IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SIXTH DISTRICT

DAVID SCHWARTZ,

Appellant/Petitioner,

v.

CASE NO.: 6D24-0707
L.T. NO.: 18-CA-005454

ADP, LLC,

Appellee/Respondent.
_____/

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Overview of Issue on Appeal

The underlying action involved a five count Complaint by ADP in relation to allegations that Schwartz violated certain employment agreements or duties during and after his employment with ADP (I. Injunctive Relief; II. Breach of Contract; III. Specific Performance; IV. Breach of Duty of Loyalty; V. Misappropriation of Trade Secrets). (ADP's Second Amended Complaint; R.7282-7336). Schwartz put forth certain affirmative defenses and also brought a counterclaim due to ADP's violation of Florida's private Whistleblower Act, Fla. Stat. 448.101-105. (R.13925-13937).

This appeal is brought as a result of multiple errors by the trial court during different times in the litigation, which culminated into an erroneous Final Judgment, after summary judgment, in favor of Appellee. (Final Judgment; R.25575-25577). The errors include I. Granting final summary judgment in favor of ADP as to (A) their claims against Schwartz and (B) Schwartz's counterclaim against ADP; II. Sustaining ADP's Motion for Exception to Magistrate's Report and Recommendation on a pertinent discovery issue; III. Limiting the deposition of ADP's expert; and IV. Striking demanded jury trial.

History of the Parties

The parties became acquainted through a 3+ year employee/employer relationship that started on or around May 18, 2015 (R. 1014). ADP alleges that, in consideration for employment, Schwartz signed a Non-Disclosure Agreement (NDA); Sales Representative Agreement (SRA); and Restrictive Covenant Agreement (RCA). (ADP's Second Amended Complaint; R.7282-7336). Although Schwartz was consistently a top performer when selling payroll services and securities to business owners, he began to question some of ADP's business practices, to include signing legal documents for ADP clients and partaking in the sale of securities without the proper licensure. (D's Second Amended Ans. and Counterclaim; R.999-1039; D's Mtn Recon Order Granting ADP's MSJ; R.20864-21013).

Up until the time that Schwartz had begun to aggressively demand ADP provide answers to concerns he had about ADP's business practices, Schwartz had been recognized by ADP as an extremely high performer and received multiple promotions/title changes and accolades. (D's Second Amended Ans. and

Counterclaim; R.999-1039; D's Mtn Recon Order Granting ADP's MSJ; R.20864-21013). Schwartz received his last promotion from ADP sometime at the very end of 2017 or beginning of 2018 which dramatically changed his target market from business owners to accounting professionals who could utilize ADP's more cost-effective wholesale payroll platform. (D's Second Amended Ans. and Counterclaim; R.999-1039; D's Mtn Recon Order Granting ADP's MSJ; R.20864-21013). The more clients provided by the accounting professional, to utilize ADP's payroll services, the more significant the discount was under the wholesale platform. (Rincon 53:11-55:18; 57:11-58:4; R.16121-16123; 16125-16126).

With all his prior customer business clients being taken away as the result of the new promotion, Schwartz was basically required to start anew in gaining accounting professional customers for ADP. (Schwartz Affidavit para.5-7; R.18484-18485). One idea that Schwartz came up with, under his new role with ADP, was to have an umbrella company to encompass many accounting and other professionals that could maximize ADP's discounts through their wholesale platform. (Schwartz Affidavit para. 8-13; R.18485). This would be a win/win for both the professionals (maximizing savings

on payroll services by providing potentially hundreds of new ADP payroll clients) and ADP (gaining significant payroll business ADP wouldn't have realized otherwise). (Rincon 53:11-55:18; 57:11-58:4; R.16121-16123; 16125-16126).

Although it was the idea of Schwartz to create United Business Consulting Group (hereinafter UBCG), an accounting professional friend of Schwartz and Schwartz's wife were listed as owners with the idea that it would be a one stop shop of professionals needing payroll services. (Schwartz Affidavit; R.18376). Part of why UBCG was formed was to utilize ADP's wholesale services platform and was created with the express knowledge of Schwartz's supervisors, to include his direct supervisor Milina Corrochano. (Schwartz Affidavit; R. 18485; Corrochanno Dep 24:15-25:9, 114:2-8; R. 10292-10293, 10382) UBCG was never set up to compete with ADP in any way, but instead to use services of ADP. (Schwartz Affidavit para. 15; R.18485).

As part of his duties to ADP and with the permission of his supervisor, Schwartz did assist in setting up UBCG. (Schwartz Affidavit para. 9-12; R.18485; Corrochanno Dep 24:15-25:9, 114:2-8; R. 10292-10293, 10382). This included Schwartz allowing UBCG

to have office space in a building in which Schwartz leased space for another business Schwartz owned. (Motion Recon ADPs MSJ; R.27328). Once UBCG was officially set up, Schwartz signed UBCG up for ADP payroll services through their wholesale platform with the knowledge of his supervisors, to include Milina Corrochano. (Schwartz Affidavit para. 8-12; R.18485; Corrochano Dep 24:15-25:9, 114:2-8; R. 10292-10293, 10382; ADP/UBCG paperwork; R.5116-5145).

As time passed, Schwartz became more persistent in requesting answers from the higher-ups at ADP regarding his concerns about illegal/unethical practices within ADP. (Schwartz 2nd Amend Counterclaim, para.10-19; R.1011-1014) When ADP continued to ignore his requests, it culminated in Schwartz sending an email, on June 13, 2018, to his supervisors attempting to negotiate a severance package. (Schwartz Amend. Response and Opp. to Pltf MFSJ; R.18388). There is evidence that this particular email was altered by ADP, after Schwartz sent the email, to include missing metadata and several different fonts within an alleged attachment. (Schwartz Affidavit para. 39, 42, 43; R.18489-18490; MSJ Hrg. Transcript R.27417:1-27418:9). Regardless, it was Schwartz's thought that a

severance made sense as he was going to report his concerns to regulatory bodies and felt it would be an uncomfortable position for everyone if he were to report the issues and maintain employment with ADP. (Schwartz Amend. Response and Opp. to Pltf MFSJ; R.18388). ADP ignored the proposed severance package. On July 3, 2018, an executive of ADP, Stephanie Karasiak, sent an email to two high ranking individuals in HR at ADP (Alexandra Brunetti and Adrienne Dollins) stating "Hi Alex, I sent you an email yesterday from David who is starting to try to connect with Javi. I am very concerned after seeing the email he sent to Javi this morning. Would you please connect with GSO/Legal today and get an update? It has been over 3 weeks with no resolution and now this." (R.10864). Almost immediately after this email was sent by Ms. Karasiak, ADP terminated Schwartz on or around July 18, 2018. (R.1019).

Upon his termination, Schwartz put ADP on notice that he planned to bring a lawsuit against ADP, but ADP beat him to the Courthouse and filed the abovementioned five count complaint before Schwartz could get counsel and file his own complaint. (Second Amend Counterclaim; R.996-1039). Once Schwartz gained counsel, he was able to answer the complaint by ADP with a demand for jury

trial and bring the counterclaim in this action for ADP's retaliation in violation of Florida's Private Whistleblower Act with a demand for jury trial. (Second Amended Counterclaim; R.996-1039).

Litigation History

Upon the initiation of the operative Complaint and Counterclaim, both sides conducted discovery and motion practice pursuing a jury trial in Lee County. (See Agreed Scheduling Orders; R. 580-583; 862-865; 1376-1379; 2713-2716; 3036-3039; 4978-4981). The litigation was contentious and lengthy.

In order to be successful in his claim against ADP, Schwartz had to show that 1) he engaged in statutorily protected activity; 2) he suffered an adverse employment action; and 3) the statutorily protected activity caused the adverse employment action. No one is disputing that Schwartz meets the second element in that he suffered an adverse employment action. As to the first element, there are three ways a private employee can engage in statutorily protected activity per Fla. Stat. 448.102(1-3). Fla. Stat. 448.102(1) (disclosure claims) prohibits retaliation against an employee who discloses his or her employer's activity, practice, or policy that violates a law, rule, or

regulation. Fla. Stat. 448.102(2) (Participation Clause) prohibits retaliation against an employee who participates in an investigation, hearing, or inquiry into an alleged violation of a rule, law, or regulation. Fla. Stat. 448.102(3) (Opposition Clause) prohibits retaliation against an employee who "[o]bjected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation."

In order to prove the first element, Schwartz planned to show that ADP violated laws, rules or regulations during his employment with ADP in which he disclosed the violations to regulating authorities, he participated in the regulatory authorities' investigation, and he refused to participate in the violations as an employee of ADP. (Second Amended Counterclaim para. 13-19; R.1012-1014). Thus, Schwartz engaged in all three protected activities under the statute. *Id.* Further, in order to Defend against the claims by ADP, it was relevant for Schwartz to show that he did not breach any agreement or duty of loyalty to ADP and that he did not misappropriate any trade secrets of ADP.

As to element three, Schwartz alleged that the temporal proximity of his protected activity to the adverse employment event

along with the fact that he was receiving accolades and promotions from superiors provided evidence of retaliation by ADP. (AmendCounterclaim; R. 1014). Further, ADP did almost no investigation prior to making claims that he was working for a competing company as an excuse to terminate Schwartz and ADP actually had knowledge that the company they say Schwartz was working for, in competition with ADP, was actually a wholesale partner of ADP set up by Schwartz in his capacity of an employee of ADP. (Corrochano Dep 24:15-25:9, 114:2-8; R. 10292-10293, 10382; UBCG/ADP paperwork; R. 0051167-5145: Schwartz Affidavit; R.18485). ADP relies solely on a hearsay printout of what, they allege, is a website with services of ADP that include payroll/HR services. (Screenshot; R.10602-10605). However, as a partner of ADP, UBCG was using ADP's platform, as a benefit to ADP, to provide those services.

Discovery Issues:

Trial Court's Exception to Magistrate's R&R:

Pertinent issues before the court, regarding discovery, included the trial court granting ADP's Motion of Exception to the Magistrates Report and Recommendation that thwarted the ability of Schwartz to

gain communications by ADP employees that were relevant to Schwartz's defenses and prosecution of his claims. (Report & Recommendation of Gen. Magistrate Relating to Objections to Notices of Deposition Duces Tecum; R.14020-14029; ADP's Exceptions to Report and Recommendation of Gen. Magistrate Relating to Objections to Notices of Deposition Duces Tecum; R.104556-14070; Order Sustaining Exception; R.14866-14867).

Throughout the course of this litigation, ADP has consistently stated that at the time Schwartz was employed by ADP, ADP's email retention policy was only 45 days. (D's MTC R.1401, 1461, 1465; Ex. M to D's Resp in Opp to P's MFSJ-P's RFP Responses; R. 18588-18589, 18593; Ex. N to D's Resp in Opp to P's MSJ-Fallon Dep; R.18601-18602). As such, what would have been responsive emails that were exchanged between Schwartz and other employees of ADP prior to the date ADP anticipated litigation, and which are not subject to attorney-client privilege, purportedly no longer existed on ADP's email servers. (D's MTC R.1401, 1461, 1465; Ex. M to D's Resp in Opp to P's MFSJ-P's RFP Responses; R. 18588-18589, 18593).

However, ADP employees had non-privileged responsive documents on their computers and their mobile telephones.

(Corrochano Dep 26:11-27-13; R.10294-10295). During the deposition of the direct supervisor of Schwartz, Milina Corrochano, it was determined that Ms. Corochano had kept and maintained certain emails and text messages as part of her professional and personal communications with Schwartz. (Corrochano Dep 26:11-27-13; R.10294-10295).

The Duces Tecum portion of her Notice of Deposition requested: 1) For the time frame May 2015 through the present, produce any and all text messages between you and David Schwartz, including, but not limited to group chats/group text messages; and 2) For the time frame of May 2015 through the present, produce any and all emails exchanged between you and David Schwartz. (Notice of Taking Videotaped Deposition Duces Tecum R.10635). Corrochano testified that she provided emails and text messages to Counsel for ADP during her deposition. (Corrochano Dep 26:11-27-13; R.10294-10295) However, none of those emails or text messages were ever provided to Schwartz by ADP. Similarly, as indicated in the Report and Recommendation of General Magistrate Relating to Objections to Notice of Depositions Duces Tecum of October 18, 2022, Schwartz requested the same documents in the Duces Tecum portion of Notice

of Deposition for Gregory Kohles and James Goldrick, but ADP objected shortly before their depositions. (Report and Recommendation of Gen. Magistrate Relating to Objections to Notice of Depositions Duces Tecum; R. 14020-14029)

After oral argument on the issue as to whether ADP was required to produce emails and text messages its employees had on their laptops and mobile phones, the General Magistrate found that employees of ADP had responsive documents, both business and personal, in their possession, custody control and that should be produced. (*Id.*).

ADP subsequently filed its Exceptions to Report and Recommendation of Gen. Magistrate Relating to Objections to Notices of Deposition Duces Tecum. (R. 104556-14070). The Court subsequently sustained ADP's Exception with no real findings as to why he granted such relief. (Order Sustaining Exception; R.14866-14867.

Limitations of Expert Deposition:

Another discovery issue for consideration in this appeal relates to the limitations on deposing ADP's securities expert. (Order on Motion to Compel Dep of Elliott Server; R.14745). As part of

Schwartz's Whistleblower claim, he planned to show that ADP engaged in the unlicensed sale of securities. (Second Amended Counterclaim para. 9-22; R.1010-1016). ADP paid an alleged expert to testify that ADP did not engage in the unlicensed sale of securities. (Server Dep; R.14150-14358).

Securities, and how it related to the case, was an extremely complex issue that required a significant amount of factfinding and questioning. After the deposition started, counsel for ADP provided 250 pages of new documents that had not been produced before the deposition. (Motion to Compel Server Dep; R.14137-14138). Later in the afternoon of that deposition counsel for ADP unilaterally halted the deposition due to personal reasons and it was agreed that the deposition could be continued. (Server Dep 198:4-199:17, R.143349,144350)

However, ADP's counsel refused to allow the rescheduling of Server's deposition, which required a Motion to Compel his attendance. (Motion to Compel; R.14137-14138). The Court ultimately decided that counsel for Schwartz had engaged in enough time regarding any issues other than the new documents that were provided at the deposition. (Minutes of MTC hearing; R.14666-14667)

As a result, the trial court limited the scope of the continued deposition, disallowing Schwartz to provide questions still pending at the time counsel for ADP unilaterally stopped the deposition. (Order on Motion to Compel Dep of Elliott Server; R.14745).

Lack of Proof that UBCG was Competing with ADP:

Because a central issue in both the claims brought by ADP and the claim brought by Schwartz hinged on whether UBCG was a competing company, a significant amount of discovery was directed to that issue. (Schwartz Affidavit para. 15; R.18485; Corrochanno Dep 24:15-25:9, 114:2-8; R. 10292-10293, 10382; DeLaRosa Dep 70:3-71:1; R. 18949-18950)

After years of discovery, the only evidence that ADP could provide to support their claim, that UBCG was set up to be a competing company with ADP, was an alleged screenshot of UBCG's website in which it listed payroll/HR services as part of the services it was to provide. (Ps Notice Filing Dep Tr. Milina Corrochano; R. 10602-10605). There has been no foundation laid as to when the screenshot was taken, who owned the website, who provided the content of the screenshot, or whether the screenshot is accurate. However, discovery and motion practice has flushed out that, even if

this screenshot was accurate and UBCG marketed payroll services, the services it was marketing would have been provided through ADP as a wholesale partner and not in competition with ADP. (Schwartz Affidavit para. 15; R.28485; UBCG/ADP paperwork; R.5116-5145).

Lack of Showing any Monetary Damages to ADP:

Also, because part of ADP's burden in their breach of contract claims was to show damages, significant discovery was propounded by Schwartz requesting information as to the amount of damages ADP was claiming. (Fallon Dep; R.15908-15988). After years of discovery, the only damages (exclusive of attorneys' fees) that ADP could come up with was, (1) $10.00 as a result of sending two letters to two ADP clients advising them that some of their information may have been compromised but that there was nothing nefarious/malicious relating to the information being compromised, and (2) a speculative unknown amount for time Schwartz allegedly was working on UBCG (which is dependent on UBCG being a competitor of ADP). (Mayorga Dep; 14:15-23; R.18239, Fallon Corp Rep Dep 16:13-15, 23:3-24:25, 24:22-25:18 R.15924, 15931-15933) Even though ADP can only point to $10 in damages, they allege over

$1.9 million in attorney's fees. (Fallon Corp Rep Dep 24:16-21; R.15932).

ADP's Summary Judgment Granted:

On June 24, 2022, ADP filed their Motion for Final Summary Judgment directed to the Second Amended Complaint and Second Amended Counterclaim. (R. 8475-8539). A hearing on ADP's Motion for Summary Judgment was heard on June 19, 2023 after which the trial court instructed each party to submit their competing proposed Orders for consideration. (R. 20862; 20874-20919). After submission of competing orders, the court adopted ADP's draft of their competing order in its entirety. (R. 20847-20856).

After ADP's proposed order was entered, Schwartz filed a Motion for Reconsideration and further pointed out the record evidence showing that the Trial Court's findings were erroneous. (R.20864-21013). However, the trial court denied the Motion for reconsideration after hearing. (Order Denying Mtn for Recon. R.21075).

Jury Trial Stricken:

On June 1, 2020, Schwartz filed a Motion for Jury Trial and/or to Amend Defendant's Answer Affirmative Defenses and

Counterclaim. (Schwartz's Mtn for Jury Trial; R.875-921). The reason for filing this Motion was ADP's refusal to agree to a new case management plan that included a provision for a jury trial, claiming that Schwartz waived a jury trial for failure to include it in the body of his most recent responsive pleading to ADP's first Amended Complaint. *Id*. ADP had refused to include the jury trial in the order, even after Schwartz's initial responsive pleading to the original complaint included Schwartz's demand for a jury trial and the current responsive pleading to the Amended Complaint provided for a demand for jury trial in its title. *Id*. At no time did ADP make any argument that Schwartz waived his jury trial as a result of contractual terms with ADP. *Id*.

On July 10, 2020, the trial court granted Schwartz's Motion for Jury Trial. (Order Granting Jury Trial; R.1042). The order was based on Schwartz's proper and timely demand for jury trial in his pleadings and prior agreed case management plans. (Schwartz's Mtn for Jury Trial; R. R.875-921). From July 2020 up until August 2023 the parties had agreed to a jury trial in their agreed scheduling and case management orders. (See Orders; R.1376-85, 2713-16, 2720-25, 3034-39, 4780-86).

However, within a few months before trial, on August 9, 2023, ADP filed a Motion to Strike Jury Trial. (Motion to Strike Jury Trial; R. 21017-21029). ADP argued that, since the court had found liability as to ADP's claims against Schwartz and extinguished Schwartz's counterclaim via summary judgment, his demand for jury trial should no longer be considered and the court should conduct a bench trial on ADP's damages. (ADP's Mtn Strike Jury Trial; R.21017-29). For the first time, ADP was claiming that Schwartz had waived his right to a jury trial based on the contractual provisions in the alleged agreements between Schwartz and ADP.

After hearing on November 21, 2023, the trial court granted ADP's Motion to Strike Jury Trial. (Order Granting Motion to Strike Jury Trial; R. 21083-21084). On February 27 and 28, 2024, the trial court conducted a bench trial on damages as requested over the objection of Schwartz.

STANDARD OF REVIEW

Summary Judgment

The Standard of Review regarding an order granting summary judgment is de novo. Summary judgment is appropriate where

"there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Brevard County v. Waters Mark Developm't Enterprises, LC,* 350 So.3d 395, (Fla. 5th DCA 2022). An issue of fact is "genuine" only if "a reasonable jury could return a verdict for the nonmoving party." *Id.* A fact is "material" if the fact could affect the outcome of the lawsuit under the governing law. *Id.*

The moving party bears the initial burden of identifying those portions of the record demonstrating the lack of a genuinely disputed issue of material fact. *Id.* (Citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). If the movant does so, then the burden shifts to the non-moving party to demonstrate that there are genuine factual disputes that preclude judgment as a matter of law. *Id.* To do so, the non-moving party must go beyond the pleadings and "identify affirmative evidence" that creates a genuine dispute of material fact. *Id.*

In determining whether a genuine dispute of material fact exists, the court must view the evidence and draw all factual inferences therefrom in a light most favorable to the non-moving party and must resolve any reasonable doubts in that party's favor. *Id.* Summary judgment should only be granted "[w]here the

record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Id.* (Citing *Matsushita*, 475 U.S. at 587, 106 S.Ct. 1348).

Injunctive Relief/Misappropriation of Trade Secrets

The appellate review of trial court orders granting injunctive relief applies a hybrid standard. *Graham v. Battey*, 347 So.3d 515 (Fla. 5th DCA 2022). This means that to the extent the trial court's order is based on factual findings, the appellate court will not reverse the decision unless the trial court abused its discretion; however, any legal conclusions are subject to de novo review. *Id.*

Orders Regarding Discovery

Protective Orders: Generally, the standard of review of a trial court's decision to limit the scope of a deposition by way of a protective order is reviewed for abuse of discretion. *Savannah Capital, LLC v. Pitisci, Dowell & Markowitz*, 313 So.3d 953 (Fla. 2d DCA 2021). Upon a showing of good cause to protect the deponent from annoyance, embarrassment, oppression, or undue burden or expense, a protective order is justified. *Id.* The burden of showing good cause is on the party seeking the protective order, and a strong

showing is required before a party will be denied the right to take a deposition. *Id.*

Quash Duces Tecum: The standard of review regarding a trial court's decision to grant and exception to a magistrate's report and recommendation on the scope of a subpoena duces tecum is abuse of discretion. *Sunrise Shopping Center, Inc. v. Allied Stores Corp.*, 270 So.2d 32 (Fla. 4th DCA 1972). In order to be justified in quashing a subpoena duces tecum, it must be shown that the subpoena is unreasonable or oppressive. *Id.* (Citing Fla.R.C.P. 1.410(b)).

Striking Jury Demand

The Standard of Review regarding the striking of a jury trial is abuse of discretion. *Olin's, Inc. v. Rader*, 161 So.2d 711 (Fla. 3d DCA 1964). "Waiver of the right to a jury trial is to be strictly construed and not be lightly inferred. When such a constitutional right is vested in a party who has timely invoked it and there is doubt as to whether this right has been waived, such doubt is to be resolved in favor of the party for whom the right is provided." *Boston Rug Galleries, Inc. v. William Iselin & Co.*, 212 So.2d 58, 61 (Fla. 4th DCA 1968).

SUMMARY OF THE ARGUMENTS

The trial court committed reversable error on several issues throughout the underlying litigation that requires reversal. This includes error in granting ADP's Motion for Summary Judgment as to liability on claims by ADP against Schwartz; granting summary judgment as to Injunctive Relief associated with misappropriation of trade secrets against Schwartz without proper findings; and granting summary judgment Exculpating ADP from liability on the Whistleblower Counterclaim brought by Schwartz.

Also, the trial court abused its discretion as to discovery issues in granting ADP's Motion for Exception from the Report and Recommendation of the Magistrate on the issue subpoenas duces tecum directed to employees of ADP; and Improperly limited the scope of deposing ADP's expert witness. Finally, the trial court abused its discretion in striking the inviolate right of Schwartz's demand for Jury Trial.

Error Granting ADP's MSJ Regarding Claims Against Schwartz:

Erroneous Findings Schwartz Breached his Contract/Duty of Loyalty

The trial court erroneously granted ADP's Motion for Summary Judgment as to liability upon Schwartz on counts of Breach of

Contract and Breach of Duty of Loyalty. There were two erroneous reasons the trial court found Schwartz committed these breaches.

The first reason the court found that Schwartz breached his agreements with ADP was because he kept property belonging to ADP after his employment was terminated. However, the Court disregarded factual issues showing Schwartz had a contractual and legal right to keep the property in furtherance of an investigation by legal authorities and his pursuit of a Whistleblower claim against ADP.

The second reason the court found Schwartz breached his contractual agreement with ADP relied upon the false assumption that Schwartz worked for a competing company (UBCG) while employed at ADP. However, the only record evidence that attempted to show UBCG was a competing company was a hearsay screenshot of, allegedly, UBCG's website showing that UBCG provided Payroll/HR services, which are service provided by ADP. The first flaw in relying on this one piece of evidence is that it is inadmissible hearsay and no foundation has been laid as to its authenticity or accuracy. The second flaw with relying on this piece of information is that there is a plethora of record evidence that disputes the fact that

UBCG was competing with ADP, but instead was a partner with ADP. Simply put, there is a multitude of issues for the factfinder to weigh and determine regarding whether UBCG was a competing company that would preclude summary judgment.

Error Ordering Schwartz Misappropriated Trade Secrects/Injunction

The Court made legal conclusions that Schwartz misappropriated ADP's trade secrets which warranted injunctive relief. However, the trial court failed to make proper findings to support such conclusions. Further, there are questions of fact to preclude the relief.

Error Granting MSJ as to Whistleblower Claims Against ADP:

The trial court relied on disputed facts to find that Schwartz failed to make an evidentiary showing regarding the causation element of a Whistleblower claim. Although ADP claimed that they had a justified right to terminate Schwartz outside of his protected activities as a whistleblower, there was a multitude of disputed facts to overcome that position. ADP claims Schwartz worked for UBCG, as a competitor of ADP, while he was an employee with ADP, precluding Schwartz's whistleblower claim. However, the court, in its own order recognized an issue of disputed fact, finding that

Schwartz claimed the temporal proximity of his protected whistleblower activities and his termination by ADP is evidential support of causation. Further, there is a plethora of disputed fact as to whether UBCG was a competitor of ADP, which would preclude a finding, as a matter of law, that Schwartz couldn't meet his causation burden.

Error in Discovery Rulings

Improper Quashing of Subpoena Duces Tecum:

The trial court abused its discretion in granting ADP's Motion for Exception from Magistrate's Report and Recommendation. Schwartz had properly served a subpoena duces tecum as part of a deposition of certain ADP employees that had emails and text messages that were relevant to the issues in the case. The Magistrate recommended the employees be compelled to produce that evidence for their deposition and the trial court erroneously granted ADP Motion for Exception as to the Magistrate's recommendation.

Improper Limitation of Scope and Time of Expert Deposition:

The trial court abused its discretion when it limited the time and subject matter upon which Schwartz could question ADP's expert during his deposition. ADP had unilaterally stopped the

deposition for personal reasons with agreement to continue the deposition but then objected to the continued deposition. The court order limitations on the deposition without the proper finding.

Error Striking Jury Trial

Although the trial court had previously determined that a jury trial demand was properly made by Schwartz early on in the litigation, the trial court abused its discretion when it struck the jury trial demand within months of the trial based on a contractual provision within one of the three contracts ADP alleged had been breached. Because damages associated with two contracts were to be tried without a waiver of jury trial, the entire trial should have been tried by jury. Further, if ADP's summary judgment reversed, the order striking jury trial should also be reversed as it would renew claims outside the contractual provision of the one alleged agreement between the parties.

ARGUMENT

I. TRIAL COURT IMPROPERLY GRANTED ADP'S MOTION FOR FINAL SUMMARY JUDGMENT

A. ADP's Motion for Summary Judgment as to their claims against Schwartz

Introduction:

On June 24, 2022, ADP filed their Motion for Final Summary Judgment directed to the Second Amended Complaint and Second Amended Counterclaim. (R. 8475-8539). This Motion requested that the Court rule in ADP's favor even though there was record evidence of disputed facts that could have had an affect on the outcome of the suit. (R. 8475-8539; R. 18373-18391). A hearing on ADP's Motion for Summary Judgment was heard on June 19, 2023 after which the trial court instructed each party to submit their competing proposed Orders for consideration. (R. 20862; 20874-20919). After submission of competing orders, the court adopted ADP's draft of their competing order in its entirety. (R. 20847-20856).

ADP's order, adopted in its entirety by the trial Court, has multiple erroneous findings that allege undisputed facts that are actually disputed through substantive and admissible evidence. (R.20847-20856). After ADP's proposed order was entered, Schwartz filed a Motion for Reconsideration and further pointed out the record evidence showing that the Trial Court's findings were erroneous.

(R.20864-21013). However, the trial court denied the Motion for reconsideration. (Order Denying Mtn for Recon. R.21075).

The foundation of ADP's argument teeters on two legs of disputed facts in their allegations that Schwartz breached his Agreements with ADP. Both of these precarious legs collapse due to disputed conclusions that the trial court erroneously relied upon as undisputed in granting summary judgment regarding ADP's claims against Schwartz.

The first leg claims that Schwartz breached his employment agreements because he failed to return certain property to ADP after his termination. (ADP's Second Amended Complaint para. 33; R.7288). This argument collapses as the Agreements and Federal law allow for an employee to assist authorities in an investigation, especially when the employee is a whistleblower. (NDA, paragraph 6; R. 7307; 18 U.S.C. 1833(b). Therefore, Schwartz was completely justified in keeping and preserving pertinent evidence and it is unrefuted that Schwartz did not use the property in any way other than to either preserve or turn over information to the investigating authorities. (Schwartz Affidavit; R.2840-2942). Contrary to ADP's allegations regarding the laptop, Schwartz repeatedly

offered/requested the laptop be surrendered to a neural third party, to no avail. (Schwartz Affidavit; R.2841-2942)

The second leg claims that Schwartz worked for and was heavily involved in a competing company (UBCG) during his employment with ADP. (ADP's Second Amended Complaint; R.7287-7288). This argument collapses as the undisputed facts show that UBCG was not competing with ADP, but instead a wholesale partner of ADP. (Affidavit of Schwartz para. 15; R.18485; UBCG/ADP paperwork; R.5116-545). Although Schwartz admittedly was the one that thought of the formation of UBCG as an umbrella-company of accounting professionals and other businesses that needed a payroll platform for their clients and employees, the idea of UBCG was never to compete with ADP. (Affidavit Schwartz; R.18484-18485; Dep Tina De la Rosa; 70:3-71:1; R. 18949-18950). Once UBCG was set up, Schwartz signed UBCG up as a customer of ADP through ADP's wholesale platform as part of his out of the box thinking and duties assigned by ADP. (Corrochano Dep 24:15-25:9, 114:2-8; R. 10292-10293, 10382; UBCG/ADP paperwork; R. 5116-5145).

The only thing that ADP points to as evidence showing UBCG was competing with ADP is an alleged screenshot of UBCG's website

claiming that UBCG provides Payroll/HR services. (Dep Tr. Milina Corrochano; R.10602-10605). There has been no foundation laid as to when the screenshot was taken, who provided the content of the screenshot, whether the screenshot is accurate and no exception to hearsay was provided as to how this screenshot would be admissible for consideration by the trier of fact. However, even if this hearsay document was admissible (which it's not) it would not show that UBCG was competing with ADP, because UBCG was to provide payroll service through ADP's wholesale platform as a wholesale partner with ADP. (Corrochanno Dep 24:15-25:9, 114:2-8; R. 10292-10293, 10382). Therefore, since UBCG was to provide payroll services through ADP, then it would only make sense that UBCG would advertise for payroll/HR services, not in competition with ADP but as a wholesale partner of ADP. There is not one other piece of evidence that gives any indication that UBCG was competing with ADP.

If this Court finds that there are disputed facts that could have had an effect on the outcome of the trial as to either or both of the two legs relied upon by ADP, then reversal is necessary. The trial court ruled New Jersey law applied and that New Jersey law allowed for attorney's fees as damages in a breach of contract claim. (Order

New Jersey Law Applies; R.19300). As a result of that ruling, the trial on damages, after summary judgment, encompassed all fees associated with prosecution of both legs of breach. (Final Judgment; R.25575-25576) This means that even if one leg of ADP's argument fails then remand is necessary and a new trial would be required in order to determine the true damages of attorney's fees associated with the surviving breach as opposed to both.

Below, in blocked quotes, are the numbered paragraphs quoting the findings of ADP's adopted order by the trial court. They are separated by subject of the findings and thereafter, outside of blocked quotes, are explanations as to why the findings of fact are disputed to such a degree that a reasonable jury could find for Schwartz.

Leg 1- Erroneous Findings of Breach by Keeping ADP Property:

Blocked quotes from the Order as to Breach:

> 8. The evidence is undisputed that Mr. Schwartz breached the Agreements in numerous ways. The Agreements obligated Mr. Schwartz, upon the termination of his employment, to return all ADP property and information, which included both equipment that was provided to him during his employment, as well as any documents, forms and electronic information that he obtained from ADP during his employment.

9. It is undisputed that, upon his termination, Mr. Schwartz failed to return the laptop computer and iPad which ADP provided him as part of his employment….

11. …. Upon his termination, Schwartz failed to return… documents and forms to ADP in violation of the Agreements.

Argument: Exceptions allowed Schwartz to keep the property

Although the findings, on their face, would seem to indicate a breach of the agreements for failure to return ADP property, it does not include the exceptions permitted within the Agreements and by 18 U.S.C 1833(b). ADP's own NDA allows for the use of ADP property if it is in furtherance of an investigation by a governing authority. (NDA, paragraph 6; R. 7307). Further, as part of the protections for a Whistleblower, an employee or prior employee that has intellectual property of the employer that may be relevant to an investigation by a governing authority is permitted to retain and/or disseminate that property in furtherance of an investigation or a lawsuit under a civil Whistleblower action. See 18 U.S.C. sec. 1833(b).

FINRA, the governing body regarding securities, was one of the authorities to whom Schwartz reported ADP's illegal/unethical sales of securities. (Schwartz Dep 177:11; R.11737; Ex 8 to Schwartz Dep R.11845, 11849, 11850, 11855). FINRA acknowledged receipt of the

complaint and requested any further support be preserved and/or provided. (D's Resp in Opp To P's MFSJ; R. 18378-18379; D's Response in Opp to P's MTC Return of Laptop; R.1476). Schwartz stated, under oath, that he did not disseminate any intellectual property to any third party and that the reasoning for maintaining possession of ADP's property was in furtherance of the investigation by authorities and his pursuit of ADP's violation of Florida's Whistleblower Act. (R. D's Resp in Opp To P's MFSJ; R. 18378-18379; D's Response in Opp to P's MTC Return of Laptop; R.1476-1477; (Schwartz Affidavit; R.2840-2942). Nothing refutes that statement by Schwartz and there is not one scintilla of evidence to indicate that Schwartz provided trade secrets to anyone in an attempt to harm ADP or divulge their intellectual property. The fact that Schwartz was aggressively trying to preserve the information associated with the ADP property, securely and without alteration, could certainly be understood and it is authorized by the agreements themselves and federal statute. (NDA, paragraph 6; R. 7307;18 U.S.C. 1833(b).

Simply put, Schwartz's preservation of evidence contained within the property of ADP was permitted under the NDA and federal statute and was not grounds for a finding that Schwartz breached

his agreements with ADP. At the very least it is a question for the jury to weigh the credibility of the witnesses as to the intent of Schwartz when he kept the property and whether if fell within exception permitted by the contracts and law. Considering that Schwartz never provided any information to third-parties, in and of itself, shows that there was no intent to divulge or use ADP property for anything other than evidence in this lawsuit and to provide to the authorities.

Therefore, the findings by the court, that it was undisputed that Schwartz breached the agreements by keeping the property after termination, is erroneous because there were exceptions permitted under the Agreements and law. The trial court's granting of Summary Judgment as to a breach of the agreements based on Schwartz keeping certain property belonging to ADP after his termination should be reversed.

Leg 2- Erroneous Findings Schwartz was Competing with ADP:

Blocked Quotes from the Order on Competing with ADP:

> 12. The RCA executed by Schwartz contains a non-competition clause which provides that, during the term of his employment and for a twelve month period thereafter, Schwartz shall not compete with ADP, either directly or indirectly through any other entity. The Agreement specifically states that Schwartz will not own, manage, operate, join, control, finance, be

employed with, or participate in any manner with a *competing business*.

Emphasis Added.

13. The record is undisputed that Schwartz breached this non-competition provision in the RCA by virtue of his association with UBCG during the term of his employment with ADP. ADP argues that Schwartz established UBCG to compete with ADP and that Schwartz was the owner of the entity. Schwartz on the other hand, claims that he was not the owner at all; that the entity was owned on a 50/50 basis by his wife Amber Schwartz in partnership with Maria (Tina) de la Rosa.

14. However, the evidence contradicts Schwartz's claims. At Mrs. Schwartz's deposition, she testified that she had been employed as a hair dresser at a beauty salon for 22 years, and she disclaimed knowledge and was not able to answer even the most basic questions concerning the operation of the business of UBCG. Ms. De La Rosa testified that she was not a partner in UBCG and in fact did not know and had never met Mrs. Schwartz.

15. The evidence on record affirmatively establishes that David Schwartz had significant involvement in the operation of UBCG, and that such involvement constitutes a breach of the Agreements. By way of example, the record establishes that Mr. Schwartz was, during the term of his employment with ADP, the point man in negotiating the lease for the commercial office space located at 1910 Park Meadows Drive, Suite 104, Fort Meyers, Florida 33907, the official address of UBCG. The documents produced by the landlord, Edison Center LLC, include dozens of emails demonstrating that David Schwartz was the person leading the negotiations with the landlord on the lease

and addressing issues regarding the tenancy. See *Plaintiff's Notice of Filing* dated August 9, 2022

16. In one email dated March 7, 2018 (during Mr. Schwartz's employment at ADP) Schwartz negotiated the key terms and provisions of the lease and closes by telling the Landlord "The flooring is costing more than expected so the free months don't even cover **my** cost'' (emphasis added).Id

17. In another email, dated March 10, 2018, Schwartz writes the landlord that he and his co-workers just got back from Home Depot with the new paint and flooring to fix up the office space that is going to be leased. *Id* In that email, Schwartz recounted a dispute he had with the CFO of the landlord. Schwartz wrote "He said! have violated almost every term in **my lease.** I need to have all things and colors etc approved by you. Which is fine. I just don't know what we're doing yet. That is why we have been trying samples" (emphasis added). Later in the email, Schwartz writes "I have spent thousands of dollars already improving this place and **even more important time**"

Plaintiff's Notice of Filing dated August 9, 2022 (emphasis added). Schwartz's personal and substantial involvement in these activities occurred while he was on ADP's payroll.

18. David Schwartz executed the Lease Agreement as the Managing Member of the tenant). *Id* In addition to executing the Lease Agreement, Mr. Schwartz executed a personal guaranty of the tenant's obligations under the Lease Agreement. Schwartz executed both documents in February 2018, while he was still employed at ADP.

19. UBCG's website reflected that email contact for the company was david@ubcgroup.biz. It is undisputed

that this was David Schwartz's email address at UBCG, the email he used to forward hundreds of pages of ADP forms and material.

20. The undisputed record establishes Schwartz's heavy and personal involvement in UBCG during the time he was employed at ADP, and that UBCG was a competing company because it advertised many of the same products ADP offers, including payroll and human resources.

Argument: Schwartz never competed with ADP

As to findings in paragraph 12 of the Order, it is admitted that the language of the NDA includes non-compete parameters. However, stress must be put on the fact that Schwartz was not permitted to work for a "competing business" under those terms.

As to paragraph 13, it is true that ADP alleges, without any admissible evidence, that UBCG is a competitor of ADP and that Schwartz worked for UBCG. (Ps Second Am Cmplt; R.7287-7288) It is also true that Schwartz correctly denies having any ownership interest in UBCG. (Ds 2d Am Ans; R.1002-1003) However, paragraph 13, drafted by ADP, strategically leaves out Schwartz's denial that UBCG was a competing company because that would raise an issue of disputed fact for which ADP has no evidence to undisputably show otherwise.

UBCG was never a competing business but instead a wholesale partner with ADP to create business for ADP. (ADP/UBCG paperwork; R.5117-5137. It was the product of an idea by Schwartz through his new position with ADP. (Schwartz Aff; R.18485). UBCG was to provide payroll/HR services to third parties through ADP, not in competition with ADP. (UBCG/ADP paper work; R.5116-5145: Schwartz Affidavit; R.18485).

It must be remembered that, prior to Schwartz's last promotion with ADP, his duties included developing payroll customers from individual businesses that needed payroll services. (D's Second Amended Ans and Counterclaim; R.999-1039: D's Mtn Recon Order Granting ADP's MSJ; R.20864-21013). After his last promotion, Schwartz's target market changed from individual business owners to developing relationships with accounting professionals who had many business owners that needed payroll services. *Id*. This type of relationship, between ADP and accounting professionals, was a win/win for both the accounting professionals and ADP as it allowed the accounting professionals to provide payroll services to their current client base through ADP's system at a discount under ADP's wholesale pricing; and gave ADP a high volume of payroll customers

that they wouldn't have received without the relationship with the accounting professional. (Rincon 53:11-55:18; 57:11-58:4; R.16121-16123; 16125-16126).

There is ample evidence that UBCG was not competing with ADP and in fact that UBCG was a current client of ADP as a wholesale partner to provide payroll services to third parties through ADP's platform. The record on appeal shows definitively that Schwartz discussed the formation of UBCG with his supervisor as an umbrella of accounting and other professionals that would have multiple new payroll customers for the benefit of ADP and not to compete with ADP. (Corrochano Dep 24:15-25:9, 114:2-8; R. 10292-10293, 10382; Corrochano email and paperwork for UBCG as Wholesale partner: R. 005117-5137: Schwartz Affidavit; R.18585). A former executive of ADP said that this was an out of the box and genius idea that was a win/win for both the company and ADP. (Rincon Dep 58:5-61:5; R.16126-16129). Simply put, UBCG was a customer of ADP, brought into ADP by Schwartz under his duties to ADP and with knowledge of his direct supervisor, Milina Corrochano. (Corrochano Dep 24:15-25:9, 114:2-8; R. 10292-10293, 10382). When asked at her deposition about her knowledge regarding UBCG, Ms. Corrochano

specifically stated that she was aware of UBCG, was aware that Schwartz was building a wholesale group for ADP and that UBCG did sign paperwork to be a wholesale partner of ADP. (Corrochano Dep 24:15-25:9, 114:2-8; R. 10292-10293, 10382)

The only finding of fact, within the order, that in any way indicates that UBCG was a competing company was in paragraph 20 of the order, which claims that "UBCG was a competing company because it advertised many of the same products ADP offers, including payroll and human resources." (Order Granting MSJ; R.20852). This finding was based on one screenshot allegedly of UBCG's website that listed payroll/HR services as part of the services that UBCG was to provide. (Screenshot; R.10602-10605). There has been no foundation laid as to when the screenshot was taken, who provided the content of the website, whether the website was owned by UBCG at the time of the screenshot, or whether the screenshot is accurate. Absolutely no exception to hearsay was provided as to how this screenshot would be admissible for consideration by the trier of fact or how it definitively proves that UBCG was a competitor of ADP. And yet it is this single document that ADP and the Court relies upon

to claim that UBCG was a competitor. (See para.20 Order Granting MSJ; R.20853).

Even if somehow ADP could find a way to admit the screenshot as evidence, it does not show, undisputedly, that UBCG was competing with ADP. It must be remembered that UBCG was going to provide payroll/HR services through ADP's wholesale platform. (Corrochano Dep 24:15-25:9, 114:2-8; R. 10292-10293, 10382; UBCG/ADP paperwork; R. 0051167-5145: Schwartz Affidavit; R.18485). Part of the benefit afforded UBCG, as a wholesale partner with ADP, is that they can use ADP's payroll platform, but advertise it as UBCG's services. (Rincon 53:11-55:18; R.16121-16123). Therefore, even if UBCG was advertising payroll/HR services, it is not evidence that they were competing with ADP. Instead, as a partner with ADP, they were marketing new payroll/HR customers for both their and ADP's business as partners, not competitors.

Throughout the many years of litigation and discovery within this suit, not one shred of evidence shows that UBCG was a competitor to ADP. This includes over 40 depositions, and tens if not hundreds of thousands of pages of produced documents, and whatever investigations was conducted by ADP. At the very least

there is a question of fact as to whether UBCG was a competing company with ADP and at the most there is definitive and unrefuted proof that UBCG was not a competing company of ADP.

Findings in paragraphs 14 through 19 of the order are strategically worded by ADP to make it sound like Schwartz was so heavily involved in the operations of UBCG that he was in violation of his non-compete agreement. First, even if he was heavily involved in the operations of UBCG, such a finding of involvement would be meaningless toward a breach since UBCG was not competing with ADP and any assistance provided would have been in furtherance of developing UBCG as a partner with ADP, as was expected under Schwartz's new role with ADP.

Second, the strategic wording that ADP provides in the findings, adopted by the Court, is a mischaracterization of Schwartz's involvement with UBCG.

Admittedly, Schwartz was helping get UBCG up and running. (Schwartz Aff; R.18484-18485). Further, as stated before, Schwartz's idea to assist accounting and other professionals to create an umbrella company, such as UBCG, to become a wholesale partner with ADP was passed on to his direct supervisor with no objection.

(Corrochano Dep 24:15-25:9, 114:2-8; R. 10292-10293, 10382; UBCG/ADP paperwork; R.005116-5145); Schwartz Affidavit; R.18485)

Taking on the task of assisting UBCG to get up and running was part of Schwartz's duties in his new role with ADP after his last promotion. (Shwartz Affidavit; R.18484-18485). Having said that, ADP mischaracterizes the involvement Schwartz had with UBCG in the findings outlined in paragraphs 15 through 19 of the order granting their Motion for Summary Judgment.

Paragraphs 15 through 19 focuses, almost exclusively, on the fact Schwartz was involved in negotiating a lease at an address in which UBCG was associated. (Order Granting ADPs MSJ; R.20850-20852). Strategically, ADP doesn't include the fact that the lease being negotiated by Schwartz was for a completely different company that did not compete with ADP. (Hrng.Tr.MtnRecon, P.33:3-6; R.27328: PsMtn3dAmCmpltEx; R. 13439-13558). When reviewing these skillfully and strategically worded paragraphs, drafted by ADP's counsel, you will notice that UBCG is never referred to as the "tenant" for which the lease is being negotiated. (PsMtn3dAmCmpltEx; R. 13439-13558). UBCG was not part of any lease with that building

and UBCG simply listed that address since Tina De La Rosa, the acting president of UBCG, was going to work from that office space. (Hrng.Tr.MtnRecon, P.33:3-6; R.27328)

UBCG never got off the ground because it was solely set up to partner with ADP and after Schwartz was terminated, ADP no longer pursued a wholesale partnership with UBCG. (Schwartz Dep 25:11-21, 35:19-37:19; R.11585, 11595-11597)

B. ADP's Motion for Summary Judgment as to Schwartz's claims against ADP.

Schwartz brought a counterclaim against ADP for violation of Florida's Whistleblower Act under Statute. Fla. Stat. 448.101-105. Schwartz's burden of proof was to show 1) he engaged in a statutorily protected activity; 2) he suffered an adverse employment action; and 3) a causal link between the protected activity and the adverse employment action. Fla. Stat. 448.102.

Paragraphs 25 through 32 of the Order granting ADP's Motion for Summary Judgment are findings as to the reasoning the court granted ADP's Motion for Summary Judgment as to Schwartz's counterclaim against ADP. The findings in the order only address the third element (a causal connection between the protected activity

and his termination) in its findings and therefore can be the only basis for ultimately granting ADP's Motion for Summary Judgment. (OrdGrantingPsMSJ; R. 20847-20856).

Paragraph 26 of the Order granting summary judgment states that Schwartz has provided no evidence of a causal link between his protected activity and termination other than the temporal proximity between the two. (R. 20853). This finding, which admits Schwartz provides evidence of temporal proximity between the protected activities and his termination, is grounds for reversal of the Motion for Summary Judgment in and of itself.

In Florida, "[t]he causal link element is construed broadly so that 'a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated.'" *Rustowicz v. N. Broward Hosp. Dist.*, 174 So.3d 414, 419 (Fla. 4th DCA 2015). "Close temporal proximity between the protected activity and the adverse employment action can show that the two events were not wholly unrelated." *Id.* at 426 (quoting *Fla. Dep't of Children & Families v. Shapiro*, 68 So.3d 298 (Fla. 4th DCA 2011)). A "seven week delay between protected activity and the adverse employment agreement action was sufficient temporal proximity to make a prima

facie showing of causation." *Id.* at 427 (citing *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1337 (11th Cir. 1999).

In the case at bar, ADP alleges that, on June 13, 2018, Schwartz put ADP on notice that he was going to report the illegal/unethical activities of ADP to governing authorities. (Motion for Summary Judgment; R. 8534-8535). On July 3, 2018 Stephanie Karasiak, as an executive of ADP, acknowledged receipt of Schwartz's complaints regarding the practices of ADP and seems to allude to her desire to have Schwartz terminated. (R. 18604). It is undisputed that, on July 18, 2018, Schwartz was terminated by ADP. (R. 8475). This temporal proximity, in and of itself, provides prima facie evidence of a causal relation between the protected activity of Schwartz and his termination. *Rustowicz, 174 So.3d at 427.*

However, there is more evidence of the causal relation between the protected activity and termination. ADP and the trial court completely ignores multiple issues of disputed facts that could lead a reasonable juror to conclude there is a causal relation between Schwartz's protected activities and his termination. There is undisputed evidence that Schwartz was receiving accolades and promotions from ADP just months prior to him becoming a

whistleblower and ultimately being terminated. (Amended Counterclaim; R. 1014; D's MSJ; R. 5107). It is undisputed that Schwartz had discussed UBCG with Milina Corrochano and she and ADP knew that UBCG was signed up as a wholesale partner with ADP and not a competitor to ADP at the time they terminated Schwartz. (Corrochano Dep 24:15-25:9, 114:2-8; R. 10292-10293, 10382; UBCG/ADP paperwork; R. 005116-5145: Schwartz Affidavit; R.18484-18485).

Beyond that, part of what would have been presented to the jury was the fact that any true basic investigation by ADP would have shown that UBCG was not a competing company of ADP. The complete lack of diligence of ADP's investigation, prior to terminating Schwartz, should have been weighed by the jury to determine whether ADP terminated Schwartz with cause outside protections of the Whistleblower Act or just made up a reason by pointing to UBCG, who they actually knew was a partner and not a competitor. (UBCG/ADP paperwork; R.5116-5145).

These inconsistencies go directly to the credibility of ADP when considering their reason for terminating Schwartz. There is a plethora of disputed facts that should go before the trier of fact and

not vanquished by summary judgment on the causal relation between the protected activity and Schwartz' s termination.

C. The Trial Court Erroneously Ordered Injunctive Relief Without Specific Findings.

In order to justify injunctive relief, the movant must show that there is (1) a likelihood of irreparable harm; (2) unavailability of an adequate legal remedy; (3) a substantial likelihood of succeeding on the merits; and (4) considerations of the public interest. *Fla.R.Civ.P.* 1.160(c). An order granting an injunction must include "clear, definite, and unequivocal sufficient factual findings" or the injunction must be reversed. See *Phelan v. Trifactor Solutions*, LLC312 So.3d 1036, 1039 (Fla. 2d DCA 2021). In the case at bar, there were no specific factual findings as to the elements of the injunctive relief granted and, therefore, such relief must be reversed and/or the granting of injunctive relief stricken from this particular order.

D. No Findings to support Schwartz Misappropriated Trade Secrets

In order to maintain a cause of action for Misappropriation of Trade Secrets, ADP has to show: (1) that it possessed a trade secret and took reasonable steps to protect its secrecy; and (2) the trade

secret was misappropriated, either by one who knew or had reason to know the trade secret was improperly obtained or who used improper means to obtain it. *Mapei Corp. v. J.M. Field Marketing, Inc.*, 295 So.3d 1193,1198 (Fla. 4th DCA 2020)(Citing § 688.002(2), Fla. Stat).

There is not one finding by the trial court as to any specific trade secrets in which ADP claims Schwartz misappropriated or what the court relied upon to determine such information is a trade secret. Further, there is no finding that any trade secret was improperly obtained or that Schwartz used improper means to obtain a trade secret. Because there are no findings regarding the granting of ADP's Motion for Summary Judgment as to Misappropriation of Trade Secrets, such a conclusion of law within the order is flawed and should be reversed.

II. TRIAL COURT CAUSED PREJUDICIAL ERROR IN SUSTAINING ADP'S EXCEPTIONS TO MAGISTRATES REPORT AND RECOMMENDATION REGARDING DISCOVERY IN THE POSSESSION OF ADP EMPLOYEES

During the deposition of the direct supervisor of Schwartz, Milina Corrochano, it was determined that Ms. Corrochano had kept and maintained certain emails and text messages as part of her

professional and personal communications with Schwartz. (Corrochano Dep 26:11-27-13; R.10294-10295)

Employees, whether parties to the litigation or not, can be compelled to produce documents, including emails and text messages, if these documents are relevant to the litigation. *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So.2d 1377 (Fla. 1994); *Talley v. Consolidated Respondents*, 350 So.3d. 415 (Fla 1st DCA 2022).

The Florida Supreme Court in *Deason* stated that communications made by employees to the company's counsel were protected by attorney-client privilege, but this context specifically relates to communications made directly to legal counsel as part of securing legal advice. *Deason,* 632 So.2d 1377. This implies that other communications, such as communications not directed to legal counsel, should be discoverable. *Id.*

Additionally, the order regarding discovery in *Coleman (Parent) Holdings Inc. v. Morgan Stanley, Inc.*, 2005 WL 674885 demonstrates that courts can compel the production of documents when they are relevant to the issues at hand, even if the process imposes a significant burden on the party or person holding the documents. In that case, the court required the production of communications

within a specified period despite objections about the burden of compliance. *Id.*

Beyond that, non-party employees do not have a clearly established right to withhold personal communications, if these communications are relevant. *Talley*, 350 So.3d. 415. As such, if emails and text messages held by employees to a party are relevant, they are subject to discovery and should be produced by the employees.

In the case at bar, early in the litigation, Schwartz requested the following in Request No. 17 of Schwartz's Third Request for Production and ADP responded with the following:

> Produce all documents evidencing each alert, warning and/or notification, Schwartz received immediately before or after each alleged email violation by Schwartz took place while employed with ADP. In your production identify any and all calls, emails, text and or correspondence Schwartz or any ADP employee/agent received regarding each violation.
>
> **RESPONSE: Objection. Overbroad and not reasonably calculated to lead to the discovery of admissible evidence.**

ADP objected, but The General Magistrate's report and Recommendation of November 29, 2021, which was adopted by the

trial court on December 16, 2021 stated that ADP was to produce responsive documents to Request No. 17 of Schwartz Third Request for Production. (Report & Recommendation of Gen. Magistrate; R. 3207-3213; Order Adopting Report & Recommendation; R. 3412-3413)

On January 04, 2022, ADP filed their Amended Responses to Schwartz's Third Request for Production, however, ADP failed to amend their response to Request No. 17, nor did ADP produce any responsive documents in relation to same. Throughout the course of this litigation, ADP has consistently stated that at the time Schwartz was employed by ADP, ADP's email retention policy was only 45 days. (D's MTC R.1401, 1461, 1465; Ex. M to D's Resp in Opp to P's MFSJ-P's RFP Responses; R. 18588-18589, 18593; Ex. N to D's Resp in Opp to P's MSJ-Fallon Dep; R.18601-18602). As such, what would have been responsive emails that were exchanged between Schwartz and other employees of ADP prior to the date ADP anticipated litigation, and which are not subject to attorney-client privilege, purportedly no longer existed on ADP's email servers. (D's MTC R.1401, 1461, 1465; Ex. M to D's Resp in Opp to P's MFSJ-P's RFP Responses; R. 18588-18589, 18593).

However, ADP employees had non-privileged responsive documents on their computers and their mobile telephones. (Corrochano Dep 26:11-27-13; R.10294-10295). The Duces Tecum portion of the Notice of Deposition requested: 1) For the time frame May 2015 through the present, produce any and all text messages between you and David Schwartz, including, but not limited to group chats/group text messages; and 2) For the time frame of May 2015 through the present, produce any and all emails exchanged between you and David Schwartz. (Notice of Taking Videotaped Deposition Duces Tecum R.10635).

Corrochano testified that she provided emails and text messages to Counsel for ADP during her deposition. (Corrochano Dep 26:11-27-13; R.10294-10295) However, none of those emails or text messages were ever provided to Schwartz by ADP.

Similarly, as indicated in the Report and Recommendation of General Magistrate Relating to Objections to Notice of Depositions Duces Tecum of October 18, 2022, Schwartz requested the same documents in the Duces Tecum portion of Notice of Deposition for Gregory Kohles and James Goldrick, but ADP objected shortly before their depositions. (Report and Recommendation of Gen. Magistrate

Relating to Objections to Notice of Depositions Duces Tecum; R. 14020-14029)

After oral argument on the issue as to whether ADP was required to produce emails and text messages its employees had on their laptops and mobile phones, the General Magistrate found that employees of ADP had responsive documents, both business and personal, in their possession, custody control and that should be produced. (*Id.*). ADP subsequently filed its Exceptions to Report and Recommendation of Gen. Magistrate Relating to Objections to Notices of Deposition Duces Tecum. (R. 104556-14070). The Court subsequently sustained ADP's Exception (Order Sustaining Exception; R.14866-14867.

Based on the foregoing, the emails and text messages in question are relevant to the litigation and the individual employees should have been required to produce them, irrespective of whether they are parties to the litigation or not. *Talley*, 350 So.3d. at 419-420. The specific emails and text messages that came to light at Ms. Corrochano's deposition were created in furtherance of Ms. Corrochano's and Schwartz's employment with ADP. (Corrochano Dep 26:11-27-13; R.10294-10295). They were central to ADP's

knowledge of Schwartz's involvement with UBCG and that UBCG was not a competing company. ADP claims that they don't have access to emails over 45 days old. ((D's MTC R.1401, 1461, 1465; Ex. M to D's Resp in Opp to P's MFSJ-P's RFP Responses; R. 18588-18589, 18593; Ex. N to D's Resp in Opp to P's MSJ-Fallon Dep; R.18601-18602). Therefore, Ms. Corrochano's emails and text messages, associated with ADP business between Corrochano and Schwartz, that she had in her possession, should be provided in response to a proper subpoena duces tecum. *Talley*, 350 So.3d. at 419-420.

Since Ms. Corrochano stated in her deposition that she provided the emails and text messages to ADP's counsel, it is uncertain as to why ADP did not produce these emails and text messages in response to timely served discovery or in response to the subpoena duces tecum associated with her deposition. The emails and texts were relevant to the issues before the court and should have been produced. This is exactly why the magistrate recommended the production of these documents in her Report and Recommendation.

Schwartz should have access to all emails and text messages that were kept by employees of ADP, which are relevant to the issues of this litigation and requested as part of a subpoena duces tecum.

This would be especially so as ADP itself claims they are unable to produce emails over 45 days old from their own retention policy (D's MTC R.1401, 1461, 1465; Ex. M to D's Resp in Opp to P's MFSJ-P's RFP Responses; R. 18588-18589, 18593; Ex. N to D's Resp in Opp to P's MSJ-Fallon Dep; R.18601-18602)

Further, the deposition duces tecum that are at issue were directed to employees of ADP and the documents requested would be documents responsive to relevant issues within that particular deposition and the litigation as a whole.

III. TRIAL COURT CAUSED PREJUDICIAL ERROR IN LIMITING THE TIME AND SCOPE OF DEPOSITION OF ADP'S EXPERT WITNESS.

The order denying or limiting the deposition of ADP's expert witness is a departure from the essential requirements of law. *Beekie v. Morgan*, 751 So.2d 694 (Fla. 5th DCA 2000). A party is not limited to one chance to take a deposition and protective orders, which could limit the deposition, must be based on good cause shown such as "annoyance, embarrassment, oppression or undue burden or expense." *Id. at* 697. It was noted that inconvenience alone was not a sufficient reason to prevent a deposition from being rescheduled. *Id.*

Additionally, if a deposition is terminated abruptly by the parties, they should still proceed under the relevant rules (in this case, Rule 1.310(d)) to seek court assistance if the deposition is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the party. *Rothschild v. De Gaspari*, 287 So.2d 341 (Fla. 3DCA 1973).

Beyond that, restrictions on the timing and scope of a deposition should not unreasonably limit a party's ability to prepare for trial. *Rose v. Brouwer*, 253 So.2d 279 (1971) (Circuit court quashed an order that limited the deposition to a 72-hour period before the trial, indicating that such a restriction was not justified by any evidence of potential annoyance, embarrassment, or oppression).

In the case at bar, the deposition that was abruptly ended by ADP was the examination of ADPs securities expert who was testifying on complex and specialized issue's regarding the sale of securities as defined by the SEC. In the late afternoon during the deposition, Mario Ruiz, Counsel for ADP indicated during the deposition that he had a "hard stop time" of 5:00 to 5:15 p.m. as he had to pick up his child. (Server Dep 184:23-185:9; R. 14335-14336)

Subsequently, Counsel for ADP raised the issue again and agreed to continue the deposition another day. (Server Dep; R. 143349:4-14350:17). Of further note, ADP had provided 250 pages of additional documents during the deposition and there were other documents, outside the 250 pages of documents produced during the deposition that Mr. Parrish needed to question the deponent about and asked that a date be provided for the continued deposition. (Server Dep; R. 14350:2-14, 14350:22-25.)

Although Mr. Ruiz, as counsel for ADP, agreed to continue the deposition, he refused to look at his calendar and provide available dates for the continued deposition on the record. (Server Dep; R. 14351:5-14; 14353:9-13) Then, counsel for ADP abruptly terminated the deposition of ADP's expert, Elliott Server. (Server Dep R.14352:15-20, 14354:10-12.) Of note, there was another attorney of record (Mr. Distel) for ADP attending the deposition and nothing prevented him from taking over for Mr. Ruiz as both Mr. Ruiz and Mr. Distel appeared at the deposition to represent ADP. Mr. Distel refused to take over for Mr. Ruiz and actually instructed the deponent, Mr. Elliott, to leave. (Server Dep; R.14354:18-25). Moreover, Mr. Distel agreed, on the record, to allow the deposition to

be continued with no specification as to any limitations on the continued deposition. (Server Dep; R.14355:2-8.)

Subsequently, after counsel for ADP refused to allow the continued deposition to go forward, Schwartz was forced to file a Motion to Compel the continued deposition of Elliott Server and set it for hearing. (D's MTC; R.14137-14138). Despite ADP agreeing to continue the deposition on the record during the deposition, ADP filed a Response and Motion for Protective Order. (ADP Response in Opp/MPO; R.14139-14149).

Without providing any findings that Mr. Server's continued deposition should be limited because it was being conducted in bad faith or in a manner that unreasonably annoyed, embarrassed, or oppressed Mr. Server, the Trial Court entered an Order which limited the scope of questions to the new documents Mr. Server produced the morning of his November 7, 2022 deposition. This arbitrary order disallowed Schwartz's counsel to complete the other questions he had pending as it related to the deposition that counsel for ADP unilaterally stopped. (Order on MTC Server Dep; R.14735-14736.)

Based on the agreement by ADP to continue the deposition and the cited case law, the trial court abused its discretion in limited the

duration and scope of a continued deposition that had previously been unilaterally terminated by ADP. There was no good cause shown or legal findings that justified the limitations imposed on the continued deposition of Mr. Server.

IV. TRIAL COURT ERRONEOUSLY STRUCK SCHWARTZ'S DEMAND FOR JURY TRIAL

Pertinent History:

On June 1, 2020, Schwartz filed a Motion for Jury Trial and/or to Amend Defendant's Answer Affirmative Defenses and Counterclaim. (Schwartz's Mtn for Jury Trial; R. R.875-921). The reason for filing this Motion was ADP's refusal to agree to a new case management plan that included a provision for a jury trial, claiming that Schwartz waived a jury trial for failure to include it in the body of his most recent responsive pleading to ADP's first Amended Complaint. (Schwartz's Mtn for Jury Trial; R. R.875-921). ADP had refused to include the jury trial in the order, even after Schwartz's initial responsive pleading to the original complaint included Schwartz's demand for a jury trial and the current responsive pleading to the Amended Complaint provided for a demand for jury trial in its title. (Schwartz's Mtn for Jury Trial; R. R.875-921). At no

time did ADP make any argument that Schwartz waived his jury trial as a result of contractual terms with ADP. (Schwartz's Mtn for Jury Trial; R. R.875-921).

On July 10, 2020, the trial court granted Schwartz's Motion for Jury Trial. (Order Granting Jury Trial; R.1042). The order was based on Schwartz's proper and timely demand for jury trial in his pleadings and prior agreed case management plans. (Schwartz's Mtn for Jury Trial; R. R.875-921). From July 2020 up until August 2023 the parties had agreed to a jury trial in their agreed scheduling and case management orders. (See Orders; R.1376-85, 2713-16, 2720-25, 3034-39, 4780-86).

However, within a few months before trial, on August 9, 2023, ADP filed a Motion to Strike Jury Trial. (Motion to Strike Jury Trial; R. 21017-21029). ADP argued that, since the court had found liability as to ADP's claims against Schwartz and extinguished Schwartz's counterclaim via summary judgment, his demand for jury trial should no longer be considered and the court should conduct a bench trial on ADP's damages. (ADP's Mtn Strike Jury Trial; R.21017-29). For the first time, ADP was claiming that Schwartz had

waived his right to a jury trial based on the contractual provisions in the alleged agreements between Schwartz and ADP.

After hearing on November 21, 2023, the trial court granted ADP's Motion to Strike Jury Trial. (Order Granting Motion to Strike Jury Trial; R. 21083-21084). On February 27 and 28, 2024, the trial court conducted a bench trial on damages as requested over the objection of Schwartz.

Argument:

"Waiver of the right to a jury trial is to be strictly construed and not be lightly inferred. When such a constitutional right is vested in a party who has timely invoked it and there is doubt as to whether this right has been waived, such doubt is to be resolved in favor of the party for whom the right is provided." *Boston Rug Galleries, Inc. v. William Iselin & Co.*, 212 So.2d 58, 61 (Fla. 4th DCA 1968). When "a proper demand for trial by jury has been made this right is preserved inviolate to the party making it. *Id* at 60. The right to a jury trial is not discretionary for the judge to deny when the demand for jury trial is timely. *Id*.

The trial court properly ruled that Schwartz timely and properly demanded a jury trial in his responsive pleadings. (Order Granting

Jury Trial; R.1042). Up until just a few months prior to a set trial date, ADP, for the first time, claimed that Schwartz's jury trial had been waived via the Restrictive Covenant Agreement (RCA) between ADP and Schwartz. (ADP's Mtn Strike Jury Trial; R.21017-29). At no time prior to this last minute Motion had ADP claimed that Schwartz waived his right to a jury trial based on the alleged RCA and ADP had continuously agreed to a jury trial in multiple Agreed Case Management and Scheduling Orders without mention of their objection based on the RCA. (See Orders; R.1376-85, 2713-16, 2720-25, 3034-39, 4780-86).

Also, only the RCA had an alleged jury trial waiver between the parties. (Ex. C to Second Amended Complaint; R.7302-7308) The Sales Representative Agreement (SRA) and the Non-Disclosure Agreement (NDA) did not provide for a waiver of jury trial. (Exhibits A (NDA) and B (SRA) of the Second Amended Complaint; R.7296-7301). The trial Court should not have stricken the inviolate right of Schwart's demand for jury trial as it still contained issues for the trier of fact regarding the alleged damages associated with the claimed breaches of agreements that did not contain a waiver of jury trial. See *Cheek v. McGowan Elect. Supply Co.*, 404 So.2d 834 (Fla. 1st DCA

1981) (intertwined claims from which at least one claim allows trial by jury should afford trial by jury on all issues). The bench trial, after the court struck Schwartz's demand for jury trial, was ultimately determined regarding damages of all alleged agreements between Schwartz and ADP. (Trial transcript; R.27161-27187). Since issues of damages associated with the NDA and the SRA were also at issue before the trier of fact, which integrated jury issues that weren't waived by contract, the trial court abused its discretion in striking the inviolate right of Schwartz of a jury trial. *Cheek*, 404 So.2d at 836.

The trial court abused its discretion in striking the jury trial that was properly and timely demanded by Schwartz. The challenge of a jury trial by ADP, at the very least, has been waived by ADP when in continuously agreed to a jury trial for several years and only challenged the jury trial (based on the RCA) just before trial. Further, since issues were still before the trier of fact regarding damages associated with the NDA and SRA, that did not provide for a waiver of jury trial, a jury trial should have been maintained. *Id.*

Finally, even if this Honorable Court were to find that the trial court was within its discretion to strike the jury trial based solely on

the new argument of ADP regarding the RCA, the issue should be remanded if this Court finds the Motion for Summary Judgment was improperly granted from the aforementioned challenge of same. It would be important for this Honorable Court to provide this ruling to insure there is no confusion on a remanded trial as to any issue this Court were to find in favor of Appellant.

CONCLUSIONS

Reversal of Order Granting ADP's MSJ is Appropriate

Under a de novo standard, this Honorable Court should reverse Judge Fuller's order granting ADP's Motion for Summary Judgment, both as to ADP's claims against Schwartz and Schwartz's counterclaim against ADP. The issues pertinent to the findings of fact by the trial court are disputed and should go before the jury as factfinder. As a further result of the reversal, this Honorable Court should quash any award of attorney's fees or costs associated with the granting of ADP's Motion for Summary Judgment and order a jury trial on the factual merits of the claims.

Further, under a de novo standard of review as to conclusions of law; and abuse of discretion as to the trial court's findings on the issue of ordering injunctive relief and misappropriation of trade

secrets, the trial court should be reversed. Relief requires specific findings of fact on each element, which was not met in the subject order granting summary judgment.

Sustaining ADP's Exception of Magistrates Report and Recommendation as to Relevant Discovery in Possession of ADP Employees was an Abuse of Discretion.

It was an abuse of discretion by the trial court to sustain ADP's exception from the Report and Recommendation of the Magistrate Judge as it relates to relevant files in possession of ADP employees and subject to a subpoena duces tecum. A subpoena duces tecum is an appropriate avenue to request documents that would be subject to the deposition of the deponent and the exception should have been denied and ADP employees with relevant information should have been compelled to provide responsive documents and permitted further questioning regarding those documents produced.

Limitations on Continued Deposition of Expert is Unwarranted

It was an abuse of discretion by the trial court to limit the deposition of ADP'S securities expert. This is an extremely complex topic and the issue upon which the expert was to testify was central to both the defense of ADP's claims against Schwartz and the

prosecution of Schwart's claims against ADP. Because there was no finding that the deposition was being conducted in bad faith or in a manner that unreasonably annoyed, embarrassed, or oppressed Mr. Server, the deposition should have continued until completion.

Abuse of Discretion to Strike Schwartz's Demand for Jury Trial

The trial court abused its discretion when it struck Schwartz's demand for jury trial. Two of the three agreements that were allegedly breached and being considered for damages during trial did not provide a waiver of jury trial. Therefore, Schwartz had an inviolate right to a jury trial as to all issues. Further, upon showing that Summary Judgment was erroneous, any remand should renew the demand for jury trial on all claims as they contain non-contractual claims outside any waiver of jury trial.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief complies with the 6th DCA's font requirements and word limitation requirements of Florida Rules of Appellate Procedure 9.210(a)(2).

/s/ Joseph Parrish
Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically transmitted to counsel for Appellee, Chritopher B. Hopkins, Esq, Craig Distel, Esq. c/o McDonald Hopkins, LLC, 501 South Flagler Drive, STE 200, West Palm Beach, FL 33401 and to Mario Ruiz, Esq., c/o Lerman & Whitebook, P.A., 2611 Hollway Boulevard, Hollywood, FL 33020, via email at chopkins@mcdonaldhopkins.com, cdistel@mcdonaldhopkins.com, kgardner@mcdonaldhopkins.com, mario@lwlawfla.com, claudia@lwlawfla.com, and pleadings@lwlawfla.com on this 19th day of August, 2024.

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