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| **JAMES WHELTON,** | : | **SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** |
| **Plaintiff-Appellant,** | : | **DOCKET NO. A-000084-24** |
| **vs.** | : | **Civil Action** |
| **REMA TIP TOP/NORTH AMERICA, INC., REMA TIP TOP OF AMERICA, INC., REMA TIP TOP AG, OLAFUR GUNNARSSON, MICHAEL ÜBELACKER and STAHLGRUBER OTTO GRUBER, AG,** | : | **ON APPEAL FROM LAW DIVISION BERGEN COUNTY HON. Anthony R. Suarez, J.S.C. DOCKET NO. L-2829-22** |
| | : | **Date of Orders Below: March 25, 2024 and April 19, 2024** |
| | : | **ORAL ARGUMENT REQUESTED** |
| **Defendants-Respondents.** | : | |

# PLAINTIFF-APPELLANT JAMES WHELTON'S BRIEF IN SUPPORT OF HIS APPEAL AND APPENDIX

## VOLUME I

**(Pa1 through Pa149)**

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## PRELIMINARY STATEMENT

Plaintiff-Appellant James Whelton respectfully submits this brief in support of his appeal of the trial court's March 25, 2024 Order denying his motion to compel the deposition of Heinz Reiff and April 19, 2024 Order denying his motion for reconsideration.

Like all corporations, the defendant corporations acted through their directors and officers when they threatened plaintiff with termination and passed him over for promotion to a position he had been promised before he objected to the defendants' unlawful conduct. Plaintiff has alleged those retaliatory actions violated the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 et seq.

In contravention of the Court Rules, the trial court refused to compel defendants Rema Tip Top AG, Stahlgruber Otto Gruber AG, and Rema Tip Top of America, Inc. to produce Heinz Reiff, a director of each defendant corporation, for deposition pursuant to the notices of deposition plaintiff had served on those defendants. Rather, in an abuse of discretion, the trial court ruled that plaintiff must subpoena Reiff for deposition because he is a non-party.

The trial court's Orders effectively deprive plaintiff of his ability to depose Reiff, who is one of the decisionmakers who retaliated against plaintiff in violation of CEPA. Because Reiff is a resident of Germany, he is outside the

subpoena power of this Court. Plaintiff's only option is to subpoena Reiff for deposition in Germany pursuant to the procedure established by the Hague Convention of 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters. But that is no option at all.

In Germany, depositions may only be taken by a consular official, a commissioner appointed by a German court or a German judge. Plaintiff would not have the right to depose Reiff as if he were a witness in open court as provided by R. 4:14-3. To the contrary, under German law, plaintiff would have no right to cross-examine Reiff and Reiff would have the right to refuse to answer questions.

The trial court's Orders conflict with Supreme Court precedent that protects a party's right to depose a foreign director of a corporate defendant in a United States court in accordance with the local court's discovery rules. The trial court itself recognized the unfairness of requiring plaintiff to depose Reiff in Germany under the restrictions imposed by German law. Therefore, the trial court ordered that the deposition take place in New Jersey. However, the trial court failed to recognize the inherent contradiction in its Order. Plaintiff cannot compel Reiff to appear in New Jersey through a subpoena served on him in Germany. Compliance with the trial court's Order is impossible.

Our Court Rules and the cases applying them require a corporate party to

produce a director with knowledge pursuant to a notice of subpoena. The trial court's Orders should be reversed because they are contrary to the Court Rules. If the Orders are not reversed, plaintiff will be deprived of the opportunity to take a meaningful deposition of a witness the trial court itself found is a witness with knowledge of relevant facts no other witness has.

Moreover, if left unchecked, the trial court's Orders will have a chilling effect on New Jersey employees with claims of unlawful discrimination or retaliation against international companies. Our employment laws depend on private actions by individual plaintiffs to vindicate the Legislature's goal of eradicating unlawful workplace discrimination and retaliation. New Jersey is home to more than 1,200 international companies who employ over 290,000 workers. Those workers must have the ability to depose foreign decisionmakers in New Jersey under our Court Rules to vindicate their statutory civil rights.

## RELEVANT PROCEDURAL HISTORY

On May 31, 2023, plaintiff filed the Second Amended Complaint. Pa24. Plaintiff alleges that the defendants retaliated against him in violation of CEPA, N.J.S.A. 34:19-3. All parties have identified Reiff as a person having knowledge of the relevant facts in their interrogatory answers. Pa190, 196, 201.

On November 9, 2023 and December 4, 2023, plaintiff served notices of deposition on each of Rema Tip Top AG, Stahlgruber Otto Gruber AG, and Rema Tip Top of America, Inc. (the "Corporate Defendants") to produce Reiff for deposition in New Jersey. Pa260-268, 282-86. On January 17, 2024, Plaintiff filed a Motion to Compel the Corporate Defendants to produce Reiff for Deposition ("Motion to Compel"). While the Motion to Compel was pending, on January 22, 2024, Rema AG and Stahlgruber offered to produce Reiff for deposition on February 2, 2024. Pa335, 352-53. On January 23, 2024, plaintiff confirmed that deposition. Id. Later on January 23, 2024, defense counsel adjourned but did not cancel the deposition because Reiff was suddenly unavailable due to "unforeseen circumstances." Id.

On March 22, 2024, the trial court denied plaintiff's motion to compel. In its oral opinion, the trial court found that "Plaintiff is entitled to depose Reiff" as "Reiff's testimony would not be cumulative, as Reiff has personal knowledge [of] material facts which the other defendants are not privy to, particularly

related to comments and conversation as to who would be [Gunnarsson's] successor." Despite the critical relevance of Reiff's testimony, the trial court denied the motion based on its finding "defendants do not have control over Reiff and that Reiff is not a defendant in this case." The court held "the witness is to be produced through a subpoena and not in [sic] notice of deposition." 1T19:24-20:10[1].

The trial court further held that "[a]s to the location of the deposition based on precedent and the limitations enforced under [German] Law,[sic] the Hague Convention of 1970, the deposition must take place in New Jersey" or "any neighboring state that is convenient for the parties." 1T20:15-19, 20:25-21:3. On March 25, 2024, the trial court entered an Order denying the motion. Pa4.

On March 28, 2024, plaintiff moved for reconsideration. Pa6. During argument, the trial court conceded it "may not be possible" for plaintiff to secure Reiff's attendance at a deposition in New Jersey by way of subpoena. 2T14:22-25. Nonetheless, on April 19, 2024, the trial court denied reconsideration. Pa9.

On May 30, 2024, the Appellate Division denied plaintiff leave to appeal. Pa372. On September 9, 2024, the Supreme Court granted leave to appeal and

[1] The transcript of the March 22, 2024 oral decision is cited as "1T." The transcript of the April 12, 2024 oral argument is cited as "2T."

remanded the appeal to the Appellate Division for a decision on the merits. Pa373.[2]

## STATEMENT OF FACTS

### A. The Parties

Plaintiff James Whelton is the Chief Legal Officer and Chief of Business Affairs for defendant Rema Tip Top/North America, Inc. ("Rema" or "RTTNA"). Pa24,50. Rema is a wholly owned subsidiary of defendant Rema America, a holding company. Rema America is a Delaware corporation with a principal place of business in New Jersey. Pa206, 211. Rema America is a wholly owned subsidiary of defendant Rema AG, a German corporation. Pa229. Rema AG, in turn, is a wholly owned subsidiary of defendant Stahlgruber.[3] Pa31.

At all relevant times, defendant Olafur Gunnarsson was the Chief

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[2] On August 2, 2024, the trial court granted plaintiff leave to file the Third Amended Complaint to add a claims of successor liability against OWG Beteiligungs, AG, which had acquired all of the outstanding stock of Stahlgruber. On September 18, 2024, the trial court granted plaintiff's motion to amend the August 2, 2024 Order to permit plaintiff to depose Reiff, who is subject to deposition, in his capacity as the Chief Executive Officer of OWG, on the merits of the CEPA claim. Pa374. On September 23, 2024, plaintiff offered to withdraw the appeal if Stahlgruber, Rema Tip Top AG and Rema America agreed to produce Reiff in his capacity as their director before December 15, 2024, as OWG has not been served and plaintiff wanted to ensure that Reiff's testimony binds those defendants. The defendants once again refused to produce Reiff.

[3] Stahlgruber merged with OWG Beteiligungs, AG in or about September 2023. Reiff is the CEO of OWG. See also, n.5, infra.

Executive Officer of Rema, the sole director of Rema, the Managing Director of Rema America, and the President, Secretary and Treasurer of Rema America. Pa30, 56, 157. Gunnarsson was an employee of both Rema and Stahlgruber and served as a member of Rema AG's Advisory Board. Pa156, 179.

During his employment as Rema America's Managing Director, and at all times relevant to this action, Gunnarsson reported to: (1) Heinz Reiff, the Chair of the Supervisory Boards of Rema AG and Stahlgruber and a member of Rema America's Board of Directors; and, (2) defendant Michael Ubelacker, the Chief Executive Officer of both Rema AG and Stahlgruber, a member of Rema AG's Management Board and the Chair of Stahlgruber's Management Board. Pa30-31,142, 157, 158, 176, 211, 229.[4] Reiff and Ubelacker reside in Germany.

**B. Plaintiff's Allegations**

**1. Gunnarsson Picks Plaintiff to Succeed Him**

On August 24, 2021, at an executive team meeting, Gunnarsson told plaintiff, John Breheny, RTTNA's COO, and Jeffrey Xu, RTTNA's CFO, that "Germany" had told him he had to step down by the end of the year and pick his successor. Pa33, 84, 85 149. After the group meeting ended, Gunnarsson met individually with plaintiff and told plaintiff that he was his choice to succeed

[4] In Germany, the Supervisory Board functions similarly to a board of directors in the United States. The Management Board oversees the daily activities of a company.

him. Pa85.

**2. Plaintiff Reports Gunnarsson's Fraudulent Actions**

On October 29, 2021, Breheny informed plaintiff that Gunnarsson had demanded that he pay a sham invoice for consulting services that Gunnarsson and a former executive of a Stahlgruber affiliate in Germany had fabricated. Pa34-35, 86, 88, 117-18, 125-27, 137-41, 146-47 160-63, 165-66. Plaintiff reasonably believed that the invoice was fraudulent and payment of the sham invoice would have been unlawful. Pa88, 110, 111, 117-18, 125-27. Therefore, plaintiff advised Breheny that the conduct he was describing was wrongful and instructed Breheny not to initiate or process a wire or other payment for the invoice. Pa36, 86, 87, 108-09, 125-27, 137-41, 147.

On November 4 and 5, 2021, plaintiff reported Gunnarsson's wrongful conduct to Ubelacker and recommended an independent investigation. Pa91-92, 110-11, 112-13, 120-21, 137-141.

**3. Defendants Retaliate Against Plaintiff**

On November 5, 2021, after Übelacker and Reiff had confronted Gunnarsson about the sham invoice, Gunnarsson phoned plaintiff and warned him that neither he nor Breheny would "survive this." Pa94, 118-20, 137-41. He further told plaintiff that he had been about to recommend plaintiff as his

successor when he learned plaintiff was the one who had reported him and, in doing so, plaintiff had cost himself the opportunity to run the company. Id.

On November 8, 2021, Gunnarsson spoke to Reiff about plaintiff's report to Ubelacker. Reiff characterized the reports by plaintiff and Breheny as a "revolt." He further stated that plaintiff was "after [Gunnarsson's] job," he "can't be trusted," he is a "cancer" and "he has to go." Pa169-70; CPa3.

Later on November 8, 2021, Gunnarsson reiterated to plaintiff that he was no longer going to recommend plaintiff as his successor. 167-68, 172. Gunnarsson was not willing to recommend plaintiff because he had reported his unlawful conduct to Germany. Id.; CPa3.

In late November 2021, Gunnarsson, Reiff, and Ubelacker decided to terminate plaintiff's employment because of his complaints to Ubelacker. Pa173. Gunnarsson then engaged in a job search for plaintiff's replacement, which included at least two offers of employment. Pa175. The defendants ultimately refrained from terminating plaintiff at the insistence of their insurance carrier. CPa5.

In December 2021, Gunnarsson also began a new search for his successor. Gunnarsson no longer considered plaintiff a potential successor because "he had made a blunt decision in the previous year, and I was not recommending him any longer for a managerial position." Pa180.

On July 5, 2022, Reiff, Ubelacker, and Gunnarsson interviewed an outside candidate in New York and decided to hire him as Gunnarsson's replacement. CPa9; Pa178, 219, 231, 236, 350. On July 6, 2022, Reiff and Ubelacker met with counsel in New York about plaintiff's lawsuit, which he had filed on May 24, 2022. CPa11.

## LEGAL ARGUMENT

### THE DECISIONS BELOW DEPRIVE PLAINTIFF OF FUNDAMENTAL DISCOVERY TO WHICH HE IS ENTITLED UNDER THE COURT RULES (Pa4, 9)

#### A. Standard of Review

Discovery matters and motions for reconsideration are reviewed under an abuse of discretion standard. Selective Ins. Co. of America v. Hudson East Pain Management Osteopathic Medicine, 210 N.J. 597, 604 (2012); Lawson v. Dewar, 468 N.J. Super. 128, 136 (App.Div. 2021). Applying this standard, New Jersey appellate courts have frequently granted interlocutory relief to allow employment litigation plaintiffs to obtain the discovery needed to prove their claims. See, e.g., Payton v. New Jersey Turnpike Authority, 148 N.J. 524 (1997) (compelling discovery of information and documents relating to internal investigation in sexual harassment case); Dixon v. Rutgers, The State University of New Jersey, 110 N.J. 432 (1988) (compelling discovery of personnel files in gender discrimination case); Connolly v. Burger King Corp., 306 N.J. Super.

344 (App. Div. 1997) (compelling discovery of other complaints in sexual harassment case). As our Supreme Court has noted, "deference [to a trial court's disposition of discovery matters] is inappropriate if the court's determination ... is based on a mistaken understanding of the applicable law." Payton, supra, 148 N.J. at 559.

### B. The Trial Court's Order Requiring Plaintiff to Subpoena Reiff Was an Abuse of Discretion (Pa4, 9)

New Jersey's discovery rules provide for broad pretrial discovery. Payton, 148 N.J. at 535. R. 4:14-1 provides that after the commencement of the action, a party may take the deposition of any person by deposition on oral examination. Examination and cross-examination of deponents may proceed as permitted at trial in open court. R. 4:14-3. R. 4:14-2(a) establishes the requirements for deposition notices. In pertinent part, the Rule provides that "a party desiring to take the deposition of any person upon oral examination shall give not less than 10 days' notice in writing to every other party to the action." Id.

In D'Agostino, this Court compelled Johnson & Johnson to produce for deposition non-party executives of a non-party Swiss subsidiary named in a deposition notice served pursuant Rule 4:14-2(a). D'Agostino v. Johnson & Johnson, 242 N.J.Super. 267, 275-76 (App.Div. 1990). In so holding, the D'Agostino court expressly rejected the argument that a non-party officer, director, or managing agent must be subpoenaed for deposition:

> [D]efendants' contention that the noticed subsidiary executives are non-parties and that their attendance at depositions could only be mandated by subpoena is without merit. . . There is no necessity for requiring service of a subpoena upon a party since adequate sanctions are provided . . . in the event that the party fails to respond to a notice to take a deposition."
>
> Id. At 275.

See also Willson v. Gerber Products Company, Docket No. A-1290-22, 2023 WL 8889528 at *5 (App. Div. Dec. 23, 2023) (citing Societie Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa, 482 U.S. 522 (1987)) (same); PRESSLER & VERNIERO, Current NEW JERSEY COURT RULES, Comment R. 4:14-2 ("Paragraph (c) of this rule is taken from Fed. R. Civ. P. 30(b)(6). It provides that the noticing party may, **in addition to or in lieu of naming the person he wishes to depose**, designate the subject matter on which he proposes to examine.") PRESSLER & VERNIERO, Current New Jersey Court Rules, Comment, R. 4:14-2(c) (emphasis added).

Rule 4:23-4 provides for the enforcement of a notice of deposition of a non-party officer, director or managing agent of a corporate party. In pertinent part, the Rule provides:

> If a party **or an officer, director, or managing agent of a party** or a person designated under R. 4:14-2(c) or R. 4:15-1 to testify on behalf of a party fails to appear before the officer within this State who is to take his deposition, after being served with a proper **notice**, the court may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (1)(2) and (3) of R. 4:23-2(b). (emphasis added).

Under the foregoing authorities, the trial court's ruling that plaintiff's notice of deposition was ineffective and plaintiff must subpoena Reiff was an abuse of discretion.

### C. The Court's Finding that the Corporate Defendants Lack Control Over Reiff Was an Abuse of Discretion (Pa4, 9)

#### 1. A corporate party's control over its own directors, officers and employees is implicit under R. 4:14-2

A corporation can only act through its directors, officers, and agents. Hardwicke v. American Boychoir School, 188 N.J. 69, 89 (2006). For deposition purposes, a corporate party's control over its own directors, officers, and managing agents is implicit under Rule 4:14-2. D'Agostino, 242 N.J.Super. at 273. The only circumstance in which a corporate party lacks control, and requires consent, is when the witness is **not** a director, officer, or managing agent. See R. 4:14-2(c) ("The organization so named shall designate one or more officers, directors, or managing agents, **or other persons who consent to testify on its behalf. . .**") (emphasis added). See also D'Agostino, 242 N.J.Super. at 274 ("[W]hen a former officer, director, or managing agent presently holds a similar position in a wholly-owned subsidiary of deponent, it has been held such person has maintained an identity of interest with, and is still subject to the control of deponent for the purpose of compelling his attendance by notice") (quoting *Moore's Federal Practice,* ¶ 30.51 at 30–45 to 30–46).

Our Court Rules pertaining to deposition notices and compelling discovery are modeled after the Federal Rules of Civil Procedure and are substantially the same. Id. at 273. R. 4:14-2(a) is based on Fed.R.Cv.P. 30(b)(1). Therefore, federal cases interpreting Federal Rule of Civil Procedure 30(b)(1) are instructive.

Under Fed.R.Civ.P. 30(b)(1), "an officer, director, or managing agent of a corporate party may be compelled to give testimony pursuant to a notice of deposition." Campbell v. Sedgwick Detert, Moran and Arnold, Civil No. 11–642–ES–SCM (D.N.J. March 28, 2013), 2013 WL 1314429 at *12. See also Loughran v. PepsiCo, Inc., Civil No. 22-4390 (RMB/EAP) (D.N.J., Jan. 29, 2024), 2024 WL 328740 at *2 n. 3; In re Valsartan, Losartan, and Irbesartan Products Liability Litigation, 2021 WL 61117676 (D.N.J. 2021) at *1 (collecting cases) (Pa363); Phila. Indem. Ins. Co. v. Fed. Ins. Co., 215 F.R.D. 492, 495 (E.D. Pa. 2003). No subpoena is necessary. Elasticsearch v. Floragunn GMBH, 2021 WL 1753796 (N.D.Cal. May 4, 2021). Pa379.

The witness' status as a non-party officer or director does not establish the absence of control. Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co., 497 F.3d. 1135, 1147 (10th Cir. 2007). To the contrary, under Fed.R.Civ.P. 30(b), a corporation is "*deemed* to have legal control over its directors … for deposition

purposes." (emphasis original). Id. The same is true under Rule 4:14-2(a). D'Agostino, 242 N.J. Super. at 273-74.

Contrary to the sound rationale of the foregoing authorities, the trial court inexplicably found that Reiff's status as a director did not establish the corporate defendants' control over him. It appears that based on a misreading of D'Agostino, the trial court believed that plaintiff had to show something more.[5] 2T14:25-18:10.

In D'Agostino, the trial court examined the issue of control because the plaintiff sought to depose non-party executives of a non-party subsidiary of Johnson & Johnson, as opposed to Johnson & Johnson's directors. For the notice to be effective, the plaintiff had to show that Johnson & Johnson had control over the subsidiary.

The trial court found that Johnson & Johnson had control over the subsidiary. In doing so, it noted that control was not denied, nor could it be, as the subsidiary was a wholly-owned subsidiary of Johnson & Johnson and, thus, "clearly under its control." D'Agostino, at 275, citing, Environmental Tectonics v. W.S. Kirkpatrick Co., 659 F.Supp. 1381, 1388 (D.N.J. 1987), aff'd. in part and rev'd in part, 847 F.2d 1052 (3d Cir. 1988), affirming judgment 493 U.S.

[5] Defense counsel raised the issue of lack of control but offered no factual or legal basis for the assertion.

400 U.S. (1990). As explained by the Kirkpatrick court, "the central factual issue in determining whether an agency relationship between a parent and subsidiary corporation is control." In other words, to "determine whether a subsidiary is such an instrumentality of the parent corporation that treating the two as one is warranted." Id. at 1388.

Because Johnson & Johnson had control over the subsidiary, ipso facto, Johnson & Johnson had control over its subsidiary's executives. The subsidiary's control over its own executives was not something that could be disputed.

"Control" is not an issue in this matter because plaintiff seeks to depose a director of three corporate party defendants, not a director of a non-party. Reiff's status as a director of the three corporate defendants is the only relevant fact and it is undisputed. Because a corporation's control over its own director is presumed, no further showing of control is necessary.

The trial court's ruling is irreconcilable with D'Agostino and the other authorities cited above. Its Orders manifest an abuse of discretion. The Orders should be reversed.

**2. The undisputed facts demonstrate the corporate defendants' control over Reiff**

The evidence before the trial court conclusively demonstrated that Stahlgruber and Rema AG have control over Reiff for deposition purposes. The

most telling evidence is that in response to plaintiff's notice of subpoena, Rema AG and Stahlgruber offered to produce Reiff for deposition. Their counsel's January 22, 2024 email stated:

> I can offer Mr. Reiff to appear for deposition in my New York City office on Friday, February 2. Please confirm you will proceed on this date as soon as possible as he is rearranging work travel plans. Please also advise how many hours you intend to need for his deposition. Pa352. April 12, 2024 Transcript at T:4-10.

Defendants' offer to produce Reiff for deposition was in response to plaintiff noticing Reiff's deposition for January 10, 2024. By offering to produce Reiff for deposition, Rema AG and Stahlgruber acknowledged both their control over Reiff as well as the effectiveness of the notice of deposition and the authority it represented.

Additional evidence of record further refutes any suggestion of lack of control over Reiff. For example, in July 2022, the Corporate Defendants sent Reiff to New York to (1) interview the outside candidates Gunnarsson had proposed as his replacement following the decision to pass plaintiff over for promotion and (2) meet with representatives of multiple law firms in New York concerning plaintiff's lawsuit. CPa3-6, Pa190, 196.

The trial court ignored these undisputed facts when it denied the motion to compel and when it denied the motion for reconsideration. In an abuse of

discretion, it simply accepted as true the bald assertions of counsel, belatedly made, that the corporate defendants lack control over Reiff.

### 3. The Inherent Contradiction in the Trial Court's Orders Make Them Impossible to Carry Out and Effectively Deprive Plaintiff of the Opportunity to Depose Reiff (Pa4, 9)

The two requirements of the trial court's Order – that plaintiff must subpoena Reiff's deposition, and that the deposition must occur in New Jersey – are irreconcilable. Because Reiff is a German resident, he is outside the trial court's subpoena power.

Rather, if plaintiff subpoenas Reiff pursuant to the Hague Convention of 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Convention"),[6] the deposition would occur in Germany. During the deposition, the plaintiff would be subject to bi-lateral treaties and local laws, which (a) do not allow for cross examination and (b) permit witnesses to refuse to answer questions that would have to be answered in New Jersey under R.

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[6] The Hague Convention provides signatory nations a process by which evidence can be obtained. This process "is based on a mutual respect as between the laws of the participating nations-i.e., 'comity.' Accordingly, a discovery request emanating from a foreign tribunal must be compatible with the laws of both the propounding and host country. [Importantly, however,] a foreign tribunal is vested with the authority to determine whether, and the extent to which, discovery from the propounding nation is permissible under the former's own laws. Tony Abdollahi, The Hague Convention: A Medium for International Discovery, 40 N.C. J. INT'L L. 771, 772 (2014). Pa378.

4:14-3.[7] That would deprive plaintiff of a meaningful deposition of one of the decisionmakers in this case who, as the trial court noted, has knowledge of facts that no other defense witness has.

Federal courts have routinely found that because depositions taken pursuant to the Hague Convention and foreign laws do not allow for the same liberal discovery permitted by the Federal Rules of Civil Procedure, it would be unfair to require a party to take the deposition of a foreign party on German soil. See Fraunhofer-Geselleshaft Zur Forderung der angewandten Forschung E.V.,

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[7] For example, in the instance of a witness residing in Germany, such as Reiff, the restrictions on depositions under German law and bilateral agreements between the U.S. and the Republic of Germany would apply. "Bilateral agreements between Germany and the United States require that the German Ministry of Justice pre-approve all requests for depositions." Pa415.
Absent prior approval, depositions are unauthorized and can lead to criminal penalties against the participants. Id. Additionally, "the German Ministry of Justice requires that all depositions take place on U.S. Consulate grounds and that the oaths be administered by a U.S. Consul." Id. Further, even if the witness has been served with a subpoena of a U.S.-based court, testimony is hardly guaranteed. German law requires that "[a]ll testimony must be given voluntarily without coercion or threat of future sanctions. Therefore, prior to the taking of testimony and in accordance with German law, the consular officer will administer a voluntariness advisement to each witness." Pa416.
If the subpoenaed witness elects not to participate, plaintiff is left without remedy. Also, German law does not permit cross-examination of witnesses and, as a corollary to the voluntary nature of the deposition, a witness may refuse to answer any questions including those to which an answer could be compelled pursuant to New Jersey Rule of Court. See R. 4:14-3 (providing for examination of deponents as at trial in open court). Additional restrictions include a prohibition on video and audio recording of the deposition and the consular officer must preside over the deposition in its entirety. Pa416.

2021 WL 861493 (D.Del. March 8, 2021) at *3 (Pa310); Metcalf v. Bay Ferries Limited, 2014 WL 3670786 (D. Mass. July 14, 2021) at *1-3 (Pa314); Peiker Acustic, Inc. v. Kennedy, 2011 WL 1344238 (D. Colorado April 8, 2011) at *2 (Pa319); In re Vitamin Antitrust Litigation, 2001 WL 35814436 (D.D.C. Sept. 11, 2001) at *7-9 (Pa323). The inability to take a meaningful deposition of a corporate decisionmaker would work a particular harm on plaintiffs in employment cases, where the plaintiff depends on discovery obtained from the employer to prove his case. Zive v. Stanley Roberts, Inc., 182 N.J. 436, 446-49 (2005).

If left unchecked, the trial court's Orders would do more than deprive plaintiff of necessary evidence. The Orders will have a chilling effect on other victims of unlawful discrimination and retaliation. There are 1,249 international companies in New Jersey who employ nearly 300,000 workers. Pa418. Foreign directors, officers, and managing agents frequently make decisions that lead to CEPA and LAD claims. If other courts follow the trial court's interpretation of the law, victims of unlawful discrimination and retaliation would be deprived of the opportunity to depose foreign decisionmakers in New Jersey in the manner provided by the Court Rules. Such circumstances will make it more difficult if not impossible for CEPA and LAD plaintiffs to prove their cases and thereby deter victims of unlawful employment practices from filing suit – all contrary to

statutory intent. Young v. Schering Corp., 141 N.J. 16, 26 (1996). See also Pinto v. Spectrum Chems. & Lab. Prods., 200 N.J. 580, 593 (2010) (CEPA's enforcement scheme depends on private civil actions by plaintiffs who act as private attorney generals).

**4. The Court Abused Its Discretion in Denying Plaintiff's Motion for Reconsideration (Pa4, 9)**

Judges should not view reconsideration motions as hostile gestures. Lawson v. Dewar, 468 N.J.Super. 128, 136 (App.Div. 2021). "Judges should view well-reasoned motions based on Rule 4:42-2 as an invitation to 'apply Cromwell's rule: "I beseech you ... think it possible you may be mistaken."'" Id. "The fair and efficient administration of justice is better served when reconsideration motions are viewed in that spirit and not as nuisances to be swatted aside." Id.

Rule 4:42-2 declares interlocutory orders "shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice." Although plaintiff respectfully views the trial court's Orders as palpably incorrect and based on a misapprehension of the law and facts of record, such a showing is unnecessary. See Lawson, 468 N.J.Super. at 134 (A motion for reconsideration does not require a showing that the challenged order was "palpably incorrect," "irrational," or based on a misapprehension or overlooking of significant material presented on the earlier

application"). Until entry of final judgment, only "sound discretion" and the "interest of justice" guides the trial court, as Rule 4:42-2 expressly states. Id. See also Lombardi v. Masso, 207 N.J. 517, 536 (2011).

In his motion for reconsideration, plaintiff demonstrated that reconsideration was in the interest of justice. The trial court's order denying the motion to compel unjustly deprived plaintiff of the opportunity to depose a director of multiple corporate defendants who participated in the decision to terminate his employment and pass him over for promotion to a job he had been promised in violation of CEPA.

Plaintiff's motion for reconsideration was not a "simple disagreement" with the outcome of the motion to compel. The Order denying plaintiff's motion to compel was legally flawed, and overlooked the undisputed record evidence of the corporate defendants' control over Reiff. The motion for reconsideration was brought in good faith and provided the trial court with the "opportunity to . . . correct a prior erroneous order." The trial court's failure to do so was an abuse of discretion.

## CONCLUSION

For the foregoing reasons, the Court should grant plaintiff's appeal and reverse the trial court's March 25, 2024 and April 19, 2024 Orders.

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A Professional Corporation
Attorneys for plaintiff, James Whelton

By: */s/ Michael F. O' Connor*
MICHAEL F. O'CONNOR

Dated: October 16, 2024

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JAMES WHELTON,

Plaintiff-Appellant,

vs.

REMA TIP TOP/NORTH AMERICA, INC., REMA TIP TOP OF AMERICA, INC., REMA TIP TOP AG, OLAFUR GUNNARSSON, MICHAEL UBELACKER and STAHLGRUBER OTTO GRUBER, AG,

Defendants-Respondents.

**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000084-24**

Civil Action

On Appeal From:
SUPERIOR COURT
LAW DIVISION: BERGEN COUNTY
DOCKET NO. BER-L-2829-22

Dates of Orders Below:
March 25, 2024 and April 19, 2024

Sat Below:
Hon. Anthony R. Suarez, J.S.C.

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# DEFENDANT-RESPONDENT REMA TIP TOP OF AMERICA INC.'S BRIEF IN OPPOSITION TO PLAINTIFF-APPELLANT'S INTERLOCUTORY APPEAL OF THE ORDERS DATED MARCH 25, 2024 AND APRIL 19, 2024

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## Federal Cases



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Defendant-Respondent Rema Tip Top of America, Inc. ("Rema of America") respectfully submits this brief in opposition to Plaintiff-Appellant James Whelton's ("Plaintiff") interlocutory appeal of the trial court's Orders, (i) dated March 25, 2024 (the "March 25 Order"), which denied Plaintiff's motion to compel the deposition of Heinz Reiff; and (ii) April 29, 2024, which denied Plaintiff's motion for reconsideration (the "April 29 Order" and together with the March 25 Order, the "Trial Court Orders").

## PRELIMINARY STATEMENT

In the instant appeal, Plaintiff challenges two interlocutory discovery orders issued by the trial court, the first of which denied Plaintiff's motion to compel Rema of America and two other defendants—Rema Tip Top AG ("Rema AG") and Stahlgruber Otto Gruber, AG ("Stahlgruber" and together with Rema AG, the "German Entity Defendants")—to produce a non-party German resident named Heinz Reiff, for a deposition, and the second of which denied Plaintiff's motion for reconsideration.

As the trial court correctly held after considering the clear New Jersey Court Rules and the parties' respective positions, while Plaintiff is entitled to depose Mr. Reiff in his individual capacity, he cannot seek the non-party deposition by serving a simple deposition notice upon counsel to Rema of America and the German Entity

Defendants who have no control over Mr. Reiff. Instead, per Rule 4:14-1, Plaintiff must seek the deposition through a subpoena.

Because Rema of America does not control Mr. Reiff, it is of no moment that he is on Rema of America's Board of Directors. By its very terms, Rule 4:14-2(c) does not permit a party to notice the deposition of a specific director—it instead provides that, in response to a deposition notice to the organization, the organization may designate the "officers, directors, or managing agents, or other persons who consent to testify on its behalf…." R. 4:14-2(c).

The trial court's holding was therefore correct: if Plaintiff wishes to depose Mr. Reiff, it cannot do so by serving Rema of America with a deposition notice. Plaintiff must serve him with a subpoena. Accordingly, the Trial Court Orders should be affirmed, and Plaintiff's appeal should be denied.

## PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

### A. Plaintiff's Allegations and Notices to Depose Heinz Reiff

Plaintiff alleges in his Second Amended Complaint, dated May 31, 2023, that he has served as the Chief Legal Officer for Rema Tip Top/North America, Inc. ("Rema NA") since 2011, and it is undisputed that he still remains employed in that

[1] The Procedural History and Counterstatement of Facts have been combined to avoid repetition and for the convenience of the Court.

position. Pa24 ¶ 2.[2] Defendant Olafur Gunnarsson served as the President and Chief Executive Officer of Rema NA for over 20 years until he retired from his position in or around mid-2022. Pa30, Pa44 ¶¶ 55, 206. The crux of Plaintiff's allegations is that, in October of 2021, Mr. Gunnarsson requested that Rema NA's then-Chief Operating Officer ("COO"), John Breheny, pay an invoice to a "personal friend" of Mr. Gunnarsson's for consulting services on behalf of Rema NA. Pa25 ¶ 5. He further alleges that when Mr. Breheny reported the payment request to Plaintiff, Plaintiff "advised [ ] against" it, and the transaction was never completed. Pa25 ¶ 6. It is therefore undisputed that the invoice was never paid.

Nevertheless, Plaintiff alleges that he "had a duty to report" Mr. Gunnarsson's payment request to Rema NA's German parent company, Defendant Rema AG. Pa36 ¶ 124. He then alleges that, as a result of his report to Rema AG, Defendants retaliated against him by threatening to terminate him, "pass[ing] [him] over for promotion to Chief Executive Officer," and denying him a bonus "while paying other high-level employees substantial bonuses." Pa28, Pa43, Pa47 ¶¶ 35, 38, 194, 198, 234, 236.

Based on these allegations, Plaintiff asserts one cause of action for the alleged violation of the Conscientious Employee Protection Act ("CEPA") against (i) his

[2] All references to "Pa__" are to the Appendix filed by Plaintiff-Appellant in this appeal.

employer, Rema NA; (ii) Mr. Gunnarsson; (iii) the parent company of Rema NA, Rema of America (Pa46-47 ¶¶ 222-240); (iii) the German parent company of Rema of America, Rema AG (Pa46-47 ¶¶ 222-240); (iv) the Chief Executive Officer of Rema AG, Michael Ubelacker, the individual to whom Plaintiff allegedly reported the invoice (Pa46-47 ¶¶ 222-240); and (v) the German parent company of Rema AG, Stahlgruber Otto Gruber, AG (Pa46-47 ¶¶ 222-240).

On October 5, 2023, Plaintiff served a notice of deposition upon counsel to the German Entity Defendants to take the remote deposition of Heinz Reiff—a German resident—on November 9, 2023. Pa243-244. On October 30, 2023, Plaintiff then served a new notice of deposition upon all defendants' counsel to take the remote deposition of Mr. Reiff on November 28, 2023. Pa257-258.

That same day, Plaintiff served a notice to take the deposition of a corporate representative of Rema NA and Rema of America, and Rema NA and Rema of America produced such a corporate representative, Jeffrey Xu, for deposition. Pa251-254, 369-371.

On November 9, 2023, Plaintiff's counsel advised that he no longer wished to take Mr. Reiff's deposition remotely and was therefore adjourning the deposition to take place in New Jersey on December 7, 2023. Pa260-268.

On December 4, 2023, Plaintiff's counsel requested by letter that Messrs. Ubelacker and Reiff agree to travel to New Jersey for their respective depositions,

and he sent new notices of deposition to take Mr. Ubelacker's deposition on January 9, 2024 and Mr. Reiff's deposition on January 10, 2024. Pa282-288. Although counsel for the German Defendants was ultimately able to secure dates for Mr. Ubelacker's deposition and attempted to expedite Plaintiff's request to take Mr. Reiff's deposition in New Jersey—though he is not a party to this action and counsel was not required to do so—counsel for the German Entity Defendants were ultimately unsuccessful in scheduling Mr. Reiff's deposition. Pa293-300.

### B. The Motion to Compel and March 25 Order

On January 17, 2024, Plaintiff moved to compel (the "Motion to Compel") the German Defendants and Rema of America to produce Mr. Reiff for a deposition. Rema of America opposed the Motion to Compel, pointing out that (i) Rema of America already produced a corporate representative (Jeffrey Xu) in response to Plaintiff's October 30, 2023 notice of deposition, (ii) Rema of America also produced defendant Olafur Gunnarsson, a director of Rema of America, for a deposition concerning the same topics on which Plaintiff seeks to depose Mr. Reiff, and (iii) Rema of America does not have control over Mr. Reiff. March 22, 2024 Transcript[3] at 15:6-16:19.

[3] The transcript of the March 22, 2024 hearing before the Honorable Anthony R. Suarez (the "March 22 Transcript") was filed by Plaintiff via eCourts on May 15, 2024 in the matter bearing Docket No. AM-000456-23, M-004780-23.

On March 25, 2024, the trial court issued a written Order denying Plaintiff's Motion to Compel (the "March 25 Order") for the reasons set forth in the trial court's decision on the record on March 22, 2024. Pa4-5.

In particular, the trial court reasoned, based on Rule 4:14-1, that while Plaintiff was entitled to depose Mr. Reiff in his individual capacity, the fact that the German Defendants and Rema of America do not have control over him required Plaintiff to seek the deposition via subpoena instead of through a simple notice of deposition. March 22 Transcript at 18:24-20:10.

The March 25 Order therefore summarized that because Mr. Reiff is not a party and none of the defendants have control over him, Plaintiff was required to seek the deposition via subpoena instead of through a deposition notice. It nevertheless ordered the deposition to proceed in New Jersey or another neighboring state that was convenient for all of the parties. Pa4-5.

### C. Plaintiff's Motion for Reconsideration and the April 19 Order

On March 28, 2024, Plaintiff filed a motion for reconsideration of the trial court's March 25 Order denying the Motion to Compel (the "Motion for Reconsideration"). Pa6-7. On April 19, 2024, the trial court denied Plaintiff's Motion for Reconsideration and attached a rider explaining its reasons. Pa9-16.

In particular, the trial court reasoned that "Plaintiff's simple disagreement with the Court's decision regarding Plaintiff's ability to compel Mr. Reiff—a non-

party located in Germany—for a deposition by way of a subpoena directed to Mr. Reiff himself, rather than by way of deposition notice issued to counsel for Defendants does not demonstrate that the 'interest of justice' requires the Court to change its decision." Pa15. The trial court also noted that it did not conclude that Plaintiff was not entitled to depose Mr. Reiff—only that Plaintiff was required to seek the deposition through subpoena. Pa15-16. In fact, the trial court even ordered the deposition to take place in New Jersey or another convenient state. Pa15-16.

### D. Plaintiff Seeks Leave to Appeal the Trial Court Orders

Plaintiff subsequently filed a motion before the Appellate Division for leave to appeal the Trial Court Orders, and on May 30, 2024, the Appellate Division denied Plaintiff's motion. Pa372. On September 4, 2024, the Supreme Court granted leave to appeal and remanded the appeal to this Court. Pa373.

## LEGAL ARGUMENT

### PLAINTIFF'S APPEAL IS WITHOUT MERIT AND THE TRIAL COURT'S ORDERS SHOULD NOT BE DISTURBED

This Court has repeatedly recited the "well-established principle that decisions of trial courts on discovery matters are upheld unless they constitute an abuse of discretion." Wampler v. Dental Health Assocs., P.A., No. A-1796-13T4, 2015 WL 10568695, at *3 (N.J. Super. Ct. App. Div. 2016) (quotation marks omitted); Est. of Lagano v. Bergen Cnty. Prosecutor's Off., No. A-1207-22, 2024

WL 3934132, at *5 (N.J. Super. Ct. App. Div. 2024) ("We review a trial court's discovery rulings pursuant to an abuse of discretion standard of review.").

Here, Plaintiff has failed to demonstrate that the trial court abused its discretion in denying his Motion to Compel and Motion for Reconsideration, and his appeal should therefore be denied.

Plaintiff's motions were premised on the faulty notion that he can compel Rema of America (and the German Defendant Entities) to produce Mr. Reiff for a deposition in his individual capacity through the mere expedient of serving a notice of deposition to counsel because he is a member of Rema of America's Board of Directors and Rema AG's Supervisory Board.

But Plaintiff's argument finds no support in the New Jersey Court Rules. The only New Jersey Rule applicable to taking the deposition of a director or officer of a corporate party is Rule 4:14-2(c), but that rule **does not** allow a party to compel the deposition of a director or officer of the corporate party by serving a simple notice of deposition. Instead, Rule 4:14-2(c) provides that the "organization so named shall designate" the "officers, directors, or managing agents, or other persons who consent to testify on its behalf…." R. 4:14-2(c). The rule **does not** allow the noticing party to specifically designate the corporate officer and/or director that will testify.

Moreover, Plaintiff's claim that Rule 4:23-4 supports the notion that a party

may enforce a simple notice of deposition against "a non-party officer, director or managing agent of a corporate party" selectively emphasizes and misconstrues that rule. Pl. Br. at 12.[4] Rule 4:23-4 merely provides, inter alia, that if the "officer, director, or managing agent of a party or a person **designated under R. 4:14-2(c)** or 4:15-1 **to testify on behalf of a party**" fails to appear, the party may be sanctioned. See R. 4:23-4 (emphasis added). But as stated above, the explicit language of Rule 4:14-2(c) provides that the **corporate party** designates the individual that will testify, **not** the noticing party. See R. 4:14-2(c). Significantly, here, no corporate party has designated Mr. Reiff as a corporate witness pursuant to a deposition notice under Rule 4:14-2(c).

Thus, the trial court did not abuse its discretion when, after reviewing these unambiguous court rules, it held that Plaintiff was required to subpoena Mr. Reiff instead of attempting to compel the deposition via a notice of deposition, as neither the German Entity Defendants nor Rema of America have control over Mr. Reiff, who is not a party to this action and resides in Germany.

Plaintiff's heavy reliance on the 1990 decision in D'Agostino v. Johnson & Johnson, 242 N.J. Super. 267 (App. Div. 1990) for the proposition that Rema of America has control over Mr. Reiff and therefore must produce him for a deposition is misplaced. Pl. Br. at 11-15.

[4] "Pl. Br." refers to Plaintiff's Brief in support of his appeal, dated October 17, 2024.

There, this Court merely held that "[a]lthough the rules do not specifically state that a proposed corporate deponent must be under the control of the corporate party in order to require the deponent's presence, **such control must exist before a party can be compelled to produce a deponent**." D'Agostino, 242 N.J. Super. at 273 (emphasis added). This Court therefore continued that, given the language in Rule 4:14-2(c) that an organization named in a notice of deposition "shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf," (see R. 4:14-2(c)), "the factor of control by a corporate party over its officers, directors and managing agents is implicit within the rule." D'Agostino, 242 N.J. Super. at 273.

This latter statement in D'Agostino merely reinforces that a corporation can only be compelled to produce an officer, director or other person over whom it has control or another individual that consents to testify on its behalf. R. 4:14-2(c). D'Agostino **did not** hold, and Plaintiff has never cited any case from this Court holding, that a corporation **always** has control over **all** of its officers, directors or managing agents, as Plaintiff claims. See Pl. Br. at 13.

Indeed, in D'Agostino, this Court analyzed the particular facts of that case to determine that the corporate party, Johnson & Johnson, had control over the noticed individuals, and considered, among other things, that Johnson & Johnson did not deny such control and that one of the proposed non-party deponents even "offered a

certification in favor of defendants" in the case, thereby already participating in the proceedings. D'Agostino, 242 N.J. Super. at 275. Had this Court issued a broad pronouncement that, in every instance, a corporation necessarily has control over—and therefore must produce for deposition—any of its officers, directors and managing agents that a plaintiff designates, it would not have had to engage in any such analysis relating to control over the subject deponents.[5]

At bottom, here, the trial court did not abuse its discretion in ordering Plaintiff to seek Mr. Reiff's non-party deposition through a subpoena rather than a notice of deposition to Rema of America's counsel. Rema of America does not have control over Mr. Reiff, has never designated him as its representative, and cannot compel him to appear. Nor has Plaintiff offered any other evidence that Rema of America controls him.

Moreover, while Plaintiff takes issue with the fact that, in light of the Trial Court Orders, he is required to follow procedures under the Hague Convention and German law when deposing Mr. Reiff, significantly, he acknowledges in his brief that he nevertheless will be able to seek information from Mr. Reiff relevant to this action. Pl. Br. 18-19; see, e.g., In re Urethane Antitrust Litig., 267 F.R.D. 361, 364

[5] Notably, Plaintiff fails to cite to any other New Jersey case in support of the proposition that, under New Jersey law, a corporation can be compelled to produce a particular director through the service of a notice of deposition. Plaintiff's reliance on federal case law—which interpret the Federal Rules of Civil Procedure, not the New Jersey Court Rules—is unavailing. *See* Pl. Br. at 14.

(D. Kan. 2010) (facilitating party's request to take a deposition of a witness in Germany pursuant to the Hague Convention and noting that "[r]esort[ing] to using the procedures of the Hague Convention is particularly appropriate when, as here, a litigant seeks to depose a foreign non-party who is not subject to the court's jurisdiction").

The fact that Plaintiff may be required to follow certain additional procedures and that the deposition may be conducted differently than under New Jersey law is simply not a basis to compel Rema of America—which has no control over Mr. Reiff—to produce him for deposition.

Plaintiff's appeal therefore lacks merit and should be denied.

## CONCLUSION

For the foregoing reasons, Rema of America respectfully requests that this Court deny Plaintiff's appeal and affirm the Trial Court Orders.

Respectfully submitted,
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*Rema Tip Top of America, Inc.*

By: */s/ Samuel J. Bazian*
SAMUEL J. BAZIAN

Dated: November 15, 2024

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JAMES WHELTON,

*Plaintiff-Appellant,*

vs.

REMA TIP TOP/NORTH AMERICA, INC., REMA TIP TOP OF AMERICA, INC., REMA TIP TOP AG, OLAFUR GUNNARSSON, MICHAEL ÜBELACKER, and STAHLGRUBER OTTO GRUBER AG,

*Defendants-Respondents.*

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**SUPERIOR COURT OF NEW JERSEY**
**APPELLATE DIVISION**
**Docket No. A-000084-24**

Civil Action

On Appeal from Trial Court Orders Entered March 25, 2024 and April 19, 2024

Docket No. in The Court Below:
BER-L-2829-22

Sat Below:
Hon. Anthony R. Suarez, J.S.C.

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# BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS REMA TIP TOP AG, STAHLGRUBER OTTO GRUBER AG, AND MICHAEL ÜBELACKER

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**DATE SUBMITTED: NOVEMBER 15, 2024**

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## PRELIMINARY STATEMENT

The present dispute before this Court involves Plaintiff James Whelton's ("Plaintiff") desire to compel the deposition of a non-party witness located in Germany, Heinz Reiff ("Reiff"), through deposition notices issued to counsel for the named Defendants in this action. In a thorough and well-reasoned decision, the trial court denied Plaintiff's motion to compel Reiff's deposition, in which Plaintiff sought Reiff's testimony ***in his individual capacity***, concluding that Defendants Rema Tip Top AG ("Rema AG"), Stahlgruber Otto Gruber AG ("Stahlgruber"), and Michael Übelacker ("Übelacker") (collectively, the "German Defendants"), on the one hand, and Defendants Rema Tip Top/North America, Inc. ("RTTNA"), Rema Tip Top of America, Inc. ("RTTOA"), and Olafur Gunnarsson ("Gunnarsson") (collectively, the "U.S. Defendants"), on the other hand, lacked control over Reiff, a non-party. The trial court thereafter denied Plaintiff's motion for reconsideration and confirmed that Plaintiff would be required to subpoena Reiff directly in order to obtain Reiff's testimony.

Plaintiff now claims that the trial court abused its discretion in both decisions. Notably, although Plaintiff claims that "the defendant corporations acted through their directors and officers," and contends that Reiff is "one of the decisionmakers who retaliated against plaintiff," by his own admission,

Plaintiff is ***not*** seeking to depose Reiff—a nonparty—in his capacity as a director of the corporate entities, but rather in his individual capacity. As Reiff is a non-party, located in Germany, whom Plaintiff wants to depose in his individual capacity, it is wholly appropriate to require that Plaintiff comply with the manner in which discovery is taken in Germany on a non-party, who has not participated in this litigation, rather than permit Plaintiff to short-circuit the process by serving a deposition notice on entities that do not control Reiff and will not be bound by his testimony (as he would be testifying as a fact witness and not on behalf of the corporate Defendants).

Although it is clear from his brief that Plaintiff would prefer to avoid the procedure established by the Hague Convention to obtain discovery from witnesses located in Germany, that preference should not create an obligation on the German Defendants (or the U.S. Defendants) to produce Reiff for a deposition by way of a deposition notice. Indeed, none of the Court Rules Plaintiff cites provide that Plaintiff can permissibly serve a deposition notice on the German Defendants or the U.S. Defendants to compel a deposition of Reiff in his individual capacity simply because he is a director of certain entities. Moreover, after considering the parties' arguments and the New Jersey case law Plaintiff continues to rely upon in his appellate brief, the trial court concluded that the identified facts did not establish that Defendants have the control over

Reiff necessary to permit Plaintiff to compel Reiff's deposition by way of deposition notice to the named entity Defendants.

Plaintiff has failed to identify binding authority demonstrating that the trial court's orders denying his motions were an abuse of discretion, and the German Defendants respectfully request that those well-reasoned orders be affirmed.

## PROCEDURAL HISTORY

On May 31, 2023, Plaintiff filed a Second Amended Complaint in this action adding Stahlgruber as a defendant to already-named defendants Rema AG, Übelacker, RTTNA, RTTOA, and Gunnarsson. (Pa24-Pa48).

On October 5, 2023, Plaintiff served a Notice of Deposition for Reiff, in his individual capacity, which was directed to counsel for the German Defendants, noticing a deposition for November 9, 2023. (Pa241-Pa244). Plaintiff did not serve a deposition notice for a corporate representative of either Rema AG or Stahlgruber. (*See* 1T 18:11-13[1]).

Thereafter, on October 30, 2023, Plaintiff served another Notice of Deposition for Reiff, which was directed to counsel for both the German

[1] "1T" as used herein refers to the transcript of the trial court's oral decision on the record dated March 22, 2024. "2T" as used herein refers to the transcript of oral argument dated April 12, 2024.

Defendants and the U.S. Defendants, noticing a deposition date of November 28, 2023. (Pa251-Pa258).

On November 9, 2023, Plaintiff served a third Notice of Deposition for Reiff, which was directed to counsel for both the German Defendants and the U.S. Defendants, noticing a deposition date of December 7, 2023. (Pa260-Pa268).

On December 4, 2023, Plaintiff served another Notice of Deposition for Reiff, which was directed to both the German Defendants and the U.S. Defendants, noticing a deposition date of January 10, 2024. (Pa282-Pa286).

On January 17, 2024, Plaintiff filed a Motion to Compel the Deposition of Heinz Reiff Pursuant to *Rule* 4:23-1, Or, In The Alternative, For Sanctions Pursuant to *Rule* 4:23-4 (the "Motion to Compel"). (Pa1-Pa3).

On March 25, 2024, following a lengthy oral argument, the trial court entered an Order denying Plaintiff's Motion to Compel, following the trial court's oral decision read into the record on March 22, 2024, finding that Defendants do not have control over Reiff. (Pa4-Pa5; 1T).

On March 27, 2024, Plaintiff filed a Motion for Reconsideration Pursuant to *Rule* 4:42-2(b) (the "Motion for Reconsideration"). (Pa6-Pa8).

On April 12, 2024, the trial court again heard lengthy oral argument on the Motion for Reconsideration. (2T). Following oral argument, on April 19,

2024, the trial court entered an Order denying Plaintiff's Motion for Reconsideration, along with a Rider containing the trial court's written opinion on the Motion for Reconsideration. (Pa9-Pa16).

On May 8, 2024, Plaintiff filed a motion for leave to appeal the trial court's Orders, dated March 25, 2024 and April 19, 2024. (Pa372). On May 30, 2024, this Court denied Plaintiff's motion for leave to appeal. (Pa372).

Plaintiff thereafter filed a motion for leave to appeal with the Supreme Court, which ultimately granted Plaintiff leave to appeal and remanded the matter to this Court for consideration of the merits. (Pa373).

## STATEMENT OF FACTS

### A. Plaintiff's Allegations In This Action

Plaintiff is an attorney, who is currently, and at all relevant times has been, employed as the Chief Legal Officer for defendant RTTNA. (Pa29). As alleged in Plaintiff's Second Amended Complaint, at all relevant times, RTTNA and RTTOA functioned as Plaintiff's joint employers. (Pa30).

Rema AG is a German corporation with its principal place of business located in Germany. (Pa229). RTTNA is a wholly owned subsidiary of RTTOA, which is a wholly owned subsidiary of Rema AG. (Pa229). Übelacker is a member of the Rema AG Management Board and was the Chief Executive

Officer of Stahlgruber, a German corporation and the parent of Rema AG. (Pa229, Pa235, Pa31).

Plaintiff alleges in this action that, in October 2021, Gunnarsson directed RTTNA's then-Chief Operating Officer ("COO") to wire funds to a personal friend based upon an invoice for services that were never performed. (Pa25). Plaintiff alleges that the COO reported this conduct to Plaintiff, who advised the COO not to authorize the payment; no payment was made. (Pa25). Thereafter, Plaintiff alleges that he contacted Übelacker to report Gunnarsson's conduct, and that, as a result, Gunnarsson informed Plaintiff that he would no longer be recommended to take over Gunnarsson's role as Chief Executive Officer ("CEO") of RTTNA. (Pa25). According to Plaintiff, the German Defendants "retaliated" against Plaintiff in violation of the Conscientious Employee Protection Act ("CEPA") by approving Plaintiff's termination (which never happened) and passing Plaintiff over for promotion. (Pa26-Pa29, Pa41-Pa45).

It is the German Defendants' position that they are not Plaintiff's "employer," nor is he their "employee," thereby precluding Plaintiff from asserting a CEPA claim against the German Defendants. (Pa231). The German Defendants also contend that Plaintiff performed no "whistleblowing activity," and that Plaintiff did not possess an objectively reasonable belief that any violation of law or public policy occurred, and therefore that Plaintiff's CEPA

claim will ultimately fail. (Pa231). Moreover, it is the German Defendants' position that they did not retaliate against Plaintiff, nor do they have any control over the terms and conditions of Plaintiff's employment. (Pa231). Critically, Plaintiff's employment was never terminated, and he continues to maintain his position as Chief Legal Officer. (*See* Pa29).

### B. Reiff Is A Non-Party Located In Germany

There is no dispute that Reiff is not a party to this action, nor is Reiff an employee of Rema AG. Instead, Reiff is a member of the Board of Directors of RTTNA and is the Chairman of the Supervisory Board of Rema AG. (Pa229).

### C. The Parties' Dispute Regarding Reiff's Deposition

During discovery, Plaintiff served multiple deposition notices for Reiff on both the German Defendants and the U.S. Defendants. (Pa241-Pa244; Pa251-Pa258; Pa260-Pa268; Pa282-Pa286). To try to expedite matters and avoid motion practice, counsel for the German Defendants attempted to coordinate scheduling Reiff's deposition. (*See, e.g.,* 2T 19:5-13). However, the parties were unable to schedule Reiff's deposition despite attempts to do so, as the German Defendants do not have control over Reiff, and counsel has not communicated directly with him. (*See id.*). As the German Defendants confirmed in arguing in opposition to Plaintiff's Motion to Compel, counsel for

the German Defendants does not represent Reiff, nor has Reiff voluntarily inserted himself into this litigation in any way. (1T 13:4-16).

### D. Plaintiff's Motion To Compel Reiff's Deposition

On January 17, 2024, Plaintiff filed the Motion to Compel, which sought to require the German Defendants and the U.S. Defendants to produce Reiff for deposition. (Pa1-Pa3). Following a lengthy oral argument, in a thorough and well-reasoned decision read into the record on March 22, 2024, the trial court denied Plaintiff's Motion to Compel. (*See* 1T 8:14-21:5). In doing so, the trial court considered the parties' arguments and summarized them on the record before issuing the opinion. (*Id.*). On March 25, 2024, the trial court entered an Order reflecting the court's oral decision denying Plaintiff's Motion to Compel. (Pa4-Pa5). In that Order, the trial court reiterated that, based on the record evidence, Defendants do not have control over Reiff. (*Id.*).

### E. Plaintiff's Motion For Reconsideration

Two days after the trial court entered the March 25 Order, Plaintiff filed a Motion for Reconsideration, claiming that the "interest of justice" warranted reconsideration of the trial court's denial of Plaintiff's Motion to Compel. (Pa6-Pa8). The trial court again held oral argument on the Motion for Reconsideration and asked multiple questions regarding Plaintiff's position. (*See, e.g.,* 2T 14:2-18:11). Thereafter, on April 19, 2024, the trial court entered an Order denying

Plaintiff's Motion for Reconsideration. (Pa9-Pa16). The Rider appended to the Order summarized the facts the trial court considered, as well as the legal positions asserted by the parties, and ultimately concluded that Plaintiff's disagreement with the trial court's order on the Motion to Compel did not equate to the "interest of justice" warranting reconsideration. (*Id.*).

## STANDARD OF REVIEW

This Court will "generally defer to a trial court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the applicable law." *Rivers v. LSC Partnership*, 378 N.J. Super. 68, 80 (App. Div. 2005). Similarly, the standard for reviewing a trial court's denial of a motion for reconsideration is whether the trial court abused its discretion. *Cummings v. Bahr*, 295 N.J. Super. 374, 389 (App. Div. 1996).

Under the "abuse of discretion" standard, the Court "may find an abuse of discretion when a decision 'rest[s] on an impermissible basis' or was 'based upon a consideration of irrelevant or inappropriate factors.'" *State v. Steele*, 430 N.J. Super. 24, 34–35 (App. Div. 2013) (quoting *Flagg v. Essex Cnty. Prosecutor*, 171 N.J. 561, 571 (2002)). The New Jersey Supreme Court has instructed that "a functional approach to abuse of discretion examines whether

there are good reasons for an appellate court to defer to the particular decision at issue." *Flagg*, 171 N.J. at 571.

As set forth below, the German Defendants respectfully submit that the trial court has not abused its discretion in entering the March 25, 2024 and April 19, 2024 Orders, and such Orders should therefore be affirmed.

## LEGAL ARGUMENT

### I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REQUIRING PLAINTIFF TO SUBPOENA REIFF, A NON-PARTY WITNESS LOCATED IN GERMANY (PA4, PA9)

#### A. The Court Rules And Case Law Plaintiff Cites Do Not State That Non-Party Directors Can Be Compelled By Deposition Notice To Testify In Their Individual Capacity

Although Plaintiff's brief suggests that the New Jersey Court Rules authorize Plaintiff to serve a deposition notice on the corporate defendants for non-party Reiff's deposition, the Rules Plaintiff cites do not do so. For one, Rule 4:14-1—cited by Plaintiff— provides that the "attendance of witnesses may be compelled ***by subpoena*** as provided in *R.* 4:14-7." (emphasis added). Reiff is a potential witness, not a party, to this action, and therefore the trial court's order directing Plaintiff to serve a subpoena on Reiff is not, in and of itself, an abuse of discretion.

Moreover, although Plaintiff is correct that Rule 4:14-2(a) "establishes the requirements for deposition notices," (*see* Pb11), that Rule does not provide any details regarding to whom a deposition notice may properly be issued. Instead,

it simply identifies the notice required to be provided to other parties in advance of a deposition:

> **Notice.** Except as otherwise provided by R. 4:14-9(b), a party desiring to take the deposition of any person upon oral examination shall not give less than 10 days' notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition, which shall be reasonably convenient for all parties, and the name and address of each person to be examined, if known, and if the name is not known a general description sufficient to identify the person or the particular class or group to which the person belongs. If a defendant fails to appear or answer in any civil action within the time prescribed by these rules, depositions may be taken without notice to that defendant.

*R.* 4:14-2(a). Rule 4:14-2(a), therefore, does not demonstrate any basis for a finding that the trial court erred by precluding Plaintiff's attempt to compel non-party Reiff's deposition by serving a deposition notice on the German Defendants.

This conclusion is bolstered by the fact that Rule 4:14-2(c), which applies to depositions of organizations, states that an organization may be named in a deposition notice, but that the organization "must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf[.]" *R.* 4:14-2(c). Neither Rema AG nor Stahlgruber has designated Reiff as a corporate representative, further supporting that Plaintiff's deposition notice for Reiff's deposition is improper. Critically, Plaintiff has acknowledged that he is ***not*** seeking testimony from Reiff as a director of the corporate

Defendants, but rather in his individual capacity. (*See* 1T 17:1-18:13) (in the trial court's summary of the parties' arguments, stating that "Plaintiff notes that he never served a deposition notice for a corporate representative" of the German Defendants but that "[h]e served notice on Übelacker and Reiff individually"). Therefore, it is wholly inappropriate for Plaintiff to seek to compel the German Defendants to produce Reiff—a non-party located in Germany—to appear for a deposition in his individual capacity by way of deposition notice rather than by subpoena to Reiff directly.

Although Plaintiff also relies on Rule 4:23-4, that Rule likewise does not demonstrate any abuse of discretion by the trial court, and instead reaffirms the conclusion that Plaintiff's issuance of a notice to compel Reiff's deposition in his individual capacity was incorrect. Indeed, Rule 4:23-4 is titled "Failure ***of Party*** to Attend at Own Deposition," and provides certain sanctions resulting from ***a party's*** failure to appear:

> If ***a party*** or an officer, director, or managing agent of a party or a person designated under R. 4:14-2(c) or R. 4:15-1 to testify ***on behalf of a party*** fails to appear before the officer within this State who is to take his deposition, after being served with a proper notice, the court may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (1), (2) and (3) of R. 4:23-2(b).

*R.* 4:23-4 (emphasis added). Reiff is ***not*** a party to this action; he has also neither been designated as a corporate representative or called to testify in a corporate

capacity or on behalf of any of the corporate Defendants. As such, the trial court did not err in concluding that Plaintiff could not compel non-party Reiff's deposition by way of notice rather than subpoena.

Finally, Plaintiff's reliance on *D'Agostino v. Johnson & Johnson*, 242 N.J. Super. 267, 275-76 (App. Div. 1990), to claim that he should not be required to issue a subpoena to compel Reiff's deposition is misplaced. Notably, the trial court did not overlook *D'Agostino*; rather, the trial court considered the *D'Agostino* court's analysis and distinguished it. This was not an abuse of discretion, as the language in *D'Agostino* demonstrates that—consistent with the Court Rules discussed above—a deposition notice is appropriate when the deposition of ***a party*** is sought, through corporate witnesses. Specifically, the court in *D'Agostino* recognized:

> The use of a subpoena is merely intended to assure that the non-party whose testimony is sought submits to an examination. There is no necessity for requiring service of a subpoena ***upon a party*** since adequate sanctions are provided . . . in the event that ***the party*** fails to respond to a notice to take a deposition.

*D'Agostino*, 242 N.J. Super. at 275 (emphasis added) (internal citation omitted). As discussed above, Plaintiff has confirmed that he is seeking to depose Reiff in his individual capacity, ***not*** as the representative of a party or on behalf of a party. As a result, the trial court's denial of Plaintiff's Motion to Compel Reiff's

deposition by way of notice issued to the German Defendants (and the U.S. Defendants) was not an abuse of discretion.

Because the Court Rules and case law Plaintiff relies upon do not demonstrate that the trial court abused its discretion, the trial court's March 25, 2024 and April 19, 2024 Orders should be affirmed.

### B. The New Jersey Case Law And Court Rules Plaintiff Relies Upon Do Not Demonstrate That The Court Abused Its Discretion In Concluding That The German Defendants Lack Control Over Reiff

Plaintiff has not identified any abuse of discretion by the trial court in its finding that the German Defendants lack control over Reiff. Plaintiff's argument otherwise to this Court partially rests on his misreading of *D'Agostino*, which he claims (along with Rule 4:14-2(c)) supports a conclusion that "[t]he only circumstance under which a corporate party lacks control, and requires consent, is when the witness is **not** a director, officer or managing agent." (Pb13) (emphasis in original). However, *D'Agostino* involved a fact-sensitive inquiry regarding whether a company had control over certain officers and directors of subsidiary companies, as such control was required before those individuals could be compelled to appear for deposition pursuant to a deposition notice issued to the parent company. *D'Agostino*, 242 N.J. Super. at 275-76; *see also* Pressler & Verniero, *Rules Governing the Courts of the State of New Jersey*, cmt. 1 to *R.* 4:14-2 (stating "[a]s to corporate employees whose attendance may

be secured by notice rather than subpoena, see *D'Agostino v. Johnson & Johnson*, 242 N.J. Super. 267 (App. Div. 1990), holding that a corporate party is required to produce those directors, executives and employees of its subsidiaries who are under its control," which presumes that not all are under its control). Ultimately, the *D'Agostino* court concluded that the entity defendant had sufficient control to permit a deposition notice to issue for depositions of certain officers and directors of the subsidiary entities. *See D'Agostino*, 242 N.J. Super. at 276 (noting that the trial court's order compelling the depositions was proper in light of the "record presented" relating to the relationship between the entity and its subsidiaries). The trial court in this matter considered and distinguished *D'Agostino*. Notably, while the *D'Agostino* court specifically noted that certain of the requested deponents had submitted certifications in the litigation in support of the entity defendant (*see D'Agostino*, 242 N.J. Super. at 274-276), Reiff has not done so here, nor has he inserted himself into this litigation in any other way.

While Plaintiff also contends that federal case law interpreting Federal Rule of Civil Procedure 30(b)(1) is "instructive" on the issue presented to this Court, the fact that the trial court did not rely upon non-binding federal case law interpreting a Federal Rule is not an abuse of discretion.

Contrary to Plaintiff's contention otherwise in his brief, there was no evidence to "conclusively demonstrate" that Rema AG and Stahlgruber "have control over Reiff for deposition purposes." (*See* Pb16). Indeed, the primary "evidence" Plaintiff relies on is counsel's attempt to coordinate Reiff's deposition, which would have streamlined discovery and likely avoided the prolonged motion practice in which the parties thereafter engaged. (*See, e.g.,* 2T 19:5-13). However, that effort was clearly unsuccessful, as Reiff did not appear—further demonstrating the lack of control of the German Defendants over Reiff. Likewise, the other "facts" that Plaintiff claims support a finding of control in reality show no such thing. Critically, none of the citations to the record provided by Plaintiff support Plaintiff's claim that "the Corporate Defendants sent Reiff to New York" to conduct any interviews or to meet with counsel. (*See* Pb17).

The trial court ultimately concluded that there were insufficient facts to demonstrate that the German Defendants (or the U.S. Defendants) control Reiff for purposes of compelling his deposition by way of notice rather than subpoena. Plaintiff's simple disagreement with this conclusion does not demonstrate any abuse of discretion. Nonetheless, Plaintiff blithely claims—without citation to any case law or court rule—that control "is not an issue in this matter because plaintiff seeks to depose a director of three corporate defendants, not a director

of a non-party" and a "corporation's control over its own director is presumed." (*See* Pb16). Again, Plaintiff has not identified any binding New Jersey authority for the concept that control over directors is presumed. Accordingly, Plaintiff's claim that the trial court's "ruling is irreconcilable with *D'Agostino*" and the other authorities he cites is incorrect (Pb16), and the trial court's Orders should be affirmed.

### C. That Plaintiff Must Pursue Discovery From Reiff By Way Of The Hague Convention Does Not Suggest That The Trial Court Abused Its Discretion

In addition to the above, the fact that the trial court's Orders will require Plaintiff to seek discovery from Reiff directly through the processes prescribed by the Hague Convention does not create an independent reason why Plaintiff should be permitted to issue a deposition notice for Reiff's deposition to the German Defendants. There is no dispute that Reiff is not a party to this action. Nonetheless, Plaintiff claims that he should be entitled to issue a deposition notice to the German Defendants to compel Reiff's deposition because otherwise Plaintiff would be required to comply with the manner of taking depositions and discovery in Germany—***where Reiff is located***. (*See* Pb18). Plaintiff may be dissatisfied that the process for conducting international discovery is not as straightforward as conducting a deposition in the United States, but that does not create a reason to compel Reiff's deposition by deposition notice in lieu of

subpoena on a party with no control over him. Plaintiff has not been precluded from conducting any discovery as to Reiff; he simply cannot pursue it in the manner he desires. This does not equate to an abuse of discretion by the trial court.

Plaintiff claims that, because Reiff is located in Germany, the limitations imposed by the Hague Convention and German law "would deprive plaintiff of a meaningful deposition of one of the decisionmakers in this case who, as the trial court noted, has knowledge of facts that no other defense witness has." (Pb19). However, even assuming that is true, that purported "decisionmaker" is not a party to this case, and Plaintiff is seeking his deposition in his individual capacity, not as a representative of any of the entity Defendants. (*See* 1T 18:11-13). While Plaintiff obviously would prefer to avoid the Hague Convention's processes for obtaining discovery from Reiff, Reiff is a non-party located in Germany and is therefore subject to German law.

Plaintiff also relies upon several federal cases to claim that "it would be unfair to require a party to take the deposition of a foreign party on German soil." (Pb19-Pb20). However, as Plaintiff acknowledges, these cases address depositions of ***parties***. *Id.* (citing *Fraunhofer-Geselleschaft Zur Forderung der angewandten Forschung E.V. v. Sirius XM Radio, Inc.*, 2021 WL 861493 (D. Del. Mar. 8, 2021); *Metcalf v. Bay Ferries Limited*, 2014 WL 3670786 (D. Mass.

July 14, 2021); *Peiker Acoustic, Inc. v. Kennedy*, 2011 WL 1344238 (D. Colo. Apr. 8, 2011); *In re Vitamin Antitrust Litigation*, 2001 WL 35814436 (D.D.C. Sept. 11, 2001). Reiff is unquestionably ***not*** a party and will not be testifying on behalf of Rema AG or Stahlgruber, and, as such, the same considerations that would apply to parties should not be applied here.[2]

In short, simply because Plaintiff will be required to comply with the proper method of obtaining discovery from a foreign non-party witness does not mandate that the German Defendants somehow produce Reiff, over whom they have no control, pursuant to a deposition notice. The trial court did not abuse its discretion in rejecting Plaintiff's argument on this basis, and the March 25, 2024 Order should be affirmed.

[2] We note that Plaintiff's brief includes reference to an Order entered by the trial court on September 18, 2024, after the Orders on appeal were entered. (Pb6, n.2). The September 18, 2024 Order states that because OWG Beteiligungs AG ("OWG"), another German entity, has been added as a defendant, and OWG has control over Reiff, Reiff may be subject to deposition through a notice to OWG. (Pa374-Pa375). If Reiff can be compelled to appear for a deposition through a notice to OWG, there is no basis for Plaintiff's argument in this appeal that he will be denied a meaningful opportunity to depose Reiff, further supporting the conclusion that the trial court's March 25, 2024 and April 19, 2024 Orders should be affirmed.

## II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION (PA9-PA16)

As Plaintiff concedes, whether to grant a motion for reconsideration rests in the trial court's "sound discretion . . . in the interest of justice." *See R.* 4:42-2(b). In denying Plaintiff's motion for reconsideration, the trial court considered and rejected all of Plaintiff's arguments, permitted the parties to again provide oral argument as to their positions, and ultimately concluded that the "interest of justice" did not warrant reconsideration of the trial court's denial of the Motion to Compel. (Pa6). For all of the reasons set forth above, the trial court did not abuse its discretion in concluding that the German Defendants do not have control over Reiff, and, therefore, the trial court likewise did not abuse its discretion in denying Plaintiff's motion for reconsideration. As such, the trial court's April 19, 2024 Order should also be affirmed.

## CONCLUSION

For all of the foregoing reasons, the trial court's March 25, 2024 and April 19, 2024 Orders should be affirmed.

Respectfully submitted,

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*Attorneys for Respondents Rema Tip Top AG, Stahlgruber Otto Gruber AG, and Michael Übelacker*

By */s/ Lindsay A. Dischley* _____
LINDSAY A. DISCHLEY

Dated: November 15, 2024

| | | |
|---|---|---|
| **JAMES WHELTON,** | : | **SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** |
| **Plaintiff-Appellant,** | : | **DOCKET NO. A-000084-24** |
| **vs.** | : | **Civil Action** |
| **REMA TIP TOP/NORTH AMERICA, INC., REMA TIP TOP OF AMERICA, INC., REMA TIP TOP AG, OLAFUR GUNNARSSON, MICHAEL ÜBELACKER and STAHLGRUBER OTTO GRUBER, AG,** | : | **ON APPEAL FROM LAW DIVISION BERGEN COUNTY HON. Anthony R. Suarez, J.S.C. DOCKET NO. L-2829-22** |
| | : | **Date of Orders Below: March 25, 2024 and April 19, 2024** |
| | : | **ORAL ARGUMENT REQUESTED** |
| **Defendants-Respondents.** | : | |

# PLAINTIFF-APPELLANT JAMES WHELTON'S BRIEF IN REPLY TO DEFENDANTS' OPPOSITION TO HIS APPEAL OF THE TRIAL COURT'S MARCH 25, 2024 ORDER DENYING HIS MOTION TO COMPEL DEFENDANTS STAHLGRUBER OTTO GRUBER AG, REMA TIP TOP AG AND REMA TIP TOP OF AMERICA, INC. TO PRODUCE HEINZ REIFF FOR DEPOSITION AND APRIL 19, 2024 ORDER DENYING HIS MOTION FOR RECONSIDERATION

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Plaintiff James Whelton respectfully submits this brief in reply to Defendants' opposition to his appeal of the trial court's March 25, 2024 Order denying his motion to compel defendants Stahlgruber Otto Gruber AG, Rema Tip Top AG and Rema Tip Top of America, Inc. to produce Heinz Reiff for deposition and April 19, 2024 Order denying his motion for reconsideration.

## LEGAL ARGUMENT

### I. THE COURT SHOULD ENFORCE THE NOTICE OF DEPOSITION THAT PLAINTIFF SERVED ON THE DEFENDANTS (Pa4, 9)

Defendants argue that a CEPA plaintiff has no right to secure the deposition of a director-decisionmaker unless either (1) he subpoenas that director or (2) the corporate defendant designates the director as a "corporate representative." The argument makes a mockery of the Court Rules. If the trial court's ruling stands, plaintiff will be deprived of fundamental evidence necessary to prove his case. If other courts follow the trial court's ruling, that precedent would not only wreak havoc in employment cases, as other plaintiffs would lack the evidence necessary to vindicate their civil rights, but also would impede all other plaintiffs seeking to depose a director of a corporate defendant who resides outside of New Jersey.

First, contrary to Defendants' arguments, a party does not have to subpoena a director of a party defendant to secure his/her/their deposition. As this Court previously held in D'Agostino:

> [D]efendants' contention that the noticed subsidiary executives are non-parties and that their attendance at depositions could only be mandated by subpoena is without merit. . . There is no necessity for requiring service of a subpoena upon a party since adequate sanctions are provided . . . in the event that the party fails to respond to a notice to take a deposition."
>
> D'Agostino v. Johnson & Johnson, 242 N.J.Super. 267, 275 (App.Div. 1990). See also Elasticsearch v. Floragunn GMBH, 2021 WL 1753796 (N.D.Cal. May 4, 2021).

Second, R. 4:23-4 empowers a trial court to enforce a notice of deposition served on the "director…of a party":

> If a party **or an officer, director, or managing agent of a party** or a person designated under R. 4:14-2(c) or R. 4:15-1 to testify on behalf of a party fails to appear before the officer within this State who is to take his deposition, after being served with a proper **notice**, the court may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (1)(2) and (3) of R. 4:23-2(b). (emphasis added).
>
> R. 4:23-4.

Defendants' argument that only notices for the deposition of a corporate representative are enforceable, while notices for specific directors are not, contradicts the plain language of the Rule. The argument is also logically flawed. If accepted, the argument advanced would allow a corporate defendant to (a) prevent a CEPA plaintiff from deposing a decisionmaker like Reiff, whose

state of mind is the ultimate issue in the case, where that decisionmaker is outside the subpoena power of the trial court, and (b) substitute another witness who did not make the decision in his place. The Court should not sanction such a perverse result. See Ramautur v. Bob Bros. Corp., (App. Div. Jan. 18, 2008), 2008 WL 169665 at *5 ("Consistent with the dictates of *Rule* 1:1-2, we adhere, in construing the Court rules, to the principle of statutory construction that laws should be read sensibly...") (citing Smith v. Bd. of Chosen Freeholders of Bergen County, 139 N.J.Super. 229, 238 (Law Div. 1976), aff'd 146 N.J.Super. 45 (App.Div.), certif. denied 74 N.J. 266 (1977).

For example, Defendant Rema Tip Top of America, Inc. ("Rema America") implies that it satisfied its obligations under the Court Rules when it produced Jeffrey Xu, Rema Tip Top/North America, Inc.'s CFO, to testify as a designated representative in response to a notice of deposition plaintiff issued pursuant to R. 4:14-2(c). Pa423-25. However, plaintiff's notice for a corporate representative sought testimony on the U.S. Defendants' financial statements and employee compensation, not the decisions to terminate plaintiff's employment and pass him over for promotion. That testimony is being sought directly from Reiff, the decisionmaker, himself.

Based on D'Agostino's analysis of the circumstances under which a corporate parent has control over the directors of a non-party subsidiary, the

Defendants argue they have no control over their own director, Reiff. However, Defendants' reliance on D'Agostino is misplaced. Plaintiff seeks to depose a director of a named defendant, not a director of a non-party subsidiary. The distinction is critical because, as D'Agostino demonstrates, the Court Rules presume that a corporate party has control over its own directors for deposition purposes. D'Agostino, 242 N.J.Super. at 273, 274. Thus, no subpoena is necessary. Id. at 275. See also Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co., 497 F.3d. 1135, 1147 (10th Cir. 2007); Campbell v. Sedgwick Detert, Moran and Arnold, Civil No. 11–642–ES–SCM (D.N.J. March 28, 2013), 2013 WL 1314429 at *12. See also Loughran v. PepsiCo, Inc., Civil No. 22-4390 (RMB/EAP) (D.N.J., Jan. 29, 2024), 2024 WL 328740 at *2 n. 3; In re Valsartan, Losartan, and Irbesartan Products Liability Litigation, 2021 WL 61117676 (D.N.J. 2021) at *1 (collecting cases); Phila. Indem. Ins. Co. v. Fed. Ins. Co., 215 F.R.D. 492, 495 (E.D. Pa. 2003).

## II. THE DEFENDANTS' OPPOSITION RESTS ON INCORRECT LEGAL PREMISES (Pa4, 9)

### A. Rema America's Counterarguments Are Untenable (Pa4, 9)

Because its arguments are untenable, Rema America attempts to obfuscate what is a straightforward rule of civil procedure with misleading citations and arguments. For example, Rema America argues that the only method by which a plaintiff can obtain the deposition of a corporate officer or director by notice

is if the corporation designates that director as its corporate representative pursuant to R. 4:14-2(c). U.S.Df.Br. at 8-9. This argument is a clear misstatement of the law. See PRESSLER & VERNIERO, Current NEW JERSEY COURT RULES, Comment R. 4:14-2 ("Paragraph (c) of this rule is taken from Fed. R. Civ. P. 30(b)(6). It provides that the noticing party may, **in addition to or in lieu of naming the person he wishes to depose**, designate the subject matter on which he proposes to examine.") (emphasis added).[1]

Rema America then emphasizes the language of R. 4:23-4 that relates to designated representatives, which is irrelevant, to deflect the Court's attention from the language in the rule that empowers trial courts to enforce notices to depose corporate directors. See U.S.Df.Br. at 9 ("Rule 4:23-4 merely provides, inter alia, that if the 'officer, director, or managing agent of a party or a person **designated under R. 4:14-2(c)** or 4:15-1 **to testify on behalf of a party'** fails to appeal, the party may be sanctioned."). The bolded language of the Rule highlights only the specious nature of the Defendants' argument, not any language that is dispositive to this appeal. The rule is written in the disjunctive and there are three separate instances when the rule applies, including, where,

[1] Interestingly, this argument was not advanced before Plaintiff secured the depositions of Stacy Joyce (HR Director of RTTNA), Jeffrey Xu (CFO of Rema America), Adam Tillery (President of RTTNA), or Vincent Javerzac (Regional President of Rema America), which he accomplished via Notices of Deposition that named each witness.

as here, the plaintiff noticed the deposition of a specific director of a party defendant, Heinz Reiff. Therefore, the trial court's Orders should be reversed with instructions to compel Rema America to produce Reiff for deposition in New Jersey.

### B. The German Defendants' Arguments Rely on False Legal Premises (Pa4, 9)

The German Defendants' arguments also rely on faulty legal bases. For example, the German Defendants repeatedly argue that because plaintiff noticed Reiff by name, and he was not designated as a corporate representative by the German Defendants, (a) Reiff would be testifying as an individual, third-party witness and (b) Reiff's testimony would not bind them. That is a blatant misstatement of law. Because Reiff was and is a director, Reiff will be testifying as a director and Reiff's testimony will bind the German Defendants. See R. 4:16-1(b) ("The deposition ... **of any one who at the time of taking the deposition was an officer, director, or managing or authorized agent**, ... may be used by an adverse party for any purpose against the deponent or the corporation, partnership, association or agency.") (emphasis added).

Based on this false premise, the German Defendants repeatedly emphasize that Reiff is not a party, and emphasize language in the Court Rules and the case law that relates to a "party" to the exclusion of the language that applies to "an officer, director or managing agent of the party" – which Reiff indisputably is.

See, e.g., German Df.Br. at 12 (citing R. 4:23-4). That Reiff himself is not a party is of no moment. A CEPA plaintiff has the right to obtain the deposition of a director he knows to be a decisionmaker via notice. R. 4:14-2(a). That notice is enforceable under R. 4:23-4. A corporate defendant cannot hide behind R. 4:14-2(c) to shield a director and decisionmaker from testifying in a deposition. R. 4:14-2(c) merely exists as an alternative when the plaintiff does not know the identity of the corporate witness with knowledge of particular facts. PRESSLER & VERNIERO, Current NEW JERSEY COURT RULES, Comment R. 4:14-2.

The German Defendants also rely on the fact that Reiff himself is not a party when they argue that plaintiff may only obtain Reiff's deposition only by subpoenaing him in Germany through the procedures established by the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. German Df.Br. at 18-19. At the risk of repetition, Reiff will be testifying as a director of three corporate defendants, not as a third-party witness. Further, the courts have repeatedly emphasized that the Hague Convention protocols are merely an option and do not apply where, as here, they would deprive a party of due process. See, e.g., Willson v. Gerber Products Company, Docket No. A-1290-22, 2023 WL 8889528 at *5 (App. Div. Dec. 23, 2023) (citing Societie Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa, 482 U.S. 522 (1987)). See also Fraunhofer-Geselleshaft Zur Forderung der

angewandten Forschung E.V., 2021 WL 861493 (D.Del. March 8, 2021) at *3 (Pa310); Metcalf v. Bay Ferries Limited, 2014 WL 3670786 (D. Mass. July 14, 2021) at *1-3 (Pa314); Peiker Acustic, Inc. v. Kennedy, 2011 WL 1344238 (D. Colorado April 8, 2011) at *2 (Pa319); In re Vitamin Antitrust Litigation, 2001 WL 35814436 (D.D.C. Sept. 11, 2001) at *7-9 (Pa323).

Finally, the German Defendants represent that their counsel does not speak to Reiff when (1) he is the person who retained them, CPa11, and (2) he previously provided deposition dates, which had to be canceled when he suddenly became unavailable. Pa352, April 12, 2024 Transcript at T:4-10. Those claims are neither credible nor material. Reiff is a director of the German Defendants. Therefore, the German Defendants are obligated to produce him for deposition pursuant to the Court Rules.

## CONCLUSION

For the foregoing reasons, the Court should reverse the trial court's Orders and remand with instructions to order the Defendants to produce Reiff for deposition. Thank you for your attention to this matter.

Respectfully submitted

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MICHAEL F. O'CONNOR

Dated: December 3, 2024