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IN THE SUPREME COURT OF THE STATE OF DELAWARE

HEARTLAND PAYMENT SYSTEMS, LLC, Defendant/Counterclaim Plaintiff Below-Appellant, v. INTEAM ASSOCIATES, LLC and LAWRENCE GOODMAN, III, Plaintiff/Counterclaim Defendants Below-Appellees.	No. 582, 2016 APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. NO. 11523-VCMR **PUBLIC VERSION** **FILED: March 9, 2017**
INTEAM ASSOCIATES, LLC, Plaintiff/Counterclaim Defendant Below-Appellee/Cross-Appellant, v. HEARTLAND PAYMENT SYSTEMS, LLC, Defendant/Counterclaim Plaintiff Below-Appellant/Cross-Appellee.	

APPELLEES' ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

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NATURE OF PROCEEDINGS

On September 21, 2015, plaintiff inTEAM Associates, LLC ("inTEAM"), as successor-in-interest to School-Link Technologies, Inc. ("SL-Tech"), filed a Verified Complaint with the Court of Chancery alleging claims against defendant Heartland Payment Systems, Inc. ("HPS") arising from HPS's breaches of a Co-Marketing Agreement, dated September 30, 2011 (the "CMA").[1] The CMA was executed in conjunction with an Asset Purchase Agreement, dated September 12, 2011 (the "APA"), between HPS, SL-Tech and Lawrence Goodman, III, SL-Tech's former CEO and the current CEO of inTEAM.

Pursuant to the APA, HPS acquired substantially all of SL-Tech's assets except for products and services that were being developed and pursued by the inTEAM division of SL-Tech – most notably, the Decision Support Toolkit ("DST") software. Though inTEAM and DST were integral parts of SL-Tech's business, HPS elected not to purchase those assets. Instead, the parties agreed that SL-Tech (and subsequently inTEAM, which assumed and was assigned SL-Tech's rights and obligations under the CMA) would continue developing and marketing the "inTEAM Business," including DST. To ensure that HPS – a multi-billion dollar, publicly traded corporation that sold "point of sale" and web-based pre-

[1] As stated in Appellant's Opening Brief (cited herein as "OB"), defendant now is named Heartland Payment Systems, LLC. *See* OB at 1.

payment systems for school meals – remained a commercial partner, SL-Tech specifically negotiated for HPS's agreement to support and refrain from competing with inTEAM's business, including DST, for five years.

These covenants are contained in the CMA, through which HPS and inTEAM agreed to cooperate with each other exclusively in pursuing their complementary product lines. When inTEAM learned that HPS was competing with inTEAM through a partnership with Colyar Technology Solutions, Inc. ("Colyar"), inTEAM suspected that HPS intended to undermine inTEAM's business model of marketing to the state agencies who oversee school district compliance with regulations adopted by the U.S. Department of Agriculture ("USDA") pursuant to the Healthy, Hunger-Free Kids Act of 2010 ("HHFKA"), 42 U.S.C. § 1751 *et seq.* This suspicion was confirmed in June 2015, when HPS rejected inTEAM's request to collaborate on a proposal to the Texas Department of Agriculture ("TDA") and instead submitted a joint bid with Colyar that competed directly with inTEAM's proposal.

inTEAM commenced this action after HPS denied that it was breaching the CMA. HPS reciprocated with its own counterclaims, alleging that inTEAM and Mr. Goodman breached restrictive covenants contained in the APA, the CMA and a consulting agreement Mr. Goodman executed in connection with the sale of SL-

Tech's assets. Both parties sought damages and injunctive relief, as well as contractually agreed upon fee-shifting.

The Court of Chancery held trial on the parties' claims and counterclaims on April 12-15, 2016. After post-trial briefing, but before the trial court issued its ruling, inTEAM learned that HPS was pursuing additional competitive activities in breach of the CMA – and that HPS withheld documents relating to that conduct in response to fact discovery. On June 3, 2016, inTEAM filed a motion for a post-trial injunction against HPS pending the Court of Chancery's final ruling, but the court deferred its consideration of that motion in favor of resolving inTEAM's plenary claims. On September 15, 2016, inTEAM notified the Court of Chancery of further unlawful conduct by HPS in breach of its restrictive covenants.

The Court of Chancery issued its post-trial Memorandum Opinion on September 30, 2016, the last day of HPS's five-year agreement not to compete with inTEAM. *See* OB Ex. A (cited herein as "Mem. Op."). In the opinion, the court held that: (1) HPS breached its non-competition and exclusivity covenants in the CMA (*see id.* at 50-53); (2) inTEAM did not breach its non-competition covenants in the APA or CMA (*see id.* at 40-50); and (3) while Mr. Goodman did not breach his non-competition covenants in the APA or his consulting agreement, communications by an inTEAM employee to an HPS customer constituted a breach of his non-solicitation covenant contained in the consulting agreement (*see*

id. at 69-78). As relief for HPS's breach, the court granted inTEAM an injunction against HPS that effectively extended the non-competition covenant to March 21, 2018 "to give inTEAM the full benefit of its bargain." *Id.* at 81. The court denied, however, inTEAM's request for an award of costs and attorneys' fees under the CMA's fee-shifting provision. *See id.* at 82. The court also issued an injunction against Mr. Goodman, extending the term of his non-solicitation covenant to March 22, 2017, and awarded HPS damages of $50,003.01 from Mr. Goodman, representing disgorgement of consulting fees paid to him while the covenant was breached. *See id.* at 83-85.

In a letter opinion issued November 18, 2016, the Court of Chancery denied the parties' cross-motions for reargument. *See* OB Ex. B. The court entered a Final Order and Judgment on December 9, 2016, from which HPS appealed. *See* OB Ex. C.

Post-judgment proceedings before the Court of Chancery are ongoing. Since HPS did not move to stay the injunction against it pending this appeal, inTEAM sought discovery to confirm that HPS had ceased its competitive activities. After HPS moved for a protective order to prevent inTEAM's discovery, inTEAM cross-moved for issuance of an order to show cause why the Court of Chancery should not hold HPS in contempt of the Final Order and Judgment. Both motions currently are pending before the trial court.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery held correctly that inTEAM's business does not breach inTEAM's or Mr. Goodman's non-competition covenants. HPS attempts to manufacture a point of error where none exists, claiming that the "ability to analyze nutrients" is defined unambiguously by the relevant contracts and arguing that the trial court should not have considered the governing federal regulations to evaluate allegedly competing software functions. To the contrary, the Court of Chancery noted correctly that none of the contracts defined "nutrient analysis" and properly examined applicable USDA regulations to aid its interpretation. As for the "menu planning" features of inTEAM's products, HPS challenges the trial court's application of unambiguous contractual language excluding these functions from the non-competition covenants, arguing that enforcing the terms to which HPS agreed is not "commercially reasonable." However, HPS's remorse about the deal it struck does not allow a reviewing court to ignore the parties' clearly expressed intent.

2. Denied. Contrary to HPS's argument, the Court of Chancery examined the software functions described in the CMA and determined correctly that HPS agreed not to sell products with functions encompassed within inTEAM's administrative review software, as expressly contemplated at the time of closing. To the extent the trial court considered extrinsic evidence, it was to rebut and reject

HPS's erroneous factual claim – repeated on appeal – that the administrative review functions were not developed until after closing. Finally, HPS offers nothing to suggest that the Court of Chancery abused its discretion in issuing an injunction of approximately 18 months' duration against HPS.

3. Denied. The Court of Chancery interpreted and applied Mr. Goodman's consulting agreement correctly in determining an award of damages to HPS.

4. inTEAM respectfully cross-appeals from the Court of Chancery's holding that the CMA does not entitle inTEAM to an award of its attorneys' fees and costs incurred in this action, notwithstanding the court's finding that HPS breached the CMA. The parties agreed unambiguously in the CMA that, in the event a court of competent jurisdiction determines that one of them breached the contract, the breaching party will be liable for reimbursing the non-breaching party for all litigation expenses. While the CMA separately caps the parties' liability for monetary damages, the limitation does not apply to fee-shifting, which is triggered unconditionally by a judicial finding that one party breached the contract. Alternatively, even if the cap applies, inTEAM still is entitled to reimbursement of its litigation expenses due to HPS's willful misconduct.

STATEMENT OF FACTS

I. THE PARTIES.

inTEAM is a Delaware limited liability company with its principal place of business in Santa Monica, California. B7. Mr. Goodman is the Chief Executive Officer of inTEAM. *Id.* inTEAM operates "in the USDA-driven, funded state and local school district child nutrition programs, primarily in K through 12 schools," offering "consulting services, training services and technology at both the state and school district level." A2038-39.

At the time of trial, HPS was a Delaware corporation with its principal place of business in Princeton, New Jersey. B7. According to HPS's public filings with the U.S. Securities and Exchange Commission, its "primary business is to provide Payment Processing services to merchants throughout the United States," which "involves ... facilitating the exchange of information and funds between [merchants] and cardholders' financial institutions." B264. The School Solutions Division of HPS "provides cafeteria POS [*i.e.*, 'point-of-sale'] solutions to more than 34,000 schools" and offers "online prepayment solutions to allow parents to fund accounts for school lunches or other on-campus activities." B285.

II. THE RELEVANT REGULATORY FRAMEWORK.

A. Menu Planning Tools For Six Cent Reimbursement.

Under USDA regulations, schools are entitled to payment of federal subsidies to reimburse them for breakfasts and lunches served to students. *See generally* Dorothy Pannell-Martin & Julie A. Boettger, *School Food & Nutrition Service Management for the 21st Century* 38-42 (6th ed. 2014) (authored by inTEAM's Co-Founder and its former Director of Operations, respectively). Pursuant to the HHFKA, school districts may receive an additional six cents per reimbursable lunch if they certify compliance with meal pattern requirements promulgated under that statute. *See id.* at 43; *see also* 42 U.S.C. § 1753(b)(3)(C)(i) ("Each lunch served in school food authorities determined to be eligible under subparagraph (D) shall receive an additional 6 cents ...."); 42 U.S.C. § 1753(b)(3)(D) ("To be eligible to receive an additional reimbursement described in this paragraph, a school food authority shall be certified *by the State* to be in compliance with the interim or final regulations ....") (emphasis added).

Software can assist school districts in submitting reimbursement claims to state agencies, which are tasked with distributing federal funds made available by the USDA. *See* Pannell-Martin & Boettger at 291; 7 C.F.R. § 210.5. As Mr. Goodman explained at trial:

> [S]chool districts applied for monthly reimbursement from the federal government based on the number of

> meals served and the meals meeting the meal pattern at point of sale. And those claims were generated at the district or sponsor level and submitted to the state agency who had responsibility for reviewing, administering, and in some cases auditing those claims.

A2046-47. Over time, however, the USDA's meal pattern requirements have changed. For example, from 1946 to 1995, federal regulations mandated a menu with items from four food-based categories. *See* Pannell-Martin & Boettger at 77-78. In the 1990's, regulations were amended to emphasize nutrients over food types and required that menus meet age-based nutrient targets under the School Meal Initiative ("SMI"). *See id.* This change "required menu planners to have computer software and extensive nutritional information for products served." *Id.*

When the HHFKA was enacted in 2010, new regulations replaced nutrient-focused criteria with a requirement that menus include foods from five categories (similar to pre-SMI standards). *See id.* at 78; *see also* 42 U.S.C. § 1753(b)(3)(A)(i) ("[T]he Secretary shall promulgate proposed regulations to update the meal patterns and nutrition standards for the school lunch program ....").[2] Under these

[2] Contrary to HPS's claims, the new regulations promulgated under the HHFKA were planned and anticipated well before the acquisition of SL-Tech's assets. Those regulations followed a 2010 report issued by the Institute of Medicine ("IOM"), at the USDA's request, recommending school meal criteria based on food types rather than specific nutrients, which had been the prevailing analysis under SMI since 1995. *See* A3403 (citing Institute of Medicine, *School Meals: Building Blocks for Healthy Children* 2 (Nat'l Academies Press 2010) (available at *http://www.fns.usda.gov/sites/default/files/SchoolMealsIOM.pdf*)).

regulations, the USDA requires each School Food Authority ("SFA") or school district to apply for "six cent certification" from the governing state authority. A2407. After a school district submits the application and supporting documentation, the state agency must make a certification determination within 60 days. *See* B887. Following this one-time certification, the state agency monitors each school district's ongoing compliance with meal pattern requirements during the administrative review process. *See id.*

The USDA allows school districts to obtain six cent certification through three methods:

- **Option 1:** SFA submits one week menus, menu worksheet and nutrient analysis.
- **Option 2:** SFA submits one week menus, menu worksheet and Simplified Nutrient Assessment.
- **Option 3:** State agency on-site review.

B892. The "menu worksheet" refers to a Certification of Compliance Worksheet developed by the USDA (commonly referred to as the "USDA Spreadsheet") in 2012 to assist school districts and state agencies with measuring compliance. *See* A3404. The USDA Spreadsheet contains the prototype menu worksheet referenced above in Options 1 and 2, as well as the "Simplified Nutrient Assessment" tool referenced in Option 2. *See* A2420-21; A3405; B897. A

Simplified Nutrient Assessment can be used to manually input menu information, including calories, saturated fat and sodium. *See* A2423; A3406.

Option 1 allows a school district that previously purchased nutrient analysis software (*see* § I(B) *infra*) to continue using that software to apply for six cent certification. B892. Since nutrient analysis was a cumbersome process, the USDA created Option 2, requiring only a Simplified Nutrient Assessment. *See* A2420-21; A2423-25. Under Option 3, a state agency may document compliance during an on-site review, using either nutrient analysis or Simplified Nutrient Assessment. *See* A2425-26; B895.

Since enactment of the HHFKA, USDA approval has been required for menu planning software designed to assist school districts with applying for six cent certification. *See* A1823. This category of software, which the USDA named "Menu Planning Tools Approved for Certification for Six Cent Reimbursement," includes "software designed for School Food Authorities (SFAs) to use in demonstrating compliance with the requirements of the Nutrition Standards in the National School Lunch Program." *Id.* Specifically, the USDA mandates approval as a "Menu Planning Tool" for software that performs any of the following functions:

> 1. Provides food-based meal pattern functionality beyond simple identification of meal pattern components, such as user-identified fruits,

vegetables, grains, meats/meat alternates, and milk,

2. Tallies or sums the meal pattern components for a menu,[3]

3. Compares the meal pattern totals to the standard or requirement,

4. Implies quantification or evaluation of the meal pattern components,

5. Provides similar functionality to the FNS certification worksheets, or

6. Provides a Simplified Nutrition Assessment (SNA) tool that does not require data entry of all menu items or the use of a nutrient database.

Id.[4]

As discussed above, Option 1 allows SFA's to continue using USDA-approved nutrient analysis software for six cent certification. *See id.*; B944. The USDA requires approval as "Nutrient Analysis Software" for products that perform any of the following functions:

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[3] At trial, this function was described as the ability "to enter all of the different meal components" (or parts of a reimbursable meal from the required food categories), as distinguished from "meal items" or "ingredients in a recipe." A2410-11.

[4] In 2012, inTEAM's Menu Compliance Tool+ became the first USDA-approved Menu Planning Tool for six cent certification. A2414. This product effectively replaces the entire USDA Spreadsheet (including the Simplified Nutrient Assessment) and can be used under either Option 2 or Option 3. A2421; A2425.

1. Calculates a nutrient analysis using nutrient data from the Child Nutrition Database or other data source provided by the developer,

2. Provides a report of weighted nutrient analysis, or

3. Provides a weighted nutrient analysis of all menu items.

A1823.[5] In this way, the USDA differentiates between two distinct categories of software, "Menu Planning Tools" and "Nutrient Analysis Software." *See id.* To assist SFAs and state agencies, the USDA publishes lists of software approved for each category. *See* B647-51.

B. Administrative Reviews.

Before the HHFKA was enacted, states conducted administrative reviews of their school districts every five years to ensure compliance with federal regulations. A2395. The administrative review, consisting of a Coordinated Review Effort ("CRE") and nutrient analysis under SMI, was required for 10% of schools in each district (called "review schools"). A2394-96. The CRE included, among other things, review of each school's free and reduced price meal applications, claims and reimbursement. A2398-99. Under SMI, states were

[5] inTEAM's Menu Compliance Tool+ does not perform any of these functions and, therefore, is not approved by the USDA for nutrient analysis. *See* A2444-46; A2448. Specifically, the software neither uses data from the Child Nutrition Database nor provides a weighted nutrient analysis because it does not "look at details of a recipe," only "the meal components .... [A]nything that matched up to that USDA spreadsheet is what [inTEAM's] tool does." A2445-46.

required to perform nutrient analysis for menus of every review school in each district – and thus every state agency was obligated to use nutrient analysis software. A2399; A2401; A2404.

Mandating nutrient analysis for every review school (*i.e.*, 10% of all schools in each state) proved burdensome to state agencies, which were required to collect food nutrition labels for every item on a school's menu and manually input menu items and ingredients into nutrient analysis software to gauge compliance. A2399-403. Since SMI required analysis of 13 separate nutrients for each menu item or ingredient, this task was time consuming – up to a month for a single review school. A2402-04. It was only after performing nutrient analysis that a state agency could determine a school's compliance with federal meal guidelines. A2404-05.

USDA regulations promulgated under the HHFKA changed the administrative review process significantly. A2429. Instead of reviewing school districts every five years, states are now required to review school districts every three years to ensure compliance with the new federal menu guidelines. A2430. In addition, while state agencies previously were required to perform nutrient analysis for 10% of a district's schools, they now only need to perform nutrient analysis, if at all, for a single school in each district – the one identified as having the highest risk for nutrition-related violations. A2431-33. The balance of the

review schools may certify compliance with meal pattern requirements by using either the USDA Spreadsheet or approved Menu Planning Tool software. A2443.

State agencies may choose from four options to conduct the single, targeted review in a school district, each of which varies in its use of nutrient analysis software:

- **Option 1:** The state uses a "dietary specifications assessment tool" (once off-site and once on-site) to determine if a target school is high-risk or low-risk. If the off-site result is low-risk, no further review is required until the agency goes on-site. If the result is high-risk, then the state must complete a nutrient analysis as part of the targeted review (which also is true when a high-risk on-site result follows a low-risk off-site result). If the on-site result is low-risk, then nutrient analysis is not required.

- **Option 2:** The state agency performs nutrient analysis as part of the targeted review, and the dietary specification assessment tool (while applied) makes no risk determination.

- **Option 3:** The school district conducts nutrient analysis using its own USDA-approved nutrient analysis software and the results are validated by the state agency. As in Option 2, while the dietary specification assessment tool is applied it makes no risk determination.

- **Option 4:** This option was specifically created for USDA-approved Menu Planning Tools. The dietary specification assessment tool is only used on-site and, if the target school is low-risk, then no nutrient analysis is required.

See A2433-41; A3412.

Under Option 4, therefore, state agencies can use inTEAM's Menu Compliance Tool+ to conduct administrative reviews even though that software does not have nutrient analysis functions. *See* A2440-44. There are other benefits, as well – using inTEAM's software under Option 4 allows schools, school districts and state agencies to share information and communicate more effectively through DST's three-tiered structure:

> And what's unique about this is in Option 4, which is what inTEAM's menu compliance tool is, ... inTEAM's really adding additional state value. And how they're doing that is ... the state agency now has access to the district's menu information. So the district can create their menu information with ... all of the components and the quantities, and then also the nutrient portion for the targeted review, and then submit it to the state agency automatically. State agency then automatically sees that and ... once they review the actual menu documentation, they can modify their menu to make sure that they're in compliance.

A2441-42.

III. DST'S DESIGN AND FUNCTIONALITY.

Long before HPS and SL-Tech discussed a potential transaction, inTEAM strove to build upon and complement SL-Tech's software offerings (primarily WebSMARTT) by integrating into DST the "best practices" inTEAM's nutrition

consultants had developed over years in the field.[6] In 2004, SL-Tech's acquisition of inTEAM "added a new dimension to [SL-Tech's] business because until that time the software had largely been developed by technology-focused people and ... peripheral people involved in the K-12 food service business." A2051-52. Adding inTEAM "represented a sea change in terms of the ability to build software using consultants with a good deal of operating experience in the field and based on an intellectual property that had proven to be a successful way of managing school food service operations." A2052. Put differently, inTEAM did not seek to develop software *for* consultants, but sought to develop software *with the input of* consultants to improve the menu planning process for school districts and state administrators.

After SL-Tech acquired inTEAM's intellectual property, Mr. Goodman sought "to digitize or scale ... some of these ideas and combine this expertise and best practices and knowledge of the inTEAM consultants in software packaging." A2052. *See* B1108 (describing DST in 2009 as "a technology solution that builds upon ... existing technology platforms developed by SL-Tech and the operational

[6] The menu-centric philosophy behind inTEAM's best practices "is pervasive across all [of inTEAM's] published materials, seminars, and other things ... a belief that the menu plan is the center of a successful food service operation and that the menu planning requires consideration of staff, skills, equipment, procurement, all sorts of consequences that ripple throughout a successful food service operation." A2053-54.

expertise of inTEAM, SL-Tech's consulting division and applies them at the state level"). In addition, since WebSMARTT was not cloud-based software with "the capability to support customers at multiple agencies" (*i.e.*, to allow state agencies and school districts to communicate), DST was developed as a "multi-tiered web-enabled application" that would allow users at both state agencies and school districts to collaborate and use common functions in real time. A2527-28.

DST, which "was intended to be an umbrella for a series of capabilities," was planned to be developed in two phases: Phase 1 "involved developing data analytics aspects of primary sales and meal count data," while Phase 2 "was a plan to integrate menu planning, work schedules, operational modeling, and a variety of other more complex tasks." A2057. Unlike WebSMARTT, DST was designed to "provid[e] the ability to model menu plans against staffing models, equipment availability, training, skills and procurement." A2060. *See also* A2062-64; B991-1006 (describing DST's menu planning and menu modeling functions in draft user guide for DST prototype); A2921-24 (describing DST menu creation, editing and export functions as stated in draft user guide). inTEAM marketed DST to state agencies which had federal funds, distributed through Administrative Review and Training ("ART") grants, available to spend on software that would facilitate their administrative reviews. *See* A2057-58.

Following issuance of the IOM Report in 2010, inTEAM anticipated the USDA's "first new menu planning changes in 15 years" to be promulgated under the HHFKA. A885. In fact, the USDA issued proposed rule changes on January 13, 2011, months before HPS approached SL-Tech. *See* Nutrition Standards in the National School Lunch and School Breakfast Programs; Proposed Rule, 76 Fed. Reg. 2494, 2536 ("Many changes associated with implementation of the proposed rule may result in an increased burden and additional required level of effort from States ... nutrient-based menus will be eliminated and only food-based menu planning will be permitted ...."). These changes "represented huge opportunities [for inTEAM] to consult, to retrain ... and ... to update technology." A2085. As described above, HHFKA "provided for increased scrutiny" by state agencies in the administrative review process, involving "many more guidelines [to] ensure compliance with both the meal pattern and also the meal counting and claiming." A2086. To inTEAM, this enhanced role for state administrative reviews represented an "opportunity as a technology focused company, to help make those changes [under HHFKA] easier to implement." *Id.*

In 2009, SL-Tech and inTEAM engaged Startech Global Corporation ("Startech") to design and develop DST as a software product from a fully functional prototype. *See* A2509-10; A2515. Startech's Director of Technology, Lei Ditch, was tasked with writing functional design documents ("FDDs") for

DST, which provided Startech's software engineers "precise instructions" on how to write code that would accomplish inTEAM's objectives. A2517-18. Mr. Ditch authored all the DST FDDs, including those describing the menu planning and modeling functions included within Phase 2. *See* A2524; A2531; A2564. The FDDs also described DST's multi-tiered structure, which would allow both school districts and state administrators to utilize these functions. *See id.*

Each of the menu input fields identified in the Phase 2 FDDs originally written by Mr. Ditch has an analogous field currently featured in DST. *See* A3418-19. When new meal patterns were promulgated under the HHFKA, DST's existing menu planning features and inputs were augmented with the Simplified Nutrient Assessment items to create DST's "Menu Compliance Tool+" module, which quickly became the first USDA-approved Menu Planning Tool. *See* A2414; *see also* A2569 (FDD for DST "built the foundations that enabled inTEAM to take advantage of the menu compliance opportunity that was offered when USDA released their regulations").

IV. INTEAM'S STATE MARKETING INITIATIVE.

Well before HPS expressed interest in acquiring SL-Tech, inTEAM marketed and sold DST to state agencies conducting administrative reviews of schools to determine compliance with federal nutrition regulations. For example, in 2009 inTEAM proposed to the New Mexico Public Education Department that it

use federal ART grant funds to purchase DST (Phase 1) to facilitate the state's oversight activities. *See* A2072; B1114. The New Mexico proposal also included a limited (but at the time undeveloped) release of WebSMARTT that would allow the state to offer web-based, remotely hosted features [redacted] B1114; B1117. *See also* A2074.

In response to this proposal, New Mexico awarded a contract to inTEAM in December 2010. *See* B32-63. In the contract, inTEAM agreed to license DST to New Mexico [redacted] B51. [redacted] B57-58.

In April 2011, after inTEAM began performing under the New Mexico contract, Terry Roberts (who then was an SL-Tech and inTEAM officer, but later moved to HPS in the asset purchase) described the state-based initiative to SL-Tech staff as follows:

> In several of our quarterly all-hands meetings, we've referenced an ongoing effort to position our products and services with state agencies. This is a new model for us, almost all of our customers are school districts. It's the job of the state agencies to administer the National School Lunch Program (and many other federal programs), to ensure that districts are in compliance with

> complex federal accountability rules, and to provide assistance to districts in achieving that compliance.
>
> We saw this as a perfect opportunity to position DST, eLearning, and inTEAM consulting services.
>
> Two weeks ago, we officially kicked off a project in New Mexico which encapsulates those three aspects of our business. Over the next 18 months, this project will bring us $1.5 million in revenue. Beyond that, we are quite far along in closing similar contracts with a handful of other states, and aggressively pursuing many more.

B64. One month later, Mr. Roberts acknowledged openly that [redacted] B1241.

Also in April 2011, months before the SL-Tech/HPS transaction, inTEAM made a proposal to the Office of Hawaii Child Nutrition Programs to use ART grant funds for implementing DST Phase 1 as a state-wide system. As it did in New Mexico, inTEAM proposed that Hawaii use a state-hosted version of WebSMARTT ASP to allow schools to input meal information. *See* A225 [redacted]

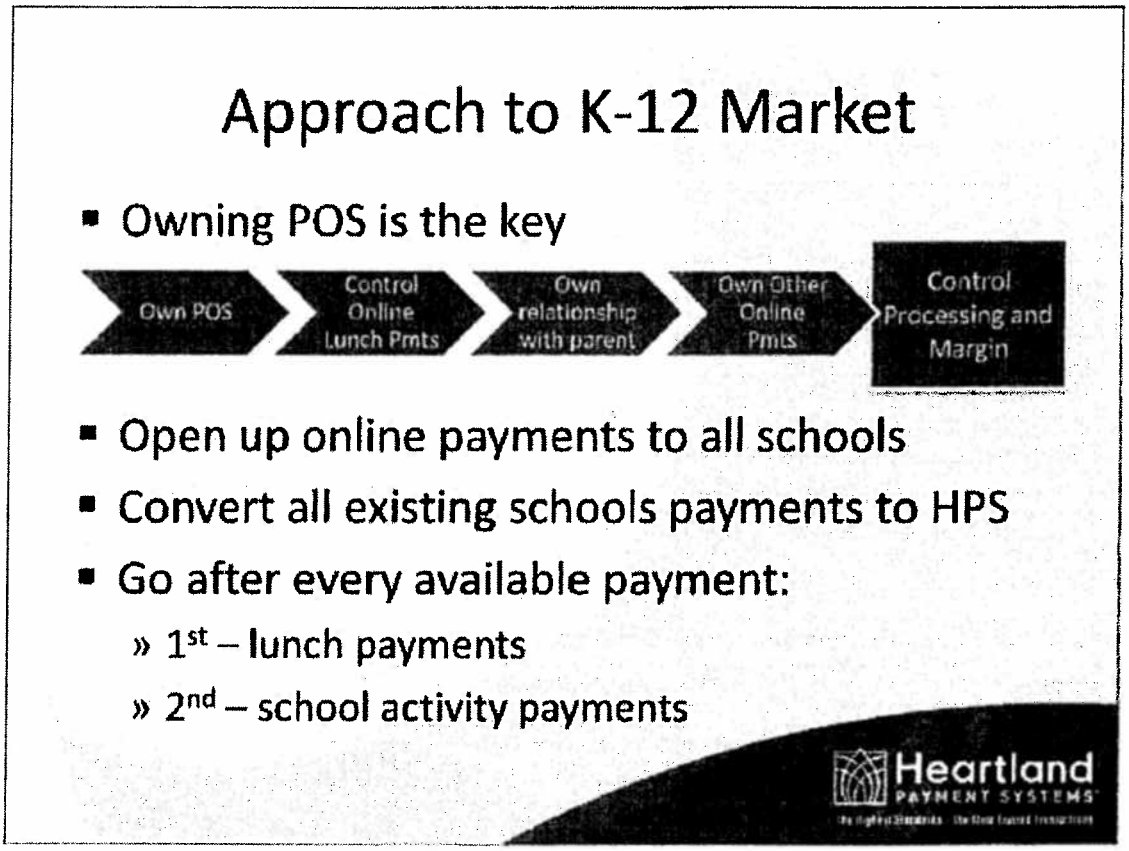
V. HPS'S SCHOOL SOLUTIONS ACQUISITION STRATEGY.

At trial, Michael Lawler (HPS's President of Strategic Markets Group and leader of the HPS School Solutions Division) described how HPS entered the K-12

market through a strategy of "acquir[ing] companies that provided the point-of-sale solutions to [schools] and then allow on-line payments to be made by parents." A2641. HPS, a "credit card processing" company that "provide[s] terminals and software so that merchants can take a credit card from a consumer," sought to "realize the revenues associated with card payments" from parents. A2639; A2641.

HPS began implementing this strategy in December 2010, when it acquired LunchBox, a K-12 point of sale software platform. *See* A2642-44. Shortly thereafter, in January 2011, HPS grew its School Solutions Division by acquiring Comalex, "another company that was doing almost exactly the same thing as LunchBox, selling point-of-sale solutions to K through 12." A2647. In February 2011, HPS next acquired mySchoolBucks, "strictly an on-line payment portal that allowed ... parents to make their lunch and student activity payments." A2647-48.

HPS then pursued SL-Tech, which had approximately 10,000 schools using the "mylunchmoney.com" online payment product ("MLM"), to further its strategy of acquiring point of sale and payment processing systems consistent with its core business. This strategy was reflected in presentation materials created by Mr. Lawler in May 2011, which stated that "[o]wning POS is the key" to HPS's "[a]pproach to K-12 Market":



B68. The same document identified SL-Tech as a "potential opportunity," noting SL-Tech's "proprietary POS terminal" and WebSMARTT's "strong ordering, inventory and management dashboard module" – but omitting any mention of WebSMARTT's menu planning or nutrient analysis functions. B72.

Preliminarily, HPS proposed to acquire all of SL-Tech's assets. A2756. In contemporaneous notes, Mr. Lawler indicated that SL-Tech's proprietary POS system was an "interesting component" of the potential acquisition, but did not mention WebSMARTT or any "back of house" functions as attractive aspects of the business. B718.

Ultimately, HPS elected not to purchase all of SL-Tech's assets. As reflected in a May 2011 summary of deal points created by Mr. Goodman, HPS decided [redacted] B78. In doing so, HPS sought [redacted] *Id.* (emphasis added). This was to be accomplished through the structure later memorialized in the APA and CMA, [redacted] *Id.* [redacted] B79. [redacted] B78. [redacted] *See id.*; A2092.

VI. THE HPS/SL-TECH TRANSACTION.

Mr. Goodman's summary identified the material terms to which SL-Tech and HPS ultimately agreed. For example, HPS agreed in the APA to a $17 million purchase price, less certain adjustments. *See* A343. As consideration for this payment, HPS acquired all of SL-Tech's assets other than what the APA defined as

"Excluded Assets." *See* A341-42; A416. Certain Excluded Assets were further defined as the "inTEAM Business," which consisted of SL-Tech's "consulting, eLearning and DST segments of the business known as 'inTEAM' and including those products and services described in Exhibit C to the Co-Marketing Agreement." A416. Also among the Excluded Assets were "Excluded Contracts," such as inTEAM's March 2011 contract with the New Mexico Public Education Department. *See* A518. Significantly, HPS agreed to exclude (at inTEAM's request) "menu planning" from the APA's definition of "Competitive Services or Products," which delineated the activities encompassed by inTEAM's non-compete covenant in that contract. *See* B150-51; A2108.

At closing, the parties also executed the CMA, in which each of HPS and SL-Tech (and later, inTEAM)[7] agreed to obligations and covenants intended to promote and support the other's products and services – *i.e.*, the business HPS acquired from SL-Tech and the business HPS agreed would remain with inTEAM. Specifically, HPS's obligations under the CMA related to the following inTEAM products and services (defined collectively in the CMA as "inTEAM Products"): (a) inTEAM consulting services; (b) inTEAM e-Learning (which included

[7] Through an Assignment and Assumption Agreement, dated October 31, 2011, inTEAM assumed and was assigned all of SL-Tech's rights under the CMA. B10.

multimedia interactive learning systems and related professional, maintenance and support services); (c) DST Phase 1; and (d) DST Phase 2. A302.

Exhibits C and D to the CMA detailed the functional, interface and mechanical specifications for DST Phase 1 and DST Phase 2, "including unique state value added functionality." A330. These exhibits, as expressly incorporated into the CMA (*see id.*), included the FDDs documenting the technical functions of DST Phase 1 and DST Phase 2 as authored by Mr. Ditch. In summary, the parties agreed that DST, at the time of the HPS/SL-Tech transaction, provided "unique state value added functionality" to state agency users as described in the FDDs collected as Exhibits C and D. The agreement to include this functionality within the inTEAM Business comported fully with HPS's online payments-driven acquisition strategy.

Exhibits C and D also helped define the scope of HPS's covenant not to compete with inTEAM. Specifically, Section 9.1.1 of the CMA provided that, for at least five years commencing October 1, 2011:

> HPS 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 HPS hereby grants to inTEAM the exclusive right and license under any intellectual property of HPS (other than trademarks) to conduct the inTEAM Business ....

A317. Like the APA, the CMA defined "inTEAM Business" as "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.

VII. HPS'S WRONGFUL COMPETITION WITH INTEAM.

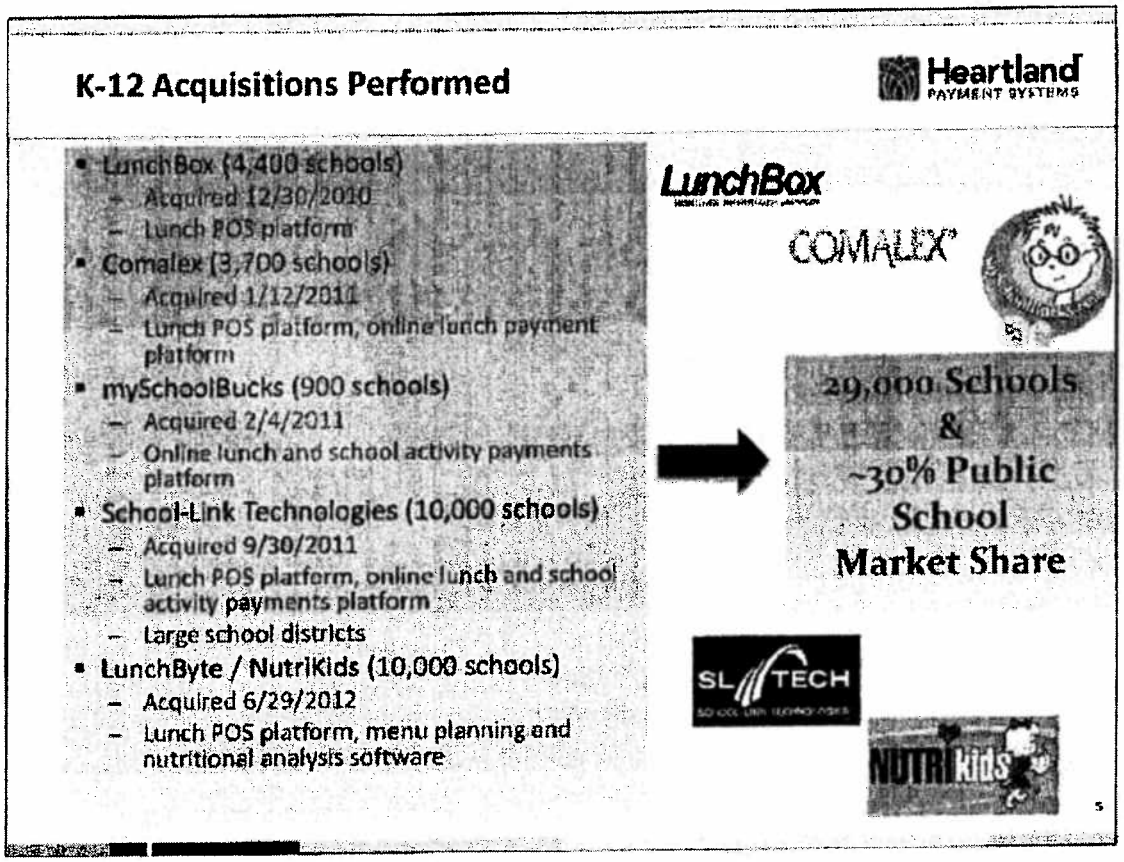
In July 2012, not long after the SL-Tech transaction, HPS acquired LunchByte Systems, Inc. ("LunchByte"), a company whose Nutrikids product was licensed to many state agencies for menu planning and nutrient analysis. HPS (unbeknownst to SL-Tech) first approached LunchByte to inquire about a potential acquisition as early as May 2011 (*see* B67), and then pursued further discussions with LunchByte no later than December 2, 2011 (*see* B611), just two months after closing with SL-Tech. As reflected in Mr. Lawler's contemporaneous notes, LunchByte's owner expressed to HPS his belief that LunchByte was "a lot different than SL-Tech because they were in more schools with their nutrition program" (*i.e.*, Nutrikids) – and, therefore, supported a higher valuation than SL-Tech. B612.

HPS accepted this view, eventually purchasing LunchByte at a far higher valuation multiple than that paid in any of HPS's prior School Solutions acquisitions:

	Total Purchase Price (in millions)	1st Year EBITDA (in millions)	EBITDA Multiple	Revenue Multiple
Lunchbox (2010)	$7.7	$2.5	3.1x	1.3x
Comalex (2011)	$6.2	$2.4	2.6x	1.2x
mySchoolBucks (2011)	$1.5	$0.8	2.0x	1.5x
School-Link (2011)	$17.1	$4.8	3.6x	0.9x
K-12 Combined	$32.5	$10.5	3.1x	1.05x
LunchByte Systems, Inc. ("Nutrikids")	**$26.3**	**$3.8**	**6.9x**	**1.76x**

B760 (emphasis added). This data, excerpted from an internal HPS document dated May 31, 2012, illustrates that HPS valued Nutrikids – a superior menu planning product to WebSMARTT or any other K-12 software HPS had purchased to that point – at a greater premium than its previous acquisitions, which were focused on the targets' POS systems.

Nutrikids thus represented a departure from HPS's earlier acquisition strategy, which had focused on "owning POS." *See* B68. In a presentation Mr. Lawler made to HPS's public investors on October 8, 2012, he identified the highlights of each School Solutions acquisition as follows:



B188. As this document shows, all transactions prior to Nutrikids were driven by the acquisition of POS and payment platforms, consistent with HPS's stated School Solutions strategy. Unlike the earlier deals – including SL-Tech – Nutrikids was a noteworthy acquisition because of its "menu planning and nutritional analysis software." *Id.* Internally, HPS recognized that acquiring LunchByte offered "minimal synergies" with the core payments business (B173) and, thus, would require retaining personnel to manage menu planning.

Following the LunchByte acquisition, HPS promoted Nutrikids to existing customers as offering "[a] wider variety of technology solutions to best meet the

needs of your school nutrition program" (B1110) – *i.e.*, beyond the menu planning and nutrient analysis functions offered by WebSMARTT. When HPS applied for USDA approval of Nutrikids as a Menu Planning Tool for six cent certification (approval inTEAM already had secured for DST in August 2012, *see* B184), Mr. Roberts e-mailed to a member of his management team:

> 48 of 50 states currently use [Nutrikids] for their menu planning analysis of districts. They'll get [Nutrikids'] $0.06 solution in their next update. *That's going to kill inTEAM's business model for their plan.* I'm not planning on mentioning it to them so I don't end up in a month-long argument about things that the CMA doesn't say.

B185 (emphasis added). As Mr. Roberts recognized, acquiring Nutrikids gave HPS a dominant market position among state agencies for menu planning and thus an advantage over inTEAM in supplying those states with USDA-approved software for use in administrative reviews.

Later, HPS pursued another opportunity to "kill" inTEAM's business model through its collaboration with Colyar, a direct competitor of inTEAM in the sale of USDA compliance software to state agencies. A2168. On March 17, 2014, Colyar contacted HPS to propose "working together" to combine Nutrikids' menu planning and nutrient analysis features with Colyar's administrative review products. *See* A969; B231-32. Discussions in March 2014 led to an in-person meeting between HPS and Colyar representatives in May 2014 and execution of a

non-disclosure agreement. *See* B234. In subsequent meetings, HPS and Colyar explored the joint short term objective of "provid[ing] state auditors a consistent view of school district menu data so that they can perform audits in a more efficient manner" under USDA regulations. B237. The companies' long term goal was to offer "access to school district menu data in a hosted environment so that state auditors can manipulate the data as needed in performing an audit and providing recommendations." B238. This replicates the "unique state value added functionality" described in Exhibit C to the CMA. *See* pp. 17-20 *supra*; A1854

[redacted] A1929 [redacted]

HPS and Colyar also negotiated drafts of a Memorandum of Understanding under which they would "work together in partnership to implement a sharing of data from [HPS] product, Mosaic, to Colyar's product related to nutrient analysis and menu planning." B241.[8] Under the MOU, Colyar's state agency customers

[8] HPS developed Mosaic after acquiring LunchByte to incorporate "the best functionality of NUTRIKIDS Menu Planning" with "WebSMARTT Order and Inventory," recognizing that "NUTRIKIDS menu planning is recognized in the marketplace as [HPS's] best of breed menu planning and nutrient analysis

would be given access to HPS software "via Colyar's Software in a seamless manner, with the full rights to utilize all features offered by [HPS's] Software in the area of nutrient analysis and menu planning as well as the ability to select data to import from [HPS's] Software to Colyar's Software for access by Colyar's customers." B242.

A few months later, in September 2014, HPS assisted Colyar in preparing a proposal to the Tennessee Department of Education reflecting a "joint effort to interface the [HPS] products with the [Colyar] products" (B694), which Mr. Roberts believed was "a good blueprint to do something pro-active in some other states." B652. By no later than December 2014, Colyar was openly promoting its collaboration with HPS to state agencies, including the State of California. *See* B712 (memorandum to inTEAM from California Department of Education disclosing that Colyar "is currently working with Heartland School Solutions to deliver a menu planning interface that can be used both by our SFAs and our state staff"). On July 1, 2015, Colyar executed a contract with the Tennessee Department of Education under which Colyar committed to provide, as an "enhancement" to the state's existing software, an additional "menu planning and production management integration tool." B676. While the contract does not identify a specific provider of menu planning services, HPS assisted Colyar in

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product." B205-07. *See also* A2912-13 (explaining that Mosaic's menu planning and nutrient analysis "work flow" is modeled after Nutrikids).

preparing the proposal and designing the interface required by Tennessee. *See* A1916; A1928.

HPS and Colyar then further capitalized on their partnership in May 2015, when the TDA issued an RFP for menu analysis and planning software. *See* B251. Within days after the RFP was issued on May 13, 2015, representatives of HPS and Colyar began working on a joint proposal. *See* B246-50.

While inTEAM also intended to submit a proposal to the TDA, its products (consistent with its non-competition covenants) lacked the limited nutrient analysis functions required by the RFP. Accordingly, Geri Hughes of inTEAM e-mailed Mr. Roberts on May 27, 2015 to inquire about HPS's interest in [redacted] for Texas. B254. Ms. Hughes noted that an HPS-inTEAM collaboration, like one between HPS and Colyar, [redacted] *Id.* While HPS already had committed to submitting a joint proposal with Colyar, Mr. Roberts responded: [redacted] B253.

On June 19, 2015, HPS and Colyar submitted a joint proposal to the TDA detailing a "solution for the Menu Analysis and Planning System (MAPS) that will provide web-based and mobile application software to support [USDA] meal

pattern requirements for schools who participate in the National School Lunch and School Breakfast Program." B763. HPS and Colyar touted their "combined business and technical skills ... and the seamless integration of [HPS]'s Menu Planning and Nutrient Analysis software product, Mosaic, with Colyar's TX-UNPS solution." *Id.* *See also* B796-97 (describing the proposed integration of Colyar's administrative review system with Mosaic's menu planning functions).

In July 2015, Colyar prepared (and distributed at an industry conference, *see* A2191-92) marketing materials for its "menu integration" function which promoted to state agencies [redacted] The materials described [redacted]

On July 20, 2015, after inTEAM learned of HPS's joint proposal with Colyar to the TDA, inTEAM notified HPS in writing of its wrongful competition in breach of Section 9.1.1 of the CMA. *See* B1243-45. Even after inTEAM provided such notice, Colyar and HPS continued to explore the potential

integration of their products for state agency customers. *See* B255 (on August 4, 2015, a Colyar representative requested a call with Mr. Roberts "to chat about the use of Mosaic in our states who we are promoting a state-wide system for" and expressed Colyar's desire "to regroup on that topic and discuss how we market it"). On September 8, 2015, when HPS learned that its proposal was not selected by the TDA, Mr. Roberts informed HPS employees that HPS will "get smarter" with respect to the ongoing "initiative" of selling software to state agencies. B257. Despite the result in Texas, Mr. Roberts expressed his belief that HPS was "now in a good position to pro-actively pitch other states" and made clear that HPS would continue to pursue this "initiative" with Colyar: "*We're going to ramp up that effort with Colyar's.*" *Id.* (emphasis added).

HPS did, in fact, "ramp up" its efforts to compete with inTEAM's unique state value added business, as inTEAM learned through evidence that came to light after trial. On or about May 4, 2016, the Illinois State Board of Education ("ISBE") issued a public notice that it awarded a $950,000 contract to HPS for a master license of Mosaic and additional licenses to be provided to approximately 1,100 users at Illinois school districts. *See* B1252-55. Shortly thereafter, inTEAM obtained through a public records request a copy of HPS's response to ISBE's Request for Proposal which had been submitted on January 21, 2016 (and was followed by a presentation to ISBE on January 26, 2016). *See id.* Even though the

parties were engaged in fact discovery at the time HPS made its proposal to ISBE, HPS withheld from its production any documents relating thereto, even though those documents were responsive to inTEAM's pending requests. The proposal reflects that HPS offered to ISBE, and was awarded a contract to provide, a new version of Mosaic that allows the state agency to access, review and modify the compliance data generated by Illinois school districts using that software – *i.e.*, HPS offered "unique state value added functionality" directly, without collaborating with Colyar, even though the functions were included within the "inTEAM Business" with which HPS agreed it would not compete. *See id.* Later, inTEAM learned that Colyar entered into a contract with the Montana Office of Public Instruction under which HPS sub-contracted to furnish Mosaic as part of an integrated solution with Colyar's state-level compliance software, just as the two companies had proposed to do for other states such as Texas, California and Tennessee. *See* B1465-1509.

ARGUMENT

I. THE COURT OF CHANCERY HELD CORRECTLY THAT NEITHER INTEAM NOR MR. GOODMAN BREACHED THEIR NON-COMPETITION OBLIGATIONS.

A. Question Presented.

Should this Court uphold the Court of Chancery's finding that neither inTEAM nor Mr. Goodman breached the terms of their covenants not to compete? *See* A3556-3568.

B. Scope Of Review.

This Court reviews a trial court's "interpretation of a contract *de novo* and will overturn any of its factual determinations only if they are clearly erroneous." *Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, 112 A.3d 878, 889 (Del. 2015). "To the extent the trial court's interpretation of the contract rests on findings extrinsic to the contract, or upon inferences drawn from those findings," this Court will "defer to the trial court's findings, unless the findings are not supported by the record or unless the inferences drawn from those findings are not the product of an orderly or logical deductive reasoning process." *Honeywell Int'l Inc. v. Air Prods. & Chems., Inc.*, 872 A.2d 944, 950 (Del. 2005).

C. Merits Of Argument.

1. *The Court Of Chancery Held Correctly That Simplified Nutrient Assessment Does Not Violate The Non-Competition Covenants.*

The scope of inTEAM's and Mr. Goodman's non-competition covenants (which is materially identical between the APA, the CMA and Mr. Goodman's consulting agreement) includes "computer software ... designed to facilitate ... 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)." A293-94; A303; A413. While HPS relies upon the language "management and reporting of transactional data functions" to argue that inTEAM's products impermissibly compete with WebSMARTT, none of the relevant contracts identifies or defines the analysis of nutrients as a function falling within the scope of competitive conduct. Thus, there is no basis for HPS's contention that the contracts "unambiguously" prohibit "the ability to input and analyze nutrients." OB at 31.[9]

[9] Paradoxically, HPS cites *extrinsic evidence* – the trial testimony of Tyson Prescott, a former SL-Tech and current HPS employee – to support its position that "management of transactional data" is "an industry term of art" that must be applied as written yet impliedly includes nutrient analysis. *See* OB at 2, 31, 34. This alone demonstrates that the term "management of transactional data" does not unambiguously encompass "the ability to input and analyze nutrients." *Cf. Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del.

Rather, the court below noted correctly that "[n]either the [APA] nor the [CMA] addresses this issue or expressly defines 'nutrient analysis.'" Mem. Op. at 48.[10] The court then properly "look[ed] to the USDA regulations, because the very purpose of this software is to aid districts in reporting for USDA compliance." *Id.* at 48-49. Significantly, HPS (both at trial and on appeal) has cited WebSMARTT as the SL-Tech product it acquired with "nutrient analysis" and other functions. *See, e.g.*, OB at 6-7. At the time of the acquisition, however, WebSMARTT was designed to conduct nutrient analysis under the then-current, but burdensome, SMI criteria. *See* pp. 13-14 *supra*. Since enactment of the HHFKA in 2010, USDA regulations have distinguished between "nutrient analysis" and a "Simplified Nutrient Assessment" and have established different certification requirements for each. *See id.* While HPS disregards this distinction by arguing that WebSMARTT and inTEAM's Menu Compliance Tool+ both "analyze nutrients," the USDA classifies the two products *differently* according to the specific tasks for which

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1992) ("Ambiguity does not exist where the court can determine the meaning of a contract 'without any other guide than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends.'") (quoting *Holland v. Hannan*, 456 A.2d 807, 815 (D.C. 1983)).

[10] While HPS suggests that "the trial court found that the transaction agreements were unambiguous" (OB at 31), the reference cited relates to the Court of Chancery's determination that the "inTEAM Carve-Out" unambiguously included *menu planning* functions. *See* Mem. Op. at 44. The court made no such finding with respect to *nutrient analysis* functions, recognizing instead that the contracts were unclear on this point. *See id.* at 48.

school districts and state agencies are permitted to use them – *i.e.*, WebSMARTT is approved only for Nutrient Analysis, while Menu Compliance Tool+ is approved only as a Menu Planning Tool. *See* B647-51. As the Court of Chancery recognized correctly, the two products *cannot* compete with each other because a user cannot perform the same functions with them as classified by the USDA. *See* Mem. Op. at 49-50.

Therefore, the trial court properly considered the USDA regulations to interpret the scope of the non-competition covenants and determine whether inTEAM and Mr. Goodman breached those covenants.[11] Neither opinion cited by HPS prohibits judicial review of extrinsic evidence arising after parties agree to a contract; rather, a court may consider evidence such as "overt statements and acts of the parties, the business context, prior dealings between the parties, [and] business custom and usage in the industry" when interpreting an ambiguous contractual term. *Salamone v. Gorman*, 106 A.3d 354, 374 (Del. 2014). *Accord Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1233 (Del.

[11] As a threshold matter, this issue is not properly before the Court on appeal because HPS never challenged the trial court's ability to consider extrinsic evidence that post-dated execution of the relevant contracts. *See* Supr. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review ...."). In fact, HPS itself presented to the trial court post-execution extrinsic evidence to support its contractual interpretation. *See* A3370-71 ("inTEAM's course of conduct following Heartland's acquisition of SL-Tech actually confirms Heartland's interpretation.").

1997).[12] Moreover, when a term is not defined in a contract – such as "nutrient analysis" here – "the rules of contract construction require that the term be given the meaning commonly understood in the [relevant] industry, as established by the record." *FleetBoston Fin. Corp. v. Advanta Corp.*, 2003 WL 240885, at *21 (Del. Ch. Jan. 22, 2003). *See also* Restatement (Second) of Contracts § 222(3) (1981) ("Unless otherwise agreed, a usage of trade in the vocation or trade in which the parties are engaged or a usage of trade which they know or have reason to know gives meaning to or supplements or qualifies their agreement."). In summary, the Court of Chancery appropriately exercised its discretion to interpret the parties' agreement consistent with the USDA regulations that govern and form the basis for their respective products.[13]

2. *The Court Of Chancery Held Correctly That Menu Planning Software Is Excluded From The Non-Competition Covenants.*

HPS does not and cannot dispute that the contractual carve-outs for the "inTEAM Business" expressly incorporate the DST Phase 2 FDDs included within Exhibit C to the CMA. As it did unsuccessfully at trial, however, HPS attempts to

[12] In *Eagle Industries*, this Court recognized further that, even when a contract term is unambiguous, "[t]here may be occasions where it is appropriate for the trial court to consider some undisputed background facts to place the contractual provision in its historical setting." 702 A.2d at 1232 n.7.

[13] Similarly, there is no reason to remand this action to allow the court below to consider extrinsic evidence offered by HPS (*see* OB at 32), since the court already had an opportunity to do so and gave the USDA regulations greater weight in the proper exercise of its discretion.

mischaracterize DST as a "modeling" tool to distinguish the menu planning functions described explicitly in Exhibit C to the CMA – functions which HPS agreed are excluded from inTEAM's and Mr. Goodman's non-competition covenants. As the Court of Chancery held correctly, HPS's argument finds no support in the contract itself.

Two of the DST Phase 2 FDDs relied upon by the court below, "Milestone A – Menu Item" and "Milestone B – Menu Planning" (*see* Mem. Op. at 43), explain how DST utilizes core menu planning concepts, such as "menu items," "menu categories," "menu templates" and "menu cycles." *See* A99; A149; A2528-30. Each of these represents a building block that a school district or state administrator would use to create and plan a menu – menu items (servings of a specific food) are grouped into menu categories (such as fruits, etc.) and combined to form menu templates (an arrangement of items comprising a single meal). *See* A2528-29. A menu cycle then aggregates menu templates for each day over a specific period of time (week, month, etc.). *See* A2529-30.[14]

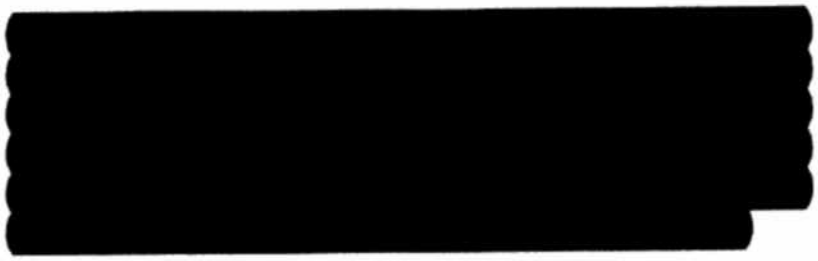
As described in the "Menu Item" FDD, users of DST Phase 2 perform certain software functions, such as creating, editing, copying and saving menu

[14] At trial, Mr. Prescott confirmed that a menu template is "a reusable set of recipes or menu items that you can then use to create menu plans or create menu plan cycles." A2829. Mr. Prescott also testified that a menu cycle is a "planning mechanism" that allows schools to identify meals served to students on particular days within a specified period of time. *Id.*

items to be assigned to menu categories, which also can be created, edited, copied and saved. *See* A100-11; A113-17; A121-22; A2536-51. The "Menu Planning" FDD similarly describes the functions by which users create, edit, copy and save menus in menu templates, which in turn are placed into menu cycles. *See* A162-70; A172-84; A190-91; A195-97; A2551-63. In this way, the FDDs incorporated into Exhibit C to the CMA identify unambiguously the software functions the parties agreed to include within the "inTEAM Business" – and, therefore, the functions carved out from inTEAM's and Mr. Goodman's covenants not to compete. The trial court held correctly that the menu planning functions challenged by HPS fit squarely within this agreed-upon carve-out.

HPS attempts to distract from the FDDs' clear description of permissible functions by selectively citing instances where the documents use the terms "model" or "modeling." First, HPS's reliance upon the introductory "general overview section" of the FDDs (*see* OB at 35-36) is misplaced, since – as Mr. Prescott conceded at trial – this portion of the documents contains no functional instructions to software developers for writing code. *See* A2918-19. Second, HPS cites only to labels given to "tabs" contained within the visual DST user interface without considering the actual functions performed by the software (*see* OB at 36), a superficial approach used by HPS's expert at trial and disregarded correctly by the court below. *See* A2980. HPS also fails to acknowledge record evidence

showing that, as early as 2009, DST was designed to permit users to create and edit menu items and menu templates within the context of "modeling":



A946 (emphasis added).

Finally, HPS urges the Court to disregard the unambiguous carve-out to which it agreed on the grounds that enforcing the non-competition covenants as written "would lead to an absurd result." OB at 34. The authorities HPS cites, however, recognize that an unreasonable reading of a contract should be rejected in favor of a reasonable interpretation only when the contract is ambiguous and "lends itself to two interpretations." *Axis Reins. Co. v. HLTH Corp.*, 993 A.2d 1057, 1063 (Del. 2010). *Accord Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 & n.21 (Del. 2010). As the Court of Chancery determined, the carve-out for "inTEAM Business" explicitly incorporates by reference the FDDs which describe the very menu planning functions that HPS claims to be unlawfully competitive, so there are no alternative interpretations against which one can evaluate relative "reasonableness" or "absurdity." HPS cannot evade the unambiguous terms to

which it agreed by asserting with hindsight, more than five years later, that it never would have entered into a contract as enforced by the trial court.[15]

3. *The Court Of Chancery Applied Mr. Goodman's Non-Competition Covenant Correctly.*

On appeal, as it did at trial, HPS argues that the carve-out for the "inTEAM Business" as defined in the APA was limited to activities conducted at the time HPS acquired the SL-Tech assets and, therefore, did not include the software functions HPS claims to give rise to a breach of Mr. Goodman's non-competition covenant. *See* OB at 40; A3358-60. HPS asserts erroneously, however, that the Court of Chancery "ignor[ed] this temporal restriction." OB at 40. To the contrary, the trial court rejected HPS's argument because "the definition of

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[15] HPS's contention that it "paid $17 million for a business built around menu planning software (WebSMARTT)," and thus would not have agreed to a contract that "allowed inTEAM to develop similar software the very next day" (OB at 35), is based in litigation strategy rather than the fact record. As detailed above and at trial, HPS purchased SL-Tech's assets as part of a strategy to acquire companies with point of sale and online payment systems, consistent with HPS's core credit card processing business. *See* pp. 22-25 *supra*. HPS saw SL-Tech as an attractive target because of its proprietary POS terminal and online payment product, while WebSMARTT's menu planning functions were merely an afterthought. *See id.* There is no support in the record for HPS's claims that WebSMARTT was SL-Tech's "core software product" (OB at 1) and was "market leading" (*id.* at 6); to the contrary, HPS's internal documents prove that HPS itself placed a much higher value on the Nutrikids menu planning software when it acquired that product less than one year later. *See* p. 29 *supra*. In short, the $17 million purchase price paid by HPS represented consideration for material assets *other than* WebSMARTT's menu planning software, and the exclusion of menu planning functions from inTEAM's and Mr. Goodman's restrictive covenants is entirely consistent with HPS's acquisition strategy in 2011.

inTEAM Business, which references Exhibit C and discusses a 'future release' of DST Phase 2 as defined in the Functional Design Documents, anticipated the development of a product with functionality that did not exist at closing." Mem. Op. at 46-47. Thus, the court determined that the functions inTEAM planned to include within DST Phase 2 at the time of closing, as documented in the FDDs, properly were carved out from Mr. Goodman's non-competition covenant as "inTEAM Business." *See id.* at 47-48 ("By January 2011, inTEAM was contemplating a future release of DST Phase 2 that would have greater functionalities than existed at the time of the agreement ... which included the ability to plan menus, generate production records, and assist administrative reviews.").

This holding is consistent with and supported by the trial record. According to the APA's plain language, the definition of a "Competitive Service or Product" includes a business that not only manufactures or sells the enumerated software, but *develops* it. *See* A413.[16] By agreeing to exclude the "inTEAM Business" from this definition, the parties necessarily determined to carve out products inTEAM was developing at the time of closing as well as products then being sold. This is confirmed by Exhibit C to the CMA, which is expressly incorporated within the

[16] The same is true of the CMA's definition of "HPS Business" (*see* A303) and the definition of "Competitive Business" found in Mr. Goodman's consulting agreement (*see* A293).

"inTEAM Business" and, as the trial court noted correctly, includes the "future release" of DST Phase 2. *See* A330.

Extrinsic evidence confirms that software with the allegedly competitive functions was being developed at the time of closing and, therefore, constitutes "inTEAM Business." *See, e.g.*, A2895. At trial, Mr. Ditch explained (in testimony that was unrebutted and unchallenged) the stages of the software development cycle, which include design, implementation, verification and maintenance. *See* A2517-19. At the time of closing, DST Phase 2 was in the "design" stage, its FDDs having been created, and was ready to progress to the "implementation" stage, when engineers would write code based on the FDDs. *See id.*

In short, HPS's claim that, at closing, "inTEAM had no software capable of planning menus, generating production records, analyzing nutrients, or performing USDA compliance" (OB at 41) is irrelevant, since software functions that were in development at that time – as documented in Exhibit C to the CMA – were expressly carved out from Mr. Goodman's non-competition covenant. The Court of Chancery's interpretation and application of the carve-out were correct and should be sustained.[17]

[17] Since the Court of Chancery held that HPS failed to meet its burden of proving that inTEAM or Mr. Goodman breached their non-competition covenants, it had no reason to address the multiple affirmative defenses asserted in response to HPS's claims arising from the covenants. *See* Mem. Op. at 78. Thus, if the trial court's

II. AFTER FINDING CORRECTLY THAT HPS BREACHED ITS NON-COMPETITION AND EXCLUSIVITY OBLIGATIONS, THE COURT OF CHANCERY PROPERLY ENTERED AN INJUNCTION AS RELIEF FOR THAT BREACH.

A. Question Presented.

Should this Court uphold the Court of Chancery's finding that HPS breached Section 9.1.1 of the CMA, and its entry of a permanent injunction effectively extending that Section's restrictive covenants for approximately 18 months? *See* A3449-53; A3460-63; B1512-17.

B. Scope Of Review.

Appellate review of the Court of Chancery's findings of fact after trial "is limited to a search for substantial evidence supporting them." *Bartley v. Davis*, 519 A.2d 662, 664 (Del. 1986). The trial court's fact findings are accepted if they "are the product of an orderly and logical deductive process" and will be overturned only "when ... clearly wrong and the doing of justice requires." *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972). To the extent the Court of Chancery's post-trial ruling implicates issues of law, this Court reviews it *de novo*. *Bartley*, 519 A.2d at 664.

The Court of Chancery's issuance of permanent injunctive relief is subject to an abuse of discretion standard and will be affirmed "where the record below

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holding is reversed, the action should be remanded for consideration of those affirmative defenses.

demonstrates the judgment reached was directed by conscience and reason, as opposed to capricious or arbitrary action." *N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 382 (Del. 2014).

C. Merits Of Argument.

1. *The Court Of Chancery Held Correctly That HPS's Collaboration With Colyar Competed Indirectly With The "inTEAM Business."*

In the CMA, HPS agreed that it "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." A317. Thus, the scope of HPS's restrictive covenant is defined by the "inTEAM Business," which as noted above expressly includes "those inTEAM products and services described in Exhibit C" to the CMA. A303. Exhibit C, in turn, identifies the "[f]unctional specifications for DST Phase 1 … and DST Phase 2 (future release) including *unique state value added functionality* (attached)." A330 (emphasis added).

Preliminarily, HPS's argument that the trial court erred by interpreting the "inTEAM Business" to include "administrative review" software (*see* OB at 42-43) misconstrues the court's analysis. In finding that HPS breached the CMA, the Court of Chancery considered correctly whether HPS engaged, directly or indirectly, in providing services or products with "unique state value added functionality," as a component of the "inTEAM Business." *See* Mem. Op. at 51-

52. The "unique state value added functionality," the court found, includes "products that assist state agencies in conducting their administrative review process." *Id.* at 52. To the extent the trial court used the phrase "administrative review software," it was a shorthand description of products offering "unique state value added functionality," a category of software that undeniably falls within the scope of HPS's restrictive covenant. *See id.*

The Court of Chancery appropriately considered trial testimony to inform its interpretation of "unique state value added functionality." As it did with the issue of "nutrient analysis" functions (*see* pp. 39-42 *supra*), HPS again argues incorrectly that the trial court found the relevant contractual term to be unambiguous. The court held that the inTEAM Carve-Out unambiguously included menu planning and production record functions (*see* Mem. Op. at 44-45), while determining that "unique state value added functionality" could only be construed by reference to extrinsic evidence (*see id.* at 45-46). The court then cited testimony from Mr. Goodman, Mr. Ditch and Janet Luc Griffin – which HPS "did not rebut" – to ascertain the administrative review functions that embody "unique state value added functionality." *Id.* at 45-46. This was proper and consistent with rules of contract construction. *See, e.g., Eagle Indus., Inc.*, 702 A.2d at 1232 ("[W]hen there is uncertainty in the meaning and application of

contract language, the reviewing court must consider the evidence offered in order to arrive at a proper interpretation of contractual terms.").

HPS's contention that the Court of Chancery "rel[ied] exclusively on the extrinsic evidence presented by inTEAM, while ignoring the contrary evidence without any explanation" (OB at 45), also is incorrect. In fact, HPS advanced at trial the same argument it makes here – "because this [administrative review] functionality did not exist until 2014, three years after the parties signed the [CMA], it could not be part of the 'state value added functionality' described in the agreement" (Mem. Op. at 46 (citing A3506-07)) – and the court rejected it on the grounds that the "inTEAM Business" expressly included a future release of DST Phase 2 with these functions (*id.* at 46-47). Therefore, contrary to HPS's argument, the Court of Chancery considered the evidence offered by HPS but concluded that it did not support a reasonable interpretation of the CMA. This was "the product of an orderly [and] logical deductive reasoning process," *Honeywell Int'l Inc.*, 872 A.2d at 950, and should be affirmed.

2. *The Court Of Chancery Entered A Permanent Injunction Properly Within The Exercise Of Its Sound Discretion.*

HPS does not and cannot dispute that entry of a permanent injunction against it was an appropriate remedy for its breach of the non-competition and exclusivity covenants. Delaware law "has consistently found a threat of irreparable injury in circumstances when a covenant not to compete is breached."

Hough Assocs., Inc. v. Hill, 2007 WL 148751, at *18 (Del. Ch. Jan. 17, 2007). Since "[m]easuring the effects of breaches like this involves a costly process of educated guesswork with no real pretense of accuracy," the Court of Chancery "has been candid to admit this reality and to use injunctive relief as the principal tool of enforcing covenants not to compete." *Id.* Moreover, the Court of Chancery's equitable powers authorize it to enter injunctions to extend restrictive covenants beyond their contractual expiration date. *See id.* at *19; *Kan-Di-Ki, LLC v. Suer*, 2015 WL 4503210, at *25, *28 (Del. Ch. July 22, 2015); *W.L. Gore & Assocs., Inc. v. Wu*, 2006 WL 2692584, at *10 (Del. Ch. Sept. 15, 2006), *aff'd*, 918 A.2d 1171 (Del. 2007).[18]

In crafting an appropriate form of injunctive relief in this action, the Court of Chancery exercised its discretion to provide inTEAM the full benefit for which it bargained in the CMA – *i.e.*, a full five years free of competition from HPS with

[18] As the Court of Chancery recognized in *Hough Associates*:

> Much of the benefit of a non-compete derives from its ability to create before-the-fact (ex ante) alterations to parties' behavior based on the threat of after-the-fact (ex post) injunctive relief in the event of breach. Unless parties ... realize that injunctive relief should be expected in the event of a clear breach, non-competition agreements will not produce their intended effect, breaches will proliferate, and complicated damage inquiries into the "what might have been" world will ensue.

2007 WL 148751, at *18.

the "inTEAM Business." The court determined that HPS breached the non-competition and exclusivity covenants in the CMA by "team[ing] with Colyar to provide the same functionality that the [APA] and the [CMA] reserve for inTEAM." Mem. Op. at 53. Contrary to HPS's argument, the scope of the covenant is not limited to "providing" competitive services or products, but is much broader by its plain language – "HPS 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." A317 (emphasis added). The trial court's finding that HPS "indirectly breached" the CMA by "assisting a direct competitor of inTEAM's administrative review software" (Mem. Op. at 53) is wholly consistent with the terms of the CMA and Delaware law. *See Kan-Di-Ki, LLC*, 2015 WL 4503210, at *21 (recognizing that a party who agrees not to engage in a competitive business "directly or indirectly" breaches that covenant when it assists a competitor of the other contracting party).

Given this finding, the trial court's injunction properly (if conservatively) measured HPS's breach of contract by reference to its collaborative efforts with Colyar. HPS argues that the initial communication from Colyar proposing that the two companies "collaborate on a more complete solution for the states" (A969), viewed in isolation, does not constitute a breach of its non-competition covenant. Notably, however, HPS did not decline Colyar's invitation in recognition of its

contractual obligations – instead, Colyar's overture was merely one step in a collaboration by which HPS assisted Colyar in the development and marketing of products that offer "unique state value added functionality." Days after receiving the communication from Colyar, HPS began a dialogue that led to plans for "provid[ing] state auditors a consistent view of school district menu data so that they can perform audits in a more efficient manner" and offering state agencies "access to school district menu data in a hosted environment so that state auditors can manipulate the data as needed in performing an audit and providing recommendations." B237-38. In the subsequent months, HPS assisted Colyar with projects in Tennessee and California and, ultimately, the two companies formulated and submitted the joint proposal to TDA. *See* pp. 31-35 *supra*. These facts amply support the trial court's finding that HPS began breaching the CMA no later than March 17, 2014.[19]

HPS's comparison of its relationship with Colyar to a lone e-mail it offered as evidence of Mr. Goodman's breach of his non-competition covenant (*see* OB at 47) is unavailing. In rejecting HPS's claim against Mr. Goodman, the Court of Chancery found that "one e-mail stating that inTEAM is 'looking at adding a POS

[19] inTEAM also submitted evidence that HPS continued to pursue competitive activities following the TDA proposal, some of which HPS withheld from disclosure in discovery. *See* pp. 36-37 *supra*. The Court of Chancery, however, did not consider these facts in determining the duration of its injunction against HPS.

feature' hardly rises to the level of proving by a preponderance of evidence that inTEAM has begun development of POS software, or is otherwise actively engaging in selling POS software while claiming to gather information and conduct research." Mem. Op. at 73. By contrast, the trial court *did* find that a preponderance of evidence proved the existence of a relationship between HPS and Colyar that unlawfully competed with the "inTEAM Business." *See id.* at 52-53. When it denied HPS's motion for reargument on this point, the court below explained that it "did not rely on one e-mail alone" to determine whether HPS breached the CMA; "rather there was systemic behavior that led the Court to its conclusion. The [Colyar] e-mail served as an element, among others, to inform the Court of when this breach began, not whether it occurred." OB Ex. B at 6. This falls far short of exhibiting "capricious or arbitrary action," *N. River Ins. Co.*, 105 A.3d at 382, that justifies reversal.

III. THE COURT OF CHANCERY CALCULATED CORRECTLY THE DAMAGES AWARDED TO HPS AGAINST MR. GOODMAN.

A. Question Presented.

Should this Court uphold the Court of Chancery's calculation of damages awarded to HPS as relief for Mr. Goodman's breach of his non-solicitation covenant? *See* A3611-12.

B. Scope Of Review.

This Court reviews a trial court's findings as to damages for an abuse of discretion. *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 866 (Del. 2015). *See also Weinberger v. UOP, Inc.*, 457 A.2d 701, 715 (Del. 1983) (noting "the broad discretion of the Chancellor to fashion such relief as the facts of a given case may dictate").

C. Merits Of Argument.

At trial, HPS sought disgorgement of all compensation it paid to Mr. Goodman under the consulting agreement pursuant to Section 3, which provides in relevant part: "In the event the Consultant breaches Section 7, 8, 9, 10 or 11 of this Agreement, [HPS] shall have no obligation to pay the Consultant any compensation set forth herein." A291.

At the Court of Chancery noted, this language operates *prospectively* to relieve HPS of its ongoing obligation to pay Mr. Goodman's fees following a breach of contract (*i.e.*, "*[i]n the event the Consultant breaches ... [HPS] shall*

have no obligation") and neither requires Mr. Goodman to repay past fees nor grants HPS a right to indemnification or recoupment. In negotiating the terms under which HPS acquired most of SL-Tech's assets, sophisticated parties agreed explicitly to terms through which they could recoup funds previously paid in the event of a breach. *See* A387-96 (APA § 8, providing detailed indemnification rights to HPS arising from breaches of SL-Tech's representations, warranties and covenants). The fact that the parties chose not to do so in Mr. Goodman's consulting agreement is material and demonstrates that they did not intend to allow HPS to claw back all consideration paid to Mr. Goodman upon a breach of the non-solicitation covenant, regardless of its significance or duration. *See NACCO Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 35 (Del. Ch. 2009) ("Delaware upholds the freedom of contract and enforces as a matter of fundamental public policy the voluntary agreements of sophisticated parties."). Thus, the Court of Chancery held correctly that the Consulting Agreement does not entitle HPS to recoup the entirety of fees paid under that contract.

IV. THE COURT OF CHANCERY HELD INCORRECTLY THAT INTEAM IS NOT ENTITLED TO FEE-SHIFTING PURSUANT TO THE CMA.

A. Question Presented.

Under the plain language of the CMA, is HPS obligated to reimburse inTEAM for the costs and attorneys' fees inTEAM has incurred in this action? *See* A2023; A3467-68; A3618-20.

B. Scope Of Review.

This Court reviews *de novo* the Court of Chancery's interpretation of a contractual fee-shifting provision. *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 675 (Del. 2013).

C. Merits Of Argument.

When considering a contractual fee-shifting provision, the Court will "interpret clear and unambiguous contract terms according to their plain meaning." *Id.* at 683. Here, Section 6.5 of the CMA provides, in relevant part:

> In the event of litigation or other proceeding relating to this Agreement, if a court of competent jurisdiction ... determines that either Party has breached this Agreement, then the breaching Party shall be liable and pay to the non-breaching Party the reasonable and verifiable legal fees and costs incurred in connection with such litigation or proceeding, including an appeal therefrom.

A315. This language is unambiguous and makes clear that, if a tribunal finds that one of the parties to the CMA breached the contract, the breaching party "*shall be*

liable and pay" to the other party the expenses and fees it incurred to enforce the contract through litigation. The fee-shifting provision is unconditional and is not subject, or limited by reference, to any other terms of the CMA. Pursuant to the CMA's plain language, therefore, the Court of Chancery's holding that HPS breached the non-competition covenant contained in Section 9.1.1 entitles inTEAM to an award from HPS reimbursing it for the costs and attorneys' fees expended in connection with this action.

The Court of Chancery, however, denied inTEAM's request for fee-shifting under Section 6.5 of the CMA. *See* Mem. Op. at 82. The court's ruling relied upon a separate term of the CMA which caps the parties' liability for *monetary damages* arising from breaches of contract:

> **11.2 Limitation on Monetary Damages.**
>
> Subject to Section 11.3, in no event shall the liability of a Party arising out of or relating to this Agreement, whether in contract, tort or otherwise, ... exceed the Fees previously paid by the other Party pursuant to this Agreement.

A319.[20] Section 11.3 provided carve-outs for "damages caused by the willful misconduct of the other party," "damages resulting from a Party's breach of its confidentiality obligations" and indemnifiable losses. *Id.* After finding that

[20] "Fees" is defined as commissions paid between inTEAM and HPS on sales of products pursuant to the CMA. *See* A310. Thus, Section 11.2 was intended to limit inTEAM's damages remedy to recouping commissions it had paid to HPS, subject to certain exceptions.

inTEAM had not paid any "Fees" to HPS, and that the exceptions of Section 11.3 did not apply, the trial court determined that Section 11.2 barred inTEAM's independent right to reimbursement of litigation expenses under Section 6.5. *See* Mem. Op. at 82.

The Court of Chancery's holding, however, incorrectly applied Section 11.2's limitation on "monetary damages" to Section 6.5, which by its plain language confers the separate and distinct remedy of fee-shifting to a party who prevails on a breach of contract claim. *See Cantor Fitzgerald, L.P. v. Cantor*, 2001 WL 536911, at *3-5 (Del. Ch. May 11, 2001) (discussing the distinction between an award of attorneys' fees and damages measured by litigation expenses); *First Health Settlement Class v. Chartis Speciality Ins. Co.*, 111 A.3d 993, 1006 (Del. 2015) ("[D]amages are defined as money claimed by, or ordered to be paid to, a person as compensation for loss or injury.") (quoting Black's Law Dictionary 195 (4th Pocket Ed. 2011)). The fact that the parties also agreed in Section 6.5 that injunctive relief would be an available remedy for breaches of the CMA further demonstrates that fee-shifting is not tied to payment of commissions but is mandated where, as here, the tribunal grants an injunction to remedy such a breach. *See* A315. Awarding inTEAM the expenses and attorneys' fees it expended to secure that relief will give full effect to the parties' agreement as plainly reflected in Section 6.5.

Alternatively, even if the cap on monetary damages could be read to limit the fee-shifting provision in Section 6.5, the exception provided by Section 11.3 permits an award of fees and expenses given HPS's "willful misconduct." *See* A319. The evidentiary record showed that the conduct held to have breached HPS's non-competition and exclusivity obligations under the CMA – namely, HPS's collaboration with Colyar (*see* Mem. Op. at 32-33, 50-53) – was undertaken intentionally and in willful disregard of those obligations. *See, e.g.*, pp. 31-37 *supra* (detailing months-long partnership between HPS and Colyar to jointly develop and sell products with functions that the Court of Chancery found to qualify as "inTEAM Business" under the CMA). inTEAM also offered evidence showing that HPS continued to engage in competitive behavior in breach of the CMA before and after trial in this action, while concealing its conduct from fact discovery. *See* B1246-1509. These activities subject HPS to unlimited liability to inTEAM under Section 11.3's carve-out. *See* Black's Law Dictionary (10th ed. 2014) (defining "willful misconduct" as "[m]isconduct committed voluntarily and intentionally"). While the trial court acknowledged that HPS pursued further competition with inTEAM "at its own risk" (Mem. Op. at 67), the court did not consider the full extent of HPS's misconduct in determining whether Section 11.3 applied. *See id.* at 82; Op. Br. Ex. B at 4.

CONCLUSION

For the reasons stated herein, inTEAM and Mr. Goodman respectfully request that the Court of Chancery's judgment (1) be reversed to the extent it denied inTEAM an award of fees and expenses incurred in this action (and that this action be remanded for further proceedings to determine the fees and expenses to be reimbursed), and (2) be affirmed in all other respects.

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