Clerk of the Court
Received 03/10/2022 02:09 PM

No. 21-CV-0115

DISTRICT OF COLUMBIA
COURT OF APPEALS

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

v.

AVISON YOUNG (CANADA) INC.,
AVISON YOUNG (USA) INC.,
AVISON YOUNG - WASHINGTON, D.C., LLC,
and MARK ROSE,
APPELLEES.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA,

BRIEF OF APPELLEE
(REDACTED)

/s/ Jeremy B. Glen

Jeremy B. Glen (DC Bar No. 1002911)
STEPTOE & JOHNSON LLP
1330 Connecticut Ave. NW
Washington, DC
Tel. (202) 429-3042
jglen@steptoe.com

*Nathaniel J. Kritzer (*pro hac vice*)
STEPTOE & JOHNSON LLP

1114 Avenue of the Americas
New York, New York 10036
Tel. (212) 378-7535
nkritzer@steptoe.com

Attorneys for Appellees

APPELLEES' RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. App. R. 26.1, Appellees Avison Young (Canada) Inc., Avison Young (USA) Inc., Avison Young – Washington, D.C., LLC, and Mark Rose (collectively "Appellees") hereby certify that to the best of their knowledge and belief that: Avison Young (Canada) Inc. is the ultimate parent of Avison Young (USA) Inc., and Avison Young – Washington, D.C., LLC (collectively the "Avison Young Entities"); the Avison Young Entities have no other parent corporation; and no publicly held corporation own 10% or more of the Avison Young Entities.

Respectfully submitted,

/s/ Jeremy B. Glen

Jeremy B. Glen (DC Bar No. 1002911)
STEPTOE & JOHNSON LLP
1330 Connecticut Ave. NW
Washington, DC
Tel. (202) 429-3042
jglen@steptoe.com

Nathaniel J. Kritzer (*pro hac vice*)
STEPTOE & JOHNSON LLP
1114 Avenue of the Americas
New York, New York 10036
Tel. (212) 378-7535
nkritzer@steptoe.com

Attorneys for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Issues Presented

1. In granting summary judgment to appellees[1] Avison Young, the trial court repeatedly emphasized that it had reviewed all evidence in the summary judgment record, including "plaintiffs' Complaint, opposition, the record, and even the impermissible additional statement of facts submitted by the plaintiff . . . adding up to hundreds of exhibits and 'additional' facts." Newmark alleges that, contrary to these statements, the trial court "failed to consider" these materials and showed "disregard for the record." Do Newmark's unsupported assertions warrant reversal?

2. On Avison Young's summary judgment motion, Newmark chose to raise an argument that there were genuine issues of material fact regarding the existence of trade secrets. Newmark now argues that the trial court erred in taking up that issue and ruling against them on it. Did the trial court commit procedural error when it ruled on an issue that Newmark voluntarily raised?

3. To support its assertion that there were genuine issues of material fact regarding the existence of trade secrets, Newmark submitted voluminous exhibits while failing to point to any specific information that was secret and derived value from its secrecy. Did the trial court err when it ruled that this showing raised no genuine issue of material fact regarding the existence of a trade secret?

4. Newmark purports to assert claims for theft of trade secrets assigned to it by Grubb & Ellis. In its bankruptcy proceedings, Grubb & Ellis submitted asset schedules clearly stating that it had no trade secrets, and these schedules were never amended to state otherwise. Should this court affirm summary judgment on the trade secret count on the alternative basis that Newmark, as putative assignee of "trade secret" claims, is judicially estopped from asserting that Grubb & Ellis did, in fact, have trade secrets?

[1] The appellees, Avison Young (Canada) Inc., Avison Young (USA) Inc., Avison Young – Washington, D.C., LLC, and Mark Rose are collectively referred to herein as "Avison Young," "appellees," or "defendants." The appellants, Newmark Group Inc., G&E Acquisition Company LLC, and G&E Real Estate Inc., *d/b/a* Newmark Grubb Knight Frank, are collectively referred to herein as "Newmark," "appellants," or "plaintiffs."

5. The brokers at issue signed contracts with Grubb & Ellis expressly stating their broker team owned work product and information relating to clients they serviced. Newmark then sued Avison Young on the ground that the broker team retained such work product and information when they left the firm. Should this court affirm summary judgment on the trade secret count on the alternative basis that Newmark has no claim based on the brokers' retention of documents Grubb & Ellis agreed they could retain?

6. It is undisputed that Avison Young is a real estate brokerage firm with a commercial interest in recruiting and hiring real estate brokers. Newmark argues that Avison Young's recruitment and hiring of at-will real estate brokers from a competitor was a tort. Did the trial court correctly grant summary judgment on Newmark's tortious interference and conspiracy claims (Counts I-III) when it held, among other things, that Avison Young's recruitment of the broker team was legally justified competitive activity?

7. Two other courts have disposed, on the merits, of the same claims raised by Newmark in this case. Should Newmark be allowed to relitigate those claims here?

8. In proceedings below, Newmark filed a motion seeking an invasive forensic inspection that (i) failed to comply with mandatory "meet and confer" requirements; (ii) misstated the correspondence between the parties; and (iii) failed to acknowledge the searches already run and documents already produced from the media Newmark claimed should be inspected. Did the trial court abuse its discretion in denying this motion, and in imposing sanctions for Newmark's second and third motions seeking this same relief?

Statement of the Case

This is one of a series of meritless, anti-competitive lawsuits that Newmark has brought against Avison Young. As explained in detail below, Newmark brought claims alleging that Avison Young's hiring of at-will real estate brokers was "wrongful," but it points to no evidence of anything more than normal competition that is privileged as a matter of law. Newmark claims that various documents were "trade secrets," but it makes no argument that they were secret at all, let alone that they derived value from their secrecy. And while Newmark alleged a claim for "conspiracy," it adduced no evidence of either a conspiracy or a wrongful act that any such "conspiracy" could further.

Accordingly, after fulsome discovery that involved over twenty depositions and exchanges of tens of thousands of documents, on January 19, 2021, the trial court granted summary judgment to Avison Young. For the reasons stated by the trial court, and for the additional reasons set out below, this Court should affirm.

Statement of Facts

A. The Morris-McNair Broker Team and the Grubb & Ellis Bankruptcy

This case is rooted in the bankruptcy of commercial real estate firm Grubb & Ellis ("Grubb"). BGC Partners, Inc, a predecessor to Plaintiff Newmark, purchased most of Grubb's assets in a bankruptcy sale. Grubb's assets did not include a substantial book of business cultivated by Bruce McNair, Bill Morris, and their broker team (the "Morris-McNair Team" or "Team"). This Team left Grubb and joined another real estate firm, Avison Young, [redacted] (6 J.A. 1462–63.)

When the Team first joined Grubb in 2006, it was already established and highly successful. [redacted] (6 J.A. 1459–60.) As part of its agreement to join Grubb, the Team negotiated favorable contracts that, as relevant here, expressly stated that [redacted] (6 J.A. 1460–61, 1467.) The Teams' contracts specified, *inter alia*, that:

- [redacted]
- [redacted]
- [redacted]
- [redacted] J.A. 1460–61.)

In 2011, the Morris-McNair Team negotiated an extension to its 2006 agreement, and the Team agreed to stay at Grubb in exchange for, among other things, [redacted]. (6 J.A. 1460–61.) [redacted] (6 J.A. 1462.) [redacted] (6 J.A. 1462–63.) [redacted]

[redacted] (6 J.A. 1463.) Four days later, on February 17, 2012 Newmark acquired a controlling interest in Grubb's secured debt, and three days after that, on February 20, 2012, Grubb filed for bankruptcy. (6 J.A. 1463.) [redacted] (*Id.*)

After resigning from Grubb, the Morris-McNair Team joined Avison Young, effective February 13, 2012. (6 J.A. 1433.) The Team members and Avison Young executed independent contractor agreements. (6 J.A. 1463–64.) In those contracts, the brokers [redacted]. (6 J.A. 1464–65.)

B. Multiple Courts Dismiss Overlapping Cases Filed by Newmark

A few months after Grubb's bankruptcy filing, in August of 2012, Newmark and its affiliates filed the first of multiple overlapping lawsuits against Avison Young. The first suit was brought against ten Avison Young entities in New York state court, including three of the defendants here. (1. J.A. 38.) On December 15, 2014, the New York court dismissed seven of the defendants for lack of personal jurisdiction. (*Id.*) In early 2015, Newmark filed cases against the dismissed defendants in state courts in Illinois, Nevada, South Carolina, and here. As of the date of this filing, the case in New York, which encompasses the same claims as this case (1 J.A. 38, ¶ 8) has been dismissed with prejudice in its entirety. *See BGC*

Partners, Inc. v. Avison Young (Canada), Inc., 192 A.D.3d 498 (N.Y. App. Div. 2021), *leave to appeal denied*, 2022 WL 454164 (N.Y. Feb. 15, 2022).

In October 2013, an affiliate of Newmark's and former plaintiff in this case (G&E Real Estate, Inc.) filed the "Anser" case in federal court. *See G&E Real Estate, Inc. v. Avison Young-Washington, D.C., LLC*, 168 F. Supp. 3d 147, 152 (D.D.C. 2016). There, the plaintiff asserted four claims against Avison Young - Washington, D.C., LLC (a defendant here) related to the Morris-McNair Team's departure to Avison Young. *Id*. at 150. The claims are the same ones asserted here—tortious interference with contract, unjust enrichment, misappropriation of trade secrets, and conspiracy. *Id*. The district court dismissed claims against Avison Young on summary judgment in that case six years ago. *Id*. at 168-69.

C. Discovery Proceedings Below

Newmark filed this action on February 13, 2015, and originally asserted seven claims: Tortious Interference with Contractual Relationships (Count I); Tortious Interference with Prospective Business Relationships (Count II); Conspiracy (Count III); Theft of Trade Secrets (Count IV); Conversion (Count V); Injunctive Relief (Count VI); and Unjust Enrichment (Count VII). On January 26, 2016, the trial court dismissed Count V-VII for failure to state a claim. (30 J.A. 6474, 6486–87.) The court also noted that, "[t]o the extent [Counts I-III] are based on misappropriation of a trade secret, the claims are preempted" by the D.C. Uniform Trade Secret Act ("DCUTSA"). (30 J.A. 6479.)

Following these rulings, the parties engaged in three years of extensive discovery, which included the production of more than 42,000 documents (nearly 275,000 pages) and 22 depositions. (6 J.A. 1434-36.) In the process, Newmark filed more than ten discovery-related motions, four of which consecutively sought a "forensic inspection" of the same electronic media, including media allegedly in the possession of third party witnesses. (1 J.A. 75; 3 J.A. 699; 6 J.A. 1214) (*see* further discussion *infra* at VII). During a February 22, 2019 hearing, the trial court addressed the "disturbing pattern" of Newmark's discovery and litigation tactics, concluding:

> That there appears to be **a flaunting of the Court rules in the plaintiff's files** . . . . There appears to be **recasting of the same motions over, and over, and over again**, which is of course, denied. Motion for clarification, motions to compel forensic inspection over, and over, and over again, which were denied. **So it seems to me that this is inconsistent with the sound administration of Justice.**

(6 J.A. 1345–47) (emphasis added).

In a January 11, 2019 Order, the trial court found Newmark's second request for a forensic inspection to be "superfluous." (32 J.A. 7043.) Then, in a January 30, 2019 Order, the Court characterized Newmark's motion to reconsider the preceding order as "essentially a motion for reconsideration of a denial to a motion to reconsideration." (6 J.A. 1329.) The Court denied that motion, astutely observing that, "stripped of its caption, the plaintiffs' motion does no more than recast arguments on issues previously addressed by this Court." (*Id.*)

Given these repetitive discovery abuses, the trial court sanctioned Newmark, and awarded $43,836.50 in fees to Avison Young for the costs it incurred responding to the motions, in an order dated March 25, 2021. (35 J.A. 7828–30.) In so holding, the court noted that:

> [T]he plaintiffs clearly filed consecutive motions for reconsideration **and restyled the caption in order for the Court to consider the motions**. The plaintiffs' motion[s] did no more than recast arguments on issues previously addressed by the Court, **yet decided to file more motions for reconsideration nonetheless**. The Court stated at that time that the Court may determine what, if any, attorney's fees may be appropriate, and the Court finds that the $43,836.50 is appropriate.

(*Id.* at J.A. 7828) (emphasis added).

D. Avison Young's Motion for Summary Judgment

Avison Young filed its motion for summary judgment on April 5, 2019 and supported it with an 11-page, 46-paragraph Statement of Undisputed Facts, submitted pursuant to Superior Court Rule 56(b)(2)(A). (6 J.A. 1420-22; 1459-71.) Instead of just responding with an appropriate counterstatement of material facts that it contended were genuinely disputed, as required by the Rules (*see* Sup. Ct. R. 56(b)(2)(B)), Newmark also submitted a separate 50-page, 253-paragraph "Additional Statement of Facts Not in Dispute," along with 118 supplemental exhibits. (10 J.A. 2252-39.) In its reply brief, Avison Young specifically addressed all of the allegedly "material" issues of dispute that Newmark raised in its opposition brief (29 J.A. 6207-09), and offered to provide a paragraph-by-paragraph response to Newmark's supplemental statement of "undisputed" facts, if the trial court so desired. (*Id.* at 6209.) The trial court did not ultimately request a line-by-line rebuttal. And though the court correctly noted that Newmark's supplemental submission was "impermissible," the judge nevertheless reviewed and considered everything submitted by Newmark, including the "Complaint, the opposition to [the summary judgment] motion, and the plaintiff's impermissible 'Additional Statement of Facts Not in Dispute.'" (30 J.A. 6376.)

On January 19, 2021, the trial court ruled in favor of Avison Young and dismissed all of Newmark's remaining claims. (30 J.A. 6377.) Newmark moved to alter or amend the trial court's ruling on February 16, 2021. (33 J.A. 7080-09.) With that motion, Newmark attempted to introduce 25 new exhibits. (33 J.A. 7086.)

On June 21, 2021, the trial court denied Newmark's motion to alter or amend the judgment. (35 J.A. 7831–37.) In so ruling, the court explained that:

> The plaintiffs' 55-page motion represents the plaintiffs' latest attempt in this six-year litigation to re-litigate decided issues. In summary, the plaintiffs have cited to numerous non-binding opinions and orders in their attempt to simply disagree with the Court's ruling. Any valid contentions, if any, could have been brought in the original motion, there was no newly discovered evidence that could not have been discovered in time, and there are no well-founded allegations of misrepresentation of any kind on the part of the defendants. (*Id.* at 7832.)

The trial court further stated that:

> On more than one occasion, this Court has stated that a motion for reconsideration is not a tool for the plaintiffs to utilize simply due to disagreements. The plaintiff has attempted to file motions for reconsideration on numerus motions in the past and have all utilized such a technique in the past. The Court has carefully considered the dense record before it when considering the Defendant's Motion for Summary Judgment and made its ruling carefully. Having considered the entire record, the motion, the opposition, the Court hereby denies the Motion to Alter or Amend the Judgment. (*Id.* at 7837.)

E. Newmark's Motion for Summary Reversal and the Present Appeal

Newmark filed a Notice of Appeal on July 20, 2021, which sought relief from eleven different orders issued by the Superior Court between May 22, 2018, and June 21, 2021. The next day, July 21, 2021, Newmark filed a Motion for Summary Reversal, which was fully briefed on October 7, 2021. In that motion, Newmark asserted virtually all of the same arguments they pursue here. This court denied the Motion for Summary Reversal on October 20, 2021.

On November 18, 2021, this court set a briefing schedule for the full appeal, and Appellants filed their opening brief on January 3, 2022.

Summary of the Argument

The trial court correctly granted summary judgment and the orders below should be affirmed. Newmark's primary argument that the trial court disregarded the record is directly contrary to the trial court's own orders and basic rules of procedure. That argument provides no grounds for reversal, and each of Newmark's claims fails on the merits as well.

First, the lower court's dismissal of Newmark's trade secret claim (Count IV) was correct for multiple reasons, including that (i) none of the materials cited by Newmark constitute actionable trade secrets (the basis on which the lower court ruled); (ii) Newmark should be estopped from pursuing any claims based on Grubb's alleged trade secrets, because Grubb did not list any trade secrets among its assets during its bankruptcy filing; and (iii) even if the materials were trade secrets, and even if Newmark were allowed to pursue those claims, there is no evidence that Avison Young acquired them through "improper means."

Newmark's contention that it had insufficient notice of the ground on which the trial court ultimately ruled is also baseless. *Newmark itself* raised the issue in its attempt to show a question of fact. It cannot complain that its strategy failed.

Second, the trial court correctly dismissed Newmark's claim for tortious interference with contract (Count I) because, *inter alia*, (i) the broker Team's contracts were all explicitly "at-will," and thus not the appropriate subject of a tortious interference claim in these circumstances; and (ii) regardless, Avison Young's recruitment of the Team was a privileged competitive activity. Further, Newmark cannot show that Avison Young's actions were the reason the Team left

Grubb, as opposed to Grubb's [redacted]

Third, the trial court correctly dismissed Newmark's claim for tortious interference with business expectancies (Count II) for all the same reasons as Count I, and for the additional reason that Newmark has failed to prove what role the actual defendants in this case "played in any of these alleged potential transactions." (30 J.A. 6373.)

Fourth, the trial court correctly dismissed Newmark's conspiracy claim (Count III) for multiple reasons, including because its other claims all fail as well, leaving no wrongful act to the be the subject of a "conspiracy." And as the trial court correctly noted, Newmark's conspiracy claim is missing its core component: "[t]here is no evidence that any agreements existed between any defendants [to this action] in an attempt to further a conspiracy to unlawfully loot Grubb & Ellis' personnel and information." (30 J.A. 6374.)

Fifth, Newmark has already litigated—and lost on the merits—these very same claims in two other, overlapping cases. The decisions in those cases (from New York and D.C. District Court) bar all of Newmark's claims here.

Finally, the trial court did not abuse its discretion when it denied Newmark's request for a forensic inspection of certain electronic media. The expansive and lengthy discovery in this case led to the production of more than 42,000 documents, and 22 depositions—including voluminous productions *from the very electronic sources that Newmark demanded to forensically inspect*. The trial court properly exercised its discretion when it declined Newmark's request for more. Nor did the court abuse its discretion when it sanctioned Newmark for "flaunting of the Court rules" and filing improper, recidivist motions for reconsideration. The trial court warned Newmark against this on more than one occasion. Newmark simply did not listen.

Argument

I. THE TRIAL COURT EMBRACED THE FACTUAL RECORD WHEN IT RULED IN FAVOR OF AVISON YOUNG

Newmark's lead argument is that "the superior court ignored the unrebutted factual record in Plaintiffs' statement of additional facts." Br. at 23. Specifically, Newmark contends that: (i) when Newmark filed its 50-page, 253-paragraph "Additional Statement of Facts Not in Dispute" alongside its opposition to Avison Young's motion for summary judgment, Avison Young was somehow required to rebut it; (ii) that because Avison Young did not file a standalone response, all of Newmark's allegations should have been deemed "undisputed" for purposes of summary judgment; and (iii) that the trial court improperly failed to consider Newmark's supplemental facts, and also failed to deem Newmark's claims undisputed. Each of these arguments is incorrect.

As a threshold matter, Avison Young was under no obligation to respond to Newmark's "Additional Statement of Facts Not in Dispute." The Superior Court Rules are clear: under Rule 56(b)(2)(A), "the movant [*i.e.*, Avison Young] must file a statement of the material facts that the movant contends are not genuinely disputed, then, under Rule 56(b)(2)(B), the "party opposing the motion [*i.e.*, Newmark] must file a statement of the material facts *that the opponent contends are genuinely disputed* . . . [which should] correspond to the extent possible with the numbering of the paragraphs in the movant's statement." (emphasis added). Thus, under the rules, Avison Young was to file a statement of *undisputed* facts, and Newmark was to respond with any issues it believed were *disputed*.

Instead, Newmark, the non-movant, inexplicably filed a lengthy *additional* statement of facts that it claims are "undisputed," along with 118 supplemental exhibits. (10 J.A. 2289 *et seq*.) Nothing in Rule 56 provides for a statement of "undisputed" facts by the opponent of a motion. Accordingly, the trial court properly noted that Newmark's submission was "impermissible." (30 J.A. 6376.) Avison Young was thus under no obligation to respond to it with some unwarranted counter-counter-statement, as Newmark suggests. Instead, in its reply brief, Avison Young properly addressed each alleged dispute of *material* fact raised by Newmark in its opposition brief. (29 J.A. 6207–10.)

Avison Young also noted in its reply brief that Newmark's "Additional Statement of Facts Not in Dispute" was improper, but offered to provide a paragraph-by-paragraph rebuttal if the court "deem[ed] a response appropriate or helpful." (*Id*. at 6210.) The court did not request a response, so Avison Young did not provide one. That does not mean anything in Newmark's improper filing should have been "deemed admitted."[2]

Nor did the trial court "ignore" Newmark's submission. Instead, the trial court *explicitly* considered Newmark's statement, and found it lacking. In its original order, the trial court specifically noted that it reviewed and considered all of Newmark's submissions. (30 J.A. 6376.) And to avoid any doubt, when denying Newmark's motion to amend the judgment:

> The Court specifically noted that plaintiffs' Complaint, opposition, the record, and even the impermissible additional statement of facts submitted by the plaintiff *were reviewed*, adding up to hundreds of exhibits and 'additional' facts.

(35 J.A. 7836) (emphasis added). Thus, Newmark's argument that the trial court erred by failing to consider its factual contentions should be rejected out of hand. It is simply untrue.

---

[2] Even when a party fails to address a factual statement when required—which did not happen here—the trial court has broad discretion on how it may treat the matter, including by entering any "appropriate order." Super. Ct. R. 56(e). Newmark's argument that allegations in the improper "Additional Statement" were rendered "undisputed," (Br. at 24), is incorrect for this additional reason.

II. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON THE TRADE SECRET CLAIM (COUNT IV)

A. Newmark Was Not Prejudiced by the Trial Court's Trade Secret Ruling, Which Was Based on Legal Arguments and Evidence Put Forth by Newmark Itself

Newmark seeks reversal on the theory that the trial court ruled against its trade-secret claim "*sua sponte*," and that Newmark was "not provided with 'notice and a reasonable time to respond'" Br. at 33 (citation omitted). This argument fails under even the slightest scrutiny, because it was Newmark *itself* that raised the legal and factual arguments on which the trial court ultimately ruled.

When Avison Young filed for summary judgment, it sought judgment on Count IV under two legal theories (judicial estoppel, and lack of misappropriation—*see infra* at II.C) that are each dispositive in favor of Avison Young, whether or not the materials are actually trade secrets (which they are not). Faced with these arguments, Newmark voluntarily chose to inject a *third* issue into the proceedings in an attempt create a material issue of fact: the question of whether the materials constituted trade secrets at all. Indeed, as explained by the trial court, Newmark "explicitly argued 'whether information constitutes a trade secret or is simply confidential information is a question of fact,'" a concept Newmark deliberately sought to leverage to defeat summary judgment.[3] (35 J.A.

[3] The very first section of Newmark's underlying brief (Roman numeral "I") is titled "Cases involving the misappropriation of trade secrets and confidential

7836.) The trial court then appropriately took up the argument Newmark raised, along with "the lengthy record in this case," and rejected it. (*Id*.) Thus, far from being prejudiced, appellants are, as the lower court noted, "in essence complaining that the Court ruled against them on the issue they raised themselves because they did not agree with the ruling going against their anticipated outcome." (*Id*.)

Newmark relies on *Tobin v. John Grotta Co*., 886 A.2d 87 (D.C. 2005), arguing that, in *Tobin*, "this Court reversed the Superior Court's sua sponte entry of summary judgment on issues not raised in the briefs." Br. at 34. Here, Newmark *did* raise the ground it complains of in its brief, and *Tobin* is inapposite.

In *Tobin*, the trial court granted judgment as to *claims* that were not part of the motion. *Tobin*, 886 A.2d at 89. Specifically, the plaintiff in *Tobin* had brought claims for defamation, assault and battery, and violations of the D.C. Human Rights Act and Equal Pay Act. *Id*. In the motion at issue, the defendant moved for summary judgment *only* as to defamation. *Id*. The trial court granted judgment on defamation, and then *sua sponte* granted judgment on *all of the other claims as well*. *Id.* In that circumstance, the court held the plaintiff had insufficient "notice

---

information present fact-driven inquiries that cannot be resolved on summary judgment." There, Newmark argued, *inter alia*, that "[i]t is for a jury to decide, as a threshold matter, whether the materials at issue are a trade secret or are merely confidential information . . . [and] [t]riable factual issues involving trade secrets and confidential information *pervade this case*." (10 J.A. 2201) (emphasis added).

that she had to come forward with all her evidence" on counts that were not at issue in the motion, and reversed. *Id*. at 91. That did not happen here.

Instead, this case closely resembles *Thomas v. District of Columbia*, 942 A.2d 1154 (D.C. 2008). In *Thomas*, the trial court directed the defendant to file an omnibus pretrial brief on all issues. *Id*. at 1157. The plaintiff used his opposition to address an argument the defendant did not make. *Id*. The trial court then granted judgment on the ground raised by the plaintiff, noting its "right and duty to grant summary judgment *sua sponte* when it appears that a party cannot prevail on a claim or defense as a matter of law so long as the losing party was on notice that it had to come forward with all of its evidence." *Id.* On appeal, the plaintiff argued the "trial court erred in granting summary judgment because the court did not give him notice that he was to come forth with all of his evidence." *Id.* at 1158 (citations omitted). This court disagreed, stating:

> We reject this argument. As noted above, in his brief responding to the District's omnibus trial brief, Thomas stated explicitly that he intended to assist the court by explaining what he contended (and still contends) is the statutory authority for his damages suit. Thus, even if Thomas did not understand or envision that the court might consider whether to grant summary judgment *sua sponte*, it seems clear that he was not prejudiced by any lack of notice. *Id*.[4]

---

[4] *See also Trudel v. SunTrust Bank*, 325 F.R.D. 23, 26 (D.D.C. 2018) (denying motion to vacate summary judgment order entered *sua sponte* where plaintiff "should have anticipated" that issue "might arise"); *Blodgett v. Univ. Club*, 930 A.2d 210, n. 14 (D.C. 2007) (when affirming on alternate grounds, noting that the plaintiff "argued in the trial court against applying the [alternate ground]; therefore, he is not prejudiced by our alternative analysis").

Likewise, Newmark is not prejudiced here, and the trial court did not err when it considered, and ruled on, an issue raised by Newmark itself.[5]

B. The Trial Court Correctly Found That Newmark Failed to Identify Any Actionable Trade Secrets

To show that information is a trade secret, a plaintiff must come forward with evidence that the information is both secret *and* derives value from being secret. *See generally DSMC, Inc. v. Convera Corp.*, 479 F. Supp. 2d 68, 77-78 (D.D.C. 2007). Instead of submitting such evidence, Newmark argues, as it did below, that the question of whether a document is a "trade secret" is conclusively presumed to a be "a question of fact" that should not be resolved on a dispositive motion. Br. at 26-27. That is an incorrect statement of law. *See e.g.*, *Econ. Rsch. Svs., Inc. v. Resolution Econ., LLC,* 208 F. Supp. 3d 219, 232–33 (D.D.C. 2016) (cited by Newmark) (dismissing claims for trade secrets as a matter of law absent allegations that "any of the information defendants allegedly misappropriated was

[5] Newmark's long string-cite of federal case law does not support its position in the least. *See* Br. at 34-35. None of the cases involve a situation like this one, where the litigant affirmatively raised the summary judgment grounds itself. Instead, much like in *Tobin*, the cases cited by Newmark involve situations where the trial court improperly granted judgment (i) on claims not raised in the briefs (*Sussman v. U.S. Marshals Servs.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007)); (ii) to *parties* that had not moved for it (*Athridge v. Rivas*, 141 F.3d 357 (D.C. Cir. 1998)); and (iii) where there had been no discovery conducted, nor facts or arguments made, on the dispositive issue (*McBride v. Merrell Dow and Pharmaceuticals, Inc.*, 800 F.2d 1208, 1212 (D.C. Cir. 1986)). *See also Harris v. Dist. Of Columbia Water & Sewer Auth.*, 172 F. Supp. 3d 253, 260 (D.D.C. 2016) (trial court declined to rule on a claim not being pursued by the movant).

valuable because of its secrecy"); *see also Commodity Futures Trading Comm'n v. Whitney*, 441 F. Supp. 2d 61, 71 (D.D.C. 2006) (holding, as a matter of law, that spreadsheets that were a "compilation of information used" in a party's business were not trade secrets because the trade secret proponent made no "colorable showing" that they contained "any information that is valuable due to its secrecy").

Instead, as with any other claim, a plaintiff must support its trade secret allegations with evidence sufficient to create a genuine issue of material fact. Under the DCUTSA, many types of information *can* be trade secrets, but the question of what *is* a trade secret depends not on the generalized category of information, but on secrecy and value. Specifically, to qualify as "a trade secret under the DCUTSA, (1) the information must be secret; (2) its value must derive from its secrecy; and (3) its owner must use reasonable efforts to safeguard its secrecy." *DSMC*, 479 F. Supp. 2d at 77-78 (internal quotes and citations omitted).

Even on appeal, Newmark does not argue the secrecy and value prongs, and so its claim must fail. *See e.g.*, *Council on Am.-Islamic Rels. Action Network, Inc. v. Gaubatz*, 82 F. Supp. 3d 344, 360 (D.D.C. 2015) (rejecting contention that documents constituted trade secrets where plaintiff did "not point" to "any basis to conclude that the documents taken derived their economic value from their secrecy"). Any attempt by Newmark to argue belatedly in reply that information it cites derives value from its secrecy should be rejected.[6]

Instead, Newmark relies on naked proclamations throughout its brief that various documents simply *are* "trade secrets"—coupled with citations to cases holding that various types of information *may*, under certain, distinguishable circumstances, be trade secrets. *E.g.*, Br. at 28, 29 ("This document is a trade secret."); *id.* at 30 ("These documents are trade secrets."); *id.* at 31 ("Marketing materials qualify as trade secrets, regardless of whether they contain publicly available information."). These evidence-free assertions simply cannot establish the existence of actual, protectible trade secrets under the DCUTSA.[7]

Emblematic of this approach, Newmark blithely argues that "[t]he record is replete with examples of trade secrets," (Br. at 27) then identifies only a handful of documents allegedly taken by former Grubb executives, and three sets of materials relating to the "Team" (plus "additional examples" that Newmark only obliquely

---

[6] *Washington Convention Ctr. Auth. v. Johnson*, 953 A.2d 1064, 1082 (D.C. 2008) ("Because arguments raised for the first time in a reply brief come too late for appellate consideration, we decline to rule on this issue.").

[7] Newmark's argument that so-called "admissions" in a complaint filed in an unrelated case (*Puritz*) raise questions of fact in this case is nonsense. Br. at 33. *Puritz* involved different parties, different documents, different circumstances, and different trade secret allegations that have no bearing whatsoever on the facts of this case. Likewise, the fact that Avison Young includes confidentiality terms in its agreements with brokers is irrelevant and fails to create any genuine issue of material fact. Br. at 32.

references, because Newmark failed to raise them in the original summary judgment briefing, *see infra* at 35). None of these documents are trade secrets.

1. None of the Materials Allegedly Misappropriated by Former Grubb Executives Are Trade Secrets

Newmark argues that certain former executives of Grubb misappropriated trade secrets when they left the company 15 years ago, which ultimately wound up at Avison Young. The trial correctly granted summary judgment on these claims.

a. The Recruiting Analysis Template is not a trade secret.

Newmark first claims that a "recruiting analysis template" is a trade secret. Br. at 27. This "template" is simply a spreadsheet [redacted] The spreadsheet also [redacted] This is not a trade secret—it consists of basic accounting fields [redacted] (25 J.A. 7750.) In that sense, it is no different from the spreadsheet at issue in *Whitney*, which, though it compiled information used in the proponent's business, did not contain anything secret. 441 F. Supp. 2d 61, 71.

Newmark points to no evidence that these elementary calculations were known only to Grubb, or that they somehow differed meaningfully from any other brokerage's means of [redacted] To the contrary, Newmark admits elsewhere in its brief that it is [redacted]. Br. at 16. Newmark even argues that such a ramp up period is so standard that production of revenue within the standard ramp-up period is evidence of wrongdoing. *Id.* at 16-17. That argument is incorrect for other reasons, but it shows the lack of merit in Newmark's position that a [redacted], is somehow a trade secret.

Testimony of Newmark's own CEO, Barry Gosin, further undercuts any argument that the spreadsheet Newmark cites was a secret, valuable formula. Asked about whether [redacted]:

> [redacted]
>
> [redacted]
>
> [redacted]
>
> [redacted]
>
> [redacted] [redacted]

[redacted]

(14 J.A. 3210) (emphasis added).

The cases upon which Newmark relies also do not support its position. Newmark cites an unreported case from the Eastern District of Missouri for the broad proposition that "spreadsheets with formulas are trade secrets." Br. at 28, citing *Design Nine, Inc. v. Arch Rail Grp., LLC*, No. 4:18 CV 428 CDP, 2019 WL 1326677, at *2 (E.D. Mo. Mar. 25, 2019). But *Design Nine* does not stand for this indiscriminate proposition. The court held that there were sufficient allegations that the spreadsheet contained "formulas and other data *that create independent economic value from its secrecy*," and thus concluded that, "[a]t the motion to dismiss stage, Design Nine has sufficiently alleged the existence of trade secrets." *Id*. at *4 (emphasis added).[8]

---

[8] The same is true for the spreadsheet at issue in *NCMIC Fin. Corp. v. Artino*, 638 F. Supp. 2d 1042 (S.D. Iowa 2009). There, the spreadsheet contained "potential customers' names, addresses, Social Security numbers, and a credit evaluation performed by NCMIC employees." *Id*. at 1078. The credit evaluation was performed "using a proprietary formula to determine how much credit a potential leasing customer could receive from NCMIC," and the court found that NCMIC "did not release this information to the public *because it would give their competition an advantage*." *Id*. (emphasis added). That is worlds apart from the basic profit and loss template at issue here.

Here, by contrast, the recruiting analysis spreadsheet contains no "secret" formulas at all, much less ones that derive economic value from their secrecy. Indeed, as noted, the spreadsheet calculations can be easily recreated in Excel using pre-loaded formulas. Thus, as a matter of law, the "recruiting analysis template" is not a protectable trade secret.

b. The Policies and Procedures Manual is not a trade secret.

Next, Newmark points to "G&E's Policies and Procedures Manual," claiming there is "evidence that AY used G&E's Manual to compile and create its own manual, given the similarities between certain parts of the documents." Br. at 28. This argument is meritless.

Newmark makes no effort to identify what information in this 168-page document constitutes a trade secret. Instead, Newmark appears to claim that the entirety of the manual is a trade secret—including innocuous information such as [redacted], [redacted]. (16 J.A. 3473–3639.) These boilerplate policies are not trade secrets. Indeed, Newmark has even filed its own broker policy handbook publicly,[9] belying its claim that the much older policy manual acquired from Grubb is somehow a trade secret.[10]

Lest there be any doubt about this, the executive who valued Grubb's assets when Newmark acquired them cleared it up. He testified [redacted][11] (35 J.A. 7775.)

---

[9] *See Capps v. Newmark Southern Region LLC*, Case No. 5:18-cv-00133-FL (E.D.N.C.), Doc. No. 34-4 (Ex. C).

[10] The assertion that the entire policy manual is a trade secret is also directly at odds with federal law. Specifically, in *Nuance Transcription Svs., Inc.*, No. 28-CA-216065, 2018 WL 11344168 (N.L.R.B.G.C. Nov. 14, 2018) the NLRB concluded that a "rule stating that [an employee] handbook and its contents [were] confidential [was] unlawful." *Id.* at *3. The NLRB noted that the employer's alleged concern that its handbook could fall "into the hands of its main competitor" was "relatively weak." *Id.* Instead, to the extent the handbook contained "any confidential or proprietary information," the employer could "tailor a rule to protect that information" specifically. *Id.* Like the employer in *Nuance,* Newmark has failed to specify any confidential or proprietary information in their employee policy manual, instead claiming the whole thing is a confidential trade secret.

[11] The cases Newmark relies on are also inapposite. First, Newmark claims that *3M v. Pribyl* stands for the broad proposition that "operating procedures and manuals" are trade secrets. Br. at 28 (citing 259 F.3d 587, 593 (7th Cir. 2001)). But *3M* did not deal with a manual of general employee policies. The trade secret in that case, contained in various manuals, was a manufacturing process for resin sheeting "which it took the company six years and considerable income to perfect." *Id.* at 596. And there was no testimony from an executive that the putative "trade secret" [redacted] (35 J.A. 7775.) Similarly, *Check 'n Go of Va., Inc. v. Laserre*, No.Civ.A.6:04 CV 00050, 2005 WL 1926609, at *3 (W.D. Va. Aug. 9, 2005) did not involve an employment policy manual, nor admissions that the alleged trade secret was worthless. Instead, that case involved a manual that "provide[d] details on how" a loan business should "collect or verify information given to them by prospective borrowers" and "how such information is to be used to ascertain a particular borrower's creditworthiness," which the Court found to be economically valuable. *See id*. There is no such evidence here.

This conclusion is only strengthened by Newmark's bald assertion that "AY used G&E's Manual to compile and create its own manual, given the similarities between certain parts of the documents." Br. at 28. Being careful not to present the actual facts to the court, Newmark cites to its own filing, coupled with general cites to the entirety of two lengthy documents that bear no substantial resemblance to each other. *See id.* (citing 10 J.A. 2298; 16 J.A. 3473; 21 J.A. 4552.) When a careful reader navigates to the two sections Newmark identified to the trial court as having any similarity—[redacted]" (*see* 10 J.A. 2298)—they clearly contain nothing secret.

Starting with the "[redacted]" policies, though the company's policies differ in numerous respects, they both require employees to [redacted] (16 J.A. 3483; 21 J.A. 4576). Both policies also provide that [redacted]. (16 J.A. 3484; 21 J.A. 4577.) It is simple common sense that these policies are not trade secrets. Is Newmark arguing that Grubb was the only firm with policies that [redacted]?

Newmark's argument on the other section it pointed to below—[redacted]—somehow manages to be weaker yet. While it is not surprising that two companies would have policies [redacted], the resemblance between these policies largely ends there. (See 16 J.A. 3490; 21 J.A. 4602.) Avison Young's policy is in fact significantly stronger, for example [redacted]. (21 J.A. 4602.) Grubb's weaker policy [redacted] (16 J.A. 3490.)

This is emblematic of Newmark's approach. In place of meritorious claims supported by evidence, Newmark offers heated rhetoric and misstatements, coupled with vexatious filings and vague references to piles of exhibits. The strategy was designed to baffle and overwhelm the trial court in the hope it would throw up its hands and deny summary judgment. Judge Jackson even foretold this strategy when he accurately predicted Newmark would "rent a U-Haul" to dump boxes of documents on the court to oppose summary judgment. (29 J.A. 6249.) It is to the trial court's credit that Newmark's approach failed.

c. The Commission Payment Program memo is not a trade secret.

Newmark's claims regarding the supposed "Commission Payment Program" memorandum also fail. The memo is actually a [redacted] that was *made public* through Grubb's bankruptcy proceedings. All of the key terms of this program were *publicly disclosed in court* (as the memorandum expressly contemplates) on March 7, 2012. *See In re Grubb & Ellis Co.*, No. 12-10685-mg (Bankr. S.D.N.Y. March 7, 2012), ECF No. 95-2. It is thus no surprise that Newmark did not even try to argue that this document derived "value" from being "secret."

The cases on which Newmark relies are readily distinguishable. First, *Mission Measurement Corp. v. Blackbaud, Inc.*, concerned "drawings, sketches, designs, screen mock-ups, measurement concepts and calculations, business plans, and product development plans," which were *not* disclosed to the public even in patent applications. 216 F. Supp. 3d 915, 921 (N.D. Ill. 2016). Second, *First Health Grp. Corp. v. Nat'l Prescription Adm'rs, Inc.* involved a "salary structure" that was only disclosed to a limited number of employees who had to sign confidentiality agreements to see the information, since it was used in plaintiffs' bids in response to RFPs. 155 F. Supp. 2d 194, 224 (M.D. Pa. 2001). Here, the information contained in the memorandum was shared widely within Grubb, and then made public within days through Grubb's bankruptcy proceedings.

d. The Gross-Production-Summary Report and Budget Spreadsheets are not trade secrets.

Finally, the "gross-production-summary report" and "Budget Report" cited by Newmark (Br. at 29) are not trade secrets. As with all of its alleged "trade secrets," Newmark makes no argument that this document derived value from its "secrecy" or that it would have been hard for Grubb's competitors to identify which of its brokers were productive by, for example, industry reputation, public listings, or simply asking the brokers.

In fact, undisputed evidence shows that the [redacted] (15 J.A. 3383), [redacted], (14 J.A. 3266-3277).

Under these circumstances, this information was not a trade secret. *See, e.g.*, *Am. Ctr. for Excellence in Surgical Assisting Inc. v. Cmty. Coll. Dist. 502*, 315 F. Supp. 3d 1044, 1059-60 (N.D. Ill. 2018) (finding that budgetary information was not a trade secret where plaintiff failed to describe what portion of the budget was allegedly a trade secret and what steps were taken to keep it confidential).[12] And even if it were a trade secret at some point in time (which it was not), Newmark fails to explain how it retained any value so many years after the financial period

---

[12] The primary case cited by Newmark does not hold otherwise. *PepsiCo, Inc. v. Redmond* dealt with Pepsi's "plans to compete, its financial goals, and its strategies for manufacturing, production, marketing, packaging, and distribution for the coming three years" as well as its "pricing architecture," including "both a national pricing approach and specific price points for given areas." 54 F.3d 1262, 1265 (7th Cir. 1995). This is orders of magnitude different from [redacted]. Furthermore, the parties in the case *did not dispute* that the information at issue was a trade secret.

of [redacted] that it covers, and where the broker team at issue was indisputably distributing more updated information to multiple brokerages.[13]

Finally, Newmark only alleges that Lipton "had access at AY" to these materials. Newmark cites no evidence as to how Avison Young supposedly misappropriated the materials, what "improper means" were employed, or how they were supposedly used. In fact, Mr. Lipton testified [redacted] (15 J.A. 3391.) Further, as noted above, the Team made its production figures widely available as it marketed itself to other brokerages in 2011.

2. The Broker Team Did Not Steal Any Trade Secrets

Newmark's contention that the Morris-McNair Team misappropriated trade secrets when it resigned fails at the outset because Newmark has not identified which materials, if any, it claims fall outside the scope of the Team's broker contracts. Those contracts specifically provided [redacted], and

---

[13] *See UTStarcom, Inc. v. Starent Networks, Corp.*, 675 F. Supp. 2d 854, 872 (N.D. Ill. 2009) (stating that "for 'staleness' reasons alone, the Court would deny UTSI's request to designate these documents trade secrets" and given the age, they were "unlikely to hold any value for [plaintiff]."); *Applied Indus. Materials Corp. v. Brantjes*, 891 F. Supp. 432, 438 (N.D. Ill. 1994) (after five years, pricing and revenue data is "so outdated that it lacks current economic value.").

that is exactly what it did. Newmark's allegations also fail because none of the documents Newmark identifies are trade secrets.

a. The Roehrenbeck email does not contain trade secrets.

The Roehrenbeck email and attachments cited by Newmark (Br. at 30) consist of [redacted]. (12 J.A. 2678 to 13 J.A. 3072)

Initially, documents related to the [redacted] cannot be used to support the trade secret claim here, because Newmark already pursued an entirely separate action based on that transaction, from which Avison Young was dismissed entirely. Newmark is precluded from relitigating the *Anser* case here. *Infra* at VI.

And even if the [redacted] were legitimately before this court, neither they, nor any other materials attached to the Roehrenbeck email would qualify as trade secrets, because they were disclosed to third parties, and thus are not protectible trade secrets. *Aktiebolaget Bofors v. United States*, 194 F.2d 145, 147 (D.C. Cir. 1951) ("The owner of an unpatented trade secret has a property right in it as long as he does not disclose it. His right to the exclusive use of it depends upon the continuance of secrecy."); *Taylor v. Babbitt*, 760 F. Supp. 2d 80, 86

(D.D.C. 2011) (disclosing trade secrets to third parties eliminates the trade secret status of such information). Indeed, aside from two inapposite case cites,[14] Newmark makes no effort whatsoever to explain how these documents, which include [redacted], could be considered trade secrets (much less *Grubb's* trade secrets), nor how they would derive value from being kept secret. And they fail to cite any non-disclosure agreement that would maintain the secrecy of these documents despite the fact that they were shared with outside parties. *See* note 16 *infra*. The trial court correctly granted summary judgment on these materials.

b. The G&E transition plan is not a trade secret.

Newmark next points to a "G&E transition plan," (Br. at 31.) which [redacted]. (27 J.A. 5899-

[14] Newmark cites *Meyer Grp., Ltd. v. Rayborn*, No. 19–1945 (ABJ), 2020 WL 5763631 (D.D.C. Sept. 28, 2020) for the proposition that "client lists or customer information can be trade secrets," but none of the documents Newmark points to here is a customer list or a compilation of confidential customer information, let alone a secret one belonging to Grubb. Newmark's other case, *Hyman Cos., Inc. v. Brozost*, 119 F. Supp. 2d 499, 505 (E.D. Pa. 2000), does not say that leases alone are trade secrets, as Newmark contends. Instead, in *Hyman*, the court found that a lawyer's knowledge of the lease terms used for all of a former client's leases, coupled with his knowledge of the profitability of each store associated with a lease, might be a trade secret. Newmark does not allege anything remotely similar.

5903.) The document is [redacted]. It does not contain any secret information, and as such is not a trade secret to begin with. [redacted], and there is no evidence the client agreed to keep the information "secret." *See* case cites in note 16 *infra*. And, [redacted] (2 J.A. 477-84, 497), Grubb had no proprietary rights in the document to begin with. Even if it was a trade secret, it was not Grubb's.[15]

c. The "client-specific proposal" is not a trade secret.

The "client-specific proposal" cited by Newmark (Br. at 31) is not a trade secret. It consists of [redacted]. (28 J.A. 5918-6017.) The entire purpose of the materials is to be *public*, not *secret*, and Newmark has not alleged how they would derive any value whatsoever from being kept secret. And the proposal [redacted]

---

[15] The only case Newmark cites to support the argument that the transition plan is a trade secret is *PepsiCo, Inc. v. Redmond,* discussed at n.12, above. Again, Pepsi's "plans to compete, its financial goals, and its strategies for manufacturing, production, marketing, packaging, and distribution for the coming three years" as well as its "pricing architecture," including "both a national pricing approach and specific price points for given areas," are entirely different than a single transition plan for one client over which Grubb had no proprietary rights.

[redacted]. (28 J.A. 5919-20.) Thus, as a matter of law, the proposal cited by Newmark is not a trade secret.[16]

d. No other alleged trade secrets are properly before this court.

Finally, Newmark references the existence of purported "additional examples" of trade secrets that it does not specifically identify for this court. Br. at 32. Those "additional" materials are all documents that Newmark failed to allege were trade secrets in the original summary judgment proceedings (*i.e.* they were not referenced in its 50-page "Additional Statement of Facts," nor among the 118

[16] The cases Newmark cites are not to the contrary. First, Newmark relies on *Vendavo, Inv. v. Long*, 397 F. Supp. 3d 1115, 1135 (N.D. Ill. 2019), for the proposition that "marketing materials" are trade secrets even when they contain public information. But in *Vendavo*, marketing presentations qualified as trade secrets where "***every client was required to sign a non-disclosure agreement***") (emphasis added). Plaintiffs have presented no evidence whatsoever, that any of their purported "trade secrets" were shared with third parties under a non-disclosure agreement or equivalent protections to secrecy. Indeed, marketing and promotional materials shared with customers or business prospects in the absence of customer NDAs are not trade secrets. *See UTStarcom*, 675 F. Supp. 2d at 869 (rejecting trade secret protection for marketing materials in the absence of reasonable steps taken to ensure secrecy where plaintiffs had not "presented any evidence that NDAs were executed before Exhibit G was shared with customers… ."); *Multimedia Sales & Mktg., Inc. v. Marzullo*, 2020 IL App (1st) 191790, ¶ 27 (affirming grant of summary judgment to defendants on plaintiff's trade secret claims where information was provided to a third-party absent a non-disclosure agreement). Newmark's other case, *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 523 (D.C. 1989), is completely inapposite, as it deals narrowly with documents exempt from FOIA requests, not misappropriation of alleged trade secrets.

exhibits appended thereto). Instead, Newmark raised them only when seeking reconsideration of the trial court's grant of summary judgment. (33 J.A. 7080–09, 7086.) But, as the lower court noted, a motion for reconsideration is not a proper forum to raise new arguments or evidence, absent circumstances not present here:

> Under Rule 60(b)(6), the plaintiffs motion fail under the relevant standards. There were no allegations of how the newly introduced exhibits were the result of a mistake/neglect, how they could not have been discovered in time prior to the opposition, or how they were the result of fraud/misrepresentation. (35 J.A. 7836-37.)

Newmark does not seriously contest this ruling of the trial court, and certainly it makes no showing that the court abused its discretion when it declined to allow Newmark to supplement the record with documents it could have submitted earlier.[17] As such, this court should not entertain Newmark's arguments about them now. In any event, even those "additional" documents are not trade secrets either, as Avison Young thoroughly demonstrated in the briefing below.[18]

C. The Trial Court's Ruling on Count IV Can Be Affirmed on Alternate Grounds

1. Newmark is Estopped from Pursuing Any Trade Secret Claims Because Grubb Did Not Identify Any Trade Secrets as Assets in its Bankruptcy Filing

[17] This court "review[s] the denial of a Rule 60 motion for abuse of discretion." *Nave v. Newman*, 140 A.3d 450, 453 n.2 (D.C. 2016) (citing *Johnson v. Lustine Realty Co., Inc.,* 640 A.2d 708, 709 (D.C. 1994)).
[18] *See* (35 J.A. 7755-58.)

As Avison Young argued below, Newmark should also be judicially estopped from pursuing *any* claims based on Grubb's alleged "trade secrets," because Grubb did not identify any trade secrets as assets in its disclosures to the Bankruptcy court. It is a fundamental principle of bankruptcy law that a debtor *must* identify *all* of its assets when seeking debt relief, because "the integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets." *In re Coastal Plains, Inc.*, 179 F.3d 197, 208 (5th Cir. 1999) (citation omitted). When a debtor fails to disclose an asset or claim, it "is tantamount to a representation that no such claim exist[s]." *In re Superior Crewboats, Inc.* 374 F.3d 330, 335 (5th Cir. 2004).

To enforce this stringent requirement, courts nationwide apply the doctrine of judicial estoppel to preclude debtors from later asserting claims or the existence of assets that were not disclosed in a bankruptcy proceeding. "The doctrine [of judicial estoppel] recognizes that where a party successfully assumes a certain position in a legal proceeding, that party may not subsequently assume a contrary position in a different proceeding, simply because that party's interests have changed, particularly where the change in position results in an unfair advantage to that party or where the change works an unfair detriment upon another party." *Dennis v. Jackson*, 258 A.3d 860, 864 (D.C. 2021) (citing *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001)). Estoppel is particularly appropriate where, as here, there is a "'meaningful connection' between the bankruptcy proceedings and the instant lawsuit."[19] *Id*.

Here, the prior "legal proceeding" was Grubb's bankruptcy petition, where, on March 15, 2012, Grubb filed—under penalty of perjury—a lengthy schedule of its assets, including a specific rider that obligated Grubb to identify all "intellectual property." (9 J.A. 1990.) The definition of "intellectual property" in the bankruptcy code includes "trade secret[s]" as the first example of such an asset. *See* 11 U.S.C. § 101(35A)(A). And although Grubb and its advisors spent "substantial time and resources" on the schedules, Grubb did not identify *any* trade secrets in its disclosures. (6 J.A. 1468-69.) This was tantamount to an admission that Grubb had no trade secrets to protect, and it is dispositive of Newmark's claims here.

Then, in August of 2012—less than five months later—Newmark filed suit in New York state court, purporting to seek millions of dollars in damages for alleged misappropriation of the trade secrets that *Grubb told the bankruptcy court did not exist*. This is precisely the situation that judicial estoppel was designed to prevent—a litigant gaining an advantage in a bankruptcy proceeding from underreported assets and potential claims, and then turning around and attempting to pursue claims and assets that it had successfully shielded from bankruptcy.

---

[19] Indeed, as noted above (*supra* at 5), members of the broker Team were among the largest creditors in Grubb's bankruptcy proceeding.

In the briefing below, Newmark attempted to excuse these failures by implying that Grubb's failure to identify any trade secrets could have been due to "mistake or inadvertence." (10 J.A. 2234.) But Newmark has not proffered any evidence that this was actually the case—instead arguing, incorrectly, that the burden was on Avison Young to prove that the omissions were *not* mistakes. This argument is so incredible that the court need not entertain it. In this proceeding Newmark argues that "[t]he record is *replete* with examples of trade secrets," (Br. at 27) and yet, shortly prior to filing suit, and after spending "substantial time and resources," and "engag[ing] in extensive communications [with advisors] . . . regarding the information needed for the Schedules," Grubb was unable to identify a single such trade secrets in its bankruptcy proceeding. (6 J.A. 1468.)

Further, Newmark's "mistake" and "inadvertence" arguments are contrary to law. After filing suit, Grubb never updated or amended its bankruptcy schedules to reflect its realization that it supposedly had millions of dollars in purportedly valuable trade secrets, or to include the claims that it was now pursuing against Avison Young. In such situations—when a litigant "well [knows] of [its] pending lawsuit and simply [does] not disclose it to the bankruptcy court," courts "apply a *presumption of deliberate manipulation*." *Ah Quin v. County of Kauai Dept. of Transp.*, 733 F.3d 267, 272–73 (9th Cir. 2013) (emphasis added) (citing *Eastman v. Union Pac. R.R. Co*, 493 F.3d 1151, 1159 (10th Cir. 2007); *Marshall v.*

Honeywell Tech. Sys. Inc., 828 F.3d 923, 926 (D.C. Cir. 2016) (upholding judicial estoppel where debtor failed to amend bankruptcy petition after filing suit).[20]

Equally unavailing were Newmark's other arguments below, including a frivolous contention that *Avison Young* (for some reason) should have appeared in bankruptcy court to challenge Grubb's failure to list any trade secrets (10 J.A. 2233); and reference to a boilerplate reservation of rights in Grubb's bankruptcy filing as a blanket excuse for its failings (*id.* at 2235). These do not cure the fact that Newmark is asserting claims based on "assets" that Grubb told the bankruptcy court it did not have. That should end Newmark's claims here.

2. Newmark Cites No Evidence of Improper Means

Newmark's trade secret claim also fails for another reason—because, *even if* Newmark had identified any valid or enforceable trade secrets (it did not), Newmark has still never shown that Avison Young used any "improper means" to acquire those alleged trade secrets. There are two elements for a trade secret claim under the DCUTSA: "(1) the existence of a trade secret; and (2) acquisition of the trade secret by improper means, or improper use or disclosure by one under a duty

---

[20] *See also Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784-85 (9th Cir. 2001) ("It is immaterial that Hamilton did not file this action . . . for one year after filing for bankruptcy. Judicial estoppel will be imposed when the debtor has knowledge of enough facts to know that a potential cause of action exists during the pendency of the bankruptcy, but fails to amend his schedules . . . to identify the cause of action as a contingent asset.")

not to disclose." *DSMC*, 479 F. Supp. 2d at 77. The lower court correctly held that Newmark could not meet the first element, but Newmark cannot satisfy the second element either—which requires a showing of "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means." *See* D.C. Code § 36-401(1).

Newmark does not squarely address the merits of the second prong in its brief as it relates to the actual Avison Young defendants here, but instead litters its submission with a barrage of accusatory language (*i.e.* more than seventy uses of "theft," "steal," "stolen" and the like) in the apparent hope that will satisfy the test. But heated rhetoric is no substitute for evidence, and a review of the actual facts—and Newmark's arguments below—shows that Newmark cannot meet its burden.

As an initial matter, Newmark must show how the defendants in *this* case (*i.e.*, certain Avison Young entities, and Mark Rose in his official capacity), used improper means to misappropriate Newmark's trade secrets. In its Complaint, Newmark's sole argument was that Avison Young induced the broker Team in "bad faith" to breach their contracts with Grubb and to then disclose trade secrets to Avison Young simply by offering the brokers compensation that "far exceeded industry standards." (1 J.A. 46–47, 52–53, Complaint ¶¶ 38, 74.) This "excessive compensation" argument fails on both the facts and the law.

Newmark essentially contends that Avison Young paid the broker Team too much money in their first year, and this amounts to trade secret theft. The argument is ludicrous. Not only does Newmark fail to point to any evidence that Avison Young promised payment *in exchange for stealing trade secrets*, but Newmark itself *often pays brokers more*. Indeed, the record reveals that [redacted] (6 J.A. 1469.)

Moreover, Newmark cites no case in support of its "excessive compensation" theory, which would also amount to disastrous policy by creating incentives to depress compensation instead of allowing competition to drive it up. Indeed, as New York's First Department correctly held in a related matter, because an "offer of competitive compensation is not wrongful or improper," it cannot satisfy the "improper means" requirement of a trade secret claim as a matter of law. *BGC Partners, Inc. v. Avison Young (Canada) Inc.*, 160 A.D.3d 407 (N.Y. App. Div. 2018). Thus, Newmark's primary "improper means" argument must fail.

The other theories that Newmark raised below are equally baseless. To the extent Newmark argues that it was Avison Young that owed a duty to protect the secrecy of Grubb's alleged trade secrets, Newmark gets the analysis exactly backwards. The law puts the onus on the *owner*, not its *competitors*, to take reasonable steps to safeguard the owner's trade secrets:

> The law does not "impose on [subsequent employers] . . . affirmative duty to undertake an inquiry, independent of the information given to them by [the employee] as to the source" of the employee's work product. An employer is permitted to rely on the representations of the employee that no breach occurred without any further duty of inquiry. The employee's contractual or fiduciary "duty to safeguard confidential information" is not imputed to subsequent employers.

Givaudan Fragrances Corp. v. Krivda, No. 08-4409 (PGS), 2013 WL 5781183, at *5 (D.N.J. Oct. 25, 2013) (citation omitted). Clear evidence shows that Avison Young complied with this limited duty by relying on representations by the brokers that "[redacted]." *See id.*; (7 J.A. 1616, 1635, 1653, 1669.)

Next, to the extent Newmark attempts to advance a *respondeat superior* argument, that legal theory has never been applied in the trade secret context in this jurisdiction (as Newmark was forced to acknowledge below). (10 J.A. 2238-40.) Nor would it be appropriate for this court to apply it here, for even under the approach previously advocated by Newmark (*i.e.* holding an employer liable if an employee ever "uses" a previously acquired trade secret within the scope of their new employment), Newmark's arguments would fail. That is because the brokers' contracts *with Avison Young* [redacted] *See, e.g.* (7 J.A. 1614.) Thus, a purported violation of their duties to Grubb would *also* be a breach of their contracts with Avison Young—and would therefore fall outside the scope of their employment.

Finally, any "improper means" argument with respect to the former Grubb executives (including Thakar and Lipton) must fail. By roping in Thakar and Lipton, Newmark attempted an untimely amendment to its Complaint several years too late—and the court should reject the arguments on that basis alone. Moreover, Newmark has never identified ***any*** obligations to Grubb that Thakar and Lipton allegedly breached or when they supposedly breached them, and, as Avison Young explained below, any such claim would be time-barred. *See* (29 J.A. 6233.)

All told, Newmark simply has not—and cannot—show that the Avison Young defendants misappropriated *anything* from Grubb by improper means. Without that showing, Newmark cannot sustain its trade secret claim.

III. THE TRIAL COURT CORRECTLY GRANTED JUDGMENT ON NEWMARK'S TORTIOUS INTERFERENCE WITH CONTRACT CLAIM (COUNT I)

To sustain a claim for tortious interference with contract, Newmark bears the burden of showing: "(1) the existence of a contract; (2) knowledge of the contract; (3) intentional procurement of a breach of the contract; and (4) damages resulting from the breach." *Paul v. Howard Univ*., 754 A.2d 297, 309 (D.C. 2000). Newmark also "bears the burden to establish a 'substantial and direct causal link' between [Avison Young's] alleged interference and the damages suffered." *Newmyer v. Sidwell Friends School*, 128 A.3d 1023, 1038–39 (D.C. 2015) (citation omitted). And, even where a party does induce a breach, "[a]n interfering defendant may avoid liability by showing that its interference was not improper—in other words, not something *beyond mere competitive activity*." *Modis, Inc. v. InfoTran Sys., Inc.*, 893 F.Supp.2d 237, 241 (D.D.C. 2012) (citing *Int'l City Mgmt. Ass'n Ret. Corp. v. Watkins*, 726 F. Supp. 1, 6 (D.D.C.1989) and *Murray v. Wells Fargo Home Mortg.*, 953 A.2d 308, 326 (D.C. 2008)) (emphasis added).

Applying these principles, the trial court correctly granted summary judgment for Avison Young because: (i) the members of the broker Team were all at-will employees, and those at-will relationships could not, in these circumstances, serve as the basis of a tortious interference claim; and (ii) regardless, Avison Young's recruitment of the Team was nothing more than textbook competitive activity—and thus was not "improper" as a matter of law. (30 J.A. 6596, 6600.) These rulings should be affirmed.

First, Newmark argues that that the trial court failed to appreciate the state of the law vis-à-vis "at-will" employment contracts. Specifically, Newmark points to this court's decision in *Newmyer*, 128 A.3d 1023, to argue that, "post-*Newmyer*, it is clear that an employee's former employer *can* bring a tortious-interference-with-contract claim." Br. at 37 (emphasis added). But the trial court did not hold otherwise. In fact, the court *agreed* with Newmark that "the holding in *Newmyer* does suggest that a claim of tortious interference can survive notwithstanding the existence of an at-will employment," but concluded that there was still no valid claim under the specific facts at issue here, in part because the facts of *Newmyer* and this case are readily distinguishable. (30 J.A. 6368.)

In *Newmyer*, a student's parent alleged a counselor cheated with his spouse and threatened to sue the school if they did not terminate the counselor. The school acquiesced, and the counselor sued the parent for tortious interference. This court noted the general rule that "there is no tortious interference claim for at-will employees," before carving out an exception under the specific circumstances of the case. *Id.* at 1040 & n.14.[21]

The facts here are entirely different. As the lower court noted, "instead of the aggrieved former employee filing the lawsuit [against a third party], it is now the employee's former employer that is pursuing the claim" against the *new employer*. (30 J.A. 6594.) This distinction is particularly significant in the tortious interference context because, when the allegedly interfering party is a commercial competitor, their behavior must go "beyond mere competitive activity." *Modis.*, 893 F. Supp. 2d at 241. Specifically, a complaining party must show the competitor's actions were "motivated by spite, malice, or some other improper objective." *Temps & Co., Inc. v. Finova Mezzanine Capital, Inc.*, No. CIV. A. 00-

[21] *See also Metz v. BAE Sys. Tech. Sols. & Servs. Inc.*, 774 F.3d 18, 23 (D.C. Cir. 2014) ("the general rule in the District of Columbia is that an at-will employment agreement cannot form the basis of a claim of tortious interference").

1349(JR), 2001 WL 503249, at *2 (D.D.C. May 9, 2001). Newmark, as the lower court found, and as further addressed below, cannot make such a showing here.

Second, Newmark argues there is a genuine question as to whether the Team's contracts were "at-will." The actual language of those agreements decimates Newmark's argument. They state, in unambiguous terms: "[redacted] *E.g.* (2 J.A. 484) (emphasis added). The agreements later re-emphasize that [redacted]." *E.g.* (2 J.A. 489) (emphasis added). And lest there be any doubt, in its bankruptcy filings, Grubb affirmatively represented that all of its brokers were "employees at will." (6 J.A. 1467.) There is simply no legitimate question of fact as to whether the brokers were at-will employees.

Third, Newmark's arguments regarding the effects of alleged post-employment restrictive covenants should also be rejected. Newmark did not even develop this argument until its Reconsideration Motion, meaning it cannot serve as the basis of relief now. *See* (35 J.A. 7834-35.) And even if it had been properly raised, Newmark has never (including in this appeal, and below) identified the actual "covenants" that Newmark believes were (i) breached, and (ii) not subject to the broker Team's contractual carveouts. Instead, as with its other claims, Newmark simply gestures vaguely at its impermissible "Additional Statement of Facts Not in Dispute" and hopes the court will intuit a dispute of material fact. This kind of conclusory argument fails to create a genuine dispute. Regardless, the entire premise of this argument—that the trial court *only* granted summary judgment because the contracts were at-will—is false, as the competitive privilege was the primary basis for its ruling. The argument is also unsupported by any evidence of actual intentional or improper interference by Avison Young.[22]

---

[22] Newmark relies on two decisions from a case styled *Robert Half Int'l Inc. v. Billingham*,315 F. Supp. 3d 419 (D.D.C. 2018) (*Billingham I*), and 317 F. Supp. 3d 379 (D.D.C. 2018) (*Billingham II*)—for the proposition that postemployment covenants alone can sustain a tortious interference claim, even when the employment relationship is at-will. Br. at 37-38. But, as noted, Newmark has utterly failed to identify *which* covenant they believe was enforceable, much less breached, and by whom; no case law can overcome that fundamental defect. Regardless, in *Billingham*, (as in *Legal Tech*, addressed *infra* at n. 27), the defendant failed to even raise competition as a defense—which is an absolute bar here. And the facts of *Billingham* are entirely different, including, *inter alia*, the improper use of confidential information (to which the *Billingham* defendant was *not* entitled) to directly solicit clients; and the use of confidential information to recreate a portion of the previous employer's database. *Billingham I*, 315 F. Supp. 3d at 424-32. Newmark, of course, has failed to demonstrate [redacted] To the contrary, [redacted]

Finally, Newmark failed below to demonstrate that Avison Young intentionally *or* improperly procured the breach of any contract,[23] and its arguments here are equally unavailing. For its intentionality argument (which, Newmark claims, is the only thing at issue), Newmark offers only a single conclusory sentence ("the record establishes that Defendants intentionally procured breaches of the Agreements"), followed by a barebones string cite to a dozen pages of Newmark's own impermissible "Additional Statement of Facts Not in Dispute." Br. at 40. Newmark's blanket and unexplained string cite does not create an issue of material fact. Avison Young is a commercial real estate brokerage, and its recruitment of commercial real estate brokers was obviously driven by competitive motives, not out of spite or ill will. Nothing Newmark cites suggests otherwise.

Newmark also contends that the second prong—impropriety—is purportedly "not in dispute here," and then proceeds to spend multiple pages arguing about why it *would* prevail if the issue *were* in dispute. Br. at 40-42. As part of this irrelevant argument, Newmark, as it did at the trial court, makes a series of unsupported allegations that Avison Young's conduct amounted to criminal "theft" using "stolen" documents, while citing no case law whatsoever to substantiate the relevance of these bald accusations to a tortious interference claim, which is

[23] *See Econ. Rsch. Servs.*, 208 F. Supp. 3d at 230 & n.12 ("A defendant is liable only if his interference is both 'intentional[]' *and* 'improper[]' or 'wrongful.'") (brackets and emphasis original).

preempted under the DCUTSA to the extent it is based on misappropriation of documents and information.[24] Newmark also presses its baseless theory that Avison Young may be held liable for "provid[ing] substantial financial incentives" to the broker Team (*i.e.* for paying them at competitive rates that were less than what Newmark offers its new hires). *See supra* at 41-42.[25] These arguments all fail.

Newmark simply cannot overcome the fact that Avison Young's decision to hire the broker Team was driven entirely by economic self-interest—which is privileged conduct. *See Temps & Co.,* 2001 WL 503249, at *2 ("When a party asserts a financial interest privilege" the court considers "whether the person's conduct is motivated by a desire to protect his economic interest, or whether it is motivated by spite, malice, or some other improper objective.") (citations omitted)); *see also Gaujacq v. EDF, Inc.*, 601 F.3d 565, 680 (D.C. Cir. 2010) (claim was meritless where plaintiff "points to no evidence showing that [defendant's] motivation for his action was other than legally justified").

---

[24] *See DSMC*, 479 F. Supp. 2d at 83-84 (explaining that the DCUTSA preempts any claim that is "clearly focused on misappropriation of trade secrets").

[25] Newmark also feigns outrage at the fact that, after the Team had decided to leave Grubb for Avison Young, [redacted]. Br. at 40. [redacted]

There is nothing in the record to suggest that Avison Young—a commercial real estate brokerage—hired brokers out of "spite, malice, or some other improper objective," rather than to "protect [its] economic interest." *Temps & Co.*, 2001 WL 503249, at *2 (citations omitted). Instead, as Grubb hurtled towards bankruptcy, [redacted] (6 J.A. 1467–68), [redacted] Like many of Grubb's other competitors, *including Newmark at the time*,[26] Avison young lawfully hired at-will brokers from Grubb to expand their business—thereby serving their own economic interests. There is nothing tortious about this activity, and so Newmark's claim must fail.[27]

---

[26] *See* (6 J.A. 1467 (citing 8 J.A. 1808, [redacted]).)

[27] Newmark attempts to rebut these key legal propositions by citing primarily to *Billingham* (addressed *supra* at n. 22), and an unpublished trial court order which is factually and legally distinguishable. Br. at 37-38. In *Legal Tech. Grp., Inc. v. Mukerji*, No. CV 17-631 (RBW), 2019 WL 9143477 (D.D.C. June 10, 2019), a defendant accused of tortious interference with contract "made no attempt to identify a 'legally protected interest' to support" his defense that his conduct was proper. *Id.* at *17. The defendant did not argue competition as a defense, and the case is simply inapposite here. *Id.* Moreover, the portion of the Restatement (Second) of Torts § 768 that *Legal Tech.* relies on, Comment h, is directly followed by a section titled "Contracts terminable at will," which states "The rule stated in Subsection (1) that competition may be an interference that is not improper also applies to existing contracts that are terminable at will." *Id.* cmt. i. Simply, competition is a legal justification, and *Legal Tech.* is inapplicable here.

A. This Court Can Also Affirm Summary Judgment on Count I on Alternative Grounds

1. Newmark Lacks Standing to Assert Claims Arising From the Rejected Broker Contracts

Newmark also cannot pursue a successful tortious interference with contract claim because it lacks standing insomuch as *Newmark did not have a contractual relationship* with the Team. Although Newmark acquired many of Grubb's assets in bankruptcy, Grubb did *not* assume the Teams' contracts, and, under 11 U.S.C. § 365(f)(2)(A) a contract must be assumed before it can be assigned in a bankruptcy proceeding. *Cinicola v. Scharffenberger*, 248 F.3d 110, 120 (3d Cir. 2001); *Bonneville Power Admin. v. Mirant Corp.* (*In re Mirant Corp.*), 440 F.3d 238, 253 (5th Cir. 2006) (finding that assumption must precede assignment). The undisputed facts establish that Grubb in fact rejected these contracts. (6 J.A. 1469.) As a matter of law, Grubb's rights under those agreements could not have been assigned to Newmark. *See, e.g.*, *Cheadle v. Appleatchee Riders Ass'n* (*In re Lovitt*), 757 F.2d 1035, 1042 (9th Cir. 1985). Thus, Newmark cannot establish that it has rights under any contract with the Team, and therefore cannot satisfy the first or second elements of a tortious interference claim. *Murray,* 953 A.2d at 326 (breach of a valid contract is an essential element of the tort).

2. Newmark Failed to Raise Any Genuine Issues of Fact Regarding Causation

Newmark also did not meet its burden to "establish a substantial and direct causal link" between Avison Young's alleged actions, and the Team's decision to terminate their agreements with Grubb. Instead, the undisputed record shows that the Team terminated their contracts [redacted] *See supra* at 4-5. This was the explicit ground for which the Team terminated their employment relationship with Grubb, and Newmark has entirely failed to establish that it was false or pretextual. On that further ground, the trial court's grant of summary judgment on Count I should be affirmed.

IV. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON NEWMARK'S TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCY CLAIM (COUNT II)

The trial court granted judgment on Count II for all the same basic reasons it granted judgment as to Count I, and it further found that the "claim for tortious interference with prospective business advantage also fails due to [Newmark's] vague references . . . [and because] the record reveals no evidence that the defendants intentionally induced these alleged phantom prospective business expectancies." (30 J.A. 6373.) In response, Newmark cites no case law whatsoever, but instead argues that the trial court's ruling was erroneous because there is supposedly "evidence in the summary-judgment record" that identifies various clients that Newmark contends were stolen by the broker Team. Newmark still fails to identify any "business expectancies, not grounded on present contractual relationships but *which [were] commercially reasonable to anticipate*." *Ali v. MedStar Health*, No. CIV.A. 99CA001753, 2003 WL 22005014, at *9 (D.C. Super. Ct. Aug. 15, 2003) (emphasis added). Newmark must identify evidence showing that a future relationship is "probable," not merely "speculative" or possible. *Washington Metro. Area Transit Auth. v. Quik Serve Foods, Inc.*, Civ. Nos. 04-838 (RCL), 04-687 (RCL), 2006 WL 1147933, at *6 (D.D.C. Apr. 28, 2006). It failed to do so below and fails to do so now.

Newmark's argument fails for a number of additional reasons, including because (i) Newmark has not even attempted to identify which deals, if any, fell outside the parameters of the broker Team's contracts, [redacted] and (ii) Newmark cannot explain how *Grubb*, which was mere days from bankruptcy at the time the Team left, had any reasonable expectation that any of its clients would remain with Grubb through liquidation. All told, Newmark has failed to show that Grubb had *any* specific, future business expectancies. *See Xereas v. Heiss* 933 F. Supp. 2d 1, 11-12 (D.D.C. 2013) (dismissing claim where plaintiff only generally alleged interference with "long standing business relationships").

Finally, Newmark utterly fails to address the trial court's valid concern as to "what role the defendants played in any of these alleged potential transactions."

(30 J.A. 6373.) Newmark argues that "[redacted] Br. at 43-44. But even if this unsupported claim were true—and it is not[28]—the Morris-McNair Team would be the proper defendants, not Avison Young. There is no evidence that Avison Young induced any party to breach obligations to Grubb. To the contrary, [redacted] (6 J.A. 1464–65.)

V. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON NEWMARK'S CONSPIRACY CLAIM (COUNT III)

Newmark's conspiracy claim (Count III) fails for several reasons, not the least of which is because its other claims of Avison Young's purported misdeeds all fail as well. *See Griva v. Davison,* 637 A.2d 830, 848 (D.C. 1994) (a claim for civil conspiracy "depends on the performance of some underlying tortious act,") *Smalls v. Emanuel*, 840 F. Supp. 2d 23, 35-36 (D.D.C. 2012) (dismissing civil conspiracy claim because of deficiencies in plaintiff's underlying tort claims). Indeed, the trial court granted judgment for Avison Young on Count III because it concluded, *inter alia*, "that the plaintiffs have not proffered sufficient evidence in support of any action by the defendants without lawful justification . . . [and] [t]here is no evidence that any agreements existed between any defendants in an

[28] *See, e.g.*, 6 J.A. 1437–40, and 44–45.

attempt to further a conspiracy to unlawfully loot Grubb & Ellis' personnel and information." (30 J.A. 6374.) This conclusion was correct—and dispositive of Newmark's conspiracy claim—for all the reasons discussed above.

VI. NEWMARK'S CLAIMS ARE PRECLUDED

A. Newmark's Claims are Precluded by the Resolution of the Anser Case

Newmark has not established a triable issue of fact on any of its claims. But even if it had, their claims all suffer from the threshold problem that Newmark could have, and should have, brought all of its claims against these Avison Young defendants in the *Anser* case in 2013. That case, which involved all of the same core allegations that Newmark makes here, was resolved on the merits in Avison Young's favor *six years ago*.

Claim preclusion applies where, as here, (1) the claim was "adjudicated finally in the first action;" (2) "the present claim is the same as the claim which was raised *or which might have been raised* in the prior proceeding;" and (3) "the party against whom the plea is asserted was a party or in privity with a party in the prior case." *Price v. Indep. Fed. Sav. Bank*, 110 A.3d 567, 571 (D.C. 2015) (citation omitted) (emphasis added). In the *Anser* case, Newmark's predecessor asserted four claims against Avison Young regarding the Morris-McNair Team that are virtually identical to the ones they raise here—misappropriation of trade secrets, tortious interference with contract, unjust enrichment, and conspiracy. In that case, Newmark's predecessor categorically alleged that "Defendant Avison Young acquired and used the trade secrets of Grubb & Ellis with knowledge that the trade secrets were acquired through improper means and without consent by Grubb & Ellis," and pursued the same conspiracy claim against Avison Young, stating that "Defendants . . . concerted together for the purpose of willfully and maliciously injuring Plaintiff's trade, business and reputation." In short, Newmark's own words confirm there "is a common nucleus of facts," and accordingly, "the actions arise out of the same cause of action." *Faulkner v. Gov't Emps. Ins. Co. (GEICO)*, 618 A.2d 181, 183 (D.C. 1992).

In February 2016, the district court in *Anser* dismissed all claims against Avison Young on summary judgment. *G&E Real Estate*, 168 F. Supp. 3d 147. That ruling resolves the claims against Avison Young. *See Luna v.Rambo*, 841 F. Supp. 2d 193, 196 (D.D.C. 2012) (applying D.C. law) (dismissal with prejudice operates as an adjudication on the merits); *Del Rosario v. Holder*, No. 10-1565 (JDB), 2011 WL 1325600, at *2 (D.D.C. Apr. 7, 2011) (summary judgment).

Further, the parties are identical or in privity with one another. The plaintiff here (Newmark Group, Inc.) is the successor to G&E Real Estate, Inc., the plaintiff in *Anser*. *See Price*, 110 A.3d at 571. There is privity on the defense side, too. Avison Young – Washington, D.C., LLC is a defendant in both cases, as are

Avison Young (Canada) Inc. and Avison Young (USA) Inc. The other defendant here is Mark Rose, the CEO of the defendant entities.

In short, Newmark had its day in court to argue that Avison Young misappropriated trade secrets and was party to a conspiracy involving the Morris-McNair Team. The *Anser* court's decision precludes re-litigation of "not only claims which were actually raised . . . but also those arising out of the same transaction which *could* have been raised" in that case. *Watergate West, Inc. v. Barclays Bank, S.A.*, 759 A.2d 169, 179 (D.C. 2000) (citing *Patton v. Klein*, 746 A.2d 866, 870 (D.C. 1999)) (emphasis added). Newmark unquestionably *could* have raised all of its current claims in *Anser*, but it chose not to. Having lost that case, it is precluded from pursuing the claims here.

B. Newmark's Claims are Also Precluded By the Resolution of the New York Case

Newmark's claims are separately barred by the resolution of the New York lawsuit that Newmark admits "sought redress" for the same claims at issue in this case. (1 J.A. 38 ¶ 8.) Newmark originally brought suit against multiple Avison Young entities in New York state court in August of 2012. In April of 2018, an appellate court in New York dismissed all of Newmark's claims, with prejudice. Newmark spent years arguing, incorrectly, that the dismissal of their claims was not "with prejudice." Last March, after the trial court in this case granted summary judgment to Avison Young, the appellate court in New York confirmed that its

April 2018 Order was a full and final dismissal of all of Newmark's claims in the New York case, with prejudice. *See BGC Partners, Inc. v. Avison Young (Canada), Inc*., 192 A.D.3d 498 (N.Y. App. Div. 2021) (the "March 2021 Order"). New York's highest court then rejected Newmark's motion for leave to appeal that decision. *BGC Partners, Inc. v. Avison Young (Canada), Inc*., 2022 WL 454164, at *1 (N.Y. Feb. 15, 2022). The preclusive effect of the New York Judgment is yet one more independent basis on which this Court can affirm the lower court's dismissal of all of Newmark's claims.[29]

Under longstanding Supreme Court precedent, "the Full Faith and Credit Clause 'generally requires every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it.'" *Nader v. Serody*, 43 A.3d 327, 336 (D.C. 2012) (citing *Durfee v. Duke*, 375 U.S. 106, 109 (1963)). Under New York law, *res judicata* is applicable whenever there is (1) an identity of claims, (2) a final judgment on the merits, and (3) identity or privity between the parties. *United Pub. Serv. Emps. Union v. Bd. of Educ. of the Westbury Union Free Sch. Dist*., 83 N.Y.S.3d 486, 487 (N.Y. App. Div. 2018). All three elements have been met here, precluding Newmark's claims.

[29] *Bechtold v. City of Rosemount*, 104 F.3d 1062, 1068 (8th Cir.1997) (noting that res judicata can be raised for the first time on appeal as an additional ground to affirm a judgment); *Russell v. SunAmerica Sec., Inc.*, 962 F.2d 1169, 1172 (5th Cir.1992) (an appellate court "may raise the issue of res judicata sua sponte 'as a means to affirm the district court decision below'").

First, this case has an "identity of claims" with the New York case because both cases involve the same series of transactions and occurrences in that the facts in both cases are closely related in time, space, motivation, and origin. *See Smith v. Russell Sage Coll.*, 54 N.Y.2d 185, 193-4 (N.Y. App. Div. 1981). Newmark has admitted as much in its Complaint, (1 J.A. 38 ¶ 8), and a direct comparison of the two cases proves this conclusively.

Both cases begin with the same core allegations: that Mark Rose, Grubb's former President, became Avison Young's CEO in 2008, and then began hiring Grubb personnel. (1 J.A. 35-36 ¶¶ 2-3; April 5, 2013 New York Amended Complaint ("NY AC") ¶¶ 2-3).[30] Both cases discuss the sequence of events that led to Grubb's bankruptcy filing, and BGC Partners, Inc.'s purchase of Grubb's assets on April 5, 2012. (1 J.A. 40-41 ¶¶ 21-22; NY AC ¶¶ 27-28.) And both cases allege that numerous brokers left Grubb, both before and after bankruptcy, to join Avison Young. (1 J.A. 45 ¶¶ 37-38; NY AC ¶¶ 34-36.) Newmark's allegations in the New York case were broad, encompassing "dozens of brokers" from around the country,

[30] This court may take judicial notice of the NY Amended Complaint. *See In re L.D.H.,* 776 A.2d 570, 574 (D.C. 2001) (noting that courts "may take judicial notice of the contents of court records in a related prior proceeding") (citation omitted). The NY AC is publicly available on the New York court's website: https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=o6P7DonaA332Xum/fGAcEw==

including the brokers who left Grubb's D.C. office to join Avison Young. (*See* NY AC ¶¶ 59, 90-94.)

Further allegations make clear the two cases center on the same allegedly tortious conduct. In both cases, Newmark makes ***identical*** allegations that:

> Defendants misappropriated Plaintiffs' trade secrets through bad faith and improper, unfair, and fraudulent means including, but not limited to, inducing brokers and Affiliates to breach confidentiality obligations, non-compete provisions and specific contractual terms not to disclose Plaintiffs' trade secrets. (*compare* 1 J.A. 52-53 ¶ 74 with NY AC at ¶ 133.)

Newmark's claims here indisputably arise from the same "factual grouping" as their claims alleged in the dismissed New York case.

Second, the claims in the New York case and this one are between the same parties or their privies. *See UBS Sec. LLC v. Highland Cap. Mgmt., L.P.*, 86 A.D.3d 469, 474 (N.Y. App. Div. 2011). The Newmark plaintiffs and the Avison Young defendants in this case mirror, in relevant part, the parties in New York; in fact, most of the entities here are identical to those in New York. The only differences are that: (1) among the plaintiffs here is Newmark Group, Inc., which is BGC's "successor in interest regarding the claims and causes of action in this lawsuit" (1 J.A. 38 ¶ 9); (2) among the defendants is now an Avison Young regional subsidiary (Avison Young-Washington, D.C.); and (3) Newmark named Avison Young's CEO, Mark Rose, in his capacity as an officer and director of the

Defendant-corporation. Notably, the Complaint does ***not*** allege any tortious conduct or injury that is specific to any of these additional parties.

Under New York law, corporate parents and their subsidiaries are "privies" that can benefit from (or be bound by) the preclusive effect of a judgment. *NPS Corp. v. Continental Grp., Inc.*, 585 N.Y.S.2d 17 (N.Y. App. Div. 1992). More generally, one party is in privity with another if "the interests of the nonparty can be said to have been represented in the prior proceeding." *See Buechel v. Bain*, 97 N.Y.2d 295, 305 (N.Y. 2001). Further, the critical question is whether the prior claim was resolved "***against*** a party, or one in privity with a party." *See id.* at 304. That is undoubtedly true here. Newmark's Complaint here asserts the exact same claims while simply adding a wholly-owned subsidiary as an additional defendant, which "does not defeat the res judicata defense." *Galet v. Carolace Embroidery Co*., No. 97 CIV. 5702(DLC), 1998 WL 386434, at *2 (S.D.N.Y. July 10, 1998).

Finally, there has been a "final judgment on the merits" in New York. "As a general rule, a dismissal 'with prejudice' signifies that the court intended dismiss the action 'on the merits.'" *Jespersen v. Li Sheng Liang*, 890 N.Y.S.2d 103, 104 (N.Y. App. Div. 2009) (citations omitted). Under settled New York law, the dismissal of Newmark's entire case in New York, with prejudice, has preclusive effect. *Yonkers Contracting Co. v. Port Auth. Trans-Hudson Corp.*, 712 N.E.2d 678, 681 (N.Y. 1999). Newmark sought to leave to appeal the March 2021 Order to the Court of Appeals, but that request was denied on February 15, 2022. *BGC Partners, Inc.*, 2022 WL 454164, at *1. Newmark has no further avenue of appeal, and the March 2021 Order is therefore entitled to *res judicata* effect in this court.

VII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED NEWMARK'S REQUEST FOR A FORENSIC AUDIT OR WHEN IT SANCTIONED NEWMARK

Finally, the trial court providently exercised its discretion when it denied Newmark's serial "forensic inspection" motions and sanctioned Newmark for its superfluous filings. The trial court acted well within the scope of its authority, particularly in light of Newmark's "disturbing" discovery practices, which "flaunt[ed] . . . the Court rules" and were "inconsistent with the sound administration of Justice." (6 J.A. 1345–47.)

A. The Trial Court Appropriately Exercised its Discretion When it Denied Newmark's Repeated Motions for Forensic Inspection

"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 School*, 134 A.3d 789, 799 (D.C. 2016) (citation omitted). "[T]his court will reverse a trial court's decision only if it is 'clearly unreasonable, arbitrary, or fanciful.'" *Id.* (citing *Kay v. Pick*, 711 A.2d 1251, 1256 (D.C.1998)). Here, there was nothing "unreasonable, arbitrary, or fanciful" about the trial court's decision whatsoever.

Newmark filed more than *ten* discovery motions, three of which are at issue here. In those motions Newmark repeatedly demanded a "forensic inspection" of electronic devices owned or used by the broker Team, including a "shared drive" used by the Team at both Grubb and Avison Young, and a personal "thumb drive" used by David Roehrenbeck, one of the junior members of the Team. (1 J.A. 71.)

Newmark filed its first such motion on March 14, 2018. (*Id*. at 75.) Newmark's motion was frivolous and harassing. Indeed, as further detailed in the briefing below, Newmark, among other things: (i) failed to meet-and-confer prior to seeking relief (2 J.A. 321); (ii) misrepresented to the trial court the course of communications between the parties (*id.* at 326); and (iii) failed to acknowledge that Avison Young and the relevant third parties had *already searched for and produced* documents responsive to Newmark's requests from the very sources for which Newmark demanded a "forensic inspection" (*id*. at 334).

Additionally, as Avison Young explained below, Newmark's request was unreasonably invasive, and it was not likely to lead to the evidence it sought anyway. Specifically, the "shared drive" is a dynamic workspace that is constantly accessed and updated; thus, allowing Newmark to "forensically inspect" the current iteration (from which Avison Young *had already* produced documents) would have been an entirely unwarranted overreach into a competitor's information systems. Moreover, to the extent Newmark wanted to inspect the version of the drive that existed in 2012 (*i.e.* from when the Team left Grubb, and thus containing any Grubb materials that the Team could have possibly accessed), that version resides on servers that *are in Newmark's possession*. (2 J.A. 324.)

Similarly, forcing Mr. Roehrenbeck to turn his personal thumb drive over to Newmark (which is suing Mr. Roehrenbeck directly in a different case) would have been improper and invasive. Mr. Roehrenbeck is not a party here, and the drive contains significant personal and private (and potentially privileged) data unrelated to any of the parties or claims at issue here. (2 J.A. 333.) Nonetheless, Mr. Roehrenbeck, a third party, still agreed to conduct a reasonable search of the drive and produce all responsive, non-privileged documents, provided Newmark would bear the costs of those efforts. (*Id.*) Newmark refused—choosing instead to burden the court, parties, and third-parties with meritless motions practice. Newmark's unwillingness to bear the cost of this search (particularly where it offered to pay for the "forensic inspection" it was demanding) completely undermines any argument that this discovery was so critical, and its denial so prejudicial, that the trial court's final judgment should be reversed.

Newmark's demand was particularly unreasonable because, as Avison Young noted below, an order of a forensic inspection constitutes "extraordinary relief" that is "disfavored unless the requesting party can demonstrate a specific need for one." *Health Mgmt. Assocs., Inc. v. Salyer*, No. 14-14337-CIV, 2015 WL

12778793, at *1 (S.D. Fla. Aug. 19, 2015) (also cited by Newmark). Here, particularly considering that Avison Young voluntarily searched for and produced documents, there was simply no need for an invasive forensic inspection, much less a need so compelling to grant such extraordinary relief.[31]

Presented with these facts and law, the trial court acted properly when it denied Newmark's original motion, on May 23, 2018. (3 J.A. 697.) Then, on November 19, 2018 Newmark filed a procedurally improper "renewed" version of its motion which the trial court denied on January 11, 2019. (5 J.A. 1212.) In the

[31] The litany of cases cited by Newmark at 46-47 are all readily distinguishable, and do not in any way support a general proposition that "forensic inspections are commonplace." Instead, Newmark's cited cases reveal the kind of unique situations where such inspections may be necessary, and further show why the trial court is best suited to make that determination. For example, *Priority Payment Sys., LLC v. Signapay, Ltd.,* 161 F. Supp. 3d 1294 (N.D. Ga. 2016), was a case *about source code* for computer software, and the court had already granted a preliminary injunction after finding that the plaintiffs' had a "likelihood of success on the merits." The court had also issued a preliminary injunction in *AdvantaCare Health Partners, L.P. v. Access IV*, No. C 03-04496 JF, 2004 WL 1837997, (N.D. Cal. Aug. 17, 2004), based in part on information plaintiffs had already obtained from a forensic audit of their own files. Other cases involved egregious fact patterns, sanctionable discovery conduct, or uncooperative witnesses. *See e.g.*, *Pearce v. Emmi*, No. 16-cv-11499, 2017 WL 528254, at *2-3 (E.D. Mich. Feb. 9, 2017) (forensic inspection of cellphone in police custody where police officer allegedly used the cellphone to remotely access a camera in plaintiff's home to view plaintiff while she was breastfeeding); *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) (defendant admitted he and third-party witness deleted relevant emails from third-party's email account after receiving subpoena); *Peskoff v. Faber*, 251 F.R.D. 59 (D.D.C. 2008) (defendant's "unwillingness to take his discovery obligations seriously . . . contributed to the need for a forensic examination"). None of these scenarios are remotely similar to the facts at issue here.

January 11th order, the court commented that the motion was "superfluous," and specifically noted that Newmark "failed to present any new evidence substantiating their claims that Defendants are withholding or have destroyed evidence and merely assert bald allegations of misconduct." (32 J.A. 7043.)

Undeterred, Newmark filed *another* motion a week later, on January 18, 2019, which purportedly sought reconsideration of its motion to "renew" its original discovery motion. (6 J.A. 1214.) The court denied that motion on January 30, 2019, and observed that the latest filing was "essentially a motion for reconsideration of a denial to a motion to reconsideration." (6 J.A. 1329.) The court further explained that:

> The plaintiffs now return for a third time on the same issue that the Court has already ruled on twice. The plaintiffs once again claim that there is brand new information but cites no rule or caselaw as to why this information should be considered. As stated previously, a forensic inspection is an extraordinary measure and it is not appropriate here. In short, stripped of its caption, the plaintiffs' motion does no more than recast arguments on issues previously addressed by this Court. (6 J.A. 1329.)

Newmark now claims that the trial court erred because it allegedly "ignored the evidence" when it found that Newmark had "merely asserted bald allegations of misconduct." Br. at 47-48. But, even setting aside the fact that there is no proof that members of the Team took *anything* from Grubb that they were not entitled to take, Newmark is badly misrepresenting the trial court's ruling.

Indeed, Newmark's citation to the trial court's January 11, 2019 order omits the crucial portions of the quoted sentence—entirely changing its meaning. The trial court *actually* found, in the context of Newmark's "renewed" motion, that Newmark had "failed to present any new evidence substantiating [its] claims that Defendants *are withholding or have destroyed evidence* and merely assert bald allegations of misconduct." (32 J.A. 7043.) That is, the trial court explained that Newmark had failed to make any showing that Avison Young was *hiding* evidence that could potentially be located through an invasive, and otherwise unnecessary, forensic audit. That ruling was fully supported—as noted, Avison Young and the broker Team *had already searched and produced* responsive documents from the devices at issue—and Newmark advances no actual arguments to the contrary.

The trial court's denial of Newmark's discovery motions was entirely reasonable, and far from "arbitrary, or fanciful." It should not be disturbed.

B. The Trial Court Appropriately Exercised its Discretion When it Sanctioned Newmark for Filing Repetitious, Superfluous Motions

As with a motion to compel, "[t]he decision to impose Rule 37 sanctions 'is vested in the broad discretion of the trial court, and [this court] will disturb the ruling only for an abuse of discretion.'" *Edwards v. Climate Conditioning Corp.*, 942 A.2d 1148, 1151 (D.C. 2008) (citation omitted). This court, "will find such an abuse only where the sanctions are 'too strict or unnecessary under the circumstances.'" *Id*. (citation omitted). Here, the sanctions were appropriate, and the trial court's rulings should not be overturned.

The trial court sanctioned Newmark for filing two frivolous motions for reconsideration, without raising any legitimate reconsideration grounds in either:

> [T]he plaintiffs clearly filed consecutive motions for reconsideration *and restyled the caption in order for the Court to consider the motions.* The plaintiffs' motion[s] *did no more than recast arguments on issues previously addressed by the Court, yet decided to file more motions for reconsideration nonetheless*. The Court stated at that time that the Court may determine what, if any, attorney's fees may be appropriate, and the Court finds that the $43,836.50 is appropriate. (35 J.A. 7829) (emphasis added)

Newmark argues that the trial court allegedly failed to "address the new evidence presented by [Newmark]." But, as noted above, this allegedly "new" information was *not evidence that Avison Young was withholding relevant discovery*. Moreover, Newmark has long known that the broker Team retained data and client materials (which they were entitled to). This was simply not "new" information at all. Thus, even if it were relevant, it could not support a motion for reconsideration.

Nor were the sanctions "too strict or unnecessary under the circumstances." *Edwards*, 942 A.2d at 1151. The court was not required to "close its eyes to the track record of [Newmark] on [other] discovery matters" when evaluating the propriety of the sanctions here. *Henderson v. District of Columbia*, 493 A.2d 982, 993 (D.C. 1985). The sanctions were relatively mild—and certainly not disproportionate to the severity of Newmark's abusive discovery misconduct.

The sole case cited by Newmark is *Vernell v. Gould*, 495 A.2d 306, 311 (D.C. 1985) (Br. at 50), which stands for the general proposition that a sanction should not be "too strict" under the circumstances. But in *Vernell*, the trial court *dismissed the entire case with prejudice* as a discovery sanction. *Id*. at 310-11.

Here, by contrast, the court awarded only the attorneys' fees that Avison Young expended opposing two motions for reconsideration. Under D.C. Super. Ct. R. 37(a)(5)(B), the court was *required* to award Avison Young those fees, unless it found that Newmark's "motion[s] [were] substantially justified . . . ." For all the reasons discussed, Newmark's motions to reconsider the denial of a forensic inspection were entirely meritless, and certainly not "substantially justified" (to say nothing of the dubious grounds of Newmark's initial motion, for which Newmark was not sanctioned). The trial court did not abuse its discretion when it sanctioned Newmark, and Newmark's appeal must fail.

Conclusion

For all of the foregoing reasons, the orders of the trial court appealed from should be affirmed.

Respectfully Submitted,

/s/ Jeremy B. Glen

Jeremy B. Glen (DC Bar No. 1002911)
STEPTOE & JOHNSON LLP
1330 Connecticut Ave. NW
Washington, DC

Tel. (202) 429-3042
jglen@steptoe.com

Nathaniel J. Kritzer (*pro hac vice*)
STEPTOE & JOHNSON LLP
1114 Avenue of the Americas
New York, New York 10036
Tel. (212) 378-7535
nkritzer@steptoe.com

Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of March, 2022, a copy of the foregoing Brief of Appellee was served on all counsel via the Appellate E-Filing system and electronic mail.

/s/ Jeremy B. Glen