sua sponte, in violation of the notice provisions of Rule 56(f) of the District of Columbia Superior Court Rules of Civil Procedure, that Plaintiffs had failed to identify any trade secrets, even though Defendants did not move for summary judgment on this basis, and (b) multiple

documentary examples, the testimony of Defendants' own executives, and Defendants' prior admissions supported Plaintiffs' trade-secret claim?

Tortious Interference with Contract

3. Did the superior court err by granting summary judgment on Plaintiffs' tortious-interference-with-contract claim where the court (a) concluded that an at-will employment contract cannot support such a claim; (b) ignored evidence establishing a genuine issue of fact regarding whether the employment agreements between Grubb & Ellis Company ("G&E") and its commercial-real-estate brokers were at-will agreements or term agreements; (c) failed to acknowledge that, regardless of the at-will or term status of the agreements, the postemployment restrictive covenants in the agreements survived the agreements' termination and supported Plaintiffs' tortious-interference claim; and (d) applied the wrong standard in evaluating whether Defendants intentionally interfered with the agreements?

Tortious Interference with Prospective Business Relationships

4. Did the superior court err by granting summary judgment on Plaintiffs' tortious-interference-with-business-expectancies claim where the court (a) ignored evidence that the brokers who left G&E for AY continued, with Defendants' knowledge, to work on at least 30 pending G&E real-estate transactions after departing from G&E and (b) applied the wrong standard in evaluating whether Defendants intentionally interfered with the pending transactions?

Civil Conspiracy

5. Did the superior court err by granting summary judgment on Plaintiffs' civil-conspiracy claim where the court (a) ignored evidence that Defendants agreed, among themselves and with the team of commercial-real-estate brokers who left G&E for AY, to expand AY's business by stealing G&E's proprietary information, personnel, and business opportunities; (b) ignored evidence that Defendants' conspiracy included agreeing to, and assisting with, conduct constituting breaches of the fiduciary duties of loyalty of the brokers who left G&E for AY; and (c) concluded that, to assert a conspiracy claim, Plaintiffs were required to sue each individual coconspirator, including the individual brokers who left G&E for AY?

Other

6. Did the superior court err by denying Plaintiffs' request for a forensic inspection of the devices and media used to steal information from G&E on Defendants' behalf where evidence developed during discovery supported Plaintiffs' request?

7. Did the superior court err in granting Defendants' request for attorney's fees in connection with Plaintiffs' renewed request for a forensic inspection where deposition testimony given after the initial request was denied supported the renewed request, including by indicating that Defendants' counsel were in possession of a device containing G&E's stolen information?

STATEMENT OF THE CASE

I. Overview

This lawsuit alleges claims for (1) theft of trade secrets in violation of the District of Columbia Uniform Trade Secrets Act (the "DCUTSA"), (2) tortious interference with contract, (3) tortious interference with prospective business relationships, and (4) conspiracy. (A 49–53.) The evidence establishes that, as early as 2008, AY's senior executives engineered the theft of key parts of G&E's commercial-real-estate platform in an effort to quickly expand AY's presence in the United States, including in Washington, DC—an unscrupulous shortcut to rapid expansion at G&E's expense. This conduct continued throughout and after G&E's bankruptcy in February 2012.

The litigation should have proceeded to trial, but because of the superior court's erroneous summary-judgment rulings, it was dismissed. This Court should reverse those rulings, reinstate Counts I through IV of Plaintiffs' Complaint, and remand the matter for further proceedings, including a trial on the merits.

II. The Complaint and Motion to Dismiss

On February 13, 2015, Plaintiffs filed a seven-count Complaint against Defendants. (A 35.) The Complaint alleged that Defendants, in conjunction with a group of G&E brokers (the "Team") and their junior support staff (the "Staff"), stole trade secrets and other confidential information from G&E; diverted clients, pending transactions, and commissions from G&E to AY; and induced members of the Team

and the Staff to breach their contractual obligations to G&E. (*Id*.) The Team consisted of Bruce McNair ("McNair"), William Morris ("Morris"), William Travis, and Joshua Hartman ("Hartman"), all of whom were commercial-real-estate brokers. (A 2289.) The Staff included Michael Molinari, Theo Slagle, David Roehrenbeck ("Roehrenbeck"), and Wesley Preuss ("Preuss"). (A 2311, 2323.)

When Defendants moved to dismiss, the superior court sustained Plaintiffs' claims for trade-secret misappropriation, tortious interference with contract, tortious interference with business expectancies, and civil conspiracy. (A 57.) The court dismissed Plaintiffs' claims for conversion, injunctive relief, and unjust enrichment, which are not at issue in this appeal. (*Id*.)

III. Discovery

Documents produced during discovery revealed that the Team [redacted] a wholesale theft of sensitive trade secrets coordinated and paid for by AY. (A 149, 170.) As a result, Plaintiffs moved for a forensic inspection of the Team's shared AY computer drive, which indisputably contains information stolen from the Team's shared G&E computer drive. (A 71.) Plaintiffs also moved for a forensic inspection of (1) the external hard drives [redacted] and (2) the personal email account of Roehrenbeck, [redacted]. (*Id*.)

In a perfunctory three-line order, the superior court denied Plaintiffs' motion without a hearing. (A 697.) At the time, no depositions had been taken.

Eight months after the original motion was filed, the deposition testimony of Hartman and Roehrenbeck corroborated the nature and scope of the Team's misappropriation. (A 729, 735, 767.) Among other things, Roehrenbeck confirmed [redacted]. (A 774–75.) Based on this evidence, Plaintiffs renewed their motion. (A 699.) That motion was denied without a hearing, and Plaintiffs were sanctioned for filing it. (A 1212, 1331, 7828.)

Shortly thereafter, in a final attempt to explain the import of the deposition testimony and their need for a forensic inspection, Plaintiffs moved to reconsider. (A 1214–21.) The motion to reconsider, like the renewed motion, was denied, and Plaintiffs were sanctioned for filing it. (A 1329, 1336, 7828.)

IV. The Summary-Judgment Order

On April 5, 2019, Defendants moved for summary judgment. Plaintiffs responded to each of Defendants' assertions with detailed record citations. (A 2253–89.) They also provided a well-documented statement of additional facts addressing the omissions in Defendants' statement of facts and the context surrounding Defendants' involvement in the Team's theft. (A 2289–339.)

The evidentiary record showed that Defendants had mounted a calculated, coordinated effort to loot trade secrets, other confidential information, ongoing business transactions, clients, and employees from G&E. (*See id*.) They did so with the purpose of transferring G&E's entire Washington, DC-based commercial-real-estate practice, and its substantial goodwill, to AY. (A 2299–302, 2322–33.)

This scheme began in 2008 when Rose became AY's CEO and [redacted], would be quicker and less expensive than building a business from scratch. (A 2290–95.) Rose's former colleagues [redacted]. (A 2295–303.) AY then [redacted]. (A 2303–312.) [redacted]. (A 2312–33.)

The conduct at issue—which was expressly sanctioned and supported by Defendants—violated the valid, enforceable restrictive covenants in the Team's and the Staff's agreements with G&E. (A 2326, 2303–07, 2308–09.) The Team and the Staff [redacted]. (A 2303.) AY, through its executives, including the managing director of its Washington, DC,

office, [redacted]. (A 2300, 2303, 2308.) Despite this awareness, [redacted]. (A 2300, 2308.)

On January 19, 2021, after full briefing, the superior court entered an order granting summary judgment. (A 6362.) Although Plaintiffs had submitted detailed evidence supporting each claim, the court concluded that no genuine issues of material fact existed. (*Id*.) Notably, the Court found, sua sponte, that Plaintiffs had "fail[ed] to identify any trade secrets with particularity or specificity" in a manner that was "sufficient to allege a claim of misappropriation," even though Defendants had not moved for summary judgment on this basis. (A 6375.)

V. The Postjudgment Orders

On February 16, 2021, Plaintiffs moved to alter or amend the superior court's judgment, seeking the reinstatement of their claims. (A 7080.) Alternatively, they sought relief from the judgment on Count IV based on additional examples of trade secrets not considered in the court's summary-judgment ruling. (*Id*.)

On June 21, 2021, the superior court denied Plaintiffs' motion. (A 7831.) In a separate postjudgment order, the court entered a sanctions award of $43,836.50 in connection with Plaintiffs' renewed request for a forensic inspection. (A 7828.) This appeal followed.

STATEMENT OF FACTS

I. Rose's Tenure at G&E

Rose served as G&E's CEO from March 2005 through December 2007. (A 2289, 4351.) During his tenure, his executive team included Hiren Thakar ("Thakar"), G&E's Vice President of Strategy & Planning; Robert Slaughter ("Slaughter"), G&E's General Counsel; Kimberly Krugman ("Krugman"), G&E's Vice President, Senior Counsel; and Keith Lipton ("Lipton"), the Managing Director of G&E's Washington, DC, Metro Region. (A 2289, 3696–97, 4364–65.)

As G&E's CEO, Rose [redacted]. (A 2289, 4370–72.) The Team [redacted]. (A 2289–90, 4371, 4403.) It quickly became [redacted]. (A 2290, 4371.)

II. Rose's Transition to AY

In late 2007, [redacted]. (A 2290, 4352–53.) In June 2008, [redacted]. (A 2290, 4351, 4358.) In 2009, [redacted]. (A 2291, 4358, 4368, 4182–83.)

III. AY's Expansion Plan

When Rose became AY's CEO, [redacted]. (A 2292, 4170–73, 3738–39.) At the executive level, [redacted]

[redacted]. (A 2292, 4193–98, 4202, 4363–65, 4674–80, 4296–97.) At the broker level, [redacted]. (A 2293, 4203–08.)

IV. AY's Direct Theft of G&E's Operational Documents

The wholesale theft [redacted]. Several of those documents [redacted]. (A 2296, 3722–24, 3727, 3760, 4501–02.) For example, at AY, Thakar [redacted]. (A 2296, 3756–60, 5044–50.) The [redacted]. (A 2296, 3760.)

Thakar also [redacted]. (A 2297, 5003–05.) In addition, he [redacted]. (A 2298, 3794, 5216–21.)

Lipton, too, [redacted]. Lipton began [redacted]. (A 2299, 3356, 3366.) Lipton became [redacted]. (A 2299, 3357, 3362–63.)

From the outset, Defendants [redacted]. (A 2299, 3366–68, 5224.) [redacted]. (A 2299, 5224.) He used [redacted].

When Lipton [redacted]. (A 2300, 3385–87, 2457–2572.) Lipton recognized [redacted] (A 2300, 2457.)

Other stolen G&E documents [redacted]. (A 2301, 3426–28, 3433–34.) The report [redacted]

[redacted]. (A 2301, 3426–28, 5226–30.) Lipton admitted that [redacted]. (A 2301, 3430.)

The spreadsheet [redacted]. (A 2301, 3433–34, 5246.) Lipton used [redacted]. (A 2301, 5246.) The spreadsheet [redacted]. (A 2301, 5233–46, 3434.) Lipton admitted that [redacted]. (A 2302, 3434–35.)

V. AY's Recruitment of the Team

In 2006, G&E entrusted Lipton with [redacted]. (A 2303, 3359–60.) Before leaving G&E, Lipton [redacted]. (A 2303, 3391–93.)

AY's recruitment [redacted]. (A 2307, 3382–83.) Initially, the Team [redacted]

[redacted]) But after the Team [redacted]. (A 2310, 3397.)

By January 28, 2012, [redacted]. (A 2310, 3165, 5353, 5358.) The Team and the Staff later [redacted]. (A 2311–12, 3105, 4031–32, 4123–24, 5583–89, 4126.)

VI. The Team's Theft of G&E's Protected Information

The Team's recruitment, and its transition from G&E to AY, [redacted]. (A 2323.) Between Spring 2011 and the date the Team and Staff resigned, [redacted]. (A 2323, 4149–51, 4153–55, 3423–26, 3185–86, 3191.)

Defendants, the Team, and the Staff have [redacted]. (A 2323, 3185–86, 3190–91, 3108, 4093–94.) They engaged in this conduct [redacted]. (A 2323, 2608, 2624.)

Hartman, one of the Team's brokers, [redacted]

[redacted]" (A 2324, 4092–93.) He also testified that [redacted]. (*Id.*)

Roehrenbeck testified that, [redacted] (A 2324, 2605, 2607–08.) Roehrenbeck also acknowledged [redacted]. (A 2325, 2605, 2612.) In addition, he conceded that [redacted]. (A 2325, 2653–67, 2678–3072.)

McNair, for his part, admitted that [redacted]. (A 2325, 3105–06.) He conceded that [redacted]. (A 2325, 3109.)

AY was fully aware that [redacted]. (A 2327, 3423, 4149–51.) In a February 4, 2012, email exchange [redacted]. (*Id.*) McNair stated, [redacted]

(*Id.*) He then asked [redacted]? (*Id*.) Lipton, on behalf of AY, responded that [redacted] and further stated that [redacted] (*Id*.) Lipton [redacted]. (*Id.*)

In a February 11 and 12, 2012, email exchange [redacted] (A 2327–28, 3434–26, 4153.) Lipton did not [redacted]. (A 2328, 3434–26, 4153–55.) Instead, Lipton [redacted] (A 2328, 3434–26, 4153.)

After the Team began its employment with AY, [redacted] (A 2328, 3435–36, 5899–5903.) In November 2012, Preuss, [redacted]. (*Id.*) Lipton forwarded [redacted].

(A 2328, 3436–37, 5905–09.) After doing so, Lipton asked [redacted]. (A 2329, 3437, 5911.)

In another November 2012 email chain, [redacted]. (A 2329, 3437–3439, 5918.) No one on the Team [redacted]; yet, McNair [redacted]. (*Id.*) The disclosure and use of [redacted]. (A 2329, 2368.)

VII. The Team's Theft of G&E's Transactions

When AY recruited the Team, [redacted] (A 2330, 3399–401, 5100.) A [redacted]. (A 2330, 3399–401.) AY's [redacted]. (A 2300, 4186–89.) This is because, [redacted]. (A 2330, 3399–3401.) This is standard practice in the commercial-real-estate industry.

Contrary to these assumptions and standard practices, the Team [redacted]. During the Team's [redacted]. (A 2331, 3449, 6021.) McNair himself became [redacted]. (A 2331, 4413–14, 6025, 6027, 3360–61.) There was, in effect, [redacted]. (A 2331, 4123, 5883, 3212.)

AY enabled [redacted]. (A 2332, 3377–78.) AY had no [redacted]. (*Id*.) Indeed, Lipton testified that [redacted]. (*Id*.)

Lipton knew [redacted]. (A 2332, 3450–52, 3465, 3452–53, 3470.) Despite this, Lipton [redacted]

[redacted]. (A 2333, 3450–52.)

The Team's [redacted]. As AY's management observed [redacted] (A 2333, 6061.)

SUMMARY OF THE ARGUMENT

The superior court's orders are riddled with errors warranting reversal. The court refused to engage with the voluminous evidentiary record, or the legal issues, presented by this case. In doing so, the court inverted the summary-judgment standard, resolving each disputed issue in the movants' favor. This is clear error.

As discussed below, reversing the superior court's entry of summary judgment is appropriate on five grounds, each of which independently supports remanding the case for the full, fair adjudication of Plaintiffs' claims. In addition, this Court should conclude that the superior court abused its discretion by (1) denying Plaintiffs' request for a forensic inspection of the devices and media used to steal information from G&E on Defendants' behalf and (2) sanctioning Plaintiffs for renewing their request for a forensic inspection where new evidence developed during discovery supported that request.

First, all of Plaintiffs' claims should be reinstated because the superior court ignored the unrebutted factual record in Plaintiffs' statement of additional facts. The superior court's decision to disregard these facts, and ignore Defendants' failure to respond to them, contradicts the plain language of Rule 56 and well-established case law recognizing that failing to rebut a fact in the context of a summary-judgment motion renders the fact undisputed for purposes of the motion.

Second, Plaintiffs' trade-secret claim should be reinstated because (1) the record includes numerous examples of trade secrets misappropriated by Defendants, including G&E trade secrets [redacted] (A 2295–302) and G&E trade secrets [redacted] (A 2327–29; *see also* A 7136–38, 7223–7539); (2) Defendants' own admissions in a trade-secret lawsuit filed by AY and in the deposition testimony of Earl Webb ("Webb"), AY's President of US Operations, raise genuine issues of fact regarding Plaintiffs' trade-secret claim (A 7139, 7619, 7708, 7688–89); and (3) Plaintiffs were not provided with "notice and a reasonable time to respond" to whether they had identified any trade secrets, since the superior court raised this issue sua sponte in granting Defendants' motion for summary judgment (A 6375, 6230).

Third, Plaintiffs' tortious-interference-with-contract claim should be reinstated because (1) at-will employment can serve as the basis for a tortious-

interference-with-contract claim; (2) even if the case law were as the superior court concluded, Plaintiffs have established a genuine issue of material fact regarding whether the 2006 Broker Agreements and the 2011 Letter Agreements at issue here were term agreements as opposed to at-will agreements (A 2308–09; *see also* A 3642, 3651); (3) even if the Agreements were at will, the contractual obligations that are the subject of Plaintiffs' tortious-interference claim include postemployment restrictive covenants, which survive termination (A 2303–07, 3474, 2368, 2308–09, 3640, 4070–72, 3161–62); and (4) the record establishes that Defendants intentionally procured breaches of the Agreements (A 2296–97, 2300–02, 2308, 2311, 2314, 2325, 2327–28, 2332–33).

Fourth, Plaintiffs' tortious-interference-with-business-expectancy claim should be reinstated because (1) the evidence Plaintiffs submitted identifies the specific business expectancies in question ***by name*** for [redacted] (A 2332, 3450–52, 3465, 3452–53, 3470, 3465); (2) the subject matter of the business expectancies is clear (*id*.); and (3), for the same reasons supporting the tortious-interference-with-contract claim, there is ample evidence of theft that creates a genuine issue of material fact regarding whether Defendants intentionally interfered with these pending transactions (A 2332–33).

Fifth, Plaintiffs' conspiracy claim should be reinstated because (1) the evidence demonstrates that Defendants entered into an agreement to expand AY's

business by stealing G&E's proprietary information, personnel, and business opportunities, including but not limited to by [redacted] (A 2327); (2) there is substantial evidence that Defendants' conspiracy included agreeing to, and assisting with, breaches of the Team's and the Staff's fiduciary duties of loyalty to G&E (A 2298–99); and (3) Plaintiffs were not required to sue each individual member of the Team and the Staff in order to pursue their conspiracy claim (A 2227 (collecting cases)).

Sixth, the superior court should have granted Plaintiffs' request to forensically inspect the devices and media used to steal information from G&E on Defendants' behalf. The undisputed evidence developed during discovery established that the Team [redacted]. (A 699.) The superior court abused its discretion by prohibiting Plaintiffs from conducting a forensic inspection to confirm that Defendants produced all the information the Team misappropriated from G&E.

Seventh, the superior court should not have sanctioned Plaintiffs for renewing their request for a forensic inspection. Plaintiffs' initial request was made before any depositions had been conducted. After newly obtained deposition testimony corroborated the need for a forensic inspection, Plaintiffs renewed their request. (*Id*.) They were sanctioned for doing so, despite the fact that the request was aimed at information critical to Plaintiffs' claims.

STANDARDS OF REVIEW

I. Summary Judgment

Summary judgment is reviewed de novo. *Aziken v. Dist. of Columbia*, 194 A.3d 31, 34 (D.C. 2018). It is proper only when the moving party "demonstrate[s] that there is no genuine issue of material fact and that [it is] entitled to judgment as a matter of law." *Va. Acad. of Clinical Psychologists v. Grp. Hospitalization & Med. Servs., Inc.*, 878 A.2d 1226, 1232 (D.C. 2005). In reviewing summary judgment, this Court must "construe the record in the light most favorable to the" nonmovant. *Bartel v. Bank of Am. Corp.*, 193 A.3d 767, 770 (D.C. 2018). "Any doubt . . . is sufficient to preclude a grant of summary judgment." *Va. Acad.*, 878 A.2d at 1233.

Moreover, when the superior court grants summary judgment sua sponte on grounds not raised by the movant, as the superior court did here on Plaintiffs' trade-secret claim, the order will be reversed unless "the losing party was on notice that it had to come forward with all of its evidence" and had an opportunity to proffer it. *Tobin v. John Grotta Co.*, 886 A.2d 87, 91 (D.C. 2005).

II. Denial of Discovery Motion

This Court "reviews [a] trial court's decision on discovery issues for an abuse of discretion." *Wallace v. Eckert, Seamans, Cherin & Mellott, LLC*, 57 A.3d 943, 959 (D.C. 2012). "To warrant reversal of the trial court's denial of a motion to compel discovery, the movant must show both that the trial court abused its discretion and that the denial caused prejudice." *Sibley v. St. Albans Sch.*, 134 A.3d

789, 799 (D.C. 2016) (citing *Franco v. Dist. of Columbia*, 39 A.3d 890, 896 (D.C. 2012)).

III. Sanctions Award

Rule 37 of the District of Columbia Superior Court Rules of Civil Procedure states that, if a motion to compel discovery is denied, "the court . . . must, after giving an opportunity to be heard, require the movant . . . to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees." D.C. Super. Ct. R. 37(a)(5)(B). However, "the court *must not* order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust." *Id.* (emphasis added).

"Appellate review of a court's imposition of Rule 37 sanctions . . . is confined to determining whether or not the court abused its discretion in imposing a particular sanction or set of sanctions." *Hinkle v. Sam Blanken & Co.*, 507 A.2d 1046, 1048 (D.C. 1986). "An abuse of discretion will exist where the trial court imposes a sanction which is too strict or is unnecessary under the circumstances." *Vernell v. Gould*, 495 A.2d 306, 311 (D.C. 1985).

ARGUMENT

I. The superior court ignored the factual record presented by Plaintiffs.

As an initial matter, all of Plaintiffs' claims should be reinstated because the superior court ignored the unrebutted factual record in Plaintiffs' statement of additional facts. (A 2289.) Defendants submitted a narrow statement of facts,

creating the misimpression that there was limited evidence to support Plaintiffs' claims. (A 1459.) Plaintiffs responded to each of Defendants' assertions with detailed record citations. (A 2252.) They also provided a well-documented statement of additional facts addressing the omissions in Defendants' statement of facts and the context surrounding Defendants' involvement in the Team's theft from G&E. (A 2289.) ***Defendants chose not to respond to these additional facts***. (A 6209.) They cited no authority supporting their decision. (*Id*.) The superior court accepted Defendants' approach without scrutiny. (A 6376, 7837.)

The superior court's decision to disregard Plaintiffs' statement of additional facts, and ignore Defendants' failure to respond to those additional facts, contradicts the plain language of Rule 56 and well-established case law providing that failing to rebut a fact in the context of a summary-judgment motion renders the fact undisputed for purposes of the motion. In opposing Defendants' motion for summary judgment, Plaintiffs filed their Rule 56(b)(2)(b) statement, which included Plaintiffs' statement of additional facts. Nothing in Rule 56(b)(2)(b) prohibits a responding party from submitting additional facts. *See* D.C. Super. Ct. R. 56(b)(2)(b). Indeed, the rule explicitly states that a response to a movant's statement of facts need only "correspond ***to the extent possible*** with the numbering of the paragraphs in the movant's statement." *Id*. (emphasis added).

If it were otherwise, and a nonmovant were rigidly confined to responding directly to the "facts" stated by the movant, then a movant could omit material facts from the court's consideration by ignoring detrimental or inconvenient aspects of the case in its statement of facts, as Defendants did here. This absurd, unjust outcome turns the summary-judgment standard on its head by creating a de facto presumption in favor of the moving party's version of the facts. *See Gilmore v. U.S.*, 699 A.2d 1130, 1132 (D.C. 1997) (principles of statutory construction require interpreting statutory language to avoid "absurdity"); *Varela v. Hi–Lo Powered Stirrups, Inc.*, 424 A.2d 61, 65 (D.C. 1980) (court of appeals will use "the same methods of statutory construction in interpreting [a] procedural rule as [it] would use in interpreting the meaning of a statute").

Under the rules, the additional facts submitted by Plaintiffs should have been considered undisputed for purposes of the superior court's summary-judgment analysis. Under Rule 56(e)(2), "[i]f ***a party*** . . . ***fails to properly address another party's assertion of fact as required by Rule 56(c)***, the court may: . . . (2) consider the fact undisputed for purposes of the motion . . . ." D.C. Super. Ct. R. 56(e)(2) (emphasis added). The requirements of Rule 56(e)(2) are not limited to nonmoving parties. *See id*. Nor are the requirements of Rule 56(c), which apply to any "***party*** asserting that a fact cannot be or is genuinely disputed . . . ." D.C. Super. Ct. R. 56(c)(1) (emphasis added).

Here, the court's clear disregard for the record warrants reinstating Plaintiffs' claims. *See Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 588 (D.C. Cir. 2016) ("[U]ncontested facts may be taken as true for purposes of summary judgment."); *Acevedo-Parilla v. Novartis Ex–Lax, Inc.*, 696 F.3d 128, 137 (1st Cir. 2012) (holding that district court properly "deemed admitted" unrebutted facts in nonmovant's separate statement of additional facts where those facts were "supported by the record, and not properly controverted by" the movant) (internal quotation marks omitted); *see also Varnum Props., LLC v. Dep't of Consumer & Regul. Affairs*, 204 A.3d 117, 121 (D.C. 2019) (noting that this Court refers to federal cases interpreting federal rules where superior court's "procedural rule[] is nearly identical to or the functional equivalent of a federal procedural rule").

II. Plaintiffs' trade-secret claim should be reinstated.

The superior court granted summary judgment on Plaintiffs' trade-secret claim on the basis that Plaintiffs had "fail[ed] to identify any trade secrets with particularity or specificity" in a manner that was "sufficient to allege a claim of misappropriation." (A 6375.) The court concluded that, "without proffering [any] evidence" on this issue, the claim could not survive summary judgment. (A 6376.)

The court erred in doing so. Whether information constitutes a trade secret is a question of fact. *See Econ. Rsch. Servs., Inc. v. Resolution Econ., LLC*, 208 F. Supp. 2d 219, 232 (D.D.C. 2016); *Armenian Assembly of Am., Inc. v. Cafesjian*, 692

F. Supp. 2d 20, 43 (D.D.C. 2010); *DSMC v. Convera Corp.*, 479 F. Supp. 2d 68, 78 (D.D.C. 2007). Cases involving the misappropriation of trade secrets therefore present fact-driven inquiries that should not be resolved on summary judgment. *See Econ. Rsch.*, 208 F. Supp. 2d at 232; *Armenian Assembly*, 692 F. Supp. 2d at 43; *DSMC*, 479 F. Supp. 2d at 78. It is for a jury to decide whether the materials at issue are a trade secret. *See CB Richard Ellis Real Estate Servs., Inc. v. Spitz*, 950 A.2d 704, 710 (D.C. 2008) (issue exists for trial if "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party").

The record is replete with examples of trade secrets misappropriated by Defendants. *See* D.C. Code § 36–401(4) (defining "[t]rade secret").

A. The documents stolen by G&E's former executives are trade secrets.

Thakar created a [redacted]. (A 2296, 3756–60, 5043.) This spreadsheet [redacted]. (A 2297, 5086, 5099.) ***It is derived entirely from*** [redacted]**.** (A 2296, 3760.) [redacted]. (A 2297, 3773–86.) [redacted]

[redacted], are nearly identical. (A 2297, 3773–86, 5126–28.) This document is a trade secret. *See Design Nine, Inc. v. Arch Rail Grp., LLC*, No. 4:18–CV–428 CDP, 2019 WL 1326677, at *4 (E.D. Mo. Mar. 25, 2019) (spreadsheets with formulas are trade secrets); *NCMIC Fin. Corp. v. Artino*, 638 F. Supp. 2d 1042, 1077–78 (S.D. Iowa 2009) (same); *see also DSMC*, 479 F. Supp. 2d at 77 n.9 (courts can rely on other Uniform Trade Secrets Acts in interpreting the DCUTSA).

Thakar also [redacted]. (A 2297, 5003–05.) This 166-page document includes detailed information for G&E brokers on all aspects of the company's business operations, including the handling of confidential G&E information and materials; the company's referral practices; information regarding listing and commission agreements; a description of the importance of TIP reports; the availability of research, business-development, and marketing assistance; and the process for generating and receiving commissions. It is evident that AY [redacted]. (A 2298, 3473, 4552.) This document is a trade secret. *See, e.g.*, *Minn. Mining & Mfg. Co. v. Pribyl*, 259 F.3d 587, 596 (7th Cir. 2001) ("operating procedures and manuals" qualify as trade secrets); *Check 'n Go of Virginia, Inc. v. Laserre*, No. 6:04 CV 00050, 2005 WL 1926609, at *3 (W.D. Va. Aug. 9, 2005)

("material misappropriated from [plaintiff's] Policy and Procedure manuals constitute[d] a protectable trade secret").

Additionally, Thakar improperly [redacted]. (A 2298, 3794, 5216–21.) The memorandum, [redacted]. (A 2298, 5217.) This document is a trade secret. *See Mission Measurement Corp. v. Blackbaud, Inc.*, 216 F. Supp. 3d 915, 920–21 (N.D. Ill. 2016) (acknowledging "business models" and "business plans" are trade secrets); *First Health Group Corp. v. Nat'l Prescription Adm'rs, Inc.* 155 F. Supp. 2d 194, 223–24 (M.D. Pa. 2001) (plaintiff's employee-salary structure qualified as a trade secret).

Lipton also had access at AY to [redacted]. (A 2301, 3426–28, 3433–34.) The Budget Report [redacted]. (A 2301, 3426–28, 5226–30.) ***Lipton admitted that the information in*** [redacted] (A 2301, 3430.)

These documents are trade secrets. *See, e.g.*, *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1265, 1269–70 (7th Cir. 1995) (recognizing that strategic and operating plans, including financial goals and strategies for marketing, production, and growth, are trade secrets); *Cerro Fabricated Prod. LLC v. Solanick*, 300 F. Supp. 3d 632, 650 (M.D. Pa. 2018) (price margins and sales revenue; internal financial and accounting data; pipeline information, including prospective markets and prospective businesses and customers; customer lists; marketing plans; strategic plans; and business plans are trade secrets).

B. The documents stolen by the Team when they left G&E are trade secrets.

Roehrenbeck, a member of the Staff, testified that McNair instructed him [redacted] (A 2324, 2605, 2607–08.) Roehrenbeck also acknowledged [redacted]. (A 2325, 2605, 2612.) Additionally, Roehrenbeck conceded [redacted]. (A 2325, 2653–67, 2678–3072.) These documents qualify as trade secrets. *See, e.g., Meyer Grp., Ltd. v. Rayborn*, No. 19–1945, 2020 WL 5763631, at *4 (D.D.C. Sept. 28, 2020) ("Client lists or customer information can be considered

trade secrets . . . ."); *Hyman Cos. v. Brozost*, 119 F. Supp. 2d 499, 505 (E.D. Pa. 2000) (terms and conditions of leases constitute trade secrets).

In November 2012, Preuss [redacted]. (A 2328, 3435–36, 5899–5903.) This is a [redacted]. (*Id.*) Lipton subsequently forwarded the [redacted]. (A 2328, 3436–37, 5905–09.) After doing so, Lipton asked Preuss [redacted]. (A 2329, 3437, 5911.) Strategic plans, such as this one, qualify as trade secrets. *See PepsiCo., Inc. v. Redmond*, No. 94 C 6838, 1996 WL 3965, at *7–8. (N.D. Ill. Jan. 2, 1996).

In another November 2012 email chain, McNair, copying Lipton, forwarded Fortune an email containing a 60-page G&E client-specific proposal prepared by the President of G&E's Corporate Services practice. (A 2329, 3437–3439, 5918.) No one on the Team was listed on the proposal; yet, after the Team joined AY, McNair had a stolen copy at his disposal to impermissibly distribute to Fortune. (*Id.*) Marketing materials qualify as trade secrets, regardless of whether they contain publicly available information. *Vendavo, Inc. v. Long*, 397 F. Supp. 3d 1115, 1135

(N.D. Ill. 2019). This is particularly true where, as here, the materials are "tailor[ed]" to a specific client. *Id.*; *see also Wash. Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 523 (D.C. 1989) ("[E]ntrepreneurs should not be put in the position of having their marketing techniques made a part of the public record and available as a windfall to their competitors.").

The documents produced in this case contain numerous additional examples of trade secrets stolen by the Team that Plaintiffs identified in their motion to alter or amend the judgment. (A 7136–38, 7223–7539.) The superior court erroneously refused to address them. (A 7836–37.)

C. Defendants' own admissions raise genuine issues of fact regarding Plaintiffs' trade-secret claim.

Defendants' own admissions, which the superior court ignored, create genuine issues of fact regarding the trade-secret status of the materials at issue here. *First*, Webb, AY's President, testified [redacted]. (A 7688–89.) Webb also testified that [redacted]. (A 7686–87, 7716–17.) AY admitted [redacted]. (A 7690–93, 7719–22, 7725–26.)

Second, in *Avison Young–Chicago LLC v. Keith Puritz, et al.*, a lawsuit filed by AY against certain former commercial-real-estate brokers who left to work for a competitor, AY identified the same categories of trade secrets in support of its own trade-secret claim that Plaintiffs have identified here, including "(i) client contact and sales lead information; (ii) real estate acquisition, disposition and leasing strategies; (iii) information on comparable properties and (iv) acquisition strategies." (A 7139, 7619, 7708.) These admissions further support reversing the superior court's ruling on Count IV of the Complaint.

D. The trade-secret claim should be reinstated because Plaintiffs were not provided with "notice and a reasonable time to respond."

Alternatively, the trade-secret claim should be reinstated because Plaintiffs were not provided with "notice and a reasonable time to respond" to whether they had identified any trade secrets. D.C. Super. Ct. R. 56(f). The superior court raised this issue sua sponte in granting Defendants' motion for summary judgment.

To be clear, ***Defendants did not argue*** in their motion that Plaintiffs failed to identify any trade secrets. Defendants thus waived this issue for purposes of summary judgment. (A 6230.) *See Expedia, Inc. v. Dist. of Columbia*, 120 A.3d 623, 640 (D.C. 2015) (waiver); *In Re Thomas*, 740 A.2d 538, 547 (D.C. 1999) (same).

Nonetheless, the superior court granted summary judgment on Count IV based on Plaintiffs' purported failure to identify the trade secrets they claim were misappropriated. (A 6375.) The superior court's sua sponte summary-judgment

ruling on this issue violated Rule 56(f). *See* D.C. Super. Ct. R. 56(f). Rule 56(f) expressly states that, although a court may grant summary judgment "for a nonmovant," "on grounds not raised by a party," or based on its own identification of "material facts that may not be genuinely in dispute," it may do so only "***[a]fter giving notice and a reasonable opportunity to respond***." *See id*. (emphasis added).

In *Tobin*, this Court reversed the superior court's sua sponte entry of summary judgment on issues not raised in the briefs. *Tobin*, 886 A.2d at 91. As this Court noted, while a court "possess[es] the authority to enter summary judgment against a party sua sponte, . . . that authority may only be exercised so long as the losing party was on notice that [it] had to come forward with all [its] evidence." *Id*. (internal quotation marks omitted).

This is also a fundamental principle of federal summary-judgment law, which is based on the federal equivalent of District of Columbia Superior Court Rule 56(f). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (sua sponte summary judgment is only proper where "*the losing party was on notice* that [it] had to come forward with all of [its] evidence") (emphasis added).

Federal courts in the District of Columbia have consistently taken a limited, cautious approach to sua sponte summary judgment. *See, e.g.*, *McBride v. Merrell Dow & Pharm., Inc*., 800 F.2d 1208, 1211–12 (D.C. Cir. 1986) (reversing sua sponte summary judgment on plaintiff's libel claim where superior court's ruling was based

on a lack of actual malice, but defendants only moved for summary judgment on the truth of the statement at issue); *Athridge v. Rivas*, 141 F.3d 357, 361 (D.C. Cir. 1998) (reversing sua sponte summary judgment on plaintiffs' negligence claim where it was unclear whether plaintiffs had sufficient notice of need to come forward with all their evidence); *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007) (reversing sua sponte summary judgment in FOIA case regarding documents for which defendant failed to affirmatively move for summary judgment); *Harris v. Dist. of Columbia Water & Sewer Auth*., 172 F. Supp. 3d 253, 260 (D.D.C. 2016) (declining to dispose of wrongful-discharge claim sua sponte where defendant had not moved for summary judgment on that claim).

Plaintiffs never received notice that the superior court intended to rule on the trade-secret identification issue. Nor did they have an opportunity to make a record on that issue. This Court should vacate the entry of summary judgment on Count IV and allow Plaintiffs' trade-secret claim to proceed to trial.

III. Plaintiffs' tortious-interference-with-contract claim should be reinstated.

In granting summary judgment on Plaintiffs' tortious-interference-with-contract claim, the superior court ruled that Plaintiffs "cannot prove the element of intentional procurement of a breach" of any contract. (A 6371.) The court concluded that Plaintiffs failed to present evidence establishing that "any wrongful means were employed" by Defendants in recruiting the members of the Team, and their Staff,

whom the court described as "at-will employees," to work at AY. (A 6369–70.) The court also concluded that, even if Defendants had attempted to "lure [the Team and the Staff] away" from G&E, this "action was legally justified as it was merely competitive activity." (A 6370.)

The superior court erred in reaching these conclusions. *First*, under prevailing law, at-will employment can serve as the basis for a tortious-interference-with-contract claim. *See Newmyer v. Sidwell Friends Sch.*, 128 A.3d 1023, 1039–41 (D.C. 2015); *Easaw v. Newport*, 253 F. Supp. 3d 22, 41 (D.D.C. 2017). (A 2303–07, 3474, 2368, 2308–09, 3640, 4070–72, 3161–62.) The superior court's order stated that the facts presented here are distinguishable from *Newmyer* because there is no indication that Defendants "fed information to the individual brokers that painted G&E in a bad light and that was the sole reason why the brokers left [G&E] for [AY]." (A 6370.) But this Court did not limit its ruling in *Newmyer* about the effect of at-will employment on the viability of a tortious-interference-with-contract claim to the facts before it. *See Newmyer*, 128 A.3d at 1038–41. There are countless ways in which an agreement can be wrongfully interfered with. Indeed, the cases cited in *Newmyer* demonstrate that no limitation of this nature was intended. *See, e.g.*, *Onyeoziri v. Pivok*, 44 A.3d 279, 286–92 (D.C. 2012) (reversing summary judgment because evidence of bank's "unreasonable refusal" to let homeowner proceed with potential sale to buyer once foreclosure process began created genuine issue of fact).

Post-*Newmyer*, it is clear that an employee's former employer can bring a tortious-interference-with-contract claim against a competitor who becomes the employee's new employer, even if the employee's employment with the former employer was at will. For example, in *Robert Half International Inc. v. Billingham*, 315 F. Supp. 3d 419 (D.D.C. 2018) ("*Billingham I*"), a former employer brought a tortious-interference-with-contract claim against its former employee's new employer. *Id*. at 422. The employee was employed at will. *See Robert Half Int'l Inc. v. Billingham*, 317 F. Supp. 3d 379, 383–84 (D.D.C. 2018) ("*Billingham II*"). The court, applying District of Columbia law, granted the former employer's motion for a preliminary injunction, finding that the evidence demonstrated "intentional interference" where the former employee made the new employer aware of his postemployment restrictive covenants, but the new employer nonetheless continued to employ him. *Billingham I*, 315 F. Supp. 3d at 436. The court noted that, as here, the new employer did not undertake any steps to prevent the former employee from sharing information he had learned through his former employment or from contacting the former employer's customers. *Id.* Based on these facts, which align with those at issue in this case, the court found the former employer made out a prima facie case of tortious interference with contract. *Id.*

Similarly, in *Legal Technology Group, Inc. v. Mukerji*, No. 17–631, 2019 WL 9143477 (D.D.C. June 10, 2019), a former employer brought tortious-interference-

with-contract and tortious-interference-with-business-expectancy claims against its former employee's new employer. *Id*. at *1. The employee was employed at will. *Id*. at *30. The court, applying District of Columbia law, denied the new employer's motion for summary judgment on the tortious-interference claims. *Id*. at *14–28. As in this case, the court noted that there were genuine issues of material fact regarding whether the new employer knew about the restrictive covenants in the employee's agreement with his former employer and whether the new employer induced him to solicit clients covered by those covenants. *Id*. at *15, 17, 19, 20. In its June 21 postjudgment order, the superior court refused to acknowledge, let alone address, *Mukerji*, despite the fact that it was properly brought to the court's attention as new authority that was unavailable during the original summary-judgment briefing.

Billingham I, *Billingham II*, and *Mukerji* are consistent with Section 768 of the Restatement (Second) of Torts, which states, in comment i, that "[a]n employment contract . . . may be only partially terminable at will" and thus "may leave the employment at the employee's option but provide that [the employee] is under a continuing obligation not to engage in competition with [the employee's] former employer." Restatement (Second) of Torts § 768 cmt. i (1979) ("Restatement"). Therefore, as in this case, "a defendant engaged in the same business might induce the employee to quit [the employee's] job, but [the defendant] would *not be justified in engaging the employee to work for [the defendant] in an*

activity that would mean violation of the contract not to compete." *Id*. (emphasis added). This well-established law supports the proposition that an employee's at-will status does not bar the employee's former employer from pursuing a tortious-interference-with-contract claim against the employee's new employer if the employee is subject to restrictive covenants.

Second, Plaintiffs have established a genuine issue of material fact regarding whether the 2006 Broker Agreements and the 2011 Letter Agreements at issue here (together, the "Agreements") are term agreements as opposed to at-will agreements. (*See* A 2215–16.) The Agreements each had [redacted]. (A 2308–09, 3642, 3651.) The 2011 Letter Agreements also introduced the concept of [redacted]. (A 3651.) At a minimum, these provisions create genuine issues of material fact rendering summary judgment inappropriate.

Third, the superior court's decision should be vacated because the contractual obligations that are the subject of Plaintiffs' tortious-interference claim include postemployment restrictive covenants. (A 2303–07, 3474, 2368, 2308–09, 3640, 4070-72, 3161–62.) When that is the case, it is "immaterial" whether the employment relationship at issue is at will. *See Billingham II*, 317 F. Supp. 3d 379

at 383–84; *Billingham I*, 315 F. Supp. 3d at 436. The postemployment obligations that form the basis of the claim survive the termination of at-will employment.

Fourth, the record establishes that Defendants intentionally procured breaches of the Agreements. (*See* A 2296–97, 2300, 2302, 2308, 2311, 2314, 2325, 2327–28, 2332–33.) Intentional procurement involves both intentionality and impropriety. *See Mukerji*, 2019 WL 9143477, at *16. Impropriety is not in dispute here. But even if it were, there is no question that Defendants knew their conduct would interfere with the confidentiality, nonsolicitation, and other contractual obligations of the Team and the Staff. AY provided substantial financial incentives to the Team and the Staff in exchange for G&E's proprietary information and business transactions, including those it knew were in the Team's existing G&E deal pipeline. It also helped [redacted]. For example, ***Lipton, the Managing Director of AY's Washington, DC, office*** [redacted]. (A 2327, 3423, 4149.) He also [redacted]. (A 2327–28, 3434–26, 4153–55.)

Moreover, impropriety is not Plaintiffs' burden to prove. Rather, Defendants have the burden of demonstrating that their conduct was *not* improper because it was

legally justified or privileged. *See NCRIC, Inc. v. Columbia Hosp. for Women Med. Ctr., Inc.*, 957 A.2d 890, 901 (D.C. 2008). Competition is the only justification Defendants have offered for their conduct and the only justification cited in the superior court's order. In the context of a tortious-interference-with-contract claim, "an interest in competition alone will not suffice to defeat" the claim. *See Mukerji*, 2019 WL 9143477, at *17 (citing Restatement § 768 cmt. h (1979)). This justification thus fails as a matter of law. *See id*.

Alternatively, there is a genuine issue of material fact regarding whether Defendants' conduct, which involved theft, fell within the scope of the justification defense. The record shows that AY misappropriated G&E's proprietary information, client relationships, and business transactions to expand its US operations. (A 2295–2303, 2323–2333.) It did so using stolen G&E operational documents [redacted]. (A 2296–97, 2300.) For example, ***when Lipton began recruiting the Team,*** [redacted]. (A 2300, 3385–87, 2457–2572.) ***Lipton recognized the impropriety of this,*** [redacted]. (A 2300–02, 2457.) AY's [redacted]

[redacted]. AY's [redacted]. (A 2292–95.)

Theft, by definition, is not only improper—it is illegal. The law is clear that an act done with malice, such as theft, vitiates a justification defense. *See Sorrells v. Garfinckel's, Brooks Bros., Miller & Rhoades, Inc*. 565 A.2d 285 (D.C. 1989) (under comment s of Section 766 of the Restatement, "claims of justification are vitiated if malice is proved"). The conclusion reached by the superior court—that AY's conduct was "legally justified as . . . competitive activity" (A 6370)—is erroneous because, at a minimum, the evidence of theft creates a genuine issue of material fact regarding whether AY's conduct fell within the scope of the defense of justification. The Court should reverse the superior court's ruling on Count I.

IV. Plaintiffs' tortious-interference-with-business-expectancy claim should be reinstated.

The superior court granted summary judgment on Plaintiffs' tortious-interference-with-business-expectancy claim on the basis that Plaintiffs had failed to define with sufficient clarity the "vague" prospective real-estate transactions Defendants unlawfully interfered with. (A 6373.) The court also found that it was "unclear as to the subject matter of these prospective business dealings, the likelihood of the plaintiffs securing these businesses in the future; and what role the defendants played in any of these alleged potential transactions." (*Id.*) In addition,

the court found "no evidence that the defendants intentionally induced [a breach] of these alleged phantom prospective business expectancies." (*Id.*)

The record establishes triable issues of fact regarding Defendants' tortious interference with Plaintiffs' prospective business relationships. *First*, the evidence in the summary-judgment record ***identifies*** [redacted]. They include, [redacted]. (*See, e.g.*, A 2332, 3466–68.)

Second, ***the production reports identify each business expectancy, by subject matter, as*** [redacted] (*Id.*) [redacted] (*Id.*) Most of the identified transactions also contain [redacted]. (*Id.*)

These were not simply clients with whom G&E had worked "in the past." (A 1444.) ***They were existing clients whose deals were ongoing*** at the time the Team moved to AY. As Webb, AY's President, admitted, [redacted]. (A 2331, 4185.) That did not occur

here. Instead, [redacted]. (A 2314, 5424–61.)

Third, for the same reasons supporting the tortious-interference-with-contract claim, there is ample evidence of theft that, at a minimum, creates a genuine issue of material fact regarding whether Defendants intentionally interfered with these pending transactions. (*See supra* Part III; *see also* A 2332–33, 3377–78, 3450–52, 3465, 3452–53, 3470, 3450–52.) The Court should thus reinstate Count II for trial.

V. Plaintiffs' conspiracy claim should be reinstated.

In granting summary judgment on Plaintiffs' conspiracy claim, the superior court held that Plaintiffs had "not proffered sufficient evidence in support of any action by the defendants without lawful justification" and had failed to present evidence "that any agreements existed between any defendants in an attempt to further a conspiracy to unlawfully loot G&E's personnel and information." (A 6374.) The Court also rejected Plaintiffs' argument that "defendants engaged in a conspiracy for the brokers to breach their fiduciary duty of loyalty to [G&E]." (*Id.*)

The Court should vacate this ruling and allow Plaintiffs to proceed with their conspiracy claim. *First*, the evidence demonstrates that Defendants entered into an agreement to expand AY's business by stealing G&E's proprietary information, personnel, and business opportunities. This agreement began in 2008 when Rose's

former colleagues began stealing G&E's protected information as they were departing G&E to join Rose at AY. (*See* A 2292–95.) The agreement continued when the Team and the Staff, in exchange for the financial incentives offered by AY, agreed to help steal G&E's proprietary information, personnel, and business opportunities. (*See* A 2323–29.) For example, [redacted]. (A 2327, 3423, 4149–51.) ***Meanwhile, Lipton*** [redacted]. (A 2327, 3423, 4149.) This is merely one of many examples demonstrating AY's agreement in furtherance of the conspiracy.

Second, as discussed above and in Plaintiffs' summary-judgment response, there is ample evidence that Defendants' conspiracy included agreeing to, and assisting with, conduct constituting breaches of the Team's and the Staff's fiduciary duties of loyalty to G&E, which they owed G&E as its employees. (A 2226–29.) *See Int'l Underwriters, Inc. v. Boyle*, 365 A.D.2d 779, 784 (D.C. 1976) (recognizing that civil-conspiracy claim can be based on conspiracy to breach fiduciary duties).

Third, to assert a conspiracy claim, a plaintiff need not sue each individual coconspirator, such as the individual members of the Team and the Staff. *Bell v. Westinghouse Elec. Corp.*, 483 A.2d 324, 328 (D.C. 1984) ("It is an established rule . . . that joint tortfeasors are not indispensable parties."). Therefore, Plaintiffs'

decision not to sue the individual members of the Team and the Staff does not invalidate their conspiracy claim. The Court should thus reinstate Count III for trial

VI. On remand, Plaintiffs should be allowed to forensically inspect the devices and media used to steal information from G&E.

The superior court erred in denying Plaintiffs' request for a forensic inspection of the devices and media used to steal information from G&E on Defendants' behalf. The evidence developed during discovery amply supported Plaintiffs' request.

The documents Defendants produced, and the deposition testimony of members of the Team and the Staff, demonstrated that the Team used [redacted]. (A 703–04.) It is undisputed that [redacted]. (A 729, 735, 767.) It is also undisputed that, [redacted], Defendants refused during discovery to provide Plaintiffs with access to the shared drive; the external hard drives [redacted]. (A 703–04.)

Given the evidence of misappropriation, Plaintiffs' request for a forensic inspection was appropriate. Forensic inspections are commonplace, and frequently compelled, in cases involving the theft of trade secrets and other confidential

information. *See Priority Payment Sys., LLC v. Signapay, Ltd.*, 161 F. Supp. 3d 1294, 1304–06 (N.D. Ga. 2016) (discussing forensic inspection in lawsuit against former employees who took employer's data); *AdvantaCare Health Partners, L.P. v. Access IV*, No. C–03–04496 JF, 2004 WL 1837997, at *7–11 (N.D. Cal. Aug. 17, 2004) (same); *Pearce v. Emmi*, No. 16–cv–11499, 2017 WL 528254, at *2–3 (E.D. Mich. Feb. 9, 2017) (compelling forensic inspection of cellular phone); *Brown Jordan Int'l, Inc. v. Carmicle*, No. 3:15–MC–00027–GNS, 2015 WL 6142885, at *3–4 (W.D. Ky. Oct. 19, 2015) (same); *Health Mgmt. Assocs., Inc. v. Salyer*, No. 14–14337–CIV–ROSENBERG/LYNCH, 2015 WL 12778793, at *1–2 (S.D. Fla. Aug. 19, 2015) (same as to computer devices and email account); *In re Application of Alianza Fiduciaria S.A.*, No. 13–81002–MC–MARRA/MATTHEWMAN, 2014 WL 12600502, at *1–2 (S.D. Fla. Oct. 28, 2014) (same); *Rudolph v. Beacon Indep. Living, LLC*, No. 3:11–CV–617–FDW–DSC, 2012 WL 2804114, at *2 (W.D.N.C. July 10, 2012) (same as to computer); *Levinson v. PSCC Servs., Inc.*, No. 3:09–cv–00269 (PCD), 2011 WL 13237886, at *4 (D. Conn. Nov. 10, 2011) (same as to computers and email accounts); *Peskoff v. Faber*, 251 F.R.D. 59, 60–61 (D.C.D. 2008) (same as to email account and other electronic records).

In denying Plaintiffs' request, the superior court repeatedly ignored the evidence and authorities presented by Plaintiffs. The court's initial order, entered without a hearing, provided no rationale for denying Plaintiffs' request. (A 697.) The

second order, also entered without a hearing, stated that Plaintiffs "merely assert[ed] bald allegations of misconduct," even though they cited deposition testimony expressly confirming that the misconduct had occurred and that Defendants' counsel were in possession of one of the devices containing stolen information. (A 1212, 774–75.) And the third order, which again was entered without a hearing and again failed to address the import of the deposition testimony, characterized a forensic inspection as "an extraordinary measure" that was "not appropriate" in this case, without articulating ***why*** it was not appropriate. (A 1329.) These orders were "clearly unreasonable" and "arbitrary." *Sibley*, 134 A.3d at 799.

In addition, Plaintiffs were "prejudice[d]" by the court's denial of their request for a forensic inspection. *See id*. The court's orders foreclosed relevant discovery that went to the heart of the issues in this case—namely, the theft of G&E's information, with AY's assistance, for AY's benefit. Ironically, the court later faulted Plaintiffs for "fail[ing] to identify any trade secrets" when the relief they requested would have further helped them do just that. (A 6375.)

On remand, Plaintiffs should be permitted to forensically inspect the devices and media used to misappropriate information from G&E.

VII. The Court erred in sanctioning Plaintiffs for renewing their motion for a forensic inspection.

Finally, the Court erred in sanctioning Plaintiffs for renewing their motion to compel a forensic inspection where additional evidence was uncovered after the

initial motion was denied that supported Plaintiffs' renewed motion. Contrary to Defendants' assertions before the superior court, this was not a situation in which Plaintiffs simply refused to take "no" for an answer. Plaintiffs made an initial motion that was denied without explanation. (A 71, 697.) ***Eight months later***, ***based on new evidence unavailable when Plaintiffs' original motion was filed***, they renewed their motion and were sanctioned for doing so. (A 699, 1212, 7828.) That new evidence included deposition testimony confirming that [redacted] (A 704, 736–39); and [redacted] (A 704, 769–71). ***Roehrenbeck further confirmed*** [redacted] (A 774–75.)

Since the superior court's denial of the renewed motion did not address the new evidence presented by Plaintiffs, and since the forensic-inspection issue was so critical to Plaintiffs' case, they sought reconsideration in a short, five-page motion. (A 1214.) They were again sanctioned. (A 1329, 1336, 7828.)

Under the rules, a court "must not" award sanctions to a party opposing a motion to compel if the motion "was substantially justified." D.C. Super. Ct. R.

37(a)(5)(B). Plaintiffs' renewed motion, and their motion to reconsider the denial of that motion, easily met this standard. The superior court abused its discretion in sanctioning Plaintiffs for filing those motions. *See Vernell*, 495 A.2d at 311.

CONCLUSION

For these reasons, Plaintiffs request the entry of an order (1) vacating the superior court's judgment, (2) reinstating Counts I through IV of the Complaint, (3) vacating the superior court's sanctions award, and (4) remanding the case to the superior court for further litigation, including with instructions to allow the forensic inspection requested by Plaintiffs.

Dated: January 3, 2022

Respectfully submitted,

By: */s/ Tina B. Solis*

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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2022, I caused a copy of the accompanying **Brief of Plaintiffs–Appellants (Redacted)** to be served via electronic filing and electronic mail on:

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REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

   (1) the acronym "SS#" where the individual's social-security number would have been included;
   (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
   (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
   (4) the year of the individual's birth;
   (5) the minor's initials; and
   (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Tina B. Solis
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21-cv-115, 21-cv-256, and 21-cv-256
Case Number(s)

January 3, 2022
Date