

**IN THE CIRCUIT COURT OF
THE NINTH JUDICIAL
CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA**

KHRYsos GLOBAL, INC., *et al.*

Plaintiffs,

v.

YOUNGEVITY INTERNATIONAL, INC., *et al.*,

Defendants.

_____ /

YOUNGEVITY INTERNATIONAL, INC., *et al.*,

Counter-Plaintiffs/Cross-Claim
Plaintiffs/Third-Party Plaintiffs,

v.

DWAYNE DUNDORE and DUSTIN
DUNDORE,

Counter-Defendants,

SMASH CUSTOMS INC.,

Cross-Claim Defendant,

PHANTOM X INDUSTRIES, *et al.*,

.

Third-Party Defendants.

_____ /

CASE NO.: 2021-CA-002217-O
BUSINESS COURT

**ORDER GRANTING KHRYOSOS INDUSTRIES' AND YOUNGEVITY
INTERNATIONAL'S MOTION FOR SUMMARY JUDGMENT ON
COUNTS III AND IV IN THEIR AMENDED COUNTERCLAIM**

THIS MATTER came before the Court upon Third Party Plaintiff's Youngevity International Inc.'s and Counterclaimant's Khrysos Industries Inc.'s (collectively, "Youngevity") Motion for Summary Judgment against Dwayne Dundore ("Dundore") on Counts III (Fraudulent Inducement) and IV (Breach of Employment Agreement) in their Amended Counterclaim ("the MSJ"). Youngevity filed the MSJ on June 24, 2022, the Parties have briefed the issues, and the Court held oral argument on September 1, 2022. All parties were represented by counsel. For the reasons explained below, the Court grants Youngevity's Motion for Summary Judgment on Counts III and IV, and awards Youngevity \$20,915,507.66 in damages. The Court also grants Youngevity leave to file a Motion for Attorney Fees and Costs incurred in litigating Count IV for Breach of Employment Agreement within 21 days of this Order.

I. LEGAL STANDARD

Florida Rule of Civil Procedure 1.510(a) states that:

A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court shall state on the record the reasons for granting or denying the motion. The summary judgment standard provided

for in this rule shall be construed and applied in accordance with the federal summary judgment standard.

Under Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment should be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “Rule 56[c] mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party bears the initial burden of proving the absence of a genuine issue of material fact. *Id.* at 323. The burden then shifts to the nonmoving party, who is required to “go beyond the pleadings” to establish that there is a “genuine issue for trial.” *Id.* at 324 (citation and internal quotation marks omitted). A dispute about a material fact is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

On a motion for summary judgment, the court must construe the evidence and all reasonable inferences arising from it in the light most favorable to the non-moving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Anderson*, 477 U.S. at 255. However, factual disputes will only be resolved in the non-moving party’s favor when sufficient competent evidence supports the non-moving party’s

version of the disputed facts. *See Pace v. Capobianco*, 283 F.3d 1275, 1276, 1278 (11th Cir. 2002) (a court is not required to resolve disputes in the non-moving party's favor when that party's version of events lacks support by sufficient evidence). Further, "mere conclusions and unsupported factual allegations are legally insufficient to defeat a summary judgment motion." *Ellis v. England*, 432 F.3d 1321, 1326 (11th Cir. 2005) (citing *Bald Mountain Park, Ltd. v. Oliver*, 863 F.2d 1560, 1563 (11th Cir. 1989)). Moreover, "[a] mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990) (citing *Anderson*, 477 U.S. at 252).

II. DUNDORE'S FAILURE TO RESPOND TO REQUESTS FOR ADMISSION

When a party fails to answer or dispute a Request for Admission ("RFA"), the matters contained within that RFA are deemed admitted. *See Fla. R. Civ. Proc.* 1.370(a). Florida trial courts may grant summary judgment on facts deemed admitted as a result of a party's failure to timely respond to requests for admission. *Asset Mgmt. Consultants of Va., Inc. v. City of Tamarac*, 913 So. 2d 1179, 1181 (Fla. 4th DCA 2005) (trial court acted within its discretion when it granted summary judgment based on party's failure to timely respond to requests for admission). The

Business Court Procedures expressly state that this Court may decide motions for summary judgment on admissions. *See* BCP 5.5

Youngevity International and its co-party Yvonne Dundore served RFAs on Dundore on April 19, 2022. Dundore failed to respond to those RFAs within 30 days and the matters contained therein were thus deemed admitted. *See* Fla. R. Civ. Proc. 1.370(a). Youngevity thereafter attached those RFAs to the MSJ as exhibits and relied, in part, on the admissions in the MSJ.

On September 13, 2022, the Court denied Dundore’s “Motion to Set Aside Admissions and to Accept Dwayne Dundore’s Response to Request for Admissions”

The Court thus relies on Dundore’s admissions to the Youngevity International and Yvonne Dundore RFAs that were attached to Youngevity’s MSJ. *See Asset Management*, 913 So. 2d at 1179–82 (trial court did not abuse its discretion in denying a motion to set aside admissions and in granting summary judgment based on those admissions where party did not seek to set aside those admissions until after the court held a hearing on the motion for summary judgment).

III. THE COURT GRANTS YOUNGEVITY SUMMARY JUDGMENT ON COUNT III (FRAUDULENT INDUCEMENT)

Youngevity seeks summary judgment on its claim that Dundore fraudulently induced Youngevity into entering the Asset and Equity Purchase Agreement (“AEP”), through which Youngevity acquired the assets of Dundore’s Khrysos

Global, by misrepresenting Khrysos Global's book of business and sales pipeline. "The elements of a cause of action for fraudulent misrepresentation and fraudulent inducement are: (1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in reliance on the representation." *Moriber v. Dreiling*, 194 So.3d 369, 373 (Fla. 3rd DCA 2016).

Dundore's admissions in response to Youngevity International's RFA numbers 1–5 conclusively establish that he made knowingly false statements relating to Khrysos Global's sales pipeline and book of business to induce Youngevity into acquiring the assets of Khrysos Global. *See* MSJ at Exh. A, RFA ## 1–5. He falsely stated that Khrysos Global maintained a book of business worth more than \$65 million to induce Youngevity into entering into the AEP, and he knew that statement was false because Khrysos Global had only a *de minimis* book of business. *Id.* In addition, Dundore provided Youngevity with a HVT Sales Pipeline document stating that Khrysos Global has a book of business worth \$67,084,642.00. *See* Briskie MSJ Declaration at ¶ 13 *and* MSJ at Exh. E. The Parties incorporated that document into the final Asset and Equity Purchase Agreement. *Id.* Youngevity learned that Dundore's statements were false during an audit in May 2020 when it discovered that the Khrysos Global invoices created at Dundore's direction were

illegitimate. *Id.* at ¶ 20. As Dundore admits and Youngevity demonstrates, Khrysos Global had only a *de minimis* book of business when Dundore made the sales pipeline representations, and Youngevity relied on those representations when acquiring the assets of Khrysos Global. *See* MSJ at Exh. A, RFA ## 1–5; Briskie MSJ Declaration at ¶¶ 14, 17, 20.

With liability established, Youngevity is entitled to recover benefit of the bargain or out pocket damages. *Martin v. Brown*, 566 So.2d 890, 891–92 (Fla. 4th DCA 1990). Dundore did not dispute Youngevity’s benefit of the bargain damage calculations in response to the MSJ or at the hearing on the MSJ. Thus, the Court finds that there is no genuine dispute that Youngevity suffered at least \$20,626,500.00 as a result of Dundore fraudulently inducing Youngevity into entering into the AEP.

The “benefit of the bargain” calculation requires the court to calculate the difference between the actual value of the property on the date of the transaction and the value of that property had the defendant’s fraudulent representation regarding that property been true. *Martin*, 566 So.2d at 891; *Morgan Stanley & Co. Inc. v. Coleman (Parent) Holdings Inc.*, 955 So.2d 1124, 1128 (Fla. 4th DCA 2007).

The evidence shows that Youngevity incurred \$20,626,500.00 in benefit of the bargain damages in 2020 alone resulting from Dundore’s fraudulent representations. According to Youngevity’s President Dave Briskie, on January 23,

2020, Youngevity provided revenue and profit projections for its Khrysos Industries hemp and CBD business to investors and potential investors. Briskie MSJ Decl., ¶ 19; MSJ at Exh. F. That projection used a then-conservative gross revenue projection of \$61,025,000.00, based on Dundore's representations that Khrysos Global had a sales pipeline and book of business worth more than \$65 million. *Id.* at ¶ 19; MSJ at Exh. F. Under that projection, Khrysos Industries would have earned \$20,626,500.00 in net profit had it obtained even \$61,025,000.00 in gross revenue in 2020. *Id.* at ¶ 19; MSJ at Exh. F. Thus, according to Briskie, the value of the Khrysos Global sales pipeline and book of business would have been at least \$20,626,500.00 for 2020 alone had Dundore's representations been true.

IV. THE COURT GRANTS YOUNGEVITY SUMMARY JUDGMENT ON COUNT IV (BREACH OF EMPLOYMENT AGREEMENT)

Youngevity seeks summary judgment on its claim that Dundore breached the Employment Agreement's Duty of Loyalty and Non-Solicitation provisions through his involvement in Phantom Industries, Inc. and Phantom X Enterprises and by inducing Khrysos Industries employee Yaneysis Acosta to resign and work with him at Phantom X Industries. There are three elements to a breach-of-contract claim: (1) a valid contract; (2) a material breach; and (3) damages. *Friedman v. New York Life Ins. Co.*, 985 So. 2d 56, 58 (Fla. 4th DCA 2008). Dundore does not dispute that he was bound by the Employment Agreement and does not dispute Youngevity's

damage calculations. As explained below, based on Dundore's admissions and the record evidence, the Court finds that there is no genuine dispute of material fact that Dundore materially breached the Duty of Loyalty and Non-Solicitation provisions.

A. The Duty of Loyalty and Non-Solicitation Clause Are Valid

Dundore appears to argue that the Duty of Loyalty and Non-Solicitation provisions in the Employment Agreement are invalid under Florida Statute Section 542.335. Opp. to MSJ at ¶¶ 53–54. However, Section 542.335 applies only to post-employment activity. *Rollins, Inc. v. Parker*, 755 So. 2d 839, 841 (Fla. 5th DCA 2000); *Audiology Distribution, LLC v. Simmons*, No. 8:12-CV-02427, No. 8:12-cv-02427-JDW-AEP, 2014 WL 7672536, at *7 (M.D. Fla. May 27, 2014). The section does not govern the Duty of Loyalty and Non-Solicitation provisions because YGY sues Dundore only for conduct while employed by Khrysos Industries and because the Duty of Loyalty provision applied only while Dundore was employed by Khrysos Industries.

Even if the section did apply, the Duty of Loyalty and Non-Solicitation provisions in the Employment Agreement are enforceable. The Duty of Loyalty provision, prohibiting Dundore from competing with Khrysos Industries while employed by Khrysos Industries protects Khrysos Industries' legitimate interest in preventing an employee from taking salary while contemporaneously undermining the business' standing in the market. "Public policy in Florida favors enforcement

of reasonable covenants not to compete.” *Family Heritage Life Ins. Co. of Am. v. Combined Ins. Co. of Am.*, 319 So. 3d 680, 685 (Fla. 3rd DCA 2021). Moreover, Florida permits non-competition agreements protecting a business’s “[v]aluable confidential business or professional information that otherwise does not qualify as trade secrets” and “[s]ubstantial relationships with specific prospective or existing customers, patients, or clients.” Fla. Stat. § 542.335(1)(b). As Khrysos Industries President, Dundore had knowledge of, and access to, its confidential pricing information, customers, vendors, and other partners. Briskie Reply Decl., ¶4. Khrysos Industries thus has a legitimate business interest in prohibiting Dundore from using that information to compete against Khrysos Industries while still employed by Khrysos Industries. *See Austin v. Mid State Fire Equip. of Cent. Fla.*, 727 So. 2d 1097, 1098 (Fla. 5th DCA 1999).

The non-solicitation provision prohibited Dundore from soliciting Khrysos Industries’ employees during his employment and for one year thereafter. “Florida courts recognize that an employer’s relationship with its employees constitutes a legitimate business interest.” *PartyLite Gifts, Inc. v. MacMillan*, 895 F. Sup. 2d 1213, 1225 fn. 13 (M.D. Fla. 2012); *General Parts Distrib. LLC v. Enright*, No. 8:13-cv-2500-T-23EAJ, 2014 WL 172116, at *6 (M.D. Fla. Jan. 10, 2014). Here, Youngevity seeks to enforce that clause against Dundore because he solicited Khrysos Industries employee Yaneysis Acosta to leave Khrysos Industries and work

for Dundore's competing Phantom X Industries. Acosta Decl., ¶10. Thus, Florida Statute Section 542.335 does not invalidate either the Duty of Loyalty or the Non-Solicitation provisions in the Employment Agreement.

B. Dundore Breached the Duty of Loyalty Clause

The Employment Agreement contains a Duty of Loyalty Clause stating that Dundore cannot "directly or indirectly engage in any employment or business activity which is directly or indirectly competitive with, or would otherwise conflict with, [his] employment by Company." *See* MSJ at Exh. A at Exh. B

Dundore served as the President of Khrysos Industries Inc. from February 8, 2019 through September 17, 2020 and was thus bound by the Duty of Loyalty Clause during that time. Briskie MSJ Decl., ¶ 28. The undisputed material facts, obtained from the Florida Secretary of State and not disputed by Dundore, establish that while employed as the President of Khrysos Industries, Dundore became the President of Phantom Industries Inc. on April 24, 2019 and Phantom X Industries on July 6, 2020. Briskie MSJ Decl., ¶¶ 29–30; MSJ at Exhs. G, H. Dundore's admissions establish that those businesses were in competition with Youngevity and that he breached the Duty of Loyalty provision through his involvement with those companies. Exh. A at RFA ##10, 11, 13; Exh. B at RFA ## 1, 2, 4, 9, 10, 12. The undisputed material facts in the record additionally show that the Phantom Companies and Khrysos Industries sold CBD products contemporaneously to Khrysos Industries customer Nephron

Pharmaceuticals. Briskie MSJ Decl. at ¶¶ 32–34; MSJ at Exhs. I–L; Yvonne Dundore Reply Decl. at ¶¶ 6–7; Reply at Exhs. E, F. Thus, by serving as President of the Phantom Companies while serving as President of Khrysos Industries, Dundore breached the Duty of Loyalty Clause beginning on April 24, 2022, the date upon which he became the President of Phantom Industries Inc.

Dundore argues only that the Phantom Companies were not in “direct” competition with Khrysos Industries. Opposition to MSJ at ¶ 44. That position is unsupported because Dundore’s admissions and the undisputed material facts establish that, while Dundore was serving as the Khrysos Industries and the Phantom Companies, they all sold similar CBD product to the same customer, Nephron Pharmaceuticals. Briskie MSJ Decl. at ¶¶ 32–34; MSJ at Exhs. I–L; Y. Dundore Reply Decl. at ¶¶ 6–7; Reply at Exhs. E, F. The Court also finds that Dundore’s statements in his affidavit are self-serving, unsupported by any documentary evidence, and contradicted by all documentary evidence in the record. Thus, Dundore’s affidavit is insufficient to create any genuine disputes of material fact under Fla. R. Civ. P. 1.510(a) and 1.1510(e). *See Lloyd S. Meisels, P.A. v. Dobrofsky*, 341 So.3d 1131, 1134 (Fla. 4th DCA 2022); *see also K.E.L. Title Ins. Agency, Inc. v. Portfolio Recovery Assoc., LLC*, 97 2So.2d 239 (Fla. 3rd DCA 2007) (affirming summary judgment when affidavit “was merely conclusory in nature and insufficient

to raise a genuine issue of material fact”); *Weisser Realty Grp., Inc. v. Porto Vita Prop. Owners Ass’n, Inc.*, 30 So.3d 23, 26 (Fla. 3rd DCA 2019).

Regardless, even if it were true that the Phantom Companies and Khrysos Industries were not direct competitors, that fact would be immaterial to the Court’s decision because the Duty of Loyalty Clause prohibited Dundore from engaging in any employment or business activity which is directly or indirectly competitive with Khrysos Industries. *See* MSJ at Exh. A at Exh. B.

C. Dundore Breached the Non-Solicitation Clause

The Employment Agreement contains a broad non-solicitation provision prohibiting Dundore from, inter alia, inducing Khrysos Industries employees to quit their jobs at Khrysos Industries. Exh. A at Exh. B. Dundore’s admissions prove that while employed as Khrysos Industries’ President, Dundore induced Khrysos Industries employee Yaneysis Acosta to resign from Khrysos Industries and work at Phantom X Industries. Exh. A at RFA #9; *see also* Briskie Decl., ¶ 34. Acosta concedes that fact in her own declaration. Acosta Decl., ¶ 10 (“Dundore did breach the non-solicitation by inducing me Acosta to leave KII and work at Phantom X.”) There is thus no genuine issue of material facts that Dundore breached the Employment Agreement by inducing a Khrysos Industries employee to terminate her employment and work with him at Phantom X Industries.

D. Damage Calculations

Youngevity seeks restitution in the amount it paid to Dundore as salary from the time he breached the Employment Agreement. Under Florida contract law, restitution is an available remedy “when there has been a breach of an express contract.” *Ocean Comm’ns, Inc. v. Bubeck*, 956 So.2d 1222, 1225 (Fla. 4th DCA 2007); *see also Suntrust Bank v. Mola*, No. 6:09-cv-428-Orl-31KRS, 2009 WL 10712759, at *3 (M.D. Fla. June 11, 2009) (“Under Florida law, a plaintiff may elect to seek restitution damages when, as here, the defendants materially breach an express contract.”). In *Ocean*, the Plaintiff elected to seek restitution from the defendant-employee in the form of \$176,000 paid in monthly salary for the defendant-employees’ breach of an employment agreement. *Id.* at 1224. The Court held that the plaintiff was entitled to recover the amount of salary plaintiff paid to the defendant-employee during the time that defendant-employee was in breach of his employment agreement. *Id.* at 1226.

Here, the undisputed facts establish that Dundore began breaching his Employment Agreement on April 24, 2019, when he became President of Phantom Industries, Inc. *See* MSJ at Exh. G; MSJ at Exh. B at RFA # 1,2, 4. Youngevity thus seeks to recover all salary it paid to Dundore that became due on or after April 24, 2019. That amount is \$289,007.66. Briskie MSJ Decl., ¶ 37. Moreover, the Employment Agreement expressly provides that if Youngevity is successful in

whole or in part in any action brought under the Employment Agreement, it will be entitled to an award of all costs, including reasonable attorney's fees. *See* MSJ at Exh. A at Exh. B. Dundore did not dispute Youngevity's right to recover restitution, restitution calculation, or right to attorney's fees and costs in opposition to the MSJ or at oral argument. Thus, the Court awards Youngevity \$289,007.66 in restitution damages as a result of Dundore's breach of the Employment Agreement and grants Youngevity leave to file a motion for attorney's fees and costs incurred in litigation that cause of action.

V. CONCLUSION

It is hereby **ORDERED and ADJUDGED** that Third Party Plaintiff's Youngevity International Inc.'s and Counterclaimant's Khrysos Industries Inc.'s Motion for Summary Judgment on Counts III (Fraudulent Inducement) and IV (Breach of Employment Agreement) in their Amended Counterclaim ("the MSJ") against Dwayne Dundore is **GRANTED**.

IT IS FURTHER ORDERED THAT:

1. Youngevity is awarded \$20,626,500.00 in damages against Dwayne Dundore under Count III of the Amended Counterclaim for Fraudulent Inducement.

2. Youngevity is awarded \$289,007.66 in damages against Dwayne Dundore under Count IV of the Amended Complaint for Breach of Contract.

3. Youngevity is granted leave to file a motion for attorney's fees and costs incurred in litigating Count IV of the Amended Complaint within 21 days of this Order.

DONE AND ORDERED in chambers at the Orange County Courthouse, Orlando, Florida, 20 day of September, 2022.



HON. JOHN E. JORDAN
CIRCUIT COURT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed with the Clerk of the Court this 20 day of September, 2022 by using the Florida Courts E-Filing Portal System. Accordingly, a copy of the foregoing is being served on this day to all attorney(s)/interested parties identified on the ePortal Electronics Service List, via transmission of Notices of Electronic Filing generated by the ePortal System.

Cathy Stephens, Judicial Assistant to Judge John E. Jordan