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

REPLY BRIEF OF PLAINTIFFS–APPELLANTS (REDACTED)

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INTRODUCTION

The evidentiary record presented to the superior court established that Defendants mounted a calculated, coordinated effort to transfer G&E's[1] entire Washington, DC-based commercial-real-estate practice, and its substantial goodwill, to AY by looting G&E's trade secrets, confidential information, transactions, clients, and employees. Faced with this record, the superior court improperly inverted the summary-judgment standard by resolving numerous disputed issues of fact in Defendants' favor.

As set forth in Plaintiffs' opening brief, the superior court's judgment should be reversed because:

(1) The superior court ignored the unrebutted factual record in Plaintiffs' statement of additional facts (Br. at 23–26);

(2) The record includes numerous examples of trade secrets that the superior court disregarded when it granted summary judgment sua sponte on the basis that Plaintiffs had not identified any trade secrets (*id*. at 26–35);

(3) Plaintiffs established a genuine issue of material fact regarding whether Defendants tortiously interfered with the restrictive covenants in the 2006 Broker Agreements and the 2011 Letter Agreements (*id*. at 35–42);

(4) Plaintiffs established a genuine issue of material fact regarding whether Defendants tortiously interfered with Plaintiffs' business expectancies by identifying 30 deals in the Team's

[1] Unless otherwise specified or redefined for clarity, defined terms have the same meaning as in Plaintiffs' opening brief.

G&E pipeline that the Team continued to work on—and closed—at AY after leaving G&E (*id*. at 42–44); and

(5) Plaintiffs established a genuine issue of material fact regarding whether Defendants conspired to expand AY's business by stealing G&E's proprietary information, personnel, and business opportunities, including by showing the Team members how to transfer files and contacts from G&E to AY and offering assistance from AY's outside IT vendor (*id*. at 44–46).

The superior court also should have granted Plaintiffs' request to forensically inspect the devices and media used to steal information from G&E on Defendants' behalf and should not have sanctioned Plaintiffs for renewing their request for a forensic inspection based upon newly discovered evidence. (*Id*. at 46–50).

Instead of acknowledging the flaws in the superior court's rulings, Defendants urge this Court to ignore the evidentiary record presented below and resolve the outstanding factual issues in their favor. (Resp. at 13–35, 53–58, 63–70.) This is not the correct standard: all inferences must be drawn in favor of Plaintiffs, not Defendants. In addition, Defendants seek to move the target altogether, asserting various alternative grounds for affirmance that the superior court did not address below. (*Id*. at 36–44, 52–53, 58–63.) Those arguments have no merit. For the reasons discussed in Plaintiffs' opening brief and this reply, this Court should reverse the superior court's judgment and remand this matter for further proceedings.

ARGUMENT

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

The superior court was required to assess the evidence submitted in opposition to Defendants' motion for summary judgment. It failed to do so. Instead, it focused on the sufficiency of the "allegations" in Plaintiffs' pleadings and briefs. (A 6373.)

For instance, in entering judgment on Plaintiffs' tortious-interference-with-business-expectancies claim, the superior court stated that Plaintiffs' "allegations" regarding "business relations with third parties" and the "thirty [G&E] deals in [the Team's] pipeline" were "unclear and insufficient to maintain a claim of tortious interference with prospective business advantage." (A 6373.) In reaching this conclusion, the court evaluated "allegations" rather than the underlying evidentiary record. (*Id.*) This was improper.

The record included a list of 30 specific pending transactions for which G&E was entitled to receive commissions. (A 3467.) It also included evidence explaining how Defendants tortiously interfered with those transactions, which usually take 18 to 24 months from start to finish, by providing the Team's brokers with financial incentives to hide the transactions from G&E and close them at AY for AY's benefit. (A 2312.) The superior court improperly disregarded this evidence.

This is just one example of the superior court's decision to ignore genuine factual disputes in the evidentiary record and instead rule on the pleadings. (*See also*

A 6363–65, 6367, 6370–76.) Even a cursory analysis of the court's summary-judgment order calls into question the court's purported review of "the entire record." (A 6363.) The court's decision to ignore the facts presented by Plaintiffs undermines the court's judgment and supports reversal.

Defendants' assertion that it was improper for Plaintiffs to submit a statement of undisputed facts has no merit. (Resp. at 13–15.) Plaintiffs' submission was proper and should have been considered by the superior court. (Br. at 24–26.) Rule 56 explicitly states that a response to a movant's statement of facts need only "correspond to the extent possible with the number of the paragraphs in the movant's statement." D.C. Super. Ct. R. 56(b)(2). If a nonmovant were constrained to respond only to the facts presented by the movant, whose incentive is to frame the facts in the light most favorable to its own case, then this one-sided rule would empower the movant to keep the nonmovant's strongest facts out of the record altogether.

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

A. Plaintiffs have sufficiently identified the trade secrets underlying their claim for trade-secret misappropriation.

Plaintiffs identified numerous trade secrets before the superior court, including client information, sales leads, a confidential policies-and-procedures manual (which is not the same as G&E's employee handbook), spreadsheets containing G&E's market assumptions, G&E's confidential financial information, confidential strategy and planning memoranda, pitch materials, client proposals, and

confidential compensation information. (Br. at 27–32.) These are the types of materials and information that courts have found to be trade secrets. (*Id.*) Indeed, these are the types of materials and information that ***Defendants have admitted are trade secrets*** in the commercial-real-estate industry. (Br. at 32–33; A 7688–89, 7139, 7619, 7708.) As is often true in trade-secret cases, whether the materials and information in question are, in fact, trade secrets is presumptively a question for a jury to decide. (Br. at 27–32.)

Given the superior court's holding below—a sua sponte ruling that Plaintiffs did not identify their trade secrets with sufficient particularity (A 6375–76)—Plaintiffs' showing that they identified specific trade secrets supports vacating the superior court's erroneous decision. Knowing this to be true, Defendants have pivoted to brand-new arguments and now contend that (1) Plaintiffs have failed to prove that the identified trade secrets are valuable and subject to reasonable efforts to maintain their secrecy (Resp. at 20–21), and (2) certain materials are not trade secrets (*id*. at 22–36). The Court should reject Defendants' arguments.

First, Defendants forfeited these arguments by not asserting them in their summary-judgment motion. (A 1446–50.) *See Nwaneri v. Quinn Emanuel Urquhart & Sullivan, LLP*, 250 A.3d 1079, 1082 (D.C. 2021) ("[This Court] ordinarily do[es] not consider issues raised for the first time on appeal.") (internal quotation marks

omitted); *CloseIt! Title Servs., Inc. v. Nadel*, 248 A.3d 132, 139 n.20 (D.C. 2021) ("[T]his court does not normally consider new arguments on appeal.").

Second, Defendants' arguments underscore the prejudicial nature of the superior court's sua sponte trade-secret ruling. Defendants did not move for summary judgment based on lack of value or secrecy, and the superior court did not enter judgment on these grounds. Instead, the superior court held—without any party seeking this relief and without any examination of the evidentiary record—that it was insufficient for Plaintiffs to "only describe[] these 'trade secrets' as names, customer[] data, purchase dates, lease renewal dates, and leads without ever going beyond these general descriptors." (A 6376.) The superior court made clear that it was entering judgment "[o]n this basis alone." (*Id.*)

Under the circumstances, Plaintiffs had no reason, either before the superior court or in their opening brief before this Court, to marshal all of their evidence or arguments regarding value and secrecy. It would be manifestly unjust and prejudicial to penalize Plaintiffs for not anticipating the need to compile an evidentiary record on issues that were never before the superior court. *See* D.C. Super. Ct. R. 56(f).

In addition, Defendants' value and secrecy arguments inappropriately seek to flip the burden of proof. At the summary-judgment stage, the initial burden was on Defendants, not Plaintiffs, to proffer evidence challenging whether the materials and information in question constitute trade secrets. *See Tolu v. Ayodeji*, 945 A.2d 596,

600 (D.C. 2008) (initial burden is on moving party). Plaintiffs had no obligation to present evidence on this issue until ***after*** Defendants met their initial burden. *See City Ctr. Real Estate, LLC v. 1606 7th St. NW, LLC*, 263 A.3d 1036, 1041 (D.C. 2021). Defendants never met that burden because they did not challenge the trade-secret status of any materials or information in their motion for summary judgment. (A1423–58.) Instead, they now ask this Court to determine, in the first instance, as a matter of fact, that certain documents are not trade secrets. This is improper.

Third, Defendants did not identify any ***evidence***, either before the superior court or in their opposition before this Court, demonstrating that business information identified by Plaintiffs is not a trade secret. Instead, they rely on bald assertions wholly unsupported by the record. (*See, e.g.*, Resp. at 22 (declaring that a spreadsheet simply "[redacted]"), 25 (declaring that there is nothing "secret" in the spreadsheet), 29 (declaring that a memorandum was shared widely within G&E), 32 (declaring that materials in the Roehrenbeck email were disclosed to third parties); 34 (declaring that an internal G&E memorandum is just "a basic description of a logistical timeline to transition services").) Where Defendants do bother to cite the record, it is done in a misleading manner.

For example, with regard to G&E's Policies and Procedures Manual, Defendants seek to mislead the Court into believing that one of Plaintiffs' executives testified that the Manual is of [redacted]." (Resp.

at 26.) As Defendants are well aware, that individual, Evan Denner ("Denner"), [redacted]. (A 7774–75.) Denner also testified, in the exact same colloquy quoted by Defendants, [redacted]." (A7773–74.) Defendants' argument that federal law prohibits the Manual from being kept confidential likewise fails. (Resp. at 26 n. 10.) The prohibition on which Defendants rely applies to employee handbooks, which contain information completely different from the type of sensitive internal operating information in the Manual.

Defendants likewise quote the testimony of Barry Gosin ("Gosin"), Newmark Group Inc.'s ("Newmark") CEO, to assert that a [redacted]. (Resp. at 23–24.) In doing so, they seek to distract the Court from all of the important proprietary information in the recruiting-analysis template—such as the specific components to be included in the analysis and the impact of those components on G&E's financial projections (*see* A 5126–28)—by emphasizing testimony regarding one narrow aspect of the spreadsheet. This misdirection deliberately ignores the evidence presented by Plaintiffs.

Elsewhere, Defendants resort to cherry-picking portions of documents, or simply misconstruing them, in order to support their arguments. This includes, for

example, emphasizing certain passages from the Manual to the exclusion of others, even though the Manual contains voluminous, detailed information on the [redacted]. (*See* Resp. at 25–28.)

Fourth, the record contains evidence affirmatively establishing the value of the trade secrets at issue and the measures undertaken to maintain their secrecy. Gosin testified at length regarding the type of information that qualifies as a trade secret in the commercial-real-estate industry, expressly stating that this information "[redacted]" so that it can be used "[redacted]." (*See* A 3224.) He also testified that [redacted]. (A 3241–43, 3279.) In addition, the evidence presented by Plaintiffs established that measures were taken to protect the secrecy of G&E's trade-secret information, including the restrictive covenants in the 2006 Broker Agreements and the 2011 Letter Agreements; the confidentiality provisions of the Manual, such as the provision requiring password protection of each network user's account; and Newmark's practice of disabling USB ports on its computers to prevent brokers and their staff from uploading or

downloading information to or from Newmark's network. (*See* A 2303–09, 3487–90, 3497–98, 3200.)

It is clear that the superior court erred when it ruled, sua sponte, that Plaintiffs failed to identify, with the requisite particularity, the materials they contend are trade secrets. Defendants never moved for summary judgment on the basis that the information at issue in this case does not constitute trade secrets. (A 1423–58.) They should not be allowed to pursue this argument now, in any form. However, even if the Court were to address this argument, Defendants' own admissions, coupled with the evidence presented by Plaintiffs, create genuine issues of material fact that preclude summary judgment.

B. Rule 56(f) requires reinstatement of Plaintiffs' trade-secret claim because Plaintiffs were not provided with "notice and a reasonable time to respond."

Alternatively, Plaintiffs' trade-secret claim should be reinstated because Plaintiffs were not provided with "notice and a reasonable time to respond" to the argument that they had failed to identify any trade secrets, as required by Rule 56(f). D.C. Super. Ct. R. 56(f). The superior court raised the trade-secret-identification issue sua sponte, and Plaintiffs were not given notice—and certainly not adequate notice—"that [they] had to come forward with all of [their] evidence" on this issue. *See Radbod v. Moghim*, 269 A.3d 1035, 1041 (D.C. 2022).

This Court's recent decision in *Radbod*, issued shortly after Plaintiffs filed their opening brief, makes clear that the lack of adequate notice is dispositive and mandates reversal. As this Court held:

> [Rule 56(f)] makes plain that a Superior Court judge has authority to grant summary judgment in favor of a party who has not requested it—or on a ground not advanced by any moving party—***only if the judge has provided the party against whom judgment would be entered notice of the possibility of an adverse pretrial determination of a claim or defense (and the grounds therefor) and a reasonable opportunity to present contrary evidence and argument.***

Radbod, 269 A.3d at 1042 (emphasis added). The rule "plays a critical access-to-justice role in the civil process by guaranteeing all litigants meaningful notice and a fair opportunity to defend the legal sufficiency of their claims and defenses before judgment can be entered against them." *Id.* "It is therefore essential that the preconditions to the sua sponte entry of a summary judgment order set forth in the rule be ***strictly enforced***." *Id.* (emphasis added).

Here, Defendants did not assert that the documents at issue did not rise to the level of a trade secret (A 1423–58), and Plaintiffs had no notice whatsoever that they needed to marshal all of their trade-secret evidence in order to survive summary judgment. Plaintiffs were blindsided when the superior court raised this issue on its own and were deprived of their right to present their evidence. (*See* A 6599–601.)

Defendants argue that Plaintiffs invited the superior court to rule on the existence of trade secrets. (Resp. 16–19.) They are wrong. In their response to

Defendants' motion for summary judgment, Plaintiffs merely argued that, as a general matter, cases involving trade-secret misappropriation present fact-driven inquiries that cannot be resolved on summary judgment. (A 2200–02.) In support of this contention, Plaintiffs asserted that whether material constitutes a trade secret is a question of fact. (A 2201.) In doing so, they did not request or invite a ruling on whether they had evidence to support the existence of trade secrets or whether particular materials constituted trade secrets. (*See* A 2200–02.) They merely pointed out that Defendants did ***not*** move for summary judgment on this basis. (*See id*.)

Defendants' reliance on *Thomas v. District of Columbia*, 942 A.2d 1154 (D.C. 2008), is misplaced. (Resp. at 18.) *Thomas*, and the other related cases Defendants cite, predate the new version of Rule 56(f) and are thus inapplicable. Moreover, in *Thomas*, this Court ruled that the plaintiff was not prejudiced by lack of notice since his damages claims failed "not for lack of evidence, but for lack of law." *Thomas*, 942 A.2d at 1158–59; *see also Night & Day Mgmt., LLC v. Butler*, 101 A.3d 1033, 1038 (D.C. 2014) (noting that *Thomas* was based on a lack of prejudice).

Here, the superior court's ruling was based on a purported lack of evidence, not on the absence of supporting law. (A 6374–76.) As a long line of federal cases makes clear, this is an important distinction. *See, e.g.*, *Artistic Ent., Inc. v. City of Warner Robins*, 331 F.3d 1196, 1201 (11th Cir. 2003) (distinguishing "between sua sponte grants of summary judgment in cases involving purely legal questions based

on complete evidentiary records, and cases involving factual disputes where the non-moving party has not been afforded an adequate opportunity to develop the record"); *see also id.* at 1202 n.11 (collecting additional cases). Further, Plaintiffs were severely prejudiced by the court's failure to comply with Rule 56(f), as demonstrated by the substantial evidence they subsequently submitted—and the superior court subsequently ignored—in connection with their motion to alter or amend the judgment. (A 7124, 7127–38, 7196–223, 7334–594, 7595–730, 7836–37.) *Thomas* does not apply, and the superior court's sua sponte ruling should be reversed.

C. There is no basis for judicial estoppel.

Defendants' judicial-estoppel argument should be rejected for four reasons. *First*, Defendants do not—and cannot—point to any contradictory positions ***taken by Plaintiffs***, as would be required for judicial estoppel to apply. *See Dennis v. Jackson*, 258 A.3d 860, 864 (D.C. 2021) ("[W]here a party successfully assumes a certain position in a legal proceeding, ***that party*** may not subsequently assume a contrary position in a different proceeding.") (emphasis added). Instead, Defendants incorrectly assert that G&E—the ***debtor*** in the bankruptcy action—took a contradictory position. (A 3833, 3889 (establishing that G&E was the debtor).) Even assuming that G&E would be judicially estopped (which it would not be), this does not support judicially estopping Plaintiffs, the innocent bona fide purchasers of certain G&E assets. (A 3833, 3889, 3896–99.) *See Reed v. City of Arlington*, 650

F.3d 571, 573–79 (5th Cir. 2011) (a debtor's failure to disclose an asset constitutes postpetition misconduct that does not give rise to judicial estoppel against other innocent parties). (*See also* A 3909–3912 (establishing that BGC was a purchaser of G&E's assets, not a corporate successor of G&E).)

Under bankruptcy law, it is the ***debtor's*** duty to disclose its assets in bankruptcy proceedings, not the duty of the entity purchasing the debtor's assets. *See* 11 U.S.C. § 521(1) ("The ***debtor*** shall file a list of creditors and unless the court orders otherwise a schedule of assets and liabilities.") (emphasis added). Any omission from G&E's bankruptcy schedules cannot be attributed to Plaintiffs—independent third parties that paid valuable consideration for certain assets, and materially increased the value of the bankruptcy estate by millions of dollars, for the benefit of G&E's creditors. *See Reed*, 650 F.3d at 573 ("absent unusual circumstances," a debtor's failure to include claims on a bankruptcy schedule does not result in judicial estoppel against another party); *cf. In re Coastal Plains, Inc.*, 179 F.3d 197, 202–03, 212 (5th Cir. 1999) (judicial estoppel only applied where the successor was neither innocent nor a bona fide purchaser, and the successor's recovery would benefit the individual who actually perpetrated the bankruptcy fraud in great disproportion to the bankruptcy estate).

Second, judicial estoppel does not apply when an omission from a bankruptcy schedule resulted from mistake or inadvertence. *See, e.g.*, *New Hampshire v. Maine*,

532 U.S. 742, 753 (2001); *Ryan Operations G.P. v. Santiam–Midwest Lumber Co.*, 81 F.3d 355, 364 (3d Cir. 1996) (stating that "careless or inadvertent nondisclosures" will not be treated "as equivalent to deliberate manipulation when administering the 'strong medicine' of judicial estoppel"). Here, there is no evidence in the record showing that, at the time the schedules were filed, G&E was aware of the claims Plaintiffs are now pursuing. This is understandable, given the efforts Defendants took to conceal their misconduct. While Defendants assert that Plaintiffs had knowledge of the claims five months *after* the bankruptcy court approved the sale (Resp. at 38), this says nothing about what, if any, knowledge G&E had at the time G&E filled out its bankruptcy schedules, *before* the bankruptcy court's approval. Nor is there any basis to find that G&E—a debtor selling its assets, including the claims at issue here—had a motive to conceal the claims, as is required for judicial estoppel. *See Browning v. Levy*, 283 F.3d 761, 776 (6th Cir. 2002) (finding judicial estoppel inappropriate where debtor did not have any motive to conceal the claims).

Third, even if G&E had intentionally omitted references to its trade secrets (which it did not do), this would not be enough to trigger judicial estoppel given the sensitive nature of trade secrets and the need to protect them from the public domain. *See Corp. Claims Mgmt., Inc. v. Shaiper (In re Patriot Nat'l Inc.)*, 592 B.R. 560, 573 (D. Del. 2018) (debtor not judicially estopped from asserting trade-secret claim after failing to disclose trade secrets on bankruptcy schedule where the "entire purpose in

reorganization [was] the preservation of any going-concern value throughout the bankruptcy case," and disclosing trade secrets would diminish that value).

In addition, G&E explicitly reserved its rights with regard to excluded intellectual property and undiscovered claims in the global notes to its bankruptcy disclosures (the "Global Notes"). (A 3929–31.) The Global Notes were before the bankruptcy court when it approved the Asset Purchase Agreement ("APA") in 2012. (A 3928–37.) They state, in relevant part, that, "[d]espite reasonable efforts, the Debtors may not have identified and/or set forth all of their (filed or potential) causes of action against third parties as assets in their Schedules and Statements." (A 3921.) They also state that "[t]he Debtors reserve all of their rights with respect to any causes of action against third parties[,] and nothing in the Global Notes or the Schedules and Statements shall be deemed a waiver of any such causes of action." (*Id*.) The Global Notes insulate Plaintiffs from judicial estoppel.

Fourth, for judicial estoppel to apply, there must be evidence to support a finding that, absent judicial estoppel, G&E or Plaintiffs will gain an unfair advantage, or Defendants will suffer an unfair detriment. *See Freeman v. MedStar Health Inc.*, 185 F. Supp. 3d 30, 38 (D.D.C. 2016) (denying judicial estoppel where the defendants failed to identify how the plaintiff would derive an unfair advantage or how an unfair detriment would be imposed on the defendants); *1303 Clifton St., LLC v. D.C.*, 39 A.3d 25, 35 (D.C. 2012) (same). No such evidence exists here.

D. Plaintiffs established a genuine issue of material fact regarding Defendants' misappropriation of Plaintiffs' trade secrets.

Plaintiffs have presented evidence that Defendants misappropriated G&E's trade secrets. As a threshold matter, and contrary to Defendants' assertions, Plaintiffs are not required to prove that Defendants used improper means to obtain G&E's trade secrets (though, as discussed below, Plaintiffs have done so). Rather, misappropriation occurs if there is evidence that Defendants had reason to know that the trade secrets were (1) "[d]erived from or through a person who had utilized improper means to acquire [them]"; (2) "[a]cquired under circumstances giving rise to a duty to maintain [their] secrecy or limit [their] use"; or (3) "[d]erived from or through a person who owed a duty to the person seeking relief to maintain [their] secrecy or limit [their] use." D.C. Code § 36–401.

Here, there is ample evidence that Defendants (1) used or disclosed G&E's trade secrets (A 5904–16); (2) knew the trade secrets were obtained from G&E by individuals who had contractual or fiduciary obligations to maintain their secrecy or limit their use, such as [redacted] (A 2303–07, 2327–2328, 4149–55); and (3) knew that these individuals breached contractual and fiduciary obligations in obtaining and using the materials (*id.*). As a result, Plaintiffs have evidence to support a valid misappropriation claim, regardless of whether Defendants themselves used improper means to acquire the information.

In any event, Defendants did use improper means to acquire the trade secrets. The DCUTSA defines "improper means" as "theft, bribery, misrepresentation, breach or inducement of a breach of duty to maintain secrecy, or espionage through electronic or other means." D.C. Code § 36–401(1). The statute's definition is not an exhaustive list of what constitutes "improper means." *DSMC, Inc. v. Convera Corp.*, 479 F. Supp. 2d 68, 79 (D.D.C. 2007). "More generally, 'improper means' has been defined as those means that 'fall below the generally accepted standards of commercial morality and reasonable conduct.'" *Id.*

Here, Defendants acquired numerous G&E trade secrets through [redacted] breaches of their contractual and common-law duties. (A 2295–303, 2323–29.) The latter arose from the fiduciary duties of loyalty that [redacted]. *See Nat'l R.R. Passenger Corp. v. Veolia Transp. Servs., Inc.*, 592 F. Supp. 2d 86, 94–95 (D.D.C. 2009) ("Generally, fiduciary principles are applicable to employees."); Restatement (Third) of Agency § 8.05 (an agent has a duty "not to use property of the principal, and "not to use or communicate confidential information of the principal[,] for the agent's own purposes or those of a third party"). Defendants, through G&E's former executives, were aware of these duties yet assisted the brokers in stealing G&E's trade secrets and transferring them to AY. (A 2323–29, 4149–55.) This constituted "improper means" under the DCUTSA. *See, e.g., Seneca*

Cos., Inc. v. Becker, 134 F. Supp. 3d 1148, 1154–55 (S.D. Iowa 2015) ("Because [the Iowa Uniform Trade Secrets Act] defines improper means to include breach of a duty to maintain secrecy it [was] . . . reasonable to conclude that a disclosure by [an employee] to [a new employer] in breach of [the employee's] duty [to the plaintiff] [was] a disclosure by improper means, and hence that [the new employer's] acquisition of the information would necessarily be by improper means.")

Furthermore, Plaintiffs have shown that Defendants' compensation arrangement with the Team constituted "improper means" under the DCUTSA. Under the terms of the Team's deal with AY, the brokers received [redacted]. (A 2312, 4535–36, 2330–2333.) Defendants knew that, to close the deals, the Team's members needed as many transactional materials as they could lay their hands on, regardless of whether the materials were G&E's protected information. Defendants therefore facilitated the theft of these materials from G&E. (A 2327–28, 4149–55).

Finally, even if Defendants themselves did not directly use improper means (which they did), they remain accountable under the doctrine of respondeat superior for the conduct of [redacted]. The doctrine of respondeat superior is widely recognized in the District of Columbia. *See, e.g.*, *Blair v. Dist. of Columbia*, 190 A.3d 212, 225 (D.C. App. 2018); *Brown v. Argenbright*

Sec., Inc., 782 A.2d 752, 757 (D.C. App. 2001) (same); *see also Weinberg v. Johnson*, 518 A.2d 985, 988 (D.C. 1986). Although courts within the District of Columbia have not yet applied respondeat superior to claims for trade-secret misappropriation, multiple courts in other jurisdictions have done so. In fact, the majority position is that, under state-specific equivalents of the Uniform Trade Secrets Act, a plaintiff may assert liability under the doctrine of respondeat superior if an employee misappropriates trade secrets while acting within the scope of his or her employment. *See, e.g. Newport News Indus. v. Dynamic Testing, Inc.*, 130 F. Supp. 2d 745, 754 (E.D. Va. 2001) (acknowledging respondeat superior liability under Virginia Uniform Trade Secrets Act ("VUTSA")); *Manitowoc Cranes LLC v. Sany Am. Inc.*, Case Nos. 13–C–677 & 15–C–647, 2017 WL 6327551, at *5 (E.D. Wis. Dec. 11, 2017) (collecting cases); *Advanced Fluid Sys., Inc. v. Huber*, 295 F. Supp. 3d 467, 486 (M.D. Pa. 2018) (collecting cases).

Under the doctrine of respondeat superior, an employer is responsible for the conduct of an employee who uses a trade secret after acquiring it, regardless of whether the employer knew anything about the information's acquisition. *See Newport News*, 130 F. Supp. 2d at 754. Here, the evidence shows that [redacted]. (A 2323–29, 5898–916, 5918–6017.)

Defendants nevertheless contend that the employees were acting outside the scope of their employment because they signed agreements forbidding them from bringing or using confidential information from their prior employers. (Resp. at 43.) As other courts have found, this argument is meritless. *See, e.g.*, *MicroStrategy Inc. v. Bus. Objects, S.A.*, 331 F. Supp. 2d 396, 418 (E.D. Va. 2004) (rejecting the same scope-of-employment argument Defendants raise here). "One can act in the scope of one's employment even if the specific acts performed are explicitly forbidden by the employer, so long as the act was intended to further the employer's interests rather than being wholly motivated by personal interest." *Id.*; *see also Adams Express Co. v. Lansburgh & Bro.*, 262 F. 232, 233 (D.C. Cir. 1920). Thus, it is irrelevant whether Defendants sought cover for their misconduct by [redacted]. Moreover, Defendants knew that [redacted]. (A 2328–29, 5898–916, 5918–6017). On its own, this fact precludes a finding that the employees were working outside the scope of their employment. Defendants are fully liable for this misconduct.

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

A. Genuine issues of material fact exist regarding Plaintiffs' tortious-interference-with-contract claim.

As an initial matter, Defendants' assertion that Plaintiffs did not develop their argument about restrictive covenants until Plaintiffs filed their motion to alter or

amend the judgment is false. (Resp. at 47; A 2188–92, 2202–23.) So, too, is their assertion that Plaintiffs did not identify the covenants they contend were breached. (Resp. at 47–48 & n.22; A 2188–92, 2202–23.)

Defendants knowingly induced [redacted]. (A 2188–2192, 2202–2223.) They did not simply hire brokers away from G&E, as the superior court wrongly concluded. (A 6370–71.) For example, despite being keenly aware of the brokers' contractual obligations (A 2188–89, 2191, 2303, 2307, 2308, 3359–60, 3383–86, 3391–93), Defendants [redacted] (A 2193, 2195–2197, 2202–03, 2210–13, 2219, 2222, 2323, 2328–29, 4148–51, 4152–55, 3423–26, 3437–39, 5910–16, 5917–6017). They also induced the brokers to breach their nonsolicitation obligations by having [redacted]. (A 2208–10, 2213, 2219–20, 2222, 2303–07, 491–92, 2311, 2584–85, 3324–25, 4079–81, 2318.) In addition, Defendants induced the brokers to breach their contractual transaction-in-progress obligations—obligations that [redacted]

[redacted]. (A 2190, 2197–99, 2207–08, 2220, 2222–23, 2332, 3405–09, 3413–20.)

The superior court did not consider any of this evidence. Instead, it incorrectly characterized Plaintiffs' claim as limited to Defendants' hiring of G&E's brokers, ruling that Defendants were entitled to hire whomever they chose. (A 6367–71.)

Defendants urge this Court to make the same mistake. They argue that their "decision to hire the broker Team was driven by economic self-interest" and that there is nothing to suggest they "hired brokers out of spite, malice, or some other improper objective." (Resp. at 49, 50, 51 (internal quotation marks omitted).) These arguments, which ignore the Team's and the Staff's violation of the restrictive covenants in their employment agreements, are completely irrelevant, as is the argument that Plaintiffs were required to prove that, but for Defendants' inducement, the Team would have stayed at G&E (*id*. at 53), a false premise that does not reflect the applicable standard and would allow any employee induced to breach an employment agreement to defeat a tortious-interference claim by testifying that they would have left their old employer regardless of their new employer's conduct.

Defendants' other arguments likewise fail. The law is clear: an at-will employment contract—particularly one with restrictive covenants—can serve as the basis for a tortious-interference claim. *Accord Newmyer v. Sidwell Friends Sch.*, 128

A.3d 1023, 1039 (D.C. 2015); *Legal Tech. Grp., Inc. v. Mukerji*, No. CV 17–631 (RBW), 2019 WL 9143477, at *14–28, 30 (D.D.C. June 10, 2019); *Robert Half Int'l Inc. v. Billingham*, 317 F. Supp. 3d 379, 383–84 (D.D.C. 2018) ("*Billingham II*"). As the Court explained in *Billingham II*, when a claim is for tortious interference with restrictive covenants, it does not matter whether the employment is at will. *Billingham II*, 317 F. Supp. 3d at 838-84. The issue is interference with restrictive covenants that survive the employment, not interference with the at-will employment of the former employee. *Id.* The same is true here.

Defendants' argument that Plaintiffs have failed to demonstrate intentional procurement of a breach likewise has no merit. (Resp. at 49–50.) The record shows that Defendants engaged in an active and deliberate campaign to loot G&E by any means necessary. This included, among other things, [redacted]. (*See supra* pp. 22–23.) This conduct unquestionably creates genuine issues of material fact regarding whether Defendants intentionally procured the brokers' breaches of contract. *See Mukerji*, 2019 WL 9143477 at *17. A jury should decide these issues.

Defendants next argue that their behavior constituted privileged competitive activity aimed at furthering their economic interests. (Resp. at 50–51.) By Defendants' logic, one competitor could interfere with another whenever it is in the former's financial interest to do so. Under this flawed approach, a cause of action for tortious interference with contract would not exist at all.

In reality, Defendants had no protected interest in the confidential information they induced the brokers to steal or in convincing the brokers to breach their restrictive covenants. *Id*. at *17, 20, 27 (finding that a competitor has no legal interest in procuring the breach of a restrictive covenant). Indeed, the Restatement comment on which Defendants rely for the proposition that competition is a legal justification makes clear that they had no legal basis for inducing the breach of the brokers' restrictive covenants. *See* Restatement (Second) of Torts § 768 cmt. i (when there is an at-will employment contract, "a defendant engaged in the same business might induce the employee to quit his job, but ***he would not be justified in engaging the employee to work for him in an activity that would mean violation of the contract not to compete***") (emphasis added). (*See also* Resp. at 51 n.27 (citing cmt. i).) Further, there is no basis to dispute that theft and conversion, which Defendants not only condoned but incentivized, constitute wrongful means under the law. *See Mukerji*, 2019 WL 9143477 at *17, 20, 27; Restatement (Second) of Torts § 767 cmt. c ("Conduct specifically in violation of statutory provisions or contrary to

established public policy may for that reason make an interference improper."); *see also ASDI, Inc. v. Beard Rsch., Inc.*, 11 A.3d 749, 751 n.4 (Del. 2010). Defendants' conduct does not qualify as privileged competitive activity.

Notably, the superior court did not rule that Defendants had a recognized interest in inducing the brokers to breach their restrictive covenants and steal confidential information. It merely ruled that Defendants had a privilege to hire the brokers—a ruling that has no bearing on Plaintiffs' actual claims. (A 6370–71.) Nor did the superior court rule, as Defendants incorrectly suggest, that the brokers were entitled to take all the confidential information they stole or breach their restrictive covenants. (*See* Resp. at 48 n.22, 50 n.25.) On the contrary, the record establishes that the brokers were not entitled to take the material they misappropriated and that their restrictive covenants remained in force after they terminated their employment with G&E and joined AY. (A 2303–12.)

Finally, Defendants' assertion that Plaintiffs' claim is preempted under the DCUTSA to the extent it is based on the theft of confidential information is belied by the plain text of the statute itself, which states that the act "does not affect . . . [o]ther civil remedies that are not based upon misappropriation of a trade secret." D.C. Code § 36–407; *accord Stone Castle Fin., Inc. v. Friedman, Billings, Ramsey & Co.*, 191 F. Supp. 2d 652, 659 (E.D. Va. 2002) (plain language of the VUTSA dictated that the statute does not displace claims based on non-trade secrets); *E.I.*

DuPont de Nemours & Co. v. Kolon Indus., Inc., 688 F. Supp. 2d 443, 453 (E.D. Va. 2009) (tortious-interference claims premised on theft of confidential, non-trade-secret information are not preempted by the VUTSA); *DSMC*, 479 F. Supp. 2d at 84 (looking to the VUTSA to interpret the DCUTSA's preemption provision).

B. Plaintiffs have standing to assert their tortious-interference claim.

Courts in Illinois and Nevada have already rejected Defendants' standing argument. (A 24, 5/10/19 Dkt. Entry, Pls.' Reply, Ex. Q, 8/2/16 Order at 2, 3; *BGC Partners, Inc. v. Avison Young (Canada) Inc.*, No. 2:15–cv–00531–RFB–GWF, 2018 WL 3058860, at *5 (D. Nev. June 20, 2018).) This Court should do the same.

In arguing that Plaintiffs lack standing to prosecute their tortious-interference-with-contract claim (Resp. at 52), Defendants ignore two central uncontested facts. *First*, Plaintiffs' claims accrued *prior to* the filing of the bankruptcy petition—and *prior to* the rejection of any contracts during the bankruptcy proceeding—and thus fall beyond the reach of the contract-rejection process applicable to the bankruptcy.

A claim accruing prior to the filing of a bankruptcy petition becomes a freely transferable part of the debtor's bankruptcy estate. *See* 11 U.S.C. § 541(a)(1) (bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case"); *Vieira v. Anderson (In re Beach First Nat'l Bancshares)*, 702 F.3d 772, 776 (4th Cir. 2012). In addition, any actionable conduct that occurs before the date a contract is rejected remains actionable. *See* 11 U.S.C. §

365(a); *United States ex rel. U.S. Postal Serv. v. Dewey Freight Sys.*, 31 F.3d 620, 624 (8th Cir. 1994). (*See also* A 3833 (assigning to BGC "all of [G&E's] right, title and interest in, to and under the Acquired Assets existing as of the Closing *regardless of whether any such Acquired Assets existed before, on or after the commencement of the Chapter 11 Case*") (emphasis added).)

G&E filed its bankruptcy petition on February 20, 2012, and rejected certain contracts on January 4, 2013. (A 4125, 2096.) Before either of these events, the Team had already resigned, diverted information and business opportunities from G&E to AY, and solicited G&E's personnel to work at AY, all with Defendants' knowledge and participation. (A 2303–33.) Since the tortious-interference claim accrued before the bankruptcy was filed and before any contracts were rejected, it became part of the bankruptcy estate that Plaintiffs acquired under the APA.

Second, the Team resigned on February 13, 2012, *prior to* G&E's bankruptcy filing and *prior to* the rejection of any contracts. (A 2310–12.) As a result, by the time of the bankruptcy filing, the Team's contracts were no longer executory contracts subject to Section 365 of the Bankruptcy Code and therefore were not subject to rejection under that section. *See In re Hughes*, 166 B.R. 103, 105 (Bankr. S.D. Ohio 1994) (where employee terminates employment pre-bankruptcy, restrictive covenants in employment agreement are not executory contract subject to rejection under Section 365); *In re Hawes*, 73 B.R. 584, 586 (Bankr. E.D. Wis. 1987)

(same); *see also Hoffinger Indus., Inc. v. Rinehart (In re Hoffinger Indus., Inc.)*, 308 B.R. 362, 387–88 (Bankr. E.D. Ark. 2004); *In re Kemeta, LLC*, 470 B.R. 304, 324 (Bankr. D. Del. 2012); *Consol. Oil & Gas, Inc. v. Sun Oil Co. of Penn.*, 16 B.R. 490, 494 (D. Colo. 1981); *In re Murtishi*, 55 B.R. 564, 568 (Bankr. N.D. Ill. 1985).

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

Plaintiffs identified 30 deals in the Team's G&E pipeline that Defendants tortiously interfered with. (*See* A 3467 (listing deals).) These deals, which typically take 18 to 24 months from start to finish (A 2330), were the ones actually in progress at the time the Team left G&E for AY and to which G&E was contractually entitled to commissions upon closing, regardless of whether the Team was still at G&E. The superior court ignored Plaintiffs' evidence, ruling that they had not specified the business expectancies supporting their claim. (A 6372–73.)

Recognizing the infirmity of the superior court's order, Defendants seek to obfuscate the issues before this Court, asserting that Plaintiffs have not (1) identified which clients, if any, the Team was prohibited from taking with them or (2) proved that any of the clients would have stayed with G&E through the bankruptcy. (Resp. at 54.) Both contentions are irrelevant.

Regardless of whether the clients stayed with G&E or went with the Team to AY, G&E was entitled to receive its share of any commissions on deals that were pending at the time the Team left G&E. (A 490, 2330–31, 3399–401, 3408, 6048–

50.) Likewise, G&E was entitled to receive these commissions for pending deals regardless of whether the Team was entitled to take the clients with them. (*Id*.) What matters is that Defendants interfered with G&E's expectancies—and commissions—by inducing the brokers not to disclose the deals to G&E, to close them at AY, and to allow AY to retain the commissions to which G&E was contractually entitled.

Defendants suggest there is no evidence that they induced the brokers to breach their obligation to pay G&E its percentage of the commissions. (Resp. at 54.) This is false. Defendants were aware the Team had a large number of G&E deals they intended to close at AY and were also on notice the Team wanted to hide these deals from G&E. (A 2332, 3464–72, 3450–52, 3405–07, 6048–50.) Defendants convinced McNair and Morris [redacted]. (A 2332, 3405–09, 3413–20.) And Defendants did nothing to prevent the brokers from diverting the commissions from G&E to AY. (A 2330–33, 3405–09, 3413–20.) On the contrary, they accepted commission payments they knew, or should have known, were owed to G&E. (A 2330–33, 3405–09, 3413–20, 6077.)

Further, despite presuming that the brokers would not make any money during the first six months of their tenure with AY, given that commissions on the brokers' pending deals were owed to G&E, Defendants [redacted]. (A 2222, 2225, 2312, 2330–33, 3399–3401,

4535–36.) Specifically, they offered the Team—whom Defendants expected to earn [redacted]. (A 2222, 2225, 2312, 2330, 3399, 4535–36.) The purpose of this bonus was to [redacted]. This evidence creates a genuine issue of material fact regarding whether Defendants induced the brokers to violate their obligation to pay commissions on the pending deals to G&E.

V. Plaintiffs' conspiracy claim should be reinstated.

As discussed above, Plaintiffs have established the elements of the tortious-interference claims on which their conspiracy claim is partly based. (*Supra* Parts III–IV.) In addition, Defendants gloss over, and the superior court never addressed, the fact that Defendants conspired, both among themselves and with the brokers, to breach the brokers' fiduciary duties. From 2008 to 2012, AY, [redacted]. (A 2292–95.) In doing so, they blatantly disregarded the brokers' contractual restrictions and fiduciary duties, as well as G&E's bankruptcy stay. (A 2295–2303, 2323–29, 2335–37.)

The Team played a central role in Defendants' scheme, generating substantial revenue for AY's new Washington, DC, office. (A 2331–33.) As a result, Defendants obtained a high-functioning office, and the Team obtained a revenue stream they otherwise would have forfeited to G&E's bankruptcy estate. Based on these considerations, Plaintiffs' conspiracy claim should be reinstated.

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

Plaintiffs have proved—and Defendants do not deny—that Defendants misappropriated G&E's information and documents. Indeed, Defendants have conceded that the Team transferred their [redacted]. (A 149, 170, 699.) They also concede that the Team *used G&E's stolen information* while employed by AY. (A 729, 735, 767.)

Despite these admissions and the overwhelming, undisputed evidence presented to the superior court (*see, e.g.*, A 2323–28, 2605–08, 2612, 2624, 2325, 3105–06, 3109, 4092–93, 4149–51, 4153–55, 3423–26, 3185–86, 3191), the superior court denied Plaintiffs' motion for a forensic inspection, preventing Plaintiffs from exposing the full extent of Defendants' misconduct.

This ruling was arbitrary and unreasonable and should be reversed. A forensic inspection would allow Plaintiffs to confirm what other G&E documents and information Defendants misappropriated, how G&E's materials were transferred to

AY, who transferred the materials to AY, when the materials were transferred, who has since accessed the materials, and where the materials are stored.

Tellingly, Defendants misrepresent the nature of the relief requested by Plaintiffs. (Resp. at 65.) To be clear, Plaintiffs seek a limited forensic inspection focused on the ***G&E-related materials*** in Defendants' possession, not a generalized inspection of Defendants' entire computer network. In addition, Plaintiffs offered to have the inspection performed at their own expense, in accordance with an appropriate forensic-review protocol, to minimize any burden on Defendants and protect any private or privileged information from disclosure. (A 705.)

The fact that Defendants may have searched for and produced a limited set of documents from the data-storage sources at issue does not address these concerns. (Resp. at 68.) Defendants' resistance to a forensic inspection, and the superior court's refusal to allow one, were "unreasonable." *See, e.g.*, *Priority Payment Sys., LLC v. Signapay, LTD*, 161 F. Supp. 3d 1294, 1298, 1304–05 (N.D. Ga. 2016).

Notably, in denying Plaintiffs' motion, the superior court applied the wrong standard, incorrectly requiring Plaintiffs to show that evidence was withheld or destroyed. (A 7043.) Without conducting a forensic inspection, Plaintiffs cannot identify what other documents Defendants have "with[held]," "hid[den]," or "destroyed." (Resp. at 68.) For good reason, this is not what the law requires. A party seeking a forensic inspection is only required to show a "sufficient nexus" between

its claims and the need to conduct a forensic inspection, coupled with "discrepancies" or "inconsistencies" in the other party's discovery responses. *See Genworth Fin. Wealth Mgmt., Inc. v. McMullan*, 267 F.R.D. 443, 448 (D. Conn. 2010); *White v. Graceland Coll. Ctr. for Prof'l Dev. & Lifelong Learning, Inc.*, No. 07–2319–CM, 2009 WL 722056, at *7 (D. Kan. Mar. 18, 2009); *Ameriwood Indus., Inc. v. Liberman*, No. 4:06 CV 524 DJS, 2006 WL 3825291, at *4 (E.D. Mo. Dec. 27, 2006). Plaintiffs have satisfied this standard by showing that the Team [redacted] and that, although Defendants admittedly have possession of this information, they refuse to produce it.

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

As set forth in Plaintiffs' opening brief, their renewed motion for a forensic inspection was substantially justified, as was their motion to reconsider. (Br. at 48–50.) Newly discovered evidence clearly showed that Defendants had possession of G&E's proprietary information and that they helped the Team and Staff transfer the information to AY. (A 703, 704, 730, 736–39, 769–71, 774–75.) Since the superior court, in denying Plaintiffs' renewed motion, either ignored or misunderstood the significance of this new evidence, as shown by its finding that there was no "new evidence" (A 1212), Plaintiffs were substantially justified in moving for reconsideration to give the court an opportunity to correct its erroneous ruling.

Defendants do not contest the existence of Plaintiffs' new evidence. Instead, they simply repeat the superior court's erroneous findings. (Resp. at 68–70.) As discussed, those findings are unsupportable. Since Plaintiffs' motions were substantially justified, the superior court erred in sanctioning Plaintiffs. *See* D.C. Super. Ct. R. 37(a)(5)(B); *Vernell v. Gould*, 495 A.2d 306, 311 (D.C. 1985).

VIII. Plaintiffs' claims are not precluded.

Defendants argue that the Court can affirm the superior court's ruling based on preclusion from a summary-judgment order entered in favor of Avison Young–Washington, DC, LLC ("AY DC"), in *G&E Real Estate, Inc. v. Avison Young–Washington, D.C., LLC*, 168 F. Supp. 3d 147 (D.D.C. 2016) (the "ANSER Case"), and a nonfinal dismissal in a New York case. (Resp. at 56–63.) They are incorrect.

A. The superior court properly rejected Defendants' preclusion arguments regarding the ANSER Case.

Defendants' preclusion arguments regarding the ANSER Case fail for three reasons. *First*, this case and the ANSER Case involve different claims:

- In the ANSER Case, the plaintiff alleged that AY DC tortiously interfered with G&E's tenant-representation agreement with ANSER. *G&E Real Estate*, 168 F. Supp. 3d at 160. Here, by contrast, the tortious-interference-with-contract claim is based on Defendants' interference with G&E's contracts with its brokers. (A 49–50.)

- In addition, in the ANSER Case, "the parties stipulated that the claimed trade secrets were limited to the information that was passed to [Josh] Peyton [("Peyton")] through his collaboration with [G&E]" on the ANSER transaction. *Id*. at 166. In this case,

the scope of the misappropriation is broader, covering much more than the ANSER transaction. (A 51–53.)

- Furthermore, in the ANSER Case, the plaintiff alleged a conspiracy involving Peyton, McNair, Roehrenbeck, and ANSER to divert the ANSER transaction from G&E to AY. *Id*. at 167–68. Here, by contrast, Plaintiffs allege, and have adduced evidence to support, a broad-based conspiracy among AY's senior executives, the Team, and the Staff to "loot" G&E's "commissions, personnel, offices, business, trade secrets, and Business Opportunities" in the District of Columbia. (A 51.)

- Finally, unlike the ANSER Case, this case involves a claim for tortious interference with prospective business relations. (A 50–51.) And the court in the ANSER Case applied Virginia law, not District of Columbia law, which applies here. *See id*. at n.10, 160, 161, 166, 167 (applying Virginia law).

Second, the cases involve different parties. Newmark and G&E Real Estate Inc. ("G&E Real Estate") are not identical or in privity with one another, because they do not "represent[] *precisely the same legal right* in respect to the subject matter of the case." *Patton v. Klein*, 746 A.2d 866, 870 (D.C. 1999) (emphasis added). As Plaintiffs have previously explained (*see* A 24, 3/16/18 Dkt. Entry, Pls.' Reply, at 13), BGC transferred its equity interest in G&E Real Estate to Newmark; it did not transfer G&E Real Estate's interest in any litigation to Newmark. As a result, the parties do not represent "precisely the same legal right." *Id*.

The same analysis applies to the defense side of the litigation. The defendants in the ANSER Case are AY DC, ANSER, McNair, Roehrenbeck, and Peyton. *See G&E Real Estate*, 168 F. Supp. at 149–50. The defendants in this case are Avison

Young (Canada) Inc., Avison Young (USA) Inc., AY DC, and Rose. (*See* A 39.) Although Defendants claim that AY DC is "a regional subsidiary" of the two other corporate defendants (Resp. at 61), the precise relationship among those entities is open to question, given AY's explicit denials in other cases about the defendants' control of one another and Defendants' failure in this case to cite anything in the record supporting their characterization of AY DC. (A 6197–98, 6201–02, 6204.)

In short, as the superior court correctly ruled when it rejected Defendants' preclusion argument at the outset of this litigation, "[t]he facts underlying the [ANSER] Action and the parties involved in the [ANSER] Action are substantially different from the facts and parties involved in this case." (A 61–62.)

Third, the summary-judgment order in the ANSER Case is interlocutory and does not dispose of all the claims against all the parties. *See G&E Real Estate, Inc. v. Avison Young–Washington, D.C., LLC*, Case No. 1:14–cv–00418–CKK (D.D.C.), PACER, 9/13/16 Minute Order. Consequently, the district court's decision is not final and remains subject to revision at any time. *See In Defense of Animals v. Nat'l Insts. of Health*, 543 F. Supp. 2d 70, 75 (D.D.C. 2008).

For these reasons, Defendants do not satisfy any of the elements of claim preclusion, and their claim-preclusion argument should be rejected.

B. The New York order is not preclusive.

For the first time on appeal, Defendants also argue that Plaintiffs' claims are precluded by an order entered in related litigation pending in New York. Defendants

are wrong for multiple reasons, as another court has already found. *See Newmark Grp., Inc. v. Avison Young (Canada) Inc.*, Case No. 2:15–cv–00531–RFB–GWF, 2019 WL 575476, at *4–7 (D. Nev. Jan. 7, 2019), *report and recommendation adopted*, 2019 WL 570724 (D. Nev. Feb. 11, 2019) (rejecting preclusion argument).

As a threshold matter, Defendants forfeited the right to argue preclusion based on the New York action when they failed to do so before the superior court. *Jonathan Woodner Co. v. Adams*, 534 A.2d 292, 295 n.6 (D.C. 1987); *see also Jones v. Brooks*, 97 A.3d 97, 101 n.1 (D.C. 2014); *William J. Davis, Inc. v. Young*, 412 A.2d 1187, 1193 n.17 (D.C. 1980). Defendants did not make this argument at any point during the proceedings below. Nor did they argue that Plaintiffs were splitting their claims between this case and the New York case. Under the circumstances, they acquiesced to any claim-splitting and cannot now assert that the New York action gave rise to res judicata. *See Ifill v. Dist. of Columbia*, 665 A.2d 185, 193 (D.C. 1995).

Defendants nevertheless cite an Eight Circuit case, and a footnote in a Fifth Circuit case, for the proposition that res judicata can be raised for the first time on appeal as an additional basis to affirm a judgment. (Resp. at 59 n.29.) This is not the law in the District of Columbia. But even if it were, an appellate court can address res judicata for the first time on appeal to affirm a decision "***only if all of the relevant facts are contained in the record and are uncontroverted***." *Energy Dev. Corp. v. St. Martin*, 296 F.3d 356, 361 (5th Cir. 2002); *see also id.* at 361–62 (res judicata

cannot be broached when the facts "necessary for the application of the defense are not found in the trial court record" or are "not uncontroverted"); *Bechtold v. City of Rosemount*, 104 F.3d 1062, 1068 (8th Cir. 1997) (same).

Here, the necessary facts regarding the New York action are neither contained in the record nor uncontroverted. None of the New York pleadings or orders, which are essential to any ruling on Defendants' res judicata defense, were submitted to the superior court. Further, as discussed below, the parties dispute numerous facts regarding the New York action. Thus, even under Fifth and Eighth Circuit law, it would be inappropriate to consider preclusion based on the New York action at this juncture. *Energy Dev.*, 296 F.3d at 361–62.

Alternatively, the New York order is not preclusive because the New York appellate division's dismissal for failure to state a claim has no preclusive effect, and there is no final judgment, no identity of claims, and no identity of parties, as required by New York law.

1. The appellate division's dismissal for failure to state a claim has no preclusive effect.

Longstanding New York precedent dictates that a dismissal for failure to state a claim under CPLR 3211(a)(7) has limited preclusive effect. As the New York Court of Appeals has determined, a dismissal based on a motion "directed at the pleading, attacking the sufficiency of the complaint as stating a cause of action . . . has preclusive effect only as to a new complaint for the same cause of action which

fails to correct the defect or supply the omission determined to exist in the earlier complaint," since "the only thing determined by [such a] dismissal" is that a "complaint failed to state a cause of action." *175 E. 74th Corp. v. Hartford Accident & Indem. Co.*, 51 N.Y.2d 585, 590 n.1 (1980); *see also Canzona v. Atanasio*, N.Y.S.2d 637, 639 (App. Div. 2014) (dismissal "with prejudice" for failure to state a claim "was not a dismissal on the merits," and res judicata did not bar the claim at issue); *Sullivan v. Nimmagadda*, 882 N.Y.S.2d 164, 165 (App. Div. 2009) (stating that "[t]he dismissal of an action for failure to state a cause of action has limited preclusive effect" because it is "not on the merits"); *Tortura v. Sullivan Papain Block McGrath & Cannavo*, 837 N.Y.S.2d 333, 333 (App. Div. 2007) (same).

The two cases on which Defendants rely do not hold otherwise. In *Yonkers Contracting Co. v. Port Authority Trans–Hudson Corp.*, 93 N.Y.2d 375 (1999), the court determined that a prior decision dismissing a complaint with prejudice was intended to "bring[] the litigation between the parties to a conclusive ending" based on the unique circumstances of that case and the plaintiff's tactical abandonment of an argument. *Id.* at 380–81. Here, unlike in *Yonkers*, there was no express decision on the merits to bring the New York litigation to a "conclusive ending," much less to preclude related, but different, cases pending in other jurisdictions. *Jespersen v. Li Sheng Liang*, 890 N.Y.S.2d 103, 104 (App. Div. 2009), which cited *Yonkers* without taking any of these factors into consideration, is likewise inapposite.

2. There is no final judgment in the New York action.

In addition, the New York Court of Appeals has ruled that there is no final judgment in the New York action. *See BGC Partners, Inc. v. Avison Young (Canada), Inc.*, No. 2021–815, 2022 WL 454164, at *1 (N.Y. Feb. 15, 2022) (finding that the order entered by New York's appellate division "does not finally determine the action within the meaning of the Constitution"). This ruling, which is based on the fact that another interlocutory appeal remains pending before the appellate division, *see BGC Partners, Inc. v. Avison Young (Canada), Inc.*, No. 2021–02608, is entitled to full weight under the full-faith-and-credit clause and is fatal to Defendants' res judicata argument.

3. There is no identity of claims between the New York action and this one.

"[F]or res judicata to apply . . . the foundational facts must be related in 'time, space, origin, or motivation [as well as] form a convenient trial unit[,]'" and "'treat[ing] [them] as a unit [must] conform[] to the parties' expectations.'" *See Coliseum Towers Assocs. v. Cty. of Nassau*, 637 N.Y.S.2d 972, 975 (App. Div. 1996). Under New York law, "a second action may not be barred even if both actions arise from an identical course of dealing, if the necessary elements of proof and evidence required to sustain recovery vary materially." *Jefferson Towers, Inc. v. Pub. Serv. Mut. Ins. Co.*, 600 N.Y.S.2d 41, 42 (App. Div. 1993). Put differently, "[r]es judicata only bars subsequent litigation 'where the same foundation facts serve

as a predicate for each proceeding.'" *Sage Realty Corp. v. Proskauer Rose LLP*, 675 N.Y.S.2d 14, 18 (App. Div. 1998).

That is not the case here. Each action involves different misappropriated trade secrets and geographically distinct brokers, contracts, managers, and misconduct. The New York case involves claims that arise from the conduct of former G&E brokers and personnel in New York, who joined AY in New York, and who misappropriated G&E's trade secrets in New York. (Index No. 652669/2012, NYSCEF Doc. No. 14, Am. Compl.) In contrast, Plaintiffs' claims here arise from the conduct of former G&E brokers and personnel in the District of Columbia, who joined AY in the District of Columbia, and who misappropriated G&E's trade secrets in the District of Columbia. (A 37, ¶ 6.) Moreover, even assuming there is some overlap in executive misconduct or motivation, this case's focus on the misconduct of the Team and the Staff, as encouraged and facilitated by various AY actors, involves jurisdictionally specific evidence that varies materially from the evidence in New York. (*See* A 2299–333.) Thus, the claims do not arise from "a single transaction or series of transactions" as required by New York law, and the cases are distinct in time, space, and origin.

Defendants misleadingly point to general similarities between the complaint in this case and the first amended complaint in New York. (*See* Resp. at 60–61.) The 2013 New York amended complaint, however, was filed at a time when the New

York plaintiffs were seeking to litigate all the claims involving AY's misconduct in a single forum. After the New York defendants objected to litigating all of these claims in New York, the trial court dismissed AY DC and other regional AY affiliates from the case for lack of personal jurisdiction. (Index No. 652669/2012, NYSCEF Doc. No. 48, 12/15/14 Order.) In doing so, the court held that "[the plaintiffs] [were] not without remedy, but [had to] pursue it in a more appropriate forum." (*Id*. at 14.)

Thus, each case separately filed ***after*** the December 2014 personal-jurisdiction dismissal is rooted in unique events based on the misconduct of locally based AY brokers and managers, with only a few common facts pertaining to AY's most senior executives, who coordinated a nationwide scheme with jurisdictionally specific components. Any vestigial language in the 2013 New York amended complaint that arguably encompasses Plaintiffs' District of Columbia claims is a holdover from a time when all of the related cases were expected to be litigated comprehensively in New York. Defendants cannot seriously claim that the DC-related allegations could have been, or actually were, litigated in New York following the order splitting up the case on personal-jurisdiction grounds. Based on the court's dismissal order, Plaintiffs have asserted their claims "in a more appropriate forum." (*See id*.) And based on that order, it cannot be said "that . . . treat[ing] [. . . the foundational facts]" of this case and the New York case "as a unit"

would "conform[] to the parties' expectations." *See Coliseum*, 637 N.Y.S.2d at 975 (internal quotation marks omitted).

4. This case and the New York action do not involve the same parties or privies.

Under New York law, "the party raising a res judicata defense must demonstrate a connection between the party to be precluded and a party to the prior action such that the interests of the nonparty can be said to have been represented in the prior proceeding." *Farren v. Lisogorsky*, 928 N.Y.S.2d 765, 767 (App. Div. 2011). "Privity has also been found where a person so controlled the conduct of the prior litigation in which they were interested . . . that the result is res judicata against them." *Tamily v. Gen. Contracting Corp.*, 620 N.Y.S.2d 506, 509 (App. Div. 1994). Defendants have not met this high bar.

In their opposition, Defendants fail to explain how AY DC or Rose were in privity with the parties in the New York litigation. They were not. *See Farren*, 928 N.Y.S.2d at 767. "Corporate affiliation, without more, is insufficient to establish privity." *Rossiello v. Divine Media Grp. LLC*, 977 N.Y.S.2d 670, 2013 WL 5336466, at *2 (Sup. Ct. Sept. 20, 2013) (citing *Syncora Guar. Inc. v. J.P. Morgan Secs. LLC*, 970 N.Y.S.2d 526, 531 (2013)). Likewise, there often "is no privity between a principal and . . . agent." *Haverhill v. Int'l Ry. Co.*, 217 N.Y.S. 522, 523–24 (App. Div. 1926); *see also Delford Indus., Inc. v. N.Y. State Dep't of Env't Conservation*, 566 N.Y.S.2d 984, 986 (App. Div. 1991). Further, "litigants in two different suits"

are not in privity just because "they happen to be interested in proving or disproving the same facts." *Haverhill*, 217 N.Y.S. at 525. Simply pointing to cases standing for the proposition that corporate parents and their subsidiaries ***can be*** privies for purpose of res judicata (Resp. at 62) is insufficient to carry Defendants' burden, particularly where, as here, AY has repeatedly asserted that each defendant is independent and repeatedly denied that the defendants are controlled by one another (*see* A 6197–98, 6201–02, 6204).

Contrary to Defendants' assertions, the dismissal of the AY DC affiliate from the New York case underscores the ***lack of*** privity between AY DC and the parties to the New York case, given that the dismissal was, at least in part, premised on a finding that the claims originally pleaded in New York arose from conduct that "occurred in, and [were] substantiality related to, the forums in which the brokers were employed and the entities resided," including the District of Columbia. (Index No. 652669/2012, NYSCEF Doc. No. 48, 12/15/14 Order, at 7.) The court found that it could not exercise jurisdiction over AY DC because the allegations relevant to AY DC could not be litigated in New York. It thus cannot follow that AY DC's or Rose's interests were represented in the New York litigation. *See Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 126 F.3d 365, 370 (2d Cir. 1997) (second suit not barred where first court "could not have exercised jurisdiction" over "a principal party to the [second] suit").

5. The New York plaintiffs did not have a full and fair opportunity to litigate their claims in New York.

Res judicata does not apply where a party, such as the New York plaintiffs, did not have a full and fair opportunity to litigate an issue in a prior action. *See Sabatino v. Capco Trading, Inc.*, 813 N.Y.S.2d 237, 239 (App. Div. 2006); *N.Y. Site Dev. Corp. v. N.Y. State Dep't Env't Conservation*, 630 N.Y.S.2d 335, 336 (App. Div. 1995); *see also Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 481 n.22 (1982) (full-and-fair-opportunity requirement applies to res judicata); *Garcia v. Vill. of Mount Prospect*, 360 F.3d 630, 635 (7th Cir. 2004) (same); *Yapp v. Excel Corp.*, 186 F.3d 1222, 1227 n.4 (10th Cir. 1999) (same). Here, the New York court's order did not adjudicate any of the issues in this case. As a result, the New York plaintiffs, who were not even allowed to complete discovery, did not have a "full and fair opportunity" to litigate the issues in that case. *N.Y. Site Dev.*, 630 N.Y.S.2d at 336; *Kremer*, 456 U.S. at 481 n.22.

Indeed, the New York court's December 2014 order dismissing claims against AY's regional affiliates for lack of personal jurisdiction expressly recognized that the claims were "focused on allegedly tortious acts . . . outside of New York" and that misconduct "occurred in, and [was] substantially related to, the forums in which the brokers were employed and the entities resided—namely, Atlanta, Chicago, and Washington, D.C." (Index No. 652669/2012, NYSCEF Doc. No. 48, 12/15/14 Order, at 7.) The court went on to find that the plaintiffs could refile any

geographically specific claims in appropriate jurisdictions across the country, which the plaintiffs did. (*Id*. at 14.) The court thus recognized that the New York plaintiffs were not being afforded a full and fair opportunity to litigate their District of Columbia claims in New York. As a result, res judicata cannot apply.

CONCLUSION

For these reasons, Plaintiffs request the entry of an order granting the relief requested in their opening brief.

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Respectfully submitted,

By: */s/ Tina B. Solis*

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2022, I caused a copy of the accompanying **Reply 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
Signature

21-CV-115, 21-CV-256, & 21-CV- 502 (cons.)
Case Number(s)

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