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IN THE SUPREME COURT OF THE STATE OF DELAWARE

COURT SQUARE CAPITAL MANAGEMENT, L.P., COURT SQUARE CAPITAL GP, LLC and COURT SQUARE CAPITAL GP, III, LLC,	)	No. 205, 2024
Defendants and Counterclaim Plaintiffs Below/Appellants,	)	On Appeal From The Court of Chancery, C.A. No.: 2021-0262-KSJM
v.	)	**PUBLIC VERSION FILED SEPT. 24, 2024**
KEVIN BROWN,	)	
Plaintiff and Counterclaim Defendant Below/Appellee.	)	

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Dated: September 9, 2024

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PRELIMINARY STATEMENT

Appellee Kevin Brown's response to Court Square's Opening Brief is largely an exercise in distraction. The Court of Chancery found in favor of Brown on only two limited questions of law: (i) that the use of the term "based on" in Section 5.14(a) of the Limited Liability Company Agreement for Court Square Capital GP, III, LLC (the "LLC Agreement") unambiguously required that Brown's compensation from his employer MSD be explicitly "tied to…[a] successful investment" in a specific Investment Opportunity on Brown's Deal Sheet, and (ii) that Brown's obtaining and disclosing Court Square's confidential "Heads Up Memos" ("HUMs"), was excusable since his breaches allegedly were not "material" and did not cause demonstrable independent harm to Court Square. Each of these rulings raises a purely legal determination and, as discussed in Court Square's Opening Brief, should be reviewed *de novo*.

Brown gives short shrift to these critical issues in his brief, instead urging this Court to affirm the lower court's decision by resolving detailed factual questions that the Court of Chancery expressly declined to reach. This Court should reject Brown's request that it wade into undecided factual disputes and should instead focus on the two issues that the lower court actually relied on as the basis of its judgment. When those issues are carefully examined, it is clear that the judgment of the Court of Chancery should be reversed.

The Court of Chancery accepted Brown's argument that the use of the term "based on" in Section 5.14(a) requires a "but for" relationship between Brown's compensation and his particular advice with regard to an investment. However, nothing in Section 5.14(a) limits its scope only to those situations where an employer provides a special compensation arrangement directly tied to the successful completion of a deal. Rather, Section 5.14(a) makes clear that it applies to any situation in which a Terminated Member like Brown "render[s]…investment advice" with respect to an Investment Opportunity and receives "direct or indirect" compensation for that work, whether in the form of an award of equity, payment of carried interest or a transaction bonus, as Brown suggests, or, as here, through salary and an annual bonus.

It is indisputable that Brown was compensated by MSD "based on" the work he performed for the firm. Pursuant to his employment contract Brown was to be paid a lucrative salary and guaranteed bonus (*i.e.*, undeniably "compensation") in exchange for "*working on new investment opportunities*."[1] Brown does not dispute that he rendered investment advice on Zodiac and Hayward to MSD. Accordingly, whether his pay should be labeled "direct" or "indirect" compensation, it was clearly "based," at least in part, on his work on Zodiac and Hayward. At an absolute

[1] A1478-A1483 (emphasis added).

minimum, it cannot be read to be unambiguously exempted from Section 5.14(a) as the Court of Chancery held.

With respect to Brown's breach of his confidentiality obligations under Section 5.14(c) of the LLC Agreement, the Court of Chancery again erred as a matter of law. Contrary to Brown's primary argument, the Court of Chancery did *not* find in Brown's favor on this claim because it concluded that Brown had not breached his confidentiality obligations under the LLC Agreement. Instead, the Court of Chancery premised its decision on its conclusion that Court Square had not shown that Brown's misappropriation of Court Square's HUMs was a *material* breach of his obligations which had caused *harm* to Court Square. In doing so, the court failed to consider that the LLC Agreement specifically states that "any breach," not just a "material" one which could be proven to have caused "harm," constitutes a violation of the Agreement. As a matter of law, the Court of Chancery's decision contravened this Court's ruling in *Cantor Fitzgerald*, the Delaware Limited Liability Company Act ("LLC Act"), and fundamental principles of contract law by refusing to give effect to the clear forfeiture provision in the LLC Agreement to which Brown and Court Square had both agreed.

ARGUMENTS IN REPLY

I. BROWN BREACHED HIS OBLIGATIONS UNDER SECTION 5.14(A) OF THE LLC AGREEMENTS

A. Brown's Salary and Bonus Were "Based On" His Investment Advice with Respect to Zodiac and Hayward

The critical language of Section 5.14(a) as it concerns this case is the provision's final sentence, which states that a breach occurs if a "Member or Terminated Member receives *any form* of direct or indirect fee, payment *or other compensation based on* the *rendering of investment advice* to a third party regarding such Investment Opportunity."[2] In an effort to escape his obviously violative conduct, Brown argues that his compensation from MSD could not have been based, even indirectly, on his advice with respect to Zodiac and Hayward because his "advice on Hayward and Zodiac was irrelevant to whether he received his salary or bonus." Appellee's Br. at 17-18. This argument misapprehends the meanings of both "based on" and the language of Section 5.14(a).

As discussed in the cases that Brown cites, the dictionary definition of "based on" does not suggest a "but for" requirement, but rather "is synonymous with 'arising from' and ordinarily refers to a 'starting point' or a 'foundation.'" *McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1111 (9th Cir. 2000). While the Supreme Court in *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007), concluded that a but-for

[2] A1382 (emphasis added).

connection was required in that particular case, it premised its decision on a specific statutory and regulatory framework that is not implicated here, as well as what it "suspected" was Congress's intent in drafting the language at issue. *Id.* at 62-64. There is nothing in the meaning of "based on" that necessarily implies the kind of direct or exclusive connection that Brown is suggesting here. *Accord Norem v. Lincoln Ben. Life Co.*, 737 F.3d 1145, 1150 (7th Cir. 2013) (concluding in response to a claim that language in an insurance contract dictated that cost of insurance be determined *solely* using enumerated factors that there is nothing in the meaning of "based on" that "implies exclusivity"); *Slam Dunk I, LLC v. Conn. Gen. Life Ins. Co.*, 853 F. App'x. 451, 455 (11th Cir. 2021) (same).

The broad language contained in Section 5.14(a), *i.e.*, "indirect" and "any form of compensation," clearly demonstrates that the critical question is not whether Brown would have received the same compensation if he had not advised MSD about Zodiac and Hayward, but rather whether the compensation he received was based, at least in part, on the advice he provided with respect to those to deals.

Brown's compensation from MSD was, of course, "based on" the work he performed for the company. If he had not provided any services to MSD, he would not have been paid. And it is indisputable that the work he performed as a private equity firm's "deal team leader" included "the rendering of investment advice" with respect to potential investment opportunities. Indeed, his offer letter from MSD

specifically stated that his job duties included acting as a "deal team leader…*working on new investment opportunities*,"[3] and Brown acknowledged at trial that this was exactly what he did.[4] There can be no question that his compensation from MSD was "based on" his rendering of investment advice. What he would have been paid had he not provided advice on Zodiac and Hayward is thus irrelevant. What is relevant, and dispositive, is that he was compensated by MSD "based on" the work he did for the firm, and that work unquestionably included his advice on Zodiac and Hayward. Brown's compensation was therefore "based," at least indirectly, on that advice, in direct contravention of Section 5.14(a).

As the Court of Chancery properly recognized, a court's role in interpreting a contract is to "effectuate the parties' intent" and the court must "give priority to the parties' intentions as reflected within the four corners of the agreement, construing the agreement as a whole giving effect to all its provisions." Post-Trial Memorandum Opinion (Dec. 15, 2023) (Appellant's Br., Ex. B) ("Op.") at 19 (citing *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006); *In re Viking Pump, Inc.*, 148 A.3d 633, 648 (Del. 2016)). Here, Section 5.14(a) is clearly intended to protect Court Square and its investors from the potential harm caused by their investment professionals who work on potential transactions while at Court

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3 A1481.

4 A0735 at 270:9-23.

Square and then depart to work on those very same transactions at other private equity firms, using the information and contacts they gained at Court Square. Appellant's Br. at 34-36 (addressing interests protected by Section 5.14). That is, Section 5.14(a), on its face was intended to protect against the precise conduct in which Brown admittedly engaged. Indeed, it is difficult to envision a scenario that is more clearly intended to be covered by Section 5.14(a) than Brown working on Zodiac up until the day he left Court Square, "walking across the street" to MSD, and immediately competing against Court Square with respect to Zodiac, a company for which both Court Square and MSD submitted bids. Appellant's Br. at 13-15, 17-19.

At trial and in his post-trial briefing, Brown argued that the final sentence of Section 5.14(a) was intended to be limited to "finder's fee" situations where a non-employee is paid a fee for providing advice concerning an investment to a third party that is not his or her employer.[5] In his brief to this Court, however, Brown concedes

[5] *See* A1136; A0637-38 at 172:4-173:3. Brown's argument relies heavily on his spin on the deposition testimony of Thomas McWilliams, a former Managing Partner of Court Square. Notably, however, McWilliams conceded that he had not seen, reviewed, or discussed the LLC Agreement since he signed them in 2006 and 2012. AR005-06 at 171:23-172:20. McWilliams did not state that an "indirect interest" is limited to a discrete finder's fee; rather, he simply agreed that "one thing that Section 5.14 does" is to prevent a former employee from receiving a finder's fee. B047-48 at 81:4-82:8; *see also* Appellant's Br. at 34-35.

that Section 5.14(a) applies to both the employment and non-employment context. Appellee's Br. at 17-20. He contends, however, that its application must be limited only to certain forms of compensation paid to employees, such as a bonus tied to work on a specific transaction or an award of equity in a company. Appellee's Br. at 18. There is nothing in Section 5.14(a) that suggests that it applies only if a Terminated Member and his new employer elect to identify in advance the particular investments he would advise on, or later apportion his compensation among the potential deals he worked. Nor would there be any logic to limiting the provision as Brown suggests. Whether a Terminated Member is paid a transaction-specific fee or receives a salary for advising on a particular investment, the prohibited conduct and result are the same: the Terminated Member is leveraging his or her work at Court Square to benefit a competitor thereby equally endangering the interests of the Fund covered by the LLC Agreement. Accordingly, it would make no sense to limit Section 5.14(a) to certain types of compensation but not others. *Accord Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160-61 (Del. 2010) (declining to interpret contract in a manner that would lead to an absurd result); *Capella Holdings, LLC v. Anderson*, 2017 WL 5900077, at *5 (Del. Ch. Nov. 29, 2017) (same).

B. There Is No Inconsistency between Court Square's Position and Section 5.14(a)'s Protection of the Right to Work for Other Private Equity Firms

The Court of Chancery premised its decision largely on its perceived need to avoid what it viewed as a potential inconsistency between the final sentence of Section 5.14(a) and the language earlier in the section stating that "in no event shall this Section 5.14 be construed in and of itself, as prohibiting a Member from (i) obtaining employment with, or investing in, a fund or any entity involved in similar activities as the Fund, or any such fund or entity investing in entities similar to the Fund so long as such Member otherwise complies with the provisions of this Section 5.14…." Op. at 21, 24-25. This is a false conflict, however, as there is no inconsistency whatsoever between Court Square's position and Brown's (or any other Terminated Member's) right to work for another private equity firm.

The Court of Chancery premised its position on Brown's testimony that prohibiting him from rendering investment advice with respect to the companies on his Deal Sheet would be "incredibly restrictive." Appellee's Br. at 23; Op. at 25. Based on this, the Court of Chancery concluded that "if salary was included in 'payment or other compensation' then former employees would be functionally unable to work for competitors." Op. at 25. This conclusion was not only unsupported by the evidence at trial, but actually contradicted by it.

This case is not about the scope of Brown's Deal Sheet. It is undisputed that when Brown executed his Separation Agreement, he agreed to his Deal List which included both Zodiac and Hayward. Accordingly, the dispute here centers on the investment advice that Brown gave about two companies only—Zodiac and Hayward.

Contrary to the Court of Chancery's finding, there was no evidence introduced at trial of even a single Court Square employee ever being "functionally unable to work for competitors." The uncontradicted evidence at trial established that nearly all investment professionals who leave Court Square go to work at other private equity firms without any problems in complying with their Deal Sheets.[6] Further, Brown was able to successfully avoid working on all but two of the approximately 400 companies on his Deal Sheet during his first year of employment at MSD. Thus, there is no basis for the conclusion that Brown would have been "functionally unable" to work for MSD had he simply honored his obligations and recused himself from advising on Zodiac and Hayward.

The private equity "middle market" on which both Court Square and MSD focus is comprised of over 200,000 companies.[7] The companies on Brown's Deal Sheet compromise only approximately one-fifth of one percent (.2%) of the

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6 A0956 at 491:1-9; A0960 at 495:5-9; A0793 at 328:2-19.

7 A0947-48 at 482:21-483:10; AR001-02.

companies in the middle market. And only approximately 100 of the companies on Brown's Deal Sheet were even in the industry area or "vertical" on which he focused. The notion, therefore, that avoiding pursuit of the companies on his Deal Sheet would have precluded Brown from working for MSD (or another private equity firm) is exceptionally misguided.

C. The Extrinsic Evidence Concerning the Meaning of Section 5.14(a) Supports Court Square

In rendering its decision, the Court of Chancery specifically declined to consider any extrinsic evidence concerning the meaning of Section 5.14(a). Op. at 25. While Section 5.14(a) should be interpreted according to its plain meaning in Court Square's favor, the trial record contained extensive testimonial and other extrinsic evidence supporting Court Square's reading of that provision. Appellant's Br. at 38-40. Brown does not really dispute this evidence, but instead offers various arguments that were not considered, must less accepted, by the Court of Chancery.

Brown argues that the parties engaged in a "course of performance accepted or acquiesced in without objection," and that this practice confirms a mutual understanding of the meaning of Section 5.14(a). Appellant's Br. at 25 (citing *Sun-Times Media Grp., Inc. v. Black*, 954 A.2d 380, 398 (Del. Ch. 2008). This argument fails because acquiescence requires "repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection

to it by the other." RESTATEMENT (SECOND) OF CONTRACTS § 202. There is no dispute that Court Square had no knowledge of Brown's involvement with Hayward prior to the transaction's announcement and did not know of his conduct with respect to Zodiac until after this litigation commenced. Without such knowledge, much less approval or "repeated occasions for performance," there can be no established "course of performance" that supports Brown's interpretation of his obligations.

Brown also argues that a separation agreement that Court Square proposed to another former employee, Steven Lamb, in 2020 impacts the interpretation of Section 5.14(a). However, what Court Square proposed to Lamb four years after Brown's departure simply has no relevance to this matter. The draft separation agreement sent to Lamb prefaces the language Brown focuses on with the phrase "[c]onsistent with Section 5.14(a) of the Fund III GP Agreement and Section 5.14(a) of the Fund IV GP Agreement."[8] Thus, the language of the draft itself makes clear that the language in Lamb's separation agreement simply reaffirmed Lamb's obligations and did not expand them.

Finally, contrary to Brown's incorrect assertion (Appellee's Br. at 28 & n.3), courts in Delaware have repeatedly recognized that the parties to a contract can validly agree that an agreement will not be construed against the drafter. *See Cyber*

[8] B107-08.

Holding LLC v. CyberCore Holding, Inc., 2016 WL 791069, at *4 (Del. Ch. Feb. 26, 2016); *Senior Hous. Cap., LLC v. SHP Senior Hous. Fund, LLC*, 2013 WL 1955012, at *26, n.264 (Del. Ch. May 13, 2013)); *Emerging Europe Growth Fund, L.P. v. Figlus*, 2013 WL 1250836, at *4 n.30 (Del. Ch. Mar. 28, 2013). While Brown suggests that an agreement of the parties not to apply *contra proferentem* is only valid where the parties jointly drafted an agreement, this is inconsistent with the rulings of the courts that have considered the issue, *see Senior Hous. Cap., LLC*, at *25; *Emerging Europe Growth Fund*, 2013 WL 1250836, at *4 n.30, and makes little sense since *contra proferentem* by definition applies only where an agreement is not "jointly drafted."

D. The Court of Chancery Did Not Address the Issue of "Active Consideration" and this Court Should Not Do So.

In its decision, the Court of Chancery expressly declined to address the question of whether Zodiac and Hayward were "actively considered" by Court Square at the time that was relevant under the LLC Agreement, stating that this issue was "secondary" to the interpretation of Section 5.14(a). Op. at 23.[9] Nevertheless,

[9] The parties heavily disputed the question of *when* an Investment Opportunity needed to be actively considered by Court Square. *See* A1026, 1076-92; A1193-1201; A1138-44; AR020-32. The correct reading of Section 5.14(a) is that whether an investment is "actively considered" is determined as of the time of a Member's departure.

Brown devotes a significant portion of his brief to arguing that this Court should take on the burden of performing the factual investigation that the Court of Chancery refused to undertake. Given the Court of Chancery's election not to consider this fact-intensive issue in its decision, this Court should decline to do so as well for a number of reasons, including the fact that Brown agreed to the Deal List in writing at the time of his separation. *Accord Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361 (Del. 1995) (remanding case where it would be "inequitable" to address before Court of Chancery had the opportunity to address in the first instance); *Kroll v. City of Wilmington*, 276 A.3d 476 (Del. 2022).

To the extent that this Court does address Brown's factual arguments, they should be rejected. Brown's argument with respect to the issue of active consideration is that he could not have breached his contractual obligations because Court Square had withdrawn from the bidding process for Zodiac and Hayward at the times that MSD submitted its bid. Even assuming that "active consideration" is determined following a Member's departure, this argument is belied by the fact that Court Square actually submitted bids of $850 million and $1.7 billion, respectively, for Zodiac and Hayward.[10] Given the resources that Court Square had invested to evaluate and bid on these companies, the notion that its active consideration of them

[10] A1538-A1539; A1585-A1587.

ceased the moment its initial bids were rejected is ludicrous. The record is replete with evidence that the rejection of a bidder's initial bid does not necessarily end the process for that bidder. As Brown testified, "things change" rapidly, and in the private equity world a sale process is not over until a deal is signed and closed.[11] Silvestri and Delaney both testified, and Brown did not dispute, that a significant number of Court Square's successful acquisitions occurred after its initial bid was rejected.[12]

Moreover, even if there were a basis for reading Section 5.14 to require a second determination of active consideration, it would be the timing of a Terminated Member's *investment advice* with respect to an investment opportunity, not the timing of his or her employer's bid, that is relevant. And there can be no question that Brown was providing investment advice concerning both Zodiac and Hayward at the time that Court Square was actively considering and bidding on them. For instance, there is no dispute that Court Square was actively considering Zodiac when Brown began advising MSD about the opportunity only a few days after leaving Court Square, and well in advance of any bids for the company. Appellant's Br. at 17-19.

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11 A0748-50 at 283:9-285:22.

12 A0812-17 at 347:6-352:2.

II. BROWN BREACHED HIS CONFIDENTIALITY OBLIGATIONS UNDER SECTION 5.14(C) OF THE LLC AGREEMENTS

A. The Forfeiture Provision of the LLC Agreement Should Have Been Enforced without Regard to Materiality and Proof of Harm

In *Cantor Fitzgerald v. Ainslie*, this Court held that "[w]hen sophisticated actors avail themselves of the contractual flexibility embodied in the Delaware Revised Uniform Limited Partnership Act…and agree that a departing partner will forfeit a specified benefit should he engage in competition with the partnership, our courts should, absent unconscionability, bad faith or other extraordinary circumstances, hold them to their agreements." 312 A.3d 674, 677 (Del. 2024). Here, Brown and Court Square, both highly sophisticated parties, entered into an agreement governed by Delaware's LLC Act pursuant to which Brown agreed that, in exchange for millions of dollars of carried interest, he would comply with certain restrictive covenants, including an obligation not to use and disclose Court Square's confidential information. The parties' agreement specifies clearly that in the event of *any* breach of these covenants, Brown's carried interest shall be forfeited, stating that "if any Terminated Member breaches *any* of the covenants set forth in Section 5.14 (whether such breach occurred prior to, on or after such Terminated Member's Termination Date), such Terminated Member's Vested Carried Interest Points shall be equal to zero."[13] In accordance with Delaware's "high—some might say

[13] A1377-78 (emphasis added).

reverential—regard for freedom of contract," *Cantor Fitzgerald*, 312 A.3d, at 676, this agreement should be enforced in accordance with its terms.

Brown's arguments to the contrary are unavailing. As a threshold matter, Brown argues that "it is an open question whether *Cantor Fitzgerald* even applies outside the partnership context," citing the Seventh Circuit's certification of the question of *Cantor Fitzgerald*'s application in *LKQ Corp. v. Rutledge*, 96 F.4th 977 (7th Cir. 2024). Appellee's Br. at 43, n. 7. Brown's citation to *LKQ Corp.* is misplaced. Regardless of how this Court resolves the certified question in *LKQ Corp.*, a case that considered a non-compete in a standard employment-related agreement, the principles of *Cantor Fitzgerald* clearly apply to *this* case, which involves an agreement governed by the Delaware's LLC Act. The LLC Act reflects the same fundamental "contractarian" policy as the Limited Partnership Act ("LP Act"), and states that: "[a] limited liability company agreement may provide that…[a] member who fails to perform in accordance with, or to comply with the terms and conditions of, the limited liability company agreement shall be subject to specified penalties or specified consequences," including forfeiture. 6 *Del. C.* §§ 18-306; 18-502(c).

Brown also claims that *Cantor Fitzgerald* is inapposite because it did not deal specifically with the issue of materiality. This does not alter the impact of the ruling. What this Court recognized in *Cantor Fitzgerald* is that where the parties agree to a

forfeiture provision in an LP agreement, or by analogy an LLC agreement, that provision should be strictly enforced according to its terms without regard to limiting strictures, such as reasonableness or materiality (and Brown does not explain how a reasonableness review would not naturally encompass a materiality review). *Accord Holifield v. XRI Inv. Holdings LLC*, 304 A.3d 896, 922 (Del. 2023) ("[T]he LLCA allows parties to an LLC agreement contractual freedoms not available in the corporate context.").

The cases that Brown cites merely restate a general common law rule and do not take into account the impact of the LLC Act or the parties' explicit forfeiture clause. Enforcement of a contractual forfeiture provision does not involve "abandoning performance," but instead concerns enforcement of an *agreed-upon* contractual provision that the LLC Act specifically directs should be given effect. In accordance with *Cantor Fitzgerald* and the plain language of the LLC Act, such provisions should be enforced strictly in accordance with their terms.

Court Square's position is further confirmed by the law governing contractual conditions. The LLC Agreement established that Brown's compliance with his restrictive covenants was a condition to his entitlement to carried interest payments, stating that "if" he breached his covenants, his carried interest percentage "shall be

equal to zero."[14] *Accord Ainslie v. Cantor Fitzgerald, L.P.*, 2023 WL 106924, at *10 (Del. Ch. Jan. 4, 2023) ("Words and phrases such as 'if,' 'provided that,' and 'on the condition that' generally indicate the parties have created a condition.") (citation omitted). As the Court of Chancery noted in its decision in *Cantor Fitzgerald* (in a portion of its opinion that was not reversed by this Court), "[a] condition represents a contractual agreement that something less than a material breach will prevent the duty to perform from arising…To require that the condition be material would undermine the very purpose of including such conditions in contracts, and our law imposes no such requirement." *Cantor Fitzgerald*, 2023 WL 106924, at *15; *see also Restanca, LLC v. House of Lithium, Ltd.*, 2023 WL 4306074, at *29-30 (Del. Ch. June 30, 2023) (rejecting the argument that a materiality qualifier can be implied in an agreement between sophisticated parties and finding the plain meaning of the contract controls; "[i]f the parties wanted to include a materiality qualifier…they could have done so.").

The only authorities that Brown cites on the issue of conditions are *State Farm Mut. Auto. Ins. Co. v. Johnson*, 320 A.2d 345 (Del. 1974), and *Nucor Coatings Corp. v. Precoat Metals Corp.*, 2023 WL 6368316 (Del. Super. Aug. 31, 2023). Both of these cases arose in the indemnification context and dealt with a party's technical

[14] A1377-78.

noncompliance with a contractual notice obligation, not with noncompliance with an explicitly agreed upon fundamental substantive condition like a duty of confidentiality. Further, the salient question in *Nucor* was whether certain notice requirements were material conditions of the parties' overall agreement, not whether the breach of those conditions was material. There is no question that Brown's confidentiality obligations were material terms of the LLC Agreement. 2023 WL 6368316, at *14.

Despite clear principles established by this Court and Delaware law, Brown persists in arguing that his breach should be excused because it was "exceptionally minor" and that the LLC Agreement does not specifically call for forfeiture for a breach. As to the first argument, the magnitude of the breach is irrelevant. Additionally, Brown's breach was not "minor." As noted in Court Square's Opening Brief, maintenance of confidentiality is "table stakes" in the private equity business. Appellant's Br. at 48. Any breach of the firm's right to preserve the integrity of its own strategy and business information or its contractually undertaken obligations to preserve the secrecy of information obtained from third parties under an NDA creates a risk of serious harm, reputational and otherwise, to a firm. Appellant's Br. at 48.

As to the argument that the LLC Agreement does not specifically call for forfeiture, this is utterly baseless. As discussed, Section 5.8(b) of the Agreement

states plainly that "if" a Member breaches "any" of his or her obligations under Section 5.14, then the Member's carried interest entitlement "shall" be reduced to zero, *i.e.*, forfeited. That this provision does not specifically use the word "forfeit," or that the word "forfeit" may appear elsewhere in the Agreement, does not change the clear meaning of this language. Indeed, in *Cantor Fitzgerald*, the covenants at issue similarly did not include the word "forfeit" yet this Court had no difficulty concluding that they were forfeiture provisions. 312 A.3d at 681-84.

Brown also argues that he should not be held to the terms of his bargain because he did not voluntarily or knowingly breach his confidentiality obligations. Brown's protestations of innocence ring hollow in light of the undisputed facts surrounding his actions, including his attempt to conceal his conduct through use of personal email addresses and the lack of any credible explanation for his actions. Appellant's Br. at 20, 46-47. But in any event, the language of the LLC Agreement, and the import of a breach, are clear and valid and are in no way reliant on Brown's alleged state of mind.

B. The Trial Court Did Not Address the Confidentiality of Court Square's HUMs

Brown argues extensively that this Court should affirm the lower court's decision on the basis that the HUMs that Brown gathered and shared with MSD were not confidential. He also argues that Court Square should be "quasi-estopped" from

claiming that the HUMs were confidential. The Court of Chancery, however, specifically did not reach the merits of either these arguments, stating explicitly that "the court does not need to reach the merits of the confidentiality breach claim." Op. at 29. As with the issue of "active consideration," Section I.D., *supra*, it is not appropriate for this Court to engage in extensive fact-finding that the lower court declined to undertake.

If this Court does elect to address the issue of confidentiality, however, the record is replete with evidence supporting Court Square's position. The Court of Chancery commented that "Court Square made no effort to argue that the information contained in the HUMs was non-public" and that "Court Square did not comb through each of the HUMs to identify confidential valuation, angles, and strategy purportedly contained therein." Op. at 14, 29. As discussed in Court Square's Opening Brief, this conclusion is plainly inconsistent with the extensive evidence and argument on the issue in the trial record and would be clear error. Appellant's Br. 46-48.[15]

As an example, the Court of Chancery declined to address the fact that much of the information in the HUMs was provided by third parties pursuant to non-

[15] Because the Court of Chancery did not engage in a factual determination as to the confidentiality of the HUMs, the clear error standard of review has no application to this appeal. However, even if there were issues in this appeal that were subject to a clear error review, Court Square would still prevail.

disclosure agreements that continued to bind Court Square at the time the HUMs were disclosed. The Court of Chancery also commented that the "the financial information in the HUMs was widely circulated among private equity firms and would have been easily accessible to anyone in Brown's position." Op. at 29. This reasoning misses that this information would only have been accessible to others only if and when they too signed an NDA prohibiting its further dissemination.[16] The information was not, however, available to individuals and entities that had not secured permission to receive the information, such as MSD.

Similarly baseless is the Court of Chancery's conclusion that Brown's involvement in developing the HUMs "rais[ed] questions as to whether that information was confidential as to Brown." *Id*. That Brown may have known some of the information in the HUMs did not give him the right to disclose that information to MSD or any other third parties. Brown's admitted conduct is expressly prohibited by Section 5.14(c) of the LLC Agreement which states, "[E]ach Member or Terminated Member shall not . . . directly or indirectly use, rely on, disclose, divulge, furnish or make accessible to anyone any Confidential Information."[17]

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16 A0846 at 381:4-15.

17 A1383.

Nor is there any merit to Brown's "quasi-estoppel" argument, which the lower court did not address. Quasi-estoppel is a doctrine that only applies where a party has "gained some advantage" from maintaining a position, and then seeks to "change" that position. *Bank of New York Mellon v. Commerzbacnk Capital Funding Trust II*, 2012 WL 2053299, at *1 (Del. Ch. May 31, 2012). Here, Court Square obtained no "advantage" from its treatment of third-party confidential information as there is no evidence that Court Square ever used such information for its own benefit in a way that was inconsistent with the terms of the applicable NDAs. There is also no evidence that Court Square ever changed its position with respect to such information.

CONCLUSION

For the foregoing reasons, Court Square respectfully submits that this Court should reverse the Court of Chancery's Judgment and remand for further proceedings.

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