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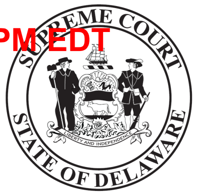

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CANTOR FITZGERALD, L.P., a Delaware limited partnership,	)	
	)	
Defendant Below, Appellant	)	No. 162,2023
	)	Court Below:
v.	)	Court of Chancery
	)	
BRAD AINSLIE, JASON BOYER, CHRISTOPHE CORNAIRE, JOHN KIRLEY, ANGELINA KWAN and REMY SERVANT,	)	Consol. C.A. No. 9436-VCZ
	)	
Plaintiffs Below, Appellees.	)	

REPLY BRIEF OF DEFENDANT-BELOW/APPELLANT CANTOR FITZGERALD, L.P.

YOUNG CONAWAY STARGATT & TAYLOR, LLP

C. Barr Flinn (No. 4092)
Paul J. Loughman (No. 5508)
Alberto E. Chávez (No. 6395)
Skyler A. C. Speed (No. 6701)
Rodney Square
1000 North King Street
Wilmington, DE 19801
(302) 571-6600

Attorneys for Defendant-Below/Appellant Cantor Fitzgerald, L.P.

OF COUNSEL:

David A. Paul
Co-Head of Litigation
Virginia J. Cardenas
Assistant General Counsel
Sid Nadkarni
Assistant General Counsel
CANTOR FITZGERALD
110 East 59th Street, 7th Floor
(212) 610-2298

Benjamin R. Nagin
Eric G. Hoffman
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300

Tacy F. Flint
Frank J. Favia, Jr.
SIDLEY AUSTIN LLP
1 South Dearborn
Chicago, IL 60603
(312) 853-7000

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INTRODUCTION

Unable to squarely meet Defendant CFLP's arguments, Plaintiffs resort to a series of limited and misguided arguments that only underscore that reversal is warranted.

First, Plaintiffs cannot overcome Delaware law and policy that compels enforcement of contracts among limited partners as codified under DRULPA. Plaintiffs erroneously urge this Court to ignore DRULPA in favor of policy concerns related to the enforcement of injunctive relief in employment contracts. Plaintiffs also argue that public policy undergirding antitrust law justifies the Court of Chancery's departure from the plain language of the agreement. Yet, the Competition Conditions in the Partnership Agreement are not an agreement to restrain competition because they do not prevent Plaintiffs from making a living in any field, on behalf of any company.[1] By their terms, they merely discontinue cash payments to departed partners who are competing against the partnership.

Second, Plaintiffs argue that this Court should overlook the Court of Chancery's novel misapplication of the reasonableness test applicable to injunctive relief for employee noncompete obligations. But, as noted above, the Competition Conditions do not prevent competition. Instead, competition is merely the trigger for the termination of future payments to the former partner. Thus, this case is not

[1] *See* Washington Legal Foundation Amicus Brief at 8-11.

about Plaintiffs' freedom to compete against CFLP. Rather, this case is about whether Plaintiffs are entitled to payments from a partnership that they are competing against. The reasonableness test reserved for injunctive relief is inapplicable to the contractual provisions at issue, which are payment provisions with monetary consequences expressly authorized by DRULPA.

Third, Plaintiffs argue that the Court of Chancery properly exercised its discretion to not blue-pencil the Competition Conditions. Plaintiffs do not address the Court of Chancery's clear error of failing to identify any equitable reasons for not enforcing the terms of the Partnership Agreement to the maximum extent permissible, as required by its plain text. Had the Court of Chancery done so, it would have narrowed the conditions and awarded summary judgment to CFLP because the undisputed record shows that Plaintiffs competed immediately upon departing the partnership. Plaintiffs cannot save the Court of Chancery's mistaken and incomplete analysis regarding the balance of the equities. Having now triggered the operation of the same conditions they agreed to and reaped benefits from while they were partners, Plaintiffs have no right to avoid the consequences for the sake of further personal profit.

Thus, the central question before the Court is whether, when limited partners agree to conditions on the receipt of money, Delaware courts will enforce those contractual conditions as DRULPA requires. For the reasons set forth in

Defendant's Opening Brief ("OB") and below, the Court of Chancery's departure from long-standing principles of freedom of contract and DRULPA should be reversed, and judgment entered in Defendants' favor.

<u>**ARGUMENT**</u>

I. THE COMPETITION CONDITIONS ARE NOT "RESTRAINTS ON TRADE" THAT OVERRIDE DELAWARE'S PUBLIC POLICY OF ENFORCING CONTRACTS BETWEEN LIMITED PARTNERS

Plaintiffs argue that "CFLP cites no case law . . . for the proposition that DRULPA exempts limited partnerships from scrutiny under the reasonableness standard." But it is hardly surprising that CFLP does not cite a case discussing a test that has never before been applied to these types of agreements in Delaware. Plaintiffs have it exactly backwards. It is Plaintiffs who must cite authority for their proffered exception to DRULPA. DRULPA directs that contracts among limited partners should be enforced to the greatest degree possible. *See* 6 *Del. C.* § 17-1101. As the Court of Chancery acknowledged, DRULPA permits terms in partnership agreements "that would be unavailable in a standard commercial contract, most notably penalties and forfeitures." (Op. at 35 (discussing 6 *Del. C.* §§ 17-306, 17-502).) This policy distinguishes DRULPA from the versions of the Uniform Limited Partnership Act ("ULPA") adopted by other states. *Compare* 6 *Del. C.* § 17-1101 (giving "maximum effect to the principle of freedom of contract") *with* UNIFORM LIMITED PARTNERSHIP ACT (2001) at 40 (August 19, 2015) (rejecting "ultra-contractarian" notions with respect to fiduciary duties, and seeking to "balance the virtues of 'freedom of contract' against the dangers that inescapably exist when some

have power over the interests of others.").[2] This essential Delaware public policy—that sophisticated parties enjoy the freedom to contract as they see fit—is at its strongest in the context of a limited partnership agreement pursuant to DRULPA. Delaware courts have therefore consistently ruled in favor of enforcing limited partnership agreements to the maximum extent of their written terms. *See Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 360 (Del. 2013); *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 170 (Del. 2002); *Ryan v. Buckeye Partners, L.P.*, 2022 WL 389827, at *9 (Del. Ch. Feb. 9, 2022); *In re KSea Transp. Partners L.P. Unitholders Litig.*, 2011 WL 2410395, at *8 (Del. Ch. June 10, 2011).

Plaintiffs fail to identify any exception from this statute. Plaintiffs claim two cases—*KPMG Peat Marwick LLP v. Fernandez*, 709 A.2d 1160 (Del. Ch. 1998), and *Deloitte & Touche USA LLP v. Lamela*, 2005 WL 2810719 (Del. Ch. Oct. 21, 2005)—endorse non-enforcement of the Competition Conditions. But both cases involved attempts to obtain a preliminary injunction to enforce a noncompete, which has never been at issue in this case. Additionally, *Lamela* applied the law of Florida, not Delaware, and thus says nothing about the impact of DRULPA. Neither case—

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[2] Even states that adopted and still follow the 1976 revision of the ULPA—the same version that Delaware adopted in 1983—do not contain in their partnership statutes the relevant policy language that makes DRULPA uniquely pro-contractarian, nor do they provide for remedies for breach by a limited partner. *See, e.g.*, Md. Code, Corp. & Ass'ns § 9A-1301; N.J. Stat. Ann. § 42:2A-2 (West); Tex. Bus. Orgs. Code Ann. § 153.002 (West); Va. Code Ann. § 50-73.72 (West).

nor any Delaware case identified by Plaintiffs or the Court of Chancery—suggests that Delaware has a policy against competition conditions to future payments, much less a policy strong enough to trump the principles embodied by DRULPA.

Indeed, the crux of any argument for the unenforceability of the Competition Conditions is the assumption that they are analogous to noncompete provisions enforced through injunction. *See, e.g.*, Small Business Majority Br. at 6 (describing "[t]he difference between a promise . . . not to compete . . . and a right of payment . . . conditional on not competing . . . [as] a matter of degree, not kind."). The Court of Chancery, for example, reasoned that any agreement imposing "financial consequences . . . for competitive circumstances" was a "restraint of trade" that ought to be subject to a reasonableness analysis. (Op. at 64-65.)

But competition conditions attached to payments to former partners are fundamentally different from affirmative noncompete provisions in a key way: they do not prevent the individual from pursuing competing work. For this reason, Delaware courts have not applied noncompete reasonableness analysis to payments that impose "financial consequences" (*cf.* Op. at 64) on one who leaves (whether voluntarily or involuntarily) and competes—such as employee forgivable loans, bonus awards with deferred vesting schedules, or grants with clawback-for-competition conditions. Such scrutiny is reserved for obligations to affirmatively refrain from competition. *See, e.g.*, *W.R. Berkley Corp. v. Hall*, 2005 WL 406348

(Del. Super. Feb. 16, 2005) (enforcing clawback-for-competition provisions in stock option award because "[d]efendant's freedom of employment . . . was not abridged" and "[a]ll that is being sought here is the repayment of the financial benefit provided . . . according to the terms of the option agreement").

Unable to locate relevant precedent, Plaintiffs contend that DRULPA does not apply to former partners. (*See* Plaintiffs' Answering Br. ("AB") at 20.) But this dispute is not about Plaintiffs' obligations to CFLP as former partners, but about whether CFLP must pay Plaintiffs for interests Plaintiffs acquired, and under an agreement Plaintiffs signed, while they were partners. Furthermore, Plaintiffs do not cite any precedent supporting this counter-intuitive interpretation of DRULPA, which was nowhere endorsed by the Court of Chancery. Certainly, DRULPA can and does apply to former partners. *See, e.g.*, 6 *Del. C.* § 17-604 (providing for distributions to former partners). The principle that limited partners may agree to and be bound by even punitive provisions of a limited partnership agreement would be toothless if it no longer applied following a limited partner's departure.

In an attempt to find a codified public policy that would contradict the policy memorialized in DRULPA, Plaintiffs cite Delaware antitrust law for the first time in the entirety of this 10-year litigation. Notably, the 1983 case on which Plaintiffs exclusively rely, *Hammermill Paper Co. v. Palese*, 1983 WL 19786 (Del. Ch. June 14, 1983), disproves Plaintiffs' argument. In *Hammermill*, the court addressed

Delaware's antitrust statute in the process of enforcing an affirmative restraint on competition against an employee. The court recognized that under Delaware law—as under the Sherman Act—there is no "outstanding policy in Delaware that all such [noncompete] agreements . . . are per se invalid." 1983 WL 19786, at *4. The court in *Hammermill* never came close to suggesting that Delaware's antitrust law would supersede DRULPA and limit the enforceability of payment conditions among limited partners.

Indeed, there is simply no authority to support Plaintiffs' argument that a condition to payment governed by DRULPA can be overridden by nebulous public policy concerns that do not establish any antitrust violation. Conversely, courts consistently reject attempts to find antitrust violations in agreements made between individuals (*e.g.*, officers, partners, etc.) in the same commercial enterprise. *See, e.g.*, *Siegel Transfer, Inc. v. Carrier Exp., Inc.*, 54 F.3d 1125, 1132-34 (3d Cir. 1995); *Koenig v. Automatic Data Processing*, 2003 U.S. Dist. LEXIS 26812, at *12-13 (D.N.J. 2003). Plaintiffs have made no effort to address this deficiency in their argument, nor have they even begun to show the required elements of antitrust injury, *Host Int'l, Inc. v. MarketPlace, PHL, LLC*, 32 F.4th 242, 249-50 (3d Cir. 2022), and market power in a properly defined relevant market, *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir. 1997). Plaintiffs could never satisfy these requirements on this record, which, again, has never before involved

any discussion of antitrust law or evidence of harm to competition. This Court should reject this eleventh-hour argument for what it is: a desperate gesture towards an irrelevant statute in the hopes of dispelling DRULPA's clear statutory policy in favor of enforcing agreements between limited partners.

II. DELAWARE AUTHORITY ESTABLISHES THAT THE COMPETITION CONDITIONS ARE NOT SUBJECT TO A NONCOMPETE REASONABLENESS ANALYSIS

1. Plaintiffs Mischaracterize the Court of Chancery's Reasonableness Analysis

The crux of Plaintiffs' defense of the Court of Chancery's conclusion is that "the Court of Chancery correctly found that both the No Breach Condition and the Competitive Activity Condition . . . are premised on unenforceable promises." (AB at 31.) This argument, however, misreads the Court of Chancery's opinion. The opinion held that only the ***No Breach Condition*** was unenforceable because it was "predicated on an unenforceable promise." (Op. at 42.) The Court of Chancery did not strike the separate Contingent Payment Provisions (referred to by both the Court of Chancery and Plaintiffs as the "Competitive Activity Condition") on these grounds. The Court of Chancery even acknowledged that the Contingent Payment Provisions—which are an ***independent*** bar to the payments in question—provide that a former partner is not entitled to future payments if she engages in competitive activity within four years of departure, "even if doing so is not a breach of any [r]estrictive [c]ovenant." (Op. at 3.)

Plaintiffs' inaccurate description of the Court of Chancery's reasoning obfuscates the legal error of subjecting the Contingent Payment Provisions to a reasonableness analysis. There can be no dispute that the conditions reflect Plaintiffs' written and willing agreement, upon entering the partnership, that certain

post-departure payments they might receive came with strings attached. The Court of Chancery conceded that enforcement of the Contingent Payment Provisions did "not depend on . . . unenforceable [r]estrictive [c]ovenants," left limited partners "free to compete," and resulted in only "financial consequences" against former partners who compete. (Op. at 5, 64, 65.) Yet, the Court of Chancery, for the first time in Delaware jurisprudence, subjected these conditions to a reasonableness test used to determine whether noncompete covenants may be enforced through ***injunction***—an entirely disanalogous scenario. (*See* OB at 18.)

The Court of Chancery cited no Delaware precedent in which a test for the reasonableness of noncompetes in contracts for the sale of a business was applied to conditions on future payments. (OB at 18.) Plaintiffs similarly identify no case in which this test was applied to competition conditions attached to the redemption of partnership interests. DRULPA expressly permits the partnership to provide for "specified penalties or specified consequences" for a "limited partner who fails to . . . comply with the terms and conditions of, the partnership agreement" which may include, *inter alia*, "a forced sale" or "forfeiture . . . of his or her partnership interest . . . ." 6 *Del. C.* §§ 17-306, 17-502(c).

2. The Cases on Which the Court of Chancery Relied Are Inapposite

Plaintiffs fail to identify any case other than *Pollard v. Autotote, Ltd.*, 852 F.2d 67 (3d Cir. 1988), *amended*, 872 F.2d 1131 (3d Cir. 1989), which the Court of

Chancery cited, in which a court suggested that competition conditions are subject to a noncompete reasonableness analysis. (AB at 24.) And the opinion in *Pollard*—a 35-year-old case from a non-Delaware court—is both limited and inapplicable. First, *Pollard* involves a deferred compensation plan between an employer and its employee who was involuntarily terminated. *See Pollard*, 852 F.2d at 69. The employer was not a Delaware limited partnership, so the law and policy of DRULPA were not considered. Additionally, the *Pollard* court did not apply the reasonableness analysis it predicted could be required. *Id.* at 73 (remanding "for further factual development and a determination" of whether the "forfeiture provision is reasonable"). The Court of Chancery's dubious reliance on *Pollard* is insufficient to avoid reversal.

Similarly, *Halpen* and *Wark*, on which the Court of Chancery and Plaintiffs rely, are cases relating to liquidated damage provisions. *See Lyons Ins. Agency, Inc. v. Wark*, 2020 WL 429114, at *1 (Del. Ch. Jan. 28, 2020); *Faw, Casson & Co. v. Halpen*, 2001 WL 985104, at *2 (Del. Super. Aug. 7, 2001). Neither case relates to a business conditioning future payments to a former partner. Furthermore, both cases involve enforcement of contract provisions against employees. *See Wark*, 2020 WL 429114 at *2; *Halpen*, 2001 WL 985104, at *1. Therefore, neither of these two cases is on point. Further, the Court of Chancery determined that the Competition Conditions did not constitute invalid penalties under Delaware law.

(Op. at 39-40.) Thus, its reliance on cases analyzing whether liquidated damages provisions were unenforceable penalties has no persuasive impact here. *See Wark*, 2020 WL 429114 at *7-8; *Halpen*, 2001 WL 985104, at *2.

The only two cases in which Delaware courts have addressed whether a business may condition the receipt of future payments on refraining from competition are *Dunai* and *Hall*. *See generally W. R. Berkley Corp. v. Dunai*, 2021 WL 1751347 (D. Del. May 4, 2021); *W.R. Berkley Corp. v. Hall*, 2005 WL 406348 (Del. Super. Feb. 16, 2005). Neither court applied the noncompete reasonableness analysis reserved for injunctive relief. The *Hall* court rejected the individual defendant's attempt to analogize the clawback-for-competition conditions on his stock option grant to "a non-compete liquidated damage provision that is an unenforceable penalty." 2005 WL 406348 at *4. The court responded that the provision was "simply a contractual obligation that requires a senior management employee to remain with the company for six months if he wants to retain the full benefit of the stock option." *Id.* at *5. Plaintiffs' contention that *Halpen* and *Wark* are applicable to competition conditions in part because *Wark* "postdates . . . *Hall* by fifteen years" (AB at 28) misses the point. *Dunai* and *Hall* make clear that the holdings of cases such as *Halpen* and *Wark* are limited to the evaluation of liquidated damage provisions, which the Court of Chancery held were not at issue. That *Wark*

postdates *Hall* is no more relevant than the fact that *Dunai* is the most recent of the four.

Plaintiffs argue that "*Dunai* and *Hall* support the Court of Chancery's conclusion." (AB at 28.) Not so. In both cases, the courts enforced the provisions as written. Neither opinion scrutinizes their geographic or temporal scope for reasonableness. Rather, they simply concluded that it was reasonable for a business to impose competition conditions on future payments to an individual. For example, in *Dunai*, the court found that "the contract was reasonable" because the plaintiff company awarded the defendant "tremendous benefits" that it was entitled "to make sure . . . w[ere] not for naught" and to avoid corporate waste. 2021 WL 1751347 at *2. The court also noted that the defendant "would never be worse off than she would have been before the agreements." *Id.* Likewise, in *Hall*, the court stated "[d]efendant's freedom of employment and his ability to seek . . . a new job was not abridged by the Plaintiff . . . . All that is being sought here is the repayment of the financial benefit provided by the Plaintiff to the Defendant when he decided to exercise the option to leave according to the terms of the option agreement." 2005 WL 406348 at *5.

Those circumstances are present here. CFLP attached conditions to post-departure payments to ensure that the Partnership would not be required to make payments to individuals competing against the businesses whose profits would be

used to make those very payments. Plaintiffs' failure to meet these conditions does not cost them any freedom or require them to come out of pocket, it does not enjoin them from working anywhere they please, and it does not amount to any loss of "earned compensation"—an erroneous factual finding (Op. at 3, 64) that Plaintiffs do not even attempt to defend before this Court. Plaintiffs chose to forego a higher price for the redemption of their partnership interests. The only distinction from *Dunai* and *Hall* is that the Competition Conditions here provide for the discontinuance of future payments to former limited partners rather than the more coercive remedy of clawing back money paid to an employee. *A fortiori*, the Competition Conditions must be enforced and are not subject to the reasonableness analysis applicable to injunctive provisions.

III. THE COURT ERRED IN DECLINING TO SEVER OR BLUE-PENCIL THE PARTNERSHIP AGREEMENT

1. CFLP's Arguments Were Preserved Before the Court of Chancery

Plaintiffs argue that Defendant did not present arguments to blue-pencil or sever the Partnership Agreement to the Court of Chancery. (AB at 40.) This argument is refuted by Plaintiffs' own filings. Plaintiffs' summary judgment reply brief stated that "CFLP's argument that the Court [of Chancery' should enforce the [Competition Conditions] as applied to Plaintiffs appears to *more properly be characterized as a request that the Court reform or 'blue-pencil' those clauses* . . . ." (A2008 (Pls.' Reply) (citing A0987-A0989 (Def.'s Opening Br. in Support of Summary Judgment)) (emphasis added).) Plaintiffs then addressed that argument in their brief. (A2008 (Pls.' Reply.) Indeed, the Court of Chancery ruled on that argument. (Op. at 45 (noting that the Court of Chancery was not "inclined to blue-pencil those terms").) This argument was preserved.

Even if this argument has not been preserved, this Court would still be allowed to consider it on appeal. There was no genuine dispute of fact as to Plaintiffs' immediate and direct competition, and the Court of Chancery rejected Plaintiffs' defense that their conduct did not constitute "material" violations of the Competition Conditions. (Op. at 40-41.) Consequently, had the Court of Chancery blue-penciled the Competition Conditions or severed the unenforceable conditions, CFLP would have been granted summary judgment. Because the Court of Chancery's legal error

was thus "outcome determinative" with "significant implications for future cases," this Court can consider the issue. *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Est. Fund*, 68 A.3d 665, 679 (Del. 2013) (applying Rule 8, finding issue "outcome determinative" and properly considered on its merits even when "not fairly present[ed]" to Vice Chancellor).

2. <u>The Court of Chancery Erred When It Used the Restrictive Covenants of Section 3.05 as a Basis for Striking Down Separate and Independent Competition Conditions</u>

Plaintiffs argue that the Court of Chancery properly applied the Partnership Agreement's severability provision by finding only the restrictive covenants under Section 3.05 and the Contingent Payment Provisions of Article XI unenforceable. (AB at 40.) Plaintiffs argue that "given the interlocking nature of the Partnership Agreement and the conditions at issue", the Court of Chancery could not "neatly" sever certain provisions and therefore "correctly gave maximum legal effect to the severability clause." (AB at 40-41.)

Plaintiffs misconstrue Defendant's argument and conflate the two sets of conditions in the Partnership Agreement. The Court of Chancery first found the No Breach Condition to be unenforceable because it was overbroad under the injunctive relief test. (Op. at 42, 52.) That holding was erroneous. *See supra* Parts I-II. But the Court of Chancery also struck down the Contingent Payment Provisions (Op. at 3)—an *independent* basis for discontinuation of future payments—because the four-

year period for those conditions overlapped with the purportedly unenforceable restrictive covenants of Section 3.05. (Op. at 66-67.) Despite acknowledging that the Contingent Payment Provisions left Plaintiffs "free to compete" (Op. at 65), the Court of Chancery reasoned that, due to Section 3.05's restrictive covenants, Plaintiffs were "free to compete . . . only after a period of being forbidden from doing so," by which point "any legitimate interest" for the Contingent Payment Provisions would be "stale." (Op. at 67.) This holding would constitute legal error even if all of the Court of Chancery's prior erroneous conclusions as to the reasonableness of the No Breach Condition are conceded. That is because the Court did not even entertain the possibility of severing the unenforceable covenants in Section 3.05 and permitting the Contingent Payment Provisions to be enforced independently, or at least for a limited period. The court's failure to sever the provision or narrow it constituted legal error because the court failed to apply the Partnership Agreement's severability clause. (*See* A0068 § 20.11.)

Instead, the Court effectively ruled that the Contingent Payment Provisions were unenforceable due to the separate restrictive covenants of Section 3.05. This rationale was particularly egregious because not only did CFLP never seek to enforce any noncompete obligations in this matter, but also because the Court of Chancery explicitly acknowledged that the Contingent Payment Provisions "do[] not depend on the . . . [r]estrictive [c]ovenants." (Op. at 5.) The Court of Chancery's

invalidation of these conditions based on their taking effect at the same time as a separate provision that the conditions "do[] not depend on" is a textbook example of failing to sever, or narrow, a purportedly unenforceable provision from the remainder of an agreement, in violation of the Partnership Agreement's severability clause.

3. The Court of Chancery Erred By Failing to Conduct Any Analysis of the Equities to Support Its Decision Not to Blue-Pencil the Partnership Agreement

Plaintiffs cite to *FP UC Hldgs., LLC v. Hamilton*, 2020 WL 1492783, at *8 (Del. Ch. Mar. 27, 2020) and *Delaware Elevator, Inc. v. Williams*, 2011 WL 1005181 (Del. Ch. Mar. 16, 2011) in support of the Court of Chancery's decision to not "exercise[] its discretion in equity" to "allow an employer to back away from an overly broad covenant by proposing to enforce it to a lesser extent than written." (AB at 42.) These cases further confirm Defendant's position that discretion to blue-pencil should be exercised according to the equities of the matter. Instead, the Court of Chancery conducted no analysis of the facts or equities before determining that blue-penciling was not warranted. This constituted error. *See FP UC Hldgs.*, 2020 WL 1492783, at *8 (reasoning that whether to "blue pencil the [] non-compete is a fact-intensive question that I am not able to resolve on this record[,]" and noting for example that the value received by defendant for his "stepped-up non-compete" was unclear). The failure to blue-pencil the Partnership Agreement is even more dubious

due to the Court of Chancery's statement that the Contingent Payment Provisions of Article XI, which leave former partners "free to compete," may have served a "legitimate interest" for a certain period of time after their departure. (Op. at 65, 67.) The Court of Chancery's holding constituted legal error for the further reason that blue-penciling is ***required*** by Section 20.11 of the Partnership Agreement, which states that any unenforceable provision must be "modified to the minimum extent necessary to cause it to be enforceable." (A0068 § 20.11.) Plaintiffs do not even address this argument.

Finally, Plaintiffs point to the "obvious inequities" that would be borne by Plaintiffs had the Court blue-penciled the Partnership Agreement. (AB at 43.) Specifically, they claim that blue-penciling would "eliminate nearly all risk to an employer seeking to enforce an illegal contractual provision, placing that risk on the former employee who is left to guess how a Court will later reshape it." *Id.* The latter point only supports ***Defendant's*** position. The chief way to avoid ambiguity and uncertainty from a court's reshaping of an agreement is to enforce the agreement as written, just as CFLP argues. (*See* OB at 2; U.S. Chamber of Commerce Amicus Br. at 10-11.) Further, there is nothing inequitable about preserving as much of the Partnership Agreement as is legally enforceable, especially when the parties agreed to that outcome under a specific provision in the contract.

IV. THE COURT ERRED BY MISCONSTRUING THE RELATIONSHIP BETWEEN THE PARTIES

1. The Court of Chancery Erroneously Considered CFLP's Interests as If CFLP Were Plaintiffs' Employer, Not a Partnership

As support for their argument that the Court of Chancery correctly understood the relationship between the parties, Plaintiffs point to the decision to apply "the more lenient" standard "afforded to restrictive covenants in the sale of a business." AB at 45. But a clear reading of the Court of Chancery's opinion confirms that it applied case law considering the interest of an employer against an employee as opposed to that of a partnership against a limited partner employed by a separate entity. (Op. at 65.) The Court of Chancery reasoned that under Delaware law, "imposing financial consequences on ***former employees*** for competitive circumstances . . . in an amount that is untethered to the ***former employer's*** loss" is "an unreasonable restraint of trade" and imposed the reasonableness test. (Op. at 64-65 (emphasis added).) This was error. The Competition Conditions are not a substitute for breach of contract damages, and they do not correlate to any losses suffered by CFLP or Cantor HK. Rather, the conditions memorialize the parties' agreement that the Partnership is not required to pay additional money to former partners on account of their interests when the former partner competes.

Plaintiffs also argue that "several of the Plaintiffs' partnership interests were . . . comparatively minor and all were inextricably intertwined with their

employment," and cite a Nebraska case reasoning that a "partner with such a minor interest . . . is in a real sense no different than an employee." (AB at 45-46.) This argument only adds more support for CFLP's position: If several Plaintiffs' interests were "minor," then Plaintiffs' ineligibility for future payments in respect of those interests—while still being allowed to work at competitors—is not inequitable.

Moreover, the fact that some Plaintiffs purchased partnership interests, over and above the grant awards, confirms that the court erred by failing to properly view them as investors in CFLP as well as employees of non-party Cantor HK. Further, the partnership interests provided Plaintiffs with millions of dollars of distributions of Partnership profits from numerous businesses. It is not controversial for the Partnership Agreement to state that Plaintiffs will not continue to receive payments if they compete against CFLP and their former partners. Had the Court of Chancery correctly analyzed the factual record, the only supportable conclusion would have been that the conditions are reasonable in light of the nature of the Partnership's business and its relationship with the Plaintiffs.

Plaintiffs construct yet another strawman by claiming that CFLP has "abandoned the argument that the Conditioned Payment Device is reasonable." (AB at 31.) That is incorrect. CFLP in fact devoted the entire fourth section of its Opening Brief to this argument. That section concludes by arguing "[h]ad the Court

correctly analyzed the factual record, the only supportable conclusion would have been that the conditions are reasonable." (OB at 44.)

2. The Origin of Payments Received by Limited Partners Under the Partnership Agreement Justifies the Geographic Scope of the Competition Conditions

In defending the Court of Chancery's conclusion that the scope of the Competition Conditions was overbroad, Plaintiffs argue that CFLP must show that any noncompetition covenant in the Partnership Agreement, due to "the absence of a geographic limitation," must be "narrowly tailored to serve the ***employer's*** interests." (AB at 31 (citing Op. at 45).) But, as the record makes clear, CFLP was not Plaintiffs' employer. *See supra* Part IV.1. Rather, CFLP is a partnership that Plaintiffs willingly joined. "Delaware law does not impose a strict requirement that the area covered by the covenant map perfectly onto the geographical area of the plaintiff's business." *Kan-Di-Ki, LLC v. Suer*, 2015 WL 4503210, at *19 (Del. Ch. July 22, 2015). The profits that CFLP distributes to its limited partners are derived from multiple affiliates in different business lines worldwide. The payment conditions match the business's geographic scope. *Lyons Ins. Agency, Inc. v. Wilson*, 2018 WL 4677606, at *6 (Del. Ch. Sept. 28, 2018) (enforcing two-year noncompete with no specified geographic scope). Accordingly, the parties defined the actions that trigger the Competition Conditions as relating to the CFLP enterprise.

Plaintiffs do no more than beg the question, asserting "CFLP cannot point to 'any legitimate business interest' justifying the geographic scope because CFLP 'only' argues that 'Plaintiffs have profited from Cantor's other business.'" (AB at 33.) But there is nothing illegitimate or illogical about conditions that establish that individuals such as Cornaire, Kirley, and Servant—who moved to New York to work for an admitted direct competitor of CFLP's New York-based affiliates (*see* OB. at 11)—cannot simultaneously collect payments from CFLP that are funded in part by the revenues of the same New York-based affiliates they compete against. Nor is it inequitable for individuals such as Ainslie, Boyer, and Kwan, who voluntarily departed for another Hong Kong institutional brokerage that directly competed with Cantor HK (*see* OB at 11), to be prohibited from receiving further payments funded in part by Cantor HK's revenues. Plaintiffs cite no authority establishing that they are equitably entitled to work for competitors of CFLP's businesses and also be subsidized for doing so via additional redemption payments.

3. <u>Some Plaintiffs' Purchase of Partnership Interests Does Not Justify the Erroneous Holding</u>

Plaintiffs' allegation that "[e]ach Plaintiff besides Kirley directly purchased a substantial sum of the partnership interests at issue," confirms the Court of Chancery's error. Plaintiffs voluntarily invested in CFLP with full knowledge of the conditions that applied to redemption of their interests. If Plaintiffs found these conditions too onerous, they could have chosen to invest their disposable income

elsewhere. But, having chosen, with eyes wide open, to invest in CFLP so that they could further profit off that investment (including through the enforcement of the Competition Conditions against previously terminated partners), Plaintiffs have no equitable basis for avoiding the consequences of the conditions they agreed to. *See Miller v. Am. Real Estate P'rs, L.P.*, 2001 WL 1045643, at *8 (Del. Ch. Sept. 6, 2001) (reasoning that limited partners should not "escape the consequences of their own decisions" and that "investors should be careful to read partnership agreements before buying units"). Even the Court of Chancery, in its opinion, noted that Plaintiffs' voluntary investment of "additional funds . . . notwithstanding these provisions" was a factor that "weigh[ed] in favor of enforcement." (Op. at 51.)

Finally, Plaintiffs do not even attempt to defend the Court of Chancery's erroneous factual finding that Plaintiffs lost future payments of "earned compensation" (Op. at 64), rather than a contingent payment from an affiliate of Plaintiffs' employer. The terms of the Partnership Agreement leave no question that the future payments were Partnership profits payable only upon satisfaction of the conditions contained within Article XI—not wages, as the term "earned compensation" implies. The Court of Chancery's assumption that Plaintiffs were forfeiting "earned compensation"—consistent with its repeated references to ***employment***-focused authorities—was the linchpin of its flawed reasonableness analysis. But that assumption has no support in the record.

CONCLUSION

For the foregoing reasons, the Court of Chancery's decision should be reversed and summary judgment entered in favor of Appellant CFLP.

YOUNG CONAWAY STARGATT
& TAYLOR, LLP

/s/ C. Barr Flinn
C. Barr Flinn (No. 4092)
Paul J. Loughman (No. 5508)
Alberto E. Chávez (No. 6395)
Skyler A. C. Speed (No. 6701)
Rodney Square
1000 North King Street
Wilmington, DE 19801
(302) 571-6600

Attorneys for Defendant-Below/Appellant Cantor Fitzgerald, L.P.

OF COUNSEL:

David A. Paul
Co-Head of Litigation
Virginia J. Cardenas
Assistant General Counsel
Sid Nadkarni
Assistant General Counsel
CANTOR FITZGERALD
110 East 59th Street, 7th Floor
(212) 610-2298

Benjamin R. Nagin
Eric G. Hoffman
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300

Tacy F. Flint
Frank J. Favia, Jr.
SIDLEY AUSTIN LLP
1 South Dearborn
Chicago, IL 60603
(312) 853-7000

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CERTIFICATE OF SERVICE

I, Skyler A. C. Speed, Esquire, do hereby certify that on August 11, 2023, I caused a copy of the foregoing document to be served on the following counsel in the manner indicated below.

BY FILE & SERVEXPRESS

Blake A. Bennett, Esq.
COOCH AND TAYLOR P.A.
The Nemours Building
1007 N. Orang Street, Suite 1120
Wilmington, DE 19801

Richard L. Renck, Esq.
DUANE MORRIS LLP
1201 N. Market Street, Suite 501
Wilmington, DE 19801

Michael L. Vild, Esq.
David G. Holmes, Esq.
CROSS & SIMON, LLC
1105 N. Market Street, Suite 901
Wilmington, DE 19801

Anthony A. Rickey, Esq.
MARGRAVE LAW LLC
3411 Silverside Road
Baynard Building, Suite 104
Wilmington, DE 19810

/s/ Skyler A. C. Speed
Skyler A. C. Speed (No. 6701)