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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| HEARTLAND PAYMENT SYSTEMS, LLC,<br><br>Appellant/Cross-Appellee,<br><br>v.<br><br>INTEAM ASSOCIATES, LLC. and LAWRENCE GOODMAN, III,<br><br>Appellees/Cross-Appellants. | REDACTED<br>PUBLIC VERSION<br><br>C.A. No. 582, 2016<br><br>Case Below<br>Court of Chancery of the State of Delaware<br>C.A. No. 11523-VCMR |

# APPELLANT'S OPENING BRIEF ON APPEAL

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## NATURE OF PROCEEDINGS

This is a straightforward contract action. In September 2011, Appellee, Lawrence "Chip" Goodman, III ("Goodman"), sold a growing technology company called School-Link Technologies, Inc. ("SL-Tech") to Appellant, Heartland Payment Systems, Inc. ("Heartland"), for $17 million.[1] Ex. A at 11-13. The transaction was memorialized in three binding contracts: (1) an asset purchase agreement (the "Asset Purchase Agreement"); (2) a consulting agreement (the "Consulting Agreement"); and, (3) a co-marketing agreement (the "Co-Marketing Agreement"). *Id*. at 12. The terms of the deal were simple—Goodman sold SL-Tech, including SL-Tech's valuable intellectual property, to Heartland, and Goodman retained the analytics division of SL-Tech's business called inTEAM.[2] *Id*. Goodman was also retained by Heartland as a consultant in exchange for a monthly fee. *Id*.

To protect its significant investment, Heartland included non-compete provisions in the three transaction agreements. A380; A317; A293-94. Because SL-Tech was a software company, the provisions were drafted to protect the functionality of SL-Tech's core software product called WebSMARTT that

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[1] Appellant has since changed its corporate name to Heartland Payment Systems, LLC. A3640.

[2] The inTEAM division continued as a separate entity under Goodman's control. That entity is Appellee inTEAM Associates, LLC ("inTEAM").

Heartland was to acquire—specifically the ability to facilitate the accounting and management of transactional data functions (an industry term of art which includes the ability to generate menu plans and analyze nutrients). A2838-39 (explaining transactional data). Limiting the non-compete provisions in this way made economic sense because, at the time of the transaction, the business operations of SL-Tech and inTEAM were designed to be complementary. inTEAM has admitted this fact (A884; A1978; A1981), and the transaction documents reflect this reality.

Notwithstanding the unambiguous language of the agreements, the trial court interpreted the agreements erroneously and in a way that no reasonable commercial party would ever agree to—an interpretation under which the non-compete that Goodman signed in exchange for $17 million did not prevent him from competing with Heartland. Such an interpretation is not supported by the plain language of the agreements and does not reflect the objective intent of the parties at the time of contracting in 2011.

As explained below, Heartland respectfully requests that this Court vacate the Final Order and Judgment, reverse the Court of Chancery's contractual interpretation, and remand for further proceedings.

## SUMMARY OF ARGUMENT

**1.** The trial court erroneously found that inTEAM and Goodman did not breach their respective non-compete provisions because: (1) both Heartland and inTEAM could develop and maintain products with menu planning functionality; and, (2) inTEAM and Goodman could develop software with the ability to analyze a subset of the same nutrients analyzed by Heartland's software. Ex. A at 48-50, 52. These conclusions are based on an incorrect interpretation of the agreements.

***First***, the trial court erroneously found that inTEAM and Goodman could develop software with an ability to analyze certain nutrients (calories, saturated fat, sodium, and carbohydrates). *Id*. at 48-50. To reach this conclusion, the trial court ignored the unambiguous contractual language and instead relied on extrinsic evidence even after finding the agreements were unambiguous. Even worse, the trial court relied on extrinsic evidence that was not in existence at the time of contracting in 2011. *Id*. at 50 (citing A1823-24). Reliance on such extrinsic evidence to interpret an unambiguous contract is inappropriate.

***Second***, no reasonable commercial party would agree to pay $17 million for comprehensive menu planning software, yet include a non-compete that allows the other contracting party to develop software with identical functionality the next day. In reaching this conclusion, the trial court erroneously interpreted

unambiguous contractual language and improperly rejected Heartland's commercially reasonable interpretation.

**2**. The trial court held that "[a]lthough offering Heartland's Mosaic Menu Planning product on its own would not have been a breach, Heartland assisting a direct competitor of inTEAM's administrative review software, Colyar, indirectly breached the non-competition obligations under the Co-Marketing Agreement." Ex. A at 53. This holding is based on the trial court's conclusion that the transaction documents gave inTEAM an exclusive right to develop administrative review software. *See, e.g.*, *id*. at 45-46. To reach this conclusion, however, the trial court ignored the unambiguous contract language and instead: (1) improperly relied on extrinsic evidence to interpret the Co-Marketing Agreement and the Functional Design Documents ("FDDs") included therein; and, (2) ignored testimony and evidence that the administrative review software was included in the functionality of a separate software program called the Menu Compliance Tool that is not referenced in the Co-Marketing Agreement. Further, the trial court erroneously issued an 18-month injunction against Heartland, triggered by Heartland's receipt of an unsolicited email from Colyar Technology Solutions, Inc. ("Colyar") in which Heartland offered no products or services to Colyar. *Id*. at 80-81. Calculating the length of the injunction based on an

unsolicited email is inconsistent with the contract language—particularly when the trial court found that a similar email from inTEAM did not rise to the level of breach. *Compare id*. at 81 *with id*. 71-73.

**3**. Goodman breached Section 11 of the Consulting Agreement. *Id*. at 74-78. Under Section 3 of the Consulting Agreement, Goodman is paid at a rate of $16,666.67 per month for three years for a total of $600,000. That same section provides that "[i]n the event [Goodman] breaches Sections 7, 8, 9, 10, or 11 of this Agreement, Heartland shall have no obligation to pay [Goodman] any compensation set forth herein." A291. The trial court erred by failing to award Heartland $600,000 based on this language as expectation damages.

## STATEMENT OF FACTS

### I. PRIOR TO 2011, SL-TECH WAS A PROFITABLE SOFTWARE COMPANY WITH MARKET LEADING SOFTWARE.

SL-Tech was founded in 1985. A2041. SL-Tech was a software company with sophisticated programs designed to assist schools in automating certain front-of-house and back-of-house operations. A2042. Front-of-house operations encompass point-of-sale applications and eligibility requirements for free and reduced-price meals. *See* A2821; A3013. Back-of-house operations encompass the planning activities and transactions that take place in a school meal program, including "menu planning, nutrient analysis, [and] production[.]" A2042; A2820; A3014. SL-Tech's proprietary software was designed to facilitate and manage these different types of transactional data functions in order to allow schools to obtain reimbursement from the federal government for offering healthy meals to children. *See, e.g.*, Ex. A at 2-3; 5-6.

#### A. SL-Tech's Primary Software Product was WebSMARTT

The SL-Tech software program designed to facilitate the management of the front-of-house and back-of-house data functions was called WebSMARTT. A2822-23. WebSMARTT was a fully integrated, end-to-end point of sale and foodservice management tool that offered customers menu planning, production records, and nutrient analysis modules. A51; A3015-16. WebSMARTT customers

were informed that "Menu Planning is at the heart of foodservice operations and it is the heart of WebSMARTT." A56; A2829; A3016. WebSMARTT was designed to analyze nutrients in various menu items (A57), create menu plans for breakfast, lunch, supper, and snacks (A58; A2832-33), create recipes and ingredients (A59; A2833-35), analyze nutrients in menu plans (A60; A2835), and generate production records. A83; A2837. All of these records were called "transactional data" (A2822), and through its various modules, WebSMARTT was designed to facilitate the accounting and management of such data. A2837-38. The data was ultimately used to confirm compliance with or qualify for certain government programs. A302 (identifying WebSMARTT as compliance software); A2934.

### B. SL-Tech's inTEAM Division Offered Consulting Software Designed to Complement WebSMARTT

SL-Tech also had a consulting division known as inTEAM. inTEAM was acquired in 2004, and, at that time, it had no software products. A2051; A2055. inTEAM was purchased to complement SL-Tech's software offerings. A884.

Starting in 2008, SL-Tech (through its inTEAM division) began to develop new software. *Id*. This software was called the Decision Support Toolkit or "DST." *Id*. As the name indicates, DST was designed to assist schools with making informed decisions by "collecting data from point of sale, back of the

house, financial management, and payroll systems to help districts analyze data from disparate systems." A2843; A3019; A884. Schools could analyze data from menu planning programs such as WebSMARTT to compare performance with other peer schools and identify corrective action plans. A204; A2844-45; A2850-53; A3019. The guiding design principles confirm that DST was intended to be an "[a]nalytics engine" with "[r]obust data mining and reporting capabilities." A272; A1563-64; A2854-55; A3020-21. DST was not designed as a back-of-house program, and it was never intended that DST would include such functionality. A3058-59. Indeed, manuals describing the functionality of DST provide that "[redacted]" such as WebSMARTT. A942; A2871-74.

In 2009, SL-Tech engaged Startech to develop and write functional design documents ("FDDs") for DST. Ex. A at 10. Former SL-Tech employee Tyson Prescott ("Prescott") oversaw the work of Startech and its developers. A2819. Eventually, a set of FDDs were published for DST Phase 2 on January 11, 2011. Ex. A at 10. DST Phase 2 was designed to expand the existing capabilities of DST to allow increased modeling functionality. A302 (describing Phase 2 as modeling a forecasting tool); A3019; A3024-25; A40; A42. As explained in the FDDs for DST Phase 2: "[w]ith Phase 2, school systems that installed DST will be able to

leverage menu planning as a tool to project the impact of staffing, equipment, and food/labor costs." A97; A148.

### C. SL-Tech Marketed WebSMARTT and DST as Complementary Products

Around the same time that the FDDs for DST Phase 2 were published, SL-Tech was considering how to market its various software products because, in 2010, the federal government had promulgated the Healthy, Hunger-Free Kids Act of 2010 (the "HHFKA"). Ex. A at 6. It was anticipated that the HHFKA would change the requirements for school meals. *Id*. at 6-9 (explaining HHFKA); A885; A3029-31.

In connection with the announcement of the HHFKA, SL-Tech and inTEAM created a business plan to address the changes. The business plan stated:

A885; A2847-49; A3029-31. As explained by former SL-Tech executive Terry Roberts ("Roberts"), SL-Tech decided to keep WebSMARTT and DST separate in order to avoid customer confusion. A3028. Going forward, WebSMARTT would

remain as the menu planning and USDA compliance software, and DST would complement WebSMARTT by allowing customers to benchmark, analyze, and model the data generated by WebSMARTT. A884; A2847; A3028-31.

## II. HEARTLAND ACQUIRES SL-TECH AND NEGOTIATES PROTECTIONS FOR ITS NEW INVESTMENT.

Soon after SL-Tech finalized its 2011 business plan, Heartland approached SL-Tech about a potential acquisition. Ex. A at 11. Heartland sought to acquire SL-Tech's WebSMARTT product (among other assets) as well as SL-Tech's numerous customers. A2639-42; A2651; A2653-54 (Heartland's Mike Lawler explaining acquisition strategy); A2652-53 (testimony that acquisition would add approximately 10,000 additional customers).

Although Heartland was interested in acquiring SL-Tech and WebSMARTT, it was not interested in acquiring inTEAM. A2655. Accordingly, the parties decided to separate SL-Tech's inTEAM division from the transaction. Ex. A at 12; A2655. Heartland would acquire SL-Tech's intellectual property—including WebSMARTT—and inTEAM would continue as a going concern with a focus on consulting and data analytics. A2655; A2666-68. Goodman testified that he valued the business opportunity associated with inTEAM at $8 million—less than half of what Heartland paid to acquire WebSMARTT and SL-Tech. A2235.

In connection with the transaction, Heartland insisted on the inclusion of non-compete provisions to protect the intellectual property it had just paid $17 million to acquire. A2670-71. Specifically, Heartland desired provisions that would protect its new WebSMARTT software and not allow Goodman to simply re-create his old business. *See* A2684-88. To effectuate this intent, but not restrict Goodman's ability to develop his analytics software, the parties drafted non-compete provisions with reference to either: (1) the business of SL-Tech at the time of the transaction (e.g. the development, manufacture, and sale of menu planning software such as WebSMARTT); or, (2) the functionality of SL-Tech's market-leading WebSMARTT software—specifically the functionality of facilitating the accounting and management of transactional data functions at K-12 schools. Given the recently announced HHFKA and the uncertainty regarding the new standards, the parties chose ***not*** to define the provisions with reference to USDA guidelines. A380; A317; A293-94 (no mention of USDA classifications). Separate non-compete provisions were included in each of the three transaction agreements.

### A. The Asset Purchase Agreement

The Asset Purchase Agreement is dated as of September 12, 2011. A336. The Asset Purchase Agreement contained specific non-compete and non-

solicitation provisions designed to prevent Goodman from recreating the business he had just sold for $17 million. A2684-88.

The Asset Purchase Agreement's non-compete provision is most relevant, and it states in pertinent part:

> For a period of five (5) years from and after the Closing Date, neither Seller nor the Major Shareholder will engage directly or indirectly, on Seller's or the Major Shareholder's own behalf or as a Principal or Representative of any Person, in providing ***any Competitive Services or Products*** or any business that School-Link conducts ***as of the Closing Date*** in any of the Restricted Territory . . . .

Ex. A at 13 (emphasis added).

Based on the plain language, the non-compete provision prohibits Goodman, as Major Shareholder, from engaging, directly or indirectly, on his own behalf or on behalf of any other Person, in providing: (1) any Competitive Services or Products, or (2) any business that School-Link conducted in the United States "as of September 30, 2011." *Id*. As explained in the agreement's recitals, the business of School-Link as of September 30, 2011 was: "a business that develops, manufactures, sells, services, and maintains computer software and POS terminal hardware designed to facilitate (i) accounting and (ii) reporting of transactional data functions and management of food service operations of K-12 schools (including point-of-sale operations, free and reduced application processing,

ordering and inventory, menu planning and entry of meal and other payments by parents via the Internet or kiosk)." A341; Ex. A at 2-3.

In addition to outlining the business of SL-Tech in the recitals, the Asset Purchase Agreement defines "Competitive Services or Products" and "School-Link" as follows:

> *Competitive Services or Products* means a business that develops, manufactures, sells and services and maintains computer software and/or POS terminal hardware designed to facilitate (i) accounting and (ii) management and reporting of transactional data functions, of food service operations of K-12 schools (including point-of-sale operations, free and reduced application processing, ordering and inventory, and entry of meal and other payments by parents via the Internet or kiosk); *provided, however*, that for purposes of clarity, Competitive Services or Products shall not include the inTEAM Business ***as currently conducted***.
>
> . . . .
>
> *School-Link* means the entirety of Seller's business, including the business of Seller known as—School-Link, but excluding the inTEAM Business.

Ex. A at 14 (emphasis added).

By including limitations such as "as currently conducted" or "as of the Closing Date", the non-compete provision precluded Goodman from re-creating the business he had just sold. It is undisputed that inTEAM had no software as of September 30, 2011 that could plan menus, analyze nutrients, generate production records, or facilitate USDA compliance. A2223-24; A2462-64; A2627; A2855-57;

A3027-28. Stated differently, the express temporal restriction meant that Goodman could not work at any business similar to SL-Tech for a period of five years.

### B. The Consulting Agreement

Whereas the Asset Purchase Agreement controlled the sale of SL-Tech, the Consulting Agreement defined Goodman's continuing obligations to Heartland going forward. A290. Under the Consulting Agreement, Goodman was to receive $16,666.67 per month over a three year period (for a total of $600,000) in exchange for performing certain services and accepting certain restrictions. A291.

Two such restrictions are non-compete and non-solicitation provisions. As explained by the trial court: "after the agreement's Effective Date on September 30, 2011, Goodman cannot directly or indirectly become an owner of any entity that does Competitive Business with Heartland, or perform or provide any services to an entity that engages in Competitive Business, in the entire United States of America" or "contact or attempt to contact any customer or prospective customer of Heartland for purposes of conducting Competitive Business, as defined in the corresponding non-competition provision, or encourage any customer of Heartland to terminate or modify its relationship with Heartland." Ex. A at 25-26. The definition of "Competitive Business" is nearly identical to the definition of

"Competitive Services and Products" found in the Asset Purchase Agreement and contains a nearly identical temporal restriction. *Compare* A413 *with* A293-94.

The Consulting Agreement provides specific remedies for breach. Paragraph 3 provides:

> In the event [Goodman] breaches Sections 7, 8, 9, 10, or 11 of this Agreement, Heartland shall have no obligation to pay [Goodman] any compensation set forth herein.

A291.

Simply put, it was the expectation of the parties that Goodman would be bound to five-year non-compete and non-solicitation provisions in exchange for $600,000.

### C. The Co-Marketing Agreement

Finally, the parties executed a Co-Marketing Agreement. Goodman is not a party—rather, it is between Heartland and inTEAM. A298.[3] As its name suggests, the Co-Marketing Agreement was intended to allow the parties to co-market each other's ***complementary*** products. A1978 ("These covenants are contained in the [Co-Marketing Agreement], through which [Heartland] and SL-Tech agreed to cooperate with and support each other in the marketing, sales and development of

[3] Although the original Co-Marketing Agreement was between Heartland and SL-Tech, inTEAM assumed and was assigned all of SL-Tech's rights through an Assignment and Assumption Agreement dated October 31, 2011. Ex. A at 16.

their complementary businesses and product lines."). This is consistent with the 2011 business plan developed prior to the transaction. A881-914.

The Co-Marketing Agreement is the only agreement that contains bi-lateral non-compete obligations, and, as a result, the non-compete provision is drafted differently than those in either the Asset Purchase Agreement or the Consulting Agreement. The bi-lateral non-compete provides:

> Except as otherwise provided herein, during the Term (A) [Heartland] shall not engage, directly or indirectly, on its own behalf or as a principal of any person, in providing any services or products competitive with the inTEAM Business, and [Heartland] hereby grants to inTEAM the exclusive right and license under any intellectual property of [Heartland] (other than trademarks) to conduct the inTEAM Business and (B) inTEAM shall not engage, directly or indirectly, on its own behalf or as a principal of any person, in providing any services or products competitive with the [Heartland] Business, and inTEAM hereby grants to [Heartland] the exclusive right and license under any intellectual property of inTEAM (other than trademarks) to conduct the [Heartland] Business.

A317.

The Co-Marketing Agreement defines "HPS Business" and "inTEAM Business" as follows:

> HPS Business means the development, manufacture, or sale of computer software and/or POS terminal hardware designed to facilitate (A) accounting and (B) reporting of transactional data functions and management of of [sic] food service operations of K-12 schools (including point-of-sale operations, free and reduced application processing, ordering and inventory, and entry of meal and other payments by parents via the Internet or kiosk).

. . . .

> inTEAM Business means certain Excluded Assets consisting of inTEAM's consulting, eLearning and DST segments of the business known as inTEAM and including those products and services described in Exhibit A and those inTEAM products and services described in Exhibit C and Exhibit D.

A303.

Unlike the non-compete provisions in the other agreements, there is no temporal restriction—the phrases "as currently conducted" and/or "at the time of Closing" are omitted. Rather, to define the "inTEAM Business" under the Co-Marketing Agreement, one must look at the inTEAM products and services defined in Exhibit C of the CMA, including the products and services to be included in the "future release" of DST Phase 2.[4]

* * *

The only inTEAM products or services described on Exhibit C are:

**Functional Specifications**

> Functional specifications for DST Phase 1 and add-ons and DST Phase 2 (future release), including unique state value added functionality (attached)

[4] As explained below, the definitions of "inTEAM Business" in both the Asset Purchase Agreement and the Consulting Agreement refer to inTEAM products listed on Exhibit C. Unlike the Co-Marketing Agreement, however, these agreements contain temporal limitations. For a discussion of how these temporal limitations affect contract interpretation, *see infra* at 40-41.

A330.

Stated differently, the functionality of DST Phases 1 and 2 is defined by reference to certain FDDs attached to the Co-Marketing Agreement. If the functionality is not described in the FDDs, it cannot be part of inTEAM Business as defined in the Co-Marketing Agreement. inTEAM has admitted that no FDD demonstrates an ability to import, analyze, or examine nutrients of any kind. A2615-20; A3414; A3418.

The only FDDs introduced at trial refer to DST Phase 2. A93; A144; Ex. A at 18. Prescott explained that the two FDDs describe the added business intelligence functionality that would be included with DST Phase 2. With respect to the functionality described in "Milestone A - Menu Item," Prescott testified:

> Q. Okay. How is the use of the menu item phrase in this functional design document different from the menu item functionality that we looked at in WebSMARTT?
>
> A. In this document, menu item would be talking about a conceptual thing that you would produce so that you could model on top of it, whether that be operational or financial modeling. In WebSMARTT, a menu item is something that you're serving to children. It's your actual record of that transaction.

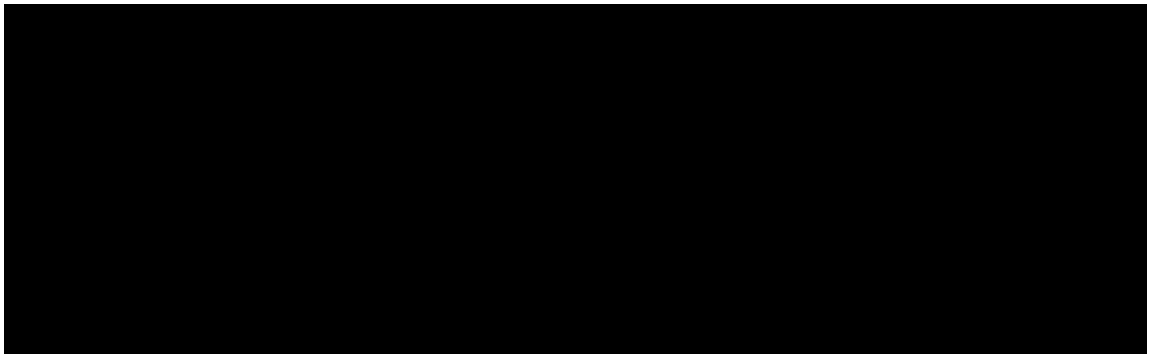
A2866.

With respect to the functionality described in Milestone B - Menu Planning," Prescott testified:

> Q. Mr. Prescott, when this document uses the phrase "menu planning," how is that different from menu planning functionality in a program like WebSMARTT?
>
> A. So here, menu planning is an operational and financial model. In WebSMARTT, menu planning would be the actual menu planning transactions used to decide what you're serving to students.

A2869.

Prescott's testimony regarding the functionality of DST Phase 2 is supported by documentary evidence describing DST Phase 2. A942-65. The implementation guide provides:



A942.

Prescott confirmed that the transactional systems would include programs like WebSMARTT. A2871-72. Prescott's understanding is consistent with the language incorporated into the transaction agreements. WebSMARTT—not DST—was the back-of-house program designed to facilitate the accounting and management of transactional data. A885; A2871-73; A3058-59. DST was never

designed to replace WebSMARTT—a reality confirmed by the existence of the Co-Marketing Agreement. A302; A3028.

## III. AS INTEAM FAILS, GOODMAN SEEKS TO RECREATE THE VALUABLE INTELLECTUAL PROPERTY HE BARGAINED AWAY.

Almost immediately after selling SL-Tech, Goodman realized that customers were not interested in inTEAM's data analytics and consulting services without the menu planning and nutrient analysis functionality embodied in WebSMARTT. inTEAM's Janet Luc Griffin ("Griffin"), an inTEAM nutritional consultant hired in March 2012, recognized that "DST was not a successful software product from a sales perspective." A2466.

As a result of DST's shortcomings, Goodman decided to develop new software to save his struggling business. This new software was entitled the "Menu Compliance Tool" and was designed to assist customers with ensuring compliance under new USDA regulations that had been released in mid-2012. Ex. A at 29; A2459-60. None of the functionality of the Menu Compliance Tool is reflected in the FDDs attached the CMA. A2301. It was new software based on new functional specifications. *Id.*; A2462-63.

### A. The New Menu Compliance Module is Conceived in 2012

inTEAM first began work on the Menu Compliance Tool in mid-2012. A2462. Contrary to the trial court's Opinion, the Menu Compliance Tool was designed as a separate and distinct software program from inTEAM's existing DST software. A2462; A2627 (inTEAM witnesses testifying that work on inTEAM's Menu Compliance Tool began in mid-2012). Goodman testified that the FDDs attached to the Co-Marketing Agreement did not reflect the functionality of the Menu Compliance Tool:

> Q. The functional design documents that are attached to the CMA, they don't reflect or refer to the menu compliance tool that was released in October of 2012. Right?
>
> A. No.

A2301.

Goodman's testimony was supported by Griffin, who testified that she assisted with the creation of the functional design documents for the Menu Compliance Tool in 2012. A2462. Lei Ditch ("Ditch"), a computer programmer with Startech, testified that none of the FDDs introduced at trial reflected an ability to input nutrients such as calories, fat, or sodium. A2615-20. inTEAM's own post-trial brief confirmed this. A3414; A3418 ("each of the menu input fields currently featured in DST has an analogous field in the Phase 2 FDDs originally

written by Mr. Ditch, except for the Simplified Nutrient Assessment items introduced in 2012.").

### B. inTEAM Employees Recognize that the Creation of the Menu Compliance Tool is Competitive Activity

inTEAM's work on the Menu Compliance Tool placed it in direct competition with Heartland. Contemporaneously with the conception of the Menu Compliance Tool in "mid-2012," inTEAM's former COO, Erik Ramp ("Ramp"), wrote to inTEAM's Geri Hughes:

[redacted]

A915.

Even Griffin, one of the creators of the Menu Compliance Tool, recognized that the development of the new software program would be problematic. Griffin wrote to inTEAM employee Lori Beckwith that "[redacted]" A966. Griffin testified that at the time she sent the November 2012 email, she understood that menu planning was "WebSMARTT territory." A2465.

### C. Goodman "Pivots" his Business to Focus Almost Exclusively on the Menu Compliance Tool

Despite his employees' qualms, Goodman pressed forward. inTEAM began to shift resources away from DST and towards the Menu Compliance Tool—a strategy that resulted in rapid development of the new software. A2470-71 (confirming shift of resources); A919 (internal email confirming that [redacted]").

inTEAM's new software was eventually certified by the USDA for "Simplified Nutrient Assessment"—a classification that did not exist when Heartland purchased SL-Tech. Ex. A at 29; A2459-60 (Griffin acknowledging that the final rules for HHFKA were not approved until mid-2012). It is undisputed that a software program performing a "Simplified Nutrient Assessment" under current USDA regulations must perform a subset of transactional data functions performed by WebSMARTT. A1808-12; A2941-42.

Following approval of the Menu Compliance Tool for "Simplified Nutrient Assessment," Goodman began to devote an ever-increasing amount of resources to his new software. In 2013, Goodman authored an email to two of inTEAM's top executives outlining his future plans. A967. He wrote:

> Learned from [New Mexico] and other experiences that BI is a tough 'tip of the spear' and considered extra work at school or district level

> and not highly valued by unsophisticated users. Pivoted to a design that makes BI a 'by-product' of required menu centric activities.

A967-68.

At trial, Goodman testified that BI meant "business intelligence" and that it was part of inTEAM's strategy to pivot away from business intelligence software towards "menu centric" software. A2308-09. Goodman outlined a vision where inTEAM would promote the Menu Compliance Tool to the detriment of DST—a strategy that reflected the market's rejection of DST (the business intelligence piece of inTEAM's software). *See, e.g.*, A916 ([redacted]); A919 ([redacted]").

## IV. INTEAM SOLICITS HEARTLAND'S CUSTOMERS.

As inTEAM "pivoted" its business towards a new "menu centric approach," it began to focus on expansion. On December 15, 2014, inTEAM's Mary Jo Tuckwell ("Tuckwell") attempted to convince an administrator at St. Paul Public Schools to replace Heartland's WebSMARTT software. A970. Goodman testified that, at the time of Tuckwell's email, St. Paul Public Schools was a customer of Heartland. A2269. Moreover, Goodman confirmed that St. Paul Public Schools had been a customer of SL-Tech prior to its acquisition by Heartland. *Id*. Roberts

confirmed in unrebutted testimony that St. Paul Public Schools used the ordering, inventory, menu planning, production records, and nutrient analysis modules of WebSMARTT (A3053)—some of the very same modules that inTEAM was offering.

## V. INTEAM CONTINUES TO INCREASE THE FUNCTIONALITY OF ITS MENU COMPLIANCE TOOL.

As inTEAM gained additional customers for its new Menu Compliance Tool, it began to increase the functionality of its software. Two of the new modules are relevant: (1) inTEAM's administrative review supplement; and, (2) inTEAM's POS module.

### A. The Administrative Review Module is Added in 2014

inTEAM's witnesses confirmed that inTEAM developed its administrative review software in 2014. A2169; A1620-21. These development efforts coincided with the advent of unified administrative reviews in 2013. As explained in School Food & Nutrition Service Management for the 21st Century (an authority relied on by the trial court):

> When a school district first offers one or more school nutrition programs, they agree to follow all provisions of the school meal regulations. The meal programs, reviewed periodically by the state agency, ensure that all provisions are met. Beginning in 2013, the reviews consolidated under one system are an Administrative Review . . . An Administrative Review is required at least once during every three-year cycle.

DOROTHY PANNELL-MARTIN & JULIE A. BOETTGER, SCHOOL FOOD & NUTRITION SERVICE MANAGEMENT 20-21 (6th ed. 2014).

According to inTEAM's Griffin, the administrative review supplement that was developed in 2014 was placed within the Menu Compliance Tool. A2441 ("And what is unique about this is in Option 4, ***which is what inTEAM's menu compliance tool is***, there is -- inTEAM's really added additional state value.") (emphasis added). This reality is confirmed by inTEAM's Senior Software Engineer, Michael Sawicky ("Sawicky"). A1748 (confirming "admin review supplement" is part of the "menu compliance tab" in inTEAM's software).

As explained above, the functionality of the Menu Compliance Tool was not developed until 2012 and is not described in the Co-Marketing Agreement or the attached FDDs. *Supra* 21-22. As Goodman acknowledged, given that the final HHFKA rules were not promulgated until 2012, it would have been impossible to describe the functionality of inTEAM's 2014 administrative review supplement in FDDs created in 2011. A2301-02.

### B. inTEAM Attempts to get a "Head Start" on a New POS Module

Following the development of the administrative review module, Goodman began to envision the addition of new POS functionality to inTEAM's products. As early as July 20, 2015, inTEAM represented to potential customers that it was

planning to add a Point of Sale ("POS") module (A973; A2296-97) while also conducting "market research" to further this objective. A1969 (March 22, 2016 email from inTEAM employee Kim Coleman requesting Kentucky School District's "current POS maintenance invoice for competitive research purposes."); A2498 (Griffin testifying that inTEAM was attempting to gather information for the development of a POS module). inTEAM undertook such efforts despite testimony from its witnesses that inTEAM "could not touch point of sale." A2499.

## VI. GOODMAN REVEALS HIS UNIFIED SOFTWARE TO THE MARKET.

In July 2015, Goodman revealed inTEAM's CN Central software to the public as the "new, rebranded successor to DST". Ex. A at 34. CN Central was a unified software concept designed to house all of inTEAM's separate software offerings—including the Menu Compliance Tool and the data analytics software. A1473; Ex. A at 34.

inTEAM's software was designed as separate modules—evidenced by its website's description of CN Central as "a single destination that includes all of inTEAM's technology tools including: Menu Compliance, Menu Costing, Production Records, Administrative Review Supplement, [and] Administrative Reviews . . ." A1473. As confirmed by Sawicky, the CN Central homepage also provides separate tabs designed to perform separate functionality (A1741-48), thus

distinguishing the data analytics software from the Menu Compliance Tool. A1360-61.

It is undisputed that CN Central performs many of the same transactional data functions as WebSMARTT, such as allowing customers to input recipes and ingredients, plan menus, analyze nutrients, and generate production records. A2471-73; A1376; A2822 (explaining "transactional data"). In fact, inTEAM represents to customers that its products can perform these functions, such as "provid[ing] real-time nutrient analysis . . . as ingredients are added to recipes," and "provid[ing the] ability to automatically calculate and display nutrient information for recipes based on ingredients listed."). A1126-27; A1129.

## VII. THE INSTANT LITIGATION

As inTEAM's business struggled, Goodman blamed Heartland for its shortcomings. *See* A924; A917. [redacted]

[redacted] After learning that Heartland and Colyar had submitted a joint bid to the Texas Department of Agriculture, inTEAM sued Heartland and claimed that Heartland's collaboration with Colyar constituted competitive activity under the Co-Marketing Agreement. A1282-1302. Heartland filed counterclaims against Goodman and inTEAM on October 5, 2015. A1303-53.

Following a four-day trial, the trial court found that Heartland breached its non-competition obligations through its collaboration with Colyar, but inTEAM and Goodman did not breach their non-competition obligations by designing software designed to compete with WebSMARTT. The trial court also found that Goodman had breached the non-solicitation provision of his Consulting Agreement and awarded approximately $50,000 to Heartland as damages. After both parties sought re-argument (Ex. B), the Court issued a final judgment on December 9, 2016. Ex. C.

Heartland timely filed a notice of appeal on December 9, 2016. A3638.

# ARGUMENT

## I. THE TRIAL COURT ERRED IN ABSOLVING INTEAM AND GOODMAN OF BREACH OF THE NON-COMPETE PROVISIONS.

### A. Question Presented

Did the trial court err by holding that the agreements gave inTEAM and Goodman the ability to develop software capable of facilitating the same transactional data functions as the software program that Heartland acquired for $17 million? A3324; A3351-61; A3367-78.

### B. Scope of Review

The interpretation of contracts "involves legal questions and thus the standard of review is *de novo*." *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 744 (Del. 1997); *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 170 (Del. 2002).

### C. Merits of the Argument

#### 1. The Agreements Prohibit inTEAM and Goodman From Developing Software that Can Analyze Nutrients

The transaction agreements unambiguously support Heartland's interpretation. Heartland, not inTEAM, was permitted to develop software with the ability to facilitate the accounting and management of transactional data functions such as planning menus and analyzing nutrients. Contrary to the trial court's interpretation, the non-compete provisions are defined by reference to

"transactional data functions"—not USDA guidelines. A software program's ability to input and analyze nutrients is an example of the program's ability to facilitate the management of transactional data functions—something expressly prohibited by the non-compete provisions. *See, e.g.*, A2838-39. None of the FDDs attached to the Co-Marketing Agreement—the documents relied upon by the trial court to determine what functionality inTEAM is permitted to perform—reference any ability to input or analyze nutrients. A2615-20; A3417-19. Accordingly, no inTEAM product may perform such functionality.

Nonetheless, the trial court held that inTEAM and Goodman were allowed to develop such functionality because the inTEAM software does not perform a "Nutrient Analysis" as defined by current USDA regulations. This analysis is erroneous and inconsistent with well-settled canons of contract interpretation.

***First***, the trial court found that the transaction agreements were unambiguous. Ex. A at 44 (finding agreements unambiguously allow inTEAM to develop menu planning software); *id*. at 48 (no finding of ambiguity). Nonetheless, the trial court relied on extrinsic evidence—the currently available USDA regulations defining "Nutrient Analysis" and "Simplified Nutrient Assessment"—to determine whether the non-compete provisions allowed inTEAM and Goodman to develop software with the ability to analyze nutrients. This was

improper. *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc*., 702 A.2d 1228, 1232 (Del. 1997) ("If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity."); *BLGH Holdings LLC v. enXco LFG Holding, LLC*, 41 A.3d 410, 414 (Del. 2012) ("Where, as here, the plain language of a contract is unambiguous *i.e.*, fairly or reasonably susceptible to only one interpretation, we construe the contract in accordance with that plain meaning and will not resort to extrinsic evidence to determine the parties' intentions.").[5] This is particularly true when each of the transaction documents contains an integration clause. A295; A323; A397.

***Second***, the extrinsic evidence relied on by the trial court is not properly used to interpret a contract. In determining whether the non-compete provisions protected "Nutrient Analysis" as opposed to "Simplified Nutrient Assessment" (a term not referenced anywhere in the agreements), the trial court relied on USDA regulations defining Nutrient Analysis as opposed to Simplified Nutrient Assessment. Ex. A at 50 (citing A1823-24). The regulations relied on by the trial court, however, were not even in existence when the transaction documents were

[5] If this Court disagrees with the trial court and finds the contracts to be ambiguous, this action would need to be remanded for further proceedings to allow the trial court to evaluate the extrinsic evidence submitted by Heartland. A3367-71 (explaining drafting history); A2838-39 (explaining the definition of "transactional data functions.").

executed in 2011 (A2459 (final regulations in mid-2012); Ex. A at 8),[6] and the document cited by the trial court to support the differences in the classifications—A1823-24—has a last modified date of March 2016. By relying on extrinsic evidence that was not even in existence when the transaction agreements were executed, the trial court committed legal error. *See Salamone v. Gorman*, 106 A.3d 354 (Del. 2014) (finding ambiguity only after considering ***contemporaneous*** extrinsic evidence); *AT&T Corp. v. Lillis*, 970 A.2d 166, 174, n.10 (Del. 2009) ("'[E]ven if we held the solicitation to be ambiguous and looked to extrinsic evidence to determine the Government's intent at the time of drafting, the Government's position is merely a legal theory developed during litigation, not a contemporaneous interpretation of the solicitation.'") (quoting *Banknote Corp. of America, Inc. v. United States*, 365 F.3d 1345, 1355 (Fed. Cir. 2004)).

By interpreting the non-compete provisions using extrinsic evidence that did not exist when the contracts were signed, the trial court committed legal error in determining the parties' intent. The appropriate inquiry in applying the unambiguous language is whether CN Central's ability to analyze calories,

[6] Indeed, the Court of Chancery's Opinion states that "***In 2012***, the USDA provided three options to school districts to submit information to their state agencies for six cent certification . . . Option 2 allowed districts to submit menus, the USDA worksheet, ***and a Simplified Nutrient Assessment in lieu of nutrient analysis***." Ex. A at 8 (emphasis added).

saturated fat, sodium, and carbohydrates: (1) facilitates the accounting and management of transactional data functions at K-12 schools; and, (2) whether such functionality is covered by the definition of "inTEAM Business" in the contracts. Given that inTEAM has admitted that no FDD references any ability to input or analyze nutrients, the ability to analyze calories, saturated fat, sodium, and carbohydrates is not within the definition of "inTEAM Business." Additionally, evidence submitted at trial confirms that a software program's ability to analyze calories, saturated fat, sodium, and carbohydrates facilitates the accounting and management of transactional data functions at K-12 school. *See, e.g.*, A2838-39. By building software that can analyze nutrients, inTEAM and Goodman have violated their obligations. The trial court's contractual interpretation should be reversed, and the action remanded for further proceedings.

### 2. The Agreements Prohibit inTEAM and Goodman From Developing Menu Planning Software

The contract interpretation advocated by Heartland that prohibits inTEAM and Goodman from developing software with menu planning functionality is the only correct interpretation as a matter of law. It is well-established that a court should not adopt an interpretation of a contract that would lead to an absurd result. *See, e.g.*, *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010) ("An unreasonable interpretation produces an absurd result or one that no reasonable

person would have accepted when entering the contract."); *Axis Reins. Co. v. HLTH Corp.*, 993 A.2d 1057, 1063 (Del. 2010) ("[W]here a contract provision lends itself to two interpretations, a court will not adopt the interpretation that leads to unreasonable results, but instead will adopt the construction that is reasonable and that harmonizes the affected contract provisions"). Under the trial court's interpretation, however, Heartland paid $17 million for a business built around menu planning software (WebSMARTT), yet allowed inTEAM to develop similar software the very next day. Worse yet, Heartland agreed to then market inTEAM's competitive product under the parties' Co-Marketing Agreement. No reasonable commercial party would ever agree to such a bargain, and no party agreed to such a bargain here.

The unambiguous contractual language supports Heartland's interpretation. For example:

- Both FDDs provide in the overview section that: "[w]ith DST Phase 2, school systems that installed DST will be able to leverage menu planning as a tool to ***project the impact*** on staffing, equipment, and food/labor costs. They will also be able to ***model*** in advance menu plans, work schedules and financials to accurately

predict the outcome under a variable set of assumptions." A97; A148 (emphasis added).

- Both FDDs provide that DST will be developed in three milestones—two of which are relevant (Milestones A and B). Milestone A expressly provides that "[a]t the inTEAM level, all such screens will fall under a new [Modeling] tab." A97. Milestone B provides that "[i]n Milestone B, the screens required for [District Administrators] to model real world or hypothetical scenarios in operations will be built. DAs will be able to create Menu Cycles and combine them with Staff and Equipment to create Operational Models that produce work schedules and food/labor costs." A97.
- Milestone A - Menu Item pages 8-12 (the pages cited by the trial court) confirm that the menu items are input for modeling purposes. A100-04. Section 5.3.1 provides that "[Modeling] > [Menu Items]." A100.
- Milestone B - Menu Planning provides that "[t]his design specification is an anchor document that catalogs functional requirements needed to create a subset of the WebSMARTT Menu

Planning hierarchy as part of DST Phase 2 Milestone B." A149. Page 19 provides that "[t]his page allows the user to administer Menu Templates that will be used to ***model*** a building's day to day menu plan in Operational Modeling." A162 (emphasis added).

- Finally, the description of DST in the Co-Marketing Agreement itself (not referenced by the trial court (Ex. A at 42-44)) casts DST as modeling and forecasting software. The recitals provide: "the DST Phase 1 data warehousing and analysis tool and related professional, maintenance and support services ('DST Phase 1); and [] the DST Phase 2 modeling and pro-forma forecasting tools and related professional, maintenance and support services ('DST Phase 2)." A302. The only software related to "foodservice accountability" is WebSMARTT—not DST. *Id*.

When interpreting an unambiguous contract, it is the role of the Court to give effect to all of the contractual provisions in order to achieve a harmonious interpretation. *E.I du Pont de Nemours & Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1114 (Del. 1985). Here, the trial court focused on the phrase "menu planning" in the FDDs, but ignored the contractual reality that DST was designed to extract the menu plan / menu items from programs like WebSMARTT in order

to create operational models to improve performance and efficiency. Both the Co-Marketing Agreement and the FDDs are replete with references to modeling and/or forecasting—a functionality designed to create hypothetical "what if scenarios." A2864. As explained in the recitals of the Co-Marketing Agreement, DST was never designed to replace or compete with WebSMARTT. It was designed to model and forecast data—a fact confirmed by the repeated use of the word "modeling" in the Co-Marketing Agreement and the FDDs. This is also consistent with Goodman's valuation of the "inTEAM Business" at $8 million. If inTEAM's software was designed to perform the same functionality as WebSMARTT, the value of inTEAM's business should have approached the value of SL-Tech. Because the trial court's interpretation cannot be correct as a matter of law, this Court should reverse.

Heartland's contractual interpretation is the only interpretation that makes economic sense. If, however, this Court agrees with the trial court that inTEAM offered a reasonable contract interpretation, this action should be remanded for further proceedings due to contractual ambiguity. *See, e.g.*, *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 614 (Del. 2003) (finding contract to be

ambiguous when two competing, reasonable interpretations are presented).[7] As explained to the trial court, numerous documents, including manuals, design principles, and business plans (A204; A272; A884-85; A942) confirm that DST was not designed to plan menus that would be served to students—that was the functionality of programs like WebSMARTT. Testimony from former SL-Tech employees also supports Heartland's interpretation. A2844-45; A2850-53; A2871-2901; A3019; A3058-59.[8]

Nonetheless, the trial court rejected Heartland's interpretation without any analysis even though it is based on the plain language of the transaction documents, market realities, and contemporaneously created documents. This was error. *Seaford Golf & Country Club v. E.I. DuPont de Nemours & Co.*, 925 A.2d 1255, 1264 (Del. 2007). No reasonable commercial party would agree to pay $17 million to compete with inTEAM the next day.

[7] The converse of this rule is that the trial court implicitly found Heartland's interpretation to be unreasonable by rejecting it.

[8] By finding the contract unambiguous in inTEAM's favor (Ex. A at 44), the trial court had no ability to consider the myriad extrinsic evidence offered by Heartland. The trial court never provided any analysis as to why Heartland's interpretation was unreasonable, however.

### 3. Goodman Cannot Develop Software with the Ability to Analyze Nutrients or Plan Menus Because Such Functionality did Not Exist at Closing

Neither inTEAM nor Goodman has any right to develop software with an ability to plan menus or analyze nutrients because such functionality is not included in the definition of "inTEAM Business." With respect to Goodman, however, the analysis is more straightforward. This is because the non-compete provisions binding Goodman are predicated on inTEAM's business as conducted in 2011. For example, the Asset Purchase Agreement restricts Goodman from "providing any Competitive Services or Products or any business that School-Link conducts as of the Closing Date in any of the Restricted Territory." A380. The definition of "Competitive Services or Products" in the Asset Purchase Agreement provides that "for purposes of clarity" the definition will not encompass the inTEAM Business as currently conducted. A413.

The trial court, however, erred by ignoring this temporal restriction. *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1184 (Del. 1992) ("The cardinal rule of contract construction is that, where possible, a court should give effect to *all* contract provisions.") (citing *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1114 (Del. 1985) (emphasis in original)). Instead, the trial court concluded that the Asset Purchase Agreement and the Co-

Marketing Agreement "contain materially similar non-competition obligations." Ex. A at 41. This analysis, however, overlooks that Goodman is not permitted to participate in "any business that School-Link conducts as of the Closing Date" or in any business not conducted by inTEAM in 2011. The undisputed evidence demonstrates that at Closing inTEAM had no software capable of planning menus, generating production records, analyzing nutrients, or performing USDA compliance. A2223-24; A2462-63; A2627; A2855-57; A3027-28. SL-Tech did. A2220-21; A2370-71; A2823-38; A3015. Goodman cannot participate in a business that develops software with such functionality because it did not exist within the inTEAM Business at Closing. To hold otherwise would result in reading the temporal restrictions entirely out of Goodman's non-compete obligations. The trial court's interpretation should be reversed.

## II. THE TRIAL COURT ERRONEOUSLY HELD THAT HEARTLAND INDIRECTLY BREACHED THE CO-MARKETING AGREEMENT.

### A. Questions Presented

Did the trial court commit error when it found that (1) Heartland breached Section 9.1 of the Co-Marketing Agreement through its collaboration with Colyar; and, (2) by issuing an 18-month injunction against Heartland for such alleged breach? A3502-07; A3626-34.

### B. Scope of Review

The interpretation of contracts "involves legal questions and thus the standard of review is *de novo*." *Emmons*, 697 A.2d at 744; *Gotham Partners, L.P.*, 817 A.2d at 170. The standard of review governing the scope of an injunction is abuse of discretion. *Cherry Hill Constr. Inc. v. James Julian, Inc.*, 608 A.2d 725 (Del. 1991) (TABLE).

### C. Merits of the Argument

#### 1. Heartland Cannot Indirectly Compete with Software Not Referenced in Co-Marketing Agreement

Although the trial court found that Heartland did not directly breach its non-compete obligation, it found that "Heartland assisting a direct competitor of inTEAM's administrative review software, Colyar, indirectly breached the non-competition obligations under the Co-Marketing Agreement." Ex. A at 53. To reach this result, the trial court found that administrative review software is

included in the "inTEAM Carve-Out" found in Exhibit C of the Co-Marketing Agreement. The trial court erred in its interpretation.

***First***, the trial court concluded that the Co-Marketing Agreement was unambiguous, yet relied on the after-the-fact testimony of inTEAM's witnesses to conclude that the Co-Marketing Agreement describes administrative review functionality. Ex. A at 45-46 (explaining how inTEAM witnesses Goodman and Ditch understood the Co-Marketing Agreement and FDDs). Reliance on the testimony of inTEAM's witnesses to interpret an unambiguous document is impermissible. *Eagle Indus.*, 702 A.2d at 1232. If the Court had simply relied on the unambiguous terms of the contract, it would have been impossible to conclude that administrative review functionality is referenced in either the Co-Marketing Agreement or the FDDs because the phrase "administrative review" is never referenced. Administrative review software is not covered by the unambiguous contractual language—particularly when the FDDs do not actually demonstrate how to build such software. A2858 (explaining FDDs are "high level" overview documents). Because administrative review software is not protected by the definition of "inTEAM Business," this Court should reverse.

***Second***, to the extent the trial court found that the Co-Marketing Agreement is ambiguous, it should have considered all available extrinsic evidence. *SI Mgmt.*

*L.P. v. Wininger*, 707 A.2d 37, 43 (Del. 1998) ("[U]nless extrinsic evidence can speak to the intent of ***all*** parties to a contract, it provides an incomplete guide with which to interpret contractual language.") (emphasis in original). Further, the trial court should have explained why it ignored Heartland's evidence and contract interpretation. *Seaford Golf*, 925 A.2d at 1263-64 (finding in contract case involving "material ambiguity" that the trial court must "address the undisputed facts that . . . undercut[] the conclusion that the Court ultimately reached" and "set forth reasons why the equally reasonable contrary inference permitted by those facts should be rejected.").

Ample evidence demonstrates that administrative review software was not contemplated in the Co-Marketing Agreement. For example:

- Griffin testified that the administrative review software was included in the Menu Compliance Tool software that was first conceived in 2012 based on separate functional design documents. A2441; A2462.
- Sawicky agreed that the administrative review software was included in the Menu Compliance Tool software. A1748.
- Goodman testified that the Menu Compliance Tool's functionality is not included in the FDDs attached to the Co-Marketing Agreement because he did not have "ESP." A2301-02.

- inTEAM's interrogatory responses never identified "administrative review software" as part of inTEAM's "unique state value added functionality." A1444; A1466.
- inTEAM did not develop the administrative review software until 2014. A2169; A1620-21. This is consistent with the government's consolidation of various reviews in one system known as an "Administrative Review" in 2013. PANNELL-MARTIN, *supra* at 26.

By relying exclusively on the extrinsic evidence presented by inTEAM, while ignoring the contrary evidence without any explanation, the trial court committed reversible error—particularly when the overwhelming weight of the extrinsic evidence presented demonstrates that inTEAM's administrative review software was developed in the Menu Compliance Tool, a separate and distinct software program created almost a year after the parties' agreements. *See Seaford Golf*, 925 A.2d at 1264. If the Court finds that reliance on extrinsic evidence was appropriate, this Court should reverse and remand for further proceedings.

### 2. The Length of the Injunction is Inappropriate

Even if there was a breach of the Co-Marketing Agreement by Heartland (which, there was not), the trial court abused its discretion in determining the length of the injunction.

The non-compete provision provides (in part):

> Except as otherwise provided herein, during the Term (A) [Heartland] shall not engage, directly or indirectly, on its own behalf or as a principal of any person, ***in providing any services or products competitive with the inTEAM Business***, and [Heartland] hereby grants to inTEAM the exclusive right and license under any intellectual property of [Heartland] (other than trademarks) to conduct the inTEAM Business.

A317.

This language prevents Heartland from directly or indirectly providing "services or products" competitive with the inTEAM Business. It does not prevent Heartland from receiving unsolicited emails from third parties or even talking with a competitor of inTEAM about potential opportunities.

Nonetheless, the trial court calculated the length of the injunction entered against Heartland based, in part, on an unsolicited email that Heartland received from Colyar's Richard Roeckner in March 2014 seeking "a short introductory call to explore the idea" of Colyar collaborating with Heartland. A969. Of course, by merely receiving Colyar's email Heartland could not have offered to provide any services or products to Colyar—a prerequisite to finding breach under the Co-Marketing Agreement. A1884-1885 (describing purpose of March 17, 2014 email). Receiving an unsolicited email from a third party should not constitute a breach of the Co-Marketing Agreement.

The trial court's rationale makes less sense considering that it did not find a breach by inTEAM based on similar evidence. A1969 (email from inTEAM employee to Kentucky requesting POS invoice for "competitive market research purposes); Ex. A at 71-73 (finding email was not a breach). If inTEAM conducting "competitive market research" in connection with developing POS software is not a breach, Heartland's having received an unsolicited email from a third-party similarly cannot constitute a breach. The trial court abused its discretion by accepting inTEAM's evidence, but rejecting nearly identical evidence presented by Heartland on a similar issue.

Simply put, the only logical method to calculate the length of the injunction, assuming an actual breach, is to determine the date of breach: when Heartland provided a service or product to (or with) Colyar. Under the trial court's analysis, that date is June 19, 2015—when the Court found that Heartland "teamed" with Colyar to provide a joint proposal to the State of Texas. Ex. A at 32. Contrary to the trial court's analysis, the length of any injunction, assuming there was a breach, should be less than three months (June 19, 2015 (date of alleged breach) until September 8, 2015 (date on which Heartland announced the joint proposal had not been selected)).

## III. THE TRIAL COURT IMPROPERLY DETERMINED THE REMEDY FOR BREACH OF THE CONSULTING AGREEMENT.

### A. Question Presented

Did the trial court erroneously calculate damages associated with Goodman's breach of Section 11 of the Consulting Agreement when that agreement expressly provides that "[i]n the event the Consultant breaches Sections 7, 8, 9, 10, or 11 of this Agreement, Heartland shall have no obligation to pay the Consultant any compensation set forth herein"? A3374-75.

### B. Scope of Review

The interpretation of contracts "involves legal questions and thus the standard of review is *de novo*." *Emmons*, 697 A.2d at 744; *Gotham Partners, L.P.*, 817 A.2d at 170.

### C. Merits of the Argument

#### 1. Heartland Should Recover the Full Amount Paid to Goodman under the Consulting Agreement

"[T]he standard remedy for breach of contract is based upon the reasonable expectations of the parties *ex ante* . . . Expectation damages thus require the breaching promisor to compensate the promisee for the promisee's reasonable expectation of the value of the breached contract, and, hence, what the promisee lost." *Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001). When parties agree in advance to a specified amount of damages in the event of a breach,

Delaware courts award such damages if they are reasonable and otherwise difficult to calculate. *See Brazen v. Bell Atl. Corp.*, 695 A.2d 43, 48 (Del. 1997) ("'Where the damages are uncertain and the amount agreed upon is reasonable, such an agreement will not be disturbed.'") (quoting *Lee Builders v. Wells*, 103 A.2d 918, 919 (Del. Ch. 1954).

Here, Heartland agreed to pay Goodman $600,000 in exchange for a five-year non-solicitation provision. Heartland's expectation was that Goodman would be entitled to none of the $600,000 if he breached, and Heartland specifically included language to effectuate this intent. A291 ("Heartland shall have no obligation to pay the Consultant any compensation set forth herein."). Merriam Webster's Dictionary provides that one definition of "any" is "all." Merriam-Webster Dictionary, www.merriam-webster.com/dictionary/any (last visited Jan. 21, 2017); *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006) ("Under well-settled case law, Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract."). Heartland should be permitted to recover "all" compensation paid to Goodman.

This is particularly true because Delaware law allows parties to provide a reasonable forecast of actual damages in the event of breach. *Brazen*, 695 A.2d at

48 ("[W]here the level of uncertainty surrounding a given transaction is high, '[e]xperience has shown that ... the award of a court or jury is no more likely to be exact compensation than is the advance estimate of the parties themselves.'") (internal citation omitted). Heartland and Goodman included language regarding a reasonable forecast of contractual damages given the difficultly of calculating damages for any breach of the non-solicitation provision. *See, e.g.*, *Singh v. Batta Envtl. Assocs., Inc.*, 2003 WL 21309115, at *9 (Del. Ch. May 21, 2003) (noting difficulty in calculating damages from violation of noncompetition provision).

Although the trial court found that the Consulting Agreement "does not state that Goodman must return the fees he was entitled to before the breach occurred", this interpretation overlooks Paragraph 3, which authorizes Goodman to receive a monthly salary of $16.666.67 over a three-year period (totaling $600,000) despite the non-solicitation provision's five-year term. A291. Essentially, Heartland agreed to pay $600,000 "up front" for a five-year obligation. But under the trial court's interpretation, had Goodman violated any covenant in sections 7 through 11 of the Consulting Agreement on the day following the end of year 3, Heartland could not recover any damages because it had already paid Goodman the full $600,000. This cannot be what the parties intended. Heartland's damages should be increased to $600,000.

## CONCLUSION

As explained above, this Court should reverse, award Heartland $600,000, vacate the injunction issued against Heartland, find inTEAM and Goodman liable for breach, and remand this action for further proceedings.

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