EFiled: Oct 09 2018 10:55AM EDT
Filing ID 62537568
Case Number 330,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

INTEAM ASSOCIATES, LLC and LAWRENCE GOODMAN, III, Plaintiff/Counterclaim Defendants Below-Appellants, v. HEARTLAND PAYMENT SYSTEMS, LLC, Defendant/Counterclaim Plaintiff Below-Appellee.	No. 330, 2018 APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. NO. 11523-VCMR **PUBLIC VERSION FILED OCTOBER 9, 2018**

APPELLANTS' REPLY BRIEF

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Dated: October 1, 2018

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INTRODUCTION

Following the last appeal, this Court explicitly affirmed the holdings and findings of the Court of Chancery that (i) Heartland[1] breached its non-competition and exclusivity covenants, and (ii) Heartland's breaches entitled inTEAM to entry of an injunction prohibiting Heartland from further competing with inTEAM. *See Heartland Payment Sys., LLC v. inTEAM Assocs., LLC*, 171 A.3d 544, 547, 569-72 (Del. 2017) (hereinafter, "Supr. Ct. Op."). Specifically, the Court wrote:

- "We reverse the Court of Chancery's finding that Goodman and inTEAM did not breach their non-compete obligations under various agreements, *but otherwise affirm the court's decision*." *Id.* at 547 (emphasis added). *See also id*. at 572 ("Otherwise, the judgment of the Court of Chancery is affirmed.").

- "[T]he Court of Chancery properly found that Heartland breached its contractual obligations by collaborating with an inTEAM competitor …." *Id.* at 547.

- "The Court of Chancery's conclusion [that Heartland breached its non-compete and exclusivity covenants] is supported by the record and thus was not in error." *Id.* at 570.

The Court reversed *only one* of the trial court's legal determinations – the holding that inTEAM and Mr. Goodman did not breach their non-competition obligations – and remanded the action with instructions to the Court of Chancery to

[1] Unless otherwise stated, capitalized terms shall have the meanings ascribed to them in Appellants' Opening Brief (cited as "OB").

determine "what relief, if any, to grant for inTEAM's and Goodman's violation of the non-compete." *Id.* at 572. This Court also made clear that Heartland's claim remained subject to the affirmative defenses inTEAM and Mr. Goodman raised but which the trial court did not reach. *See id.*

Therefore, the Court did *not* reverse the Court of Chancery's post-trial fact findings or holdings relating to Heartland, nor did it direct the trial court to reconsider its prior rejection of Heartland's affirmative defenses – in fact, Heartland never challenged those aspects of the Court of Chancery's judgment in its appeal. As a result, those findings should have stood and been acknowledged by the trial court on remand as a matter of law. Nonetheless, on remand the Court of Chancery interpreted this Court's opinion as somehow overturning the trial court's evidentiary finding that inTEAM openly and transparently developed and sold products that competed with Heartland. *See* Remand Order ¶ 17 ("I read the Supreme Court's opinion as a reversal of both the conclusion that Goodman did not breach the non-compete *and the finding that Heartland had knowledge of Goodman's and inTEAM's action*.") (emphasis added). Based on this misreading of this Court's holding, the trial court:

- Reversed the injunction against Heartland, which had been affirmed by this Court in connection with the affirmation of inTEAM's claims against Heartland (*id.* ¶ 12);

- Reversed the prior rejection of Heartland's affirmative defense that inTEAM was guilty of unclean hands (without any additional evidence) (*id.* ¶ 12);

- Thereby reversed its own prior finding that inTEAM and Mr. Goodman were "transparent" with Heartland, ruling instead that inTEAM and Mr. Goodman "took steps to conceal" violations of their non-competition covenants from Heartland (*id.* ¶ 11);

- Thereby found that inTEAM and Mr. Goodman were guilty of unclean hands, and insulating Heartland from liability for its contempt of the injunction, as detailed in inTEAM's renewed motion for a rule to show cause (*id.* ¶ 12);

- Held that Heartland's claim for damages against Mr. Goodman is not barred by the knowledge-based affirmative defenses of laches, waiver, acquiescence or equitable estoppel (*id.* ¶ 17); and

- Calculated an award of damages against Mr. Goodman, equal to 27 months of consulting fees dating back to July 2012, without considering that the "start date" of Mr. Goodman's breach of contract fell outside the three-year statute of limitations (*id.* ¶ 15).

These holdings all relied upon or were influenced by the Court of Chancery's perception that this Court reached a different factual determination concerning Heartland's knowledge of inTEAM's and Mr. Goodman's competitive activity. Not only is the Court of Chancery's admittedly implied conclusion directly contrary to this Court's prior opinion, its reasoning that this was the "only logical conclusion" is unfounded. This Court gave the trial court no reason to reconsider its earlier

findings; to the contrary, this Court *affirmed* the holdings that were based upon the trial court's determination that inTEAM openly competed with Heartland. The Court of Chancery's central premise is erroneous, and hence the holdings which directly flow from this conclusion are as well.

Heartland's Answering Brief (cited as "AB") completely ignores this reality instead relies upon four misleading (and incorrect) assumptions to rationalize the Remand Order. Ultimately, however, Heartland's misstatements cannot obscure the trial court's failure to properly apply and adhere to the clear order and mandate previously issued by this Court.

ARGUMENT

I. HEARTLAND'S SUPPORT FOR THE REMAND ORDER IS BASED ENTIRELY UPON FOUR MISLEADING AND INCORRECT ASSUMPTIONS.

A. Heartland Wrongly Assumes That This Court's Reversal Of The Court of Chancery's Holding That inTEAM And Mr. Goodman Were Not Liable For Breach Of Contract Necessarily Reversed The Entire Decision Of The Court of Chancery Following Trial, and the Factual Basis Therefor.

Based on the trial court's misreading of this Court's opinion, it vacated the injunction against Heartland even though entry of the injunction was ***affirmed*** on appeal. Throughout its Answering Brief, Heartland broadly characterizes the Court of Chancery's post-trial decision as "a now reversed holding" (e.g., AB at 5) in a transparent attempt to avoid the law of the case and collateral estoppel doctrines. Heartland claims that "[a] reversal necessarily reverses all grounds on which a trial court's opinion was previously based" (AB at 4). This assumption is obviously incorrect. It ignores that this Court affirmed the trial court's judgment in every respect but one – the holding that inTEAM and Mr. Goodman did not breach their non-competition covenants by developing and selling Menu Compliance Tool+. Heartland's failure to recognize that this Court upheld Heartland's liability to inTEAM, as well as the injunction granted to inTEAM as relief, is fatal to Heartland's arguments against the law of the case and collateral estoppel doctrines.

Heartland offers a circular argument that, because this Court reversed the trial court's holding concerning inTEAM's and Mr. Goodman's liability, the trial court was somehow compelled to re-evaluate its post-trial holdings as to Heartland's defenses to its own liability and the relief granted to inTEAM. AB at 19-20, n.11. Again, this plainly ignores that Heartland unsuccessfully appealed from the judgment entered against it for breach of contract. A2379-A2382 ("Question presented: Did the trial court commit error when it found that … Heartland breached Section 9.1 of the Co-Marketing Agreement through its collaboration with Colyar?"); A2839-A2844 (arguing that "Heartland did not improperly compete with inTEAM"). This Court expressly affirmed the portion of the judgment finding that Heartland breached its contract (and the consequent relief ordered), and thereby rejected Heartland's affirmative defenses. This Court's order did not grant the Court of Chancery authority to re-consider the finding of liability against Heartland or its prior decisions regarding Heartland's affirmative defenses.[2]

Thus, given this Court's decision to uphold the judgment against Heartland, one cannot infer – as the Court of Chancery and Heartland have done – that this Court allowed Heartland's affirmative defenses or their factual basis established at trial to be revisited. Put simply, issuing a mandate with directions to consider limited

[2] By contrast, neither this Court nor the Court of Chancery had previously considered inTEAM's or Mr. Goodman's affirmative defenses, thus necessitating the remand.

issues on remand did not offer the Court of Chancery free reign to revisit those aspects of its judgment that were not disturbed but rather were affirmed on appeal. By doing so, the Court of Chancery violated the law of the case and committed reversible error.

B. Heartland Wrongly Assumes That The Post-Trial Injunction "Never Should Have Issued."

Though affirmed on appeal, Heartland states throughout its brief that it voluntarily complied with an injunction "that never should have issued." AB at 2, 13, 16. Of course, had this Court agreed during the last appeal, it would have reversed the Court of Chancery's finding of liability against Heartland and vacated the injunction itself, rather than *affirm* these lower court holdings.

Heartland also argues illogically that the Court of Chancery was free to vacate the injunction because "[n]owhere did this Court hold that Heartland must comply with the previously-issued injunction following remand." AB at 19 (emphasis added). To be clear, Heartland specifically requested that this Court vacate the injunction on appeal (A2388), but the Court declined to do so and affirmed the judgment against Heartland. *See* Supr. Ct. Op., 171 A.3d at 570-72. Thus, Heartland's attempts to rely upon notions of fairness and equity to justify vacating an injunction "that never should have issued" are entirely misplaced in this context.

C. Heartland Wrongly Assumes That This Court Found That InTEAM And Mr. Goodman "Secretly" Developed Software With Competing Functions.

According to Heartland, this Court held that inTEAM and Mr. Goodman "breached their contractual obligations to [Heartland] by *secretly developing* competing menu planning and nutrient analysis software designed to directly compete with the business Heartland acquired from Goodman for $17 million." AB at 1 (emphasis added). This, however, is a blatant misstatement of the Court's opinion, which made no factual determination concerning whether inTEAM competed in secret – in fact, the words "secret" and "secretly" do not even appear in the Court's opinion. The Court did not reverse the trial court's conclusion based on the trial evidence that inTEAM and Mr. Goodman were transparent with Heartland. Nor did the Court find or even suggest that inTEAM and Mr. Goodman concealed the development and functionality of Menu Compliance Tool+ from Heartland.

Rather, the Court determined that inTEAM and Mr. Goodman breached their non-compete obligations by offering Menu Compliance Tool+ module because it had features that the Court found to fall within the parties' contractual definition of competition. This holding relied entirely upon the Court's interpretation of inTEAM's and Mr. Goodman's non-competition covenants and said nothing about "secret development." This Court reversed the trial court's legal application of the

relevant contractual language to the fact record concerning the software features at issue.

D. Heartland Wrongly Assumes That This Court Reversed The Trial Court's Original Fact Finding After Trial That InTEAM and Mr. Goodman Were "Transparent."

On remand, the Court of Chancery could not have ruled the way it did without misinterpreting this Court's opinion as a reversal of the previous factual findings in its post-trial opinion. Of course, the Court's opinion did nothing of the sort, but held that that the Court of Chancery erred as a matter of law with regard to the interpretation of the parties' contracts. *See* Supr. Ct. Op., 171 A.3d at 558-68. The Court's opinion otherwise *affirmed* the trial court's judgment in all respects, including the findings of fact.

Without any prior reversal of the trial court's fact findings, Heartland suggests that this Court "disagreed with" the conclusion that inTEAM and Mr. Goodman were "transparent" because the Court held "instead that inTEAM's 'development activities' actually included developing software designed to compete with Heartland." AB at 31. As set forth above, on remand the trial court relied on this same erroneous conclusion in making the rulings that it did in favor of Heartland and against inTEAM and Goodman. This argument, however, is unfounded. The notion that inTEAM developed software with competitive functions does not necessarily lead to the conclusion that the development was done *in secret*.

Rather, the trial record (which Heartland does not rebut) demonstrates overwhelmingly that the opposite was true. The precise functions that this Court held were competitive (*i.e.*, first-level menu planning and partial nutrient analysis in Menu Compliance Tool+) were well known to Heartland. As the Court of Chancery wrote in it Post-trial opinion:

> On June 8, 2012, the same year the Menu Compliance Tool+ was approved as a Menu Planning Tool, Erik Ramp, Vice President of Operations at inTEAM, e-mailed Roberts at Heartland to "make sure [he] was clear about what [inTEAM was] doing with menu compliance." Ramp informed Roberts that inTEAM was "building a menu compliance tool for use under Option #2 to certify menus submitted under the new regulations," which expressly included menu planning and analysis of certain nutrients, namely calories, saturated fat, and sodium. Ramp went on to assure Roberts that inTEAM was "not building full nutrient analysis software like what you have in the POS."

Post-Trial Op. at *23. The trial court also concluded that Heartland knew (or should have known) about the competitive functions because Menu Compliance Tool+ was publicly granted USDA certification that was *required for software with those very functions*. *See id.* at *17.

Based on its finding of "transparency," the Court of Chancery held that Heartland failed to prove an unclean hands defense that would have relieved Heartland of liability for its breach of contract. *Id*. at *23. In affirming the judgment against Heartland, the underlying fact findings were undisturbed by this Court on

Heartland's appeal, as was the trial court's rejection of Heartland's unclean hands defense. Those holdings are the law of the case and the Court of Chancery had no basis for re-evaluating them on remand.

The Court of Chancery reversed itself in this respect, however, based on the mistaken inference that this Court's opinion implied "a reversal of … the finding that Heartland had knowledge of Goodman's and inTEAM's actions." Remand Order ¶ 17; OB Ex. B at 5 ("But the Court considered this argument and determined that the Supreme Court must have rejected inTEAM's disclosure argument because '[o]therwise, waiver would have been the necessary outcome in the Supreme Court's opinion.'"). Heartland does not and cannot point to anything in the Court's opinion that reverses the trial court's post-trial fact findings on this issue and, accordingly, the Remand Order must be reversed.

II. THE POST-TRIAL INJUNCTION, WHICH WAS AFFIRMED ON APPEAL, SHOULD NOT HAVE BEEN VACATED ON REMAND.

A. Relying On Unclean Hands To Vacate The Injunction Violated This Court's Mandate And The Law Of The Case.

For the reasons set forth in appellants' opening brief and herein, the Court of Chancery's post-trial rejection of Heartland's unclean hands defense was undisturbed on appeal, is the law of the case, and offered no basis for the trial court to vacate its earlier injunction. OB at 14-27. Heartland offers several arguments in response, none of which have merit.

Heartland infers that this Court's mandate "left open the possibility that Heartland could seek vacation of the injunction as a 'remedy' on remand." AB at 15-16. Notwithstanding Heartland's arguments to the contrary, directing the trial court to consider a "remedy" or "relief" for Heartland's counterclaims against inTEAM and Mr. Goodman does not (expressly or impliedly) authorize the lower court to revisit rulings on inTEAM's claims that were *affirmed* on appeal. Nor did the Court's opinion state that Heartland *must* be granted relief on remand, as Heartland suggests – rather, the opinion provides: "to the extent that inTEAM and Goodman properly raised and briefed affirmative defenses at trial addressed to the alleged violation of the non-compete and the Court of Chancery did not reach them because it found no violation, they are free to reassert them in the course of the Court of Chancery's determination of what relief, ***if any***, to grant for inTEAM's and

Goodman's violation of the non-compete." Supr. Ct. Op. at [52] (emphasis added). Therefore, the Court acknowledged that Heartland may not be entitled to *any* relief whatsoever.

Heartland also argues that this Court's "reversal" constitutes "changed circumstances" that preclude application of the law of the case doctrine. Similarly, Heartland contends that law of the case does not apply because there is no "valid and final judgment." These arguments, however, turn the doctrine on its head by ignoring that the Court affirmed all aspects of the Court of Chancery's judgment but one. Under Heartland's theory, if one ruling in a lower court's judgment is reversed, then no other rulings in that judgment are entitled to binding effect – even if the other rulings are expressly affirmed. Unsurprisingly, Heartland does not offer any authority to support this theory, which flies in the face of logic and well-established case law. Those aspects of the Court of Chancery's judgment that Heartland appealed but were affirmed by this Court – including the finding of liability for Heartland's breach of contract and the entry of a post-trial injunction – are binding and were not open for re-examination on remand.

To the extent Heartland attempts to rely on principles of unclean hands to argue that applying law of the case in these circumstances would be "contrary to the principles of equity the court below enforces on a daily basis" (AB at 19), its argument likewise fails. Preliminarily, Heartland cites to no authority providing an

"equitable" exception to the law of the case or equitable estoppel doctrines. Moreover, Heartland's unclean hands defense finds no support in the record. On this appeal, Heartland does not point to a single action by inTEAM or Mr. Goodman that was so reprehensible that it justified vacating the injunction on equitable grounds. AB at 16-17. Rather, Heartland suggests that inTEAM and Mr. Goodman were guilty of unclean hands merely because they were found liable for breaching a contract. As this Court has recognized, however, breaching a contract is not *per se* evidence of inequitable conduct sufficient to support an unclean hands defense. *See SmithKline Beecham Pharms. Co. v. Merck & Co.*, 766 A.2d 442, 449 (Del. 2000) (recognizing that "not all breaches [of contract] necessarily amount to the imposition of the unclean hands doctrine").

The opinions cited by Heartland are distinguishable and illustrate, by comparison, how none of inTEAM's or Mr. Goodman's conduct rises to the level of unclean hands. In *Nakahara v. NS 1991 Am. Tr.*, 739 A.2d 770, 791 (Del. Ch. 1998), the Court of Chancery denied plaintiff relief on unclean hands grounds because plaintiff admittedly made questionable withdrawals for the advancement of litigation expenses in breach of a standstill agreement between the parties. *Id*. The *Nakahara* court found that plaintiff's "utter disregard of ongoing judicial proceedings" violated the general rule that a "litigant who engages in reprehensible conduct in relation to the matter in controversy … forfeits his right to have the court hear his claim

regardless of its merit." *Id*. Here, Heartland identifies no inequitable conduct by inTEAM or Mr. Goodman, let alone reprehensible conduct comparable to that seen in *Nakahara*.

Sherwood, Inc. v. Cottman Transmission Sys., Inc., 1982 WL 17882 (Del Ch. Apr. 15, 1982), also is distinguishable. In *Sherwood*, the plaintiff sought injunctive relief against defendant, its franchisor, compelling reinstatement of the plaintiff's franchise agreement. *Id*. at *1. The defendant countered that it terminated the franchise agreement for just cause because of plaintiff's failure to pay license and advertising fees, failure to forward weekly business reports for ten weeks, failure of owner to supervise operations, and failure to operate the business in conformity with the franchisor's standards. *Id*. The *Sherwood* court denied the plaintiff injunctive relief, finding that the plaintiff's unclean hands equitably barred him from seeking reinstatement of a franchise agreement that plaintiff breached repeatedly. *Id*. at *2. No such conduct is present here, where inTEAM and Mr. Goodman were found to have breached their non-competition covenants by offering software with functions that were publicly approved by the USDA and well known to Heartland.

B. There Is No Basis To Vacate The Injunction For A "Prior Material Breach."

On appeal, Heartland recycles the argument it advanced on remand – but which the Court of Chancery did not consider in the Remand Order – that inTEAM's

"prior material breach" of contract offers an alternative basis for vacating the post-trial injunction. Quite simply, however, this Court's holding that inTEAM breached its non-competition covenant does not grant Heartland complete absolution for its own, separate breaches *that the Court expressly affirmed*. Again, the Court's holding in this regard was not subject to re-visitation by the trial court or by Heartland.

Moreover, the trial record established that Heartland, after inTEAM began selling products with competitive functions as early as 2012, continued to accept the benefits of the parties' contracts and acted as if they were still valid. This, by itself, bars Heartland from now claiming that it had no obligation to comply with its own reciprocal non-competition covenant. *See In re Mobilactive Media, LLC*, 2013 WL 297950, at *14 (Del. Ch. Jan. 25, 2013) ("By continuing to accept the benefits of the contract, however, [defendant] essentially admitted to its validity, and is estopped from arguing voidability."). In *Mobilactive Media, LLC*, the Court of Chancery cited *Williston on Contracts* as a basis for finding no prior material breach:

> [T]he general rule that one party's uncured, material failure of performance will suspend or discharge the other party's duty to perform does not apply where the latter party, with knowledge of the facts, either performs or indicates a willingness to do so, despite the breach, or insists that the defaulting party continue to render future performance.

Id. Here, the same reasoning applies because Heartland knew about inTEAM's development and sale of the Menu Compliance Tool+ software, with the precise functions this Court found to be competitive, and did nothing. Tellingly, Heartland never asked for rescission of the contract and indeed, acted as if the contract was still in force by claiming a breach occurred in 2015, three years after the competitive behavior.

Heartland's arguments are circular. On the one hand, Heartland posits that it could not possibly be charged with knowledge of inTEAM's competitive functions because no one could have known whether inTEAM's products actually breached the non-compete until this Court decided the issue. *See* AB at 38. ("[U]ntil this Court held that inTEAM's development of the Menu Compliance Tool+ violated its contractual obligations, not even inTEAM employees, knew whether the Menu Compliance Tool+ was competitive with Heartland's software."). At the same time, however, Heartland accuses inTEAM of *intentionally concealing* from Heartland the *secret* development of software with functions that inTEAM *knew* were wrongfully competitive (contrary to the trial court's express post-trial findings and the overwhelming evidence presented in appellants' opening brief, *see* OB at 29-38). Obviously, Heartland cannot have it both ways – either it knew that inTEAM's products had competitive features, in which case it was relieved from performing under its own non-competition obligations, or it did not, in which case it breached

its own covenants *independently* and cannot rely on a "prior material breach" to excuse its misconduct.

As the record demonstrates, in actuality Heartland did not accuse inTEAM of wrongful competition for more than three years. Regardless, as appellants explained in their opening brief, Heartland's decision to sit on its rights bars its claims for relief under inTEAM's and Mr. Goodman's affirmative defenses.

C. Court Of Chancery Rule 60(b) Does Not Apply.

Alternatively, Heartland contends that, even though this Court affirmed the injunction on appeal, the trial court nonetheless was authorized to vacate the injunction under Court of Chancery Rule 60(b). AB at 23-24. This argument, however, essentially repackages Heartland's other appeals to "fairness," claiming that it is "no longer equitable" that the "injunction be enforced against Heartland in light of the finding of inTEAM and Goodman's development of competitive software." AB at 24. Like those other arguments, this one also fails. If this Court's mandate did not permit the trial court to reconsider the prior injunction, and that aspect of the post-trial judgment was the law of the case and could not be disturbed, Rule 60(b) did not override those principles or allow the Court of Chancery to disregard a valid, final order.

The opinion cited by Heartland, *Scureman v. Judge*, 1998 WL 409153 (Del. Ch. June 26, 1998), does not hold otherwise. Heartland cites *Scureman* for the

proposition that "Rule 60(b) can … be applied at any time after final judgment is entered" (AB at 24). However, the *Scureman* court recognized the primacy of final judgments and confirmed that Rule 60(b) is to be used only in "extraordinary circumstances" and that "[t]he underlying policy is that final judgments should remain final except where extreme circumstances are present that, unless rectified, will create manifest injustice." *Id*. at *3 (internal citations omitted).

There are no such extraordinary circumstances here, and Heartland identifies none. The fact that the Court of Chancery did not rely upon Rule 60(b) in the Remand Order – notwithstanding Heartland's request that it do so – demonstrates that it does not apply.[3]

[3] Heartland's assertions that inTEAM and Mr. Goodman waived their arguments against Rule 60(b) should be disregarded. AB at 25. During the remand hearing, inTEAM and Mr. Goodman made the same arguments they advance here that Rule 60(b) has no application to this case. A3646-A3647.

III. HEARTLAND'S ATTACKS ON MR. GOODMAN'S AFFIRMATIVE DEFENSES LACK MERIT AND ARE UNSUPPORTED BY THE TRIAL RECORD.

Mr. Goodman's affirmative defenses of laches, statute of limitations, acquiescence, waiver and estoppel all arise from the same premise – namely, Heartland's actual or constructive knowledge, as early as June 2012, of the software functions that this Court held to be competitive. Not once in its Answering Brief does Heartland even mention the fact that inTEAM's Menu Compliance Tool+ software was the first program approved by the USDA as a ***"Menu Planning Tool"*** for Six Cent Certification. This omission is telling, since the software functions for which the USDA mandated such approval – and which this Court found to breach inTEAM's and Mr. Goodman's non-competition covenants – were public and well-known to Heartland, inTEAM, and all other companies operating in this industry. *See* OB at 33-35; Supr. Ct. Op., 171 A.3d at 554. This, coupled with the fact that Heartland's own Nutrikids product applied for and secured the same USDA certification shortly thereafter (*see* OB at 34-35), belies Heartland's claim that it had no knowledge that inTEAM developed and sold a product with competitive functions.

As the Court of Chancery noted after trial, the record leaves no doubt that Heartland had full and complete knowledge of the competitive functions or, at a minimum, had constructive knowledge from the USDA's public regulatory approval

of those functions. *See* Post-Trial Op. at *17 ("Heartland should be familiar with this concept, as WebSMARTT unsuccessfully attempted to obtain USDA approval as a Menu Planning Tool, and another Heartland program, Mosaic Menu Planning, is an approved Menu Planning Tool and Nutrient Analysis Software."). In his opening brief, Mr. Goodman detailed the evidence that led the trial court to reach this conclusion. OB at 29-38. Heartland does nothing to rebut these facts, and it cannot credibly oppose Mr. Goodman's affirmative defenses by claiming that it was duped.

A. Heartland's Claims For Relief Are Time-Barred.

Heartland argues against the application of laches because the legal claims against Mr. Goodman are subject to the statute of limitations. AB at 33. Regardless of which doctrine applies, as an equitable matter Heartland should not be permitted to sit on its rights for more than three years while Mr. Goodman and inTEAM expended time and resources developing products and working alongside Heartland, their supposed partner. As inTEAM explained in the remand proceeding, even under a three-year statute of limitations (10 *Del. C.* § 8106), Heartland's contractual claims are time-barred. (A3520). On remand, Heartland attempted to defeat this argument by placing inTEAM's breach of contract in October 2012, when Menu Compliance Tool+ software was released for sale (A3490). At the same time however, when Heartland sought a lengthy injunction and recoupment of Mr. Goodman's consulting

fees, it claimed that the competition began no later than July 2012 (A3385) – more than three years before Heartland's counterclaims were filed on October 25, 2015.

Heartland misleads the Court by arguing that Mr. Goodman took inconsistent positions and/or waived arguments in the remand proceeding. AB at 34-35. By arguing that laches would apply if Heartland's counterclaims "were filed before the applicable statute of limitations expired," Mr. Goodman asked the Court of Chancery to equitably bar Heartland's claims for relief even if it assumed that Mr. Goodman's breaches began in October 2012. (A3414). Indeed, at the remand hearing the trial court recognized this issue and questioned whether Heartland's claims should be time-barred:

> [I]f Heartland knew about this in June of 2012, when the email from Mr. Ramp went to Mr. Roberts, just doing the math, you don't get there with an October 2015 counterclaim. If Heartland didn't find out until inTEAM got USDA approval to be six cent certified, then you're in August, and you don't get there. So is the argument, then, that because inTEAM didn't start selling the product until October, that's when I should consider? And if so, then what's the date? What's the actual date for when inTEAM started selling this? Because the counterclaims weren't filed until October.

A3569-A3570.

Ultimately, the Court of Chancery declined to apply laches based on its erroneous conclusion that this Court impliedly reversed the fact finding that inTEAM and Mr. Goodman were "transparent" with Heartland. *See* Remand Order

¶ 17 (finding that Mr. Goodman's statute of limitation and laches defenses failed because "Heartland lacked knowledge of Goodman's breaching behavior"). Had the trial court correctly adhered to its prior factual determination as the law of the case (*see* Post-Trial Op. at *23), Heartland would have been barred from recovering any relief for Mr. Goodman's breach of contract.

Heartland's citation to a "tolling" provision in Mr. Goodman's consulting agreement (AB at 36-37) is misplaced. That provision only operates to extend the duration of Mr. Goodman's non-competition covenant in the event of a breach, and does not extend the legal time period under which Heartland could pursue claims against Mr. Goodman. B8 (§ 11(f)); A3521. Additionally, since the Court of Chancery previously found that Heartland failed to properly raise the "tolling" provision at trial, *see inTEAM Associates, LLC v. Heartland Payment Sys., Inc.*, 2016 WL 6819734, at *2 (Del. Ch. Nov. 18, 2016), Heartland could not rely upon that argument on remand or on appeal.

B. Acquiescence, Waiver And Estoppel Bar Heartland's Claims For Relief.

In response to Mr. Goodman's defenses, Heartland claims only that it lacked the requisite knowledge of inTEAM's and Mr. Goodman's competitive activities. AB at 37-38. Again, this was clearly not the case as the Court of Chancery held after trial based on the overwhelming evidence. *See* Post-Trial Op. at *23. Had the Court

of Chancery properly applied this Court's mandate and adhered to its post-trial fact findings (instead of presuming that this Court reversed these findings in its prior opinion, which this Court certainly did not do), Mr. Goodman's "transparency" with Heartland would have barred its recovery under any of these equitable principles.

C. Heartland's Unclean Hands Bar Its Claims For Relief.

Finally, the Court of Chancery awarded damages against Mr. Goodman, and in Heartland's favor, notwithstanding the court's express finding that Heartland was guilty of unclean hands. It did so on the grounds that the unclean hands doctrine could apply to bar equitable relief, but not damages. As Mr. Goodman explained, however, there is precedent for the Court of Chancery to deny an award of damages based on a litigant's inequitable conduct. *Phillips v. Hove*, 2011 WL 4404034, at *25 (Del. Ch. Sept. 22, 2011).[4] Heartland attempts unsuccessfully to distinguish *Phillips*, which denied fee-shifting to all parties but also rejected on the basis of unclean hands the plaintiff's plea for damages in an amount "equal to the attorneys' fees and costs" incurred in defending an improper bankruptcy filing. *Id.* More importantly, however, *Phillips* cited this Court's holding in *Bodley v. Jones*, 59 A.2d 463 (Del. 1947), which recognized that "[l]itigants seeking the aid of the Court must not only do so with clean hands, but must keep them clean after entry and until the

[4] Heartland's claim that Mr. Goodman did not advance this argument on remand is incorrect. *See* A3812, n.1.

final determination of the cause." 59 A.2d at 469. This broad principle is not limited to equitable relief, but applies to any remedy sought by a party who comes to court with unclean hands.

CONCLUSION

inTEAM and Mr. Goodman respectfully request that this Court: (1) reverse the Remand Order's vacation of the injunction against Heartland, reinstate the injunction, and remand with instructions to consider entry of a new injunction against Heartland and consider any evidence of Heartland's prior contempt that will be relevant to determining the duration of such injunction; and (2) reverse the Remand Order's holding that Mr. Goodman's affirmative defenses do not bar Heartland's recovery and vacate the award of monetary damages against Mr. Goodman.

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Dated: October 1, 2018

CERTIFICATE OF SERVICE

I, Andrea S. Brooks, hereby certify that on this 9th day of October, 2018, I caused true copies of the **PUBLIC VERSION OF APPELLANTS' REPLY BRIEF** to be served upon the following via File & Serve*Xpress*:

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