IN THE SUPREME COURT OF THE STATE OF DELAWARE

FORTILINE, INC. and **PATRIOT SUPPLY HOLDINGS, INC.**, Appellants/ Plaintiffs-Below, v. **HAYNE MCCALL**, **CHRISTOPHER ANTOS**, **BRUCE ROBERTS**, **JEFFREY T. JENKINS**, **SIDNEY C. PETERSON III, CLIFFORD SPAHN, JAMES R. COOK, JR.**, **TIMOTHY L. VANEGMOND, ALAN HIBBARD, DAVID S. HORN, DAVID T. MCLEAN, DAVID W. KING, E. TODD O'TUEL, GREGORY F. WEINGART, GREGORY MCCLELLAND, JR., JASON A. WEISER, JOHN C. WEST, LEMUEL MAZA,** and **SEAN P. STILLEY**, Appellees/ Defendants-Below.	No. 300, 2025 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2024-0211-MTZ

<u>APPELLANTS' OPENING BRIEF</u>
(<u>CORRECTED</u>)

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NATURE OF PROCEEDINGS

Appellants/Plaintiffs-Below Fortiline, Inc. ("Fortiline") and Patriot Supply Holdings, Inc. ("PSH") (collectively, "Plaintiffs") appeal from the trial court's refusal to provide a remedy for breach of straightforward equity award agreements. The ruling below is in contravention of this Court's recent decisions in *Cantor Fitzgerald, L.P. v. Ainslie*, 312 A.3d 674 (Del. 2024) and *LKQ Corporation v. Rutledge*, 337 A.3d 1215 (Del. 2024); hence, this appeal.

In 2016, PSH and its subsidiaries (which included Fortiline), were acquired by a private equity firm. To protect the value and stability of the newly acquired businesses, PSH offered stock options (the "Award Agreements") to key employees, including the Appellees/Defendants-Below ("Defendants"),[1] who are now former employees of Fortiline. It is undisputed that the Award Agreements were ***not*** a condition of continued employment but were instead offered as a supplemental benefit to sophisticated businesspeople who had the option to choose to accept them in exchange for promises not to compete, solicit, or use their employer's confidential information. This is not a situation where an employer is trying to impose draconian contractual restrictions and remedies on an employee to keep their job.

[1] The Defendants are Hayne McCall, Christopher Antos, Bruce Roberts, Jeffrey T. Jenkins, Sidney C. Peterson III, Clifford Spahn, James R. Cook, Jr., Timothy L. Vanegmond, Alan Hibbard, David S. Horn, David T. McLean, David W. King, E. Todd O'Tuel, Gregory F. Weingart, Gregory McClelland, Jason A. Weiser, John C. West, Lemuel Maza, and Sean P. Stilley.

After executing the Award Agreements and accepting the stock options, Defendants received cash payments for the value of their options when Plaintiffs were again acquired, and the Defendants executed "Surrender Agreements" in which they agreed the surrender of the options did not terminate their various covenants. An unrebutted expert report established that the covenants protected Plaintiffs' business interests and that for investors in businesses that rely heavily on human capital, non-compete agreements are a reasonable and acceptable enforcement mechanism to protect that value and maintain business stability. That expert opinion is consistent with this Court's observation in *LKQ* that granting stock options without tying them to an enforceable promise, like covenants not-to-compete, runs afoul of Delaware's waste jurisprudence.

Unfortunately, this case exists because the multiple Defendants here not only competed with Plaintiffs but systemically raided their workforce and stole hundreds of millions of dollars in violation of their contractual promises. Despite the multiple breaches and coordinated attempts by Defendants to cripple Fortiline permanently, the trial court granted judgment in Defendants' favor. The court held that the non-compete provisions of the Award Agreements are unenforceable per se, and therefore, there can be no remedy whatsoever for a breach, not even one for unjust enrichment seeking return of the value Defendants accepted and retained without fulfilling their end of the bargain.

Respectfully, the trial court's legally incorrect and inequitable rulings must be reversed. An expert report was not even necessary to explain the basis and sound rationale for equity awards tied to covenants not-to-compete. Such contracts are vital to preserving value and encouraging investment in Delaware entities so buyers can be certain that they are able to preserve the human capital and trade secrets critical to maintaining the value of acquired businesses. This too is consistent with the policy goals implicit in *Cantor Fitzgerald* and *LKQ*, all of which reflect a proper balancing of the interests to ensure employees' right to choose their employer are preserved while also ensuring that those choices have consequences that protect businesses from loss of value when those employees breach validly negotiated agreements between sophisticated parties.

The central question presented by this appeal is whether a Delaware court can award a monetary remedy for a sophisticated employee's breach of an equity-investment contract that restricts disclosure of confidential information, competition, and solicitation of customers and employees. This Court answered that question with a resounding "yes" in *Cantor Fitzgerald* and *LKQ*, holding that a contract should be enforced as written if enforcement of the contract does not deprive the employee of his livelihood and does not deprive the public of the employee's services. Indeed, the guidance from those decisions makes clear that this State holds freedom of contract in "high—some might say, reverential—regard" and that only a strong showing of dishonoring a contract is permitted if the vindication of public policy is one stronger than freedom of contract. *See Cantor Fitzgerald*, 312 A.3d at 674. Delaware upholds freedom of contract and enforces such contracts as a matter of "fundamental public policy" because "respecting private agreements has 'wealth-creating and peace-inducing effects,' which 'are undercut if citizens cannot rely on the law to enforce their voluntarily-undertaken mutual obligations.'" *LKQ*, 337 A.3d at 1221.

The trial court twisted *Cantor Fitzgerald* and *LKQ* to hold that when an employer seeks a monetary remedy (rather than injunctive relief), restrictive covenants and forfeiture-for-competition clauses should be treated "for what they are, based on what they command from the employee, no matter what the company seeks as a remedy." (Ex. B at 8.) The trial court then held that the Award Agreements—which permit the sophisticated employees here to compete (but not without consequence)—should not be enforced as written. If this holding were correct, then both *Cantor Fitzgerald* and *LKQ* would have come out differently. Instead, those cases adopted the "employee-choice doctrine" that looks at whether the remedy sought limits the ability of the employee to work or compete. When the remedy is merely damages, restitution, or clawed back equity upside, the employee is free to choose to breach the contracts but is also liable for that breach. This Court could not have been clearer, and its precedent should have been followed below.

Moreover, as noted in *LKQ*, a ruling like the decision below would mean that corporations engage in "waste" when they grant equity awards that are not enforceable via a contractual monetary remedy. Indeed, the trial court had to do some interpretive gymnastics to accomplish its outcome. The court severed the supposedly unenforceable per se covenants to then hold that severing did not produce waste because Plaintiffs received consideration based on the remaining provisions in the option plan. The problem is that this holding is contradicted by the plain terms of the Award Agreements which state that the stock options were awarded "in consideration of" the covenants. Tellingly, a comparison of the restricted stock unit agreement in *LKQ* and the equity plan in this case yields striking similarities that were ignored by the trial court, meaning the decision below did not follow this Court's clear policy guidance in *LKQ*. Because Plaintiffs sought monetary damages, there was no need to sever any terms of the contract.

While the primary error below was the trial court's singular focus on whether the covenants constrained competition, rather than focusing on whether the remedy sought would prohibit the employee from choosing to compete or not, there were additional errors. The errors led to the denial of remedies that would be fully in line with this Court's plain guidance in *Cantor Fitzgerald* and *LKQ*.

Finally, even if no monetary damages are available at law (an erroneous legal conclusion), and even if this Court determines that the trial court properly granted summary judgment on the basis that the Award Agreement are unenforceable contracts, then the trial court still erred when it dismissed Plaintiffs' unjust enrichment count at the pleading stage because that claim comports with the employee-choice doctrine.

In sum, this Court's decisions in *Cantor Fitzgerald* and *LKQ* provided much needed clarity that directly impacts private equity and venture capital transactions, and any transaction with non-compete or non-solicit covenants. Respectfully, affirmance of the trial court would be a step backwards and would bring nothing but confusion to this critical area of business law.

SUMMARY OF ARGUMENT

I. In *Cantor Fitzgerald* and *LKQ*, this Court held that when an employee chooses to breach restrictive covenants, those breaches are enforceable, reflecting Delaware's long-held and reverential respect for "freedom of contract." Here, the parties agreed Plaintiffs could seek remedies in addition to specific performance or injunctive relief if the Award Agreements were breached. Defendants breached the Award Agreements by, *inter alia*, choosing to invest in and work for a competitor, and/or to misappropriate proprietary information. Plaintiffs sought monetary damages and the trial court committed reversible error when it refused to enforce the Award Agreements as written.

a. The trial court misapplied *Cantor Fitzgerald* and *LKQ*. Those decisions explained that the underlying policy and limited circumstances that trigger "reasonableness" review are claims to restrain competition. Plaintiffs' claims do not implicate a restraint on competition, so there is no basis for a reasonableness review of the Award Agreements. Rather, the employee choice doctrine (recognized in *Cantor Fitzgerald* and *LKQ*) applies because Plaintiffs' claims do not prevent Defendants from competing and only seek the return of a supplemental benefit and other appropriate monetary damages for the breach of contract.

b. The trial court relied heavily on the fact that the Award Agreements do not include liquidated damages or forfeiture-for-competition provisions. The ruling drew from *Cantor Fitzgerald* and *LKQ*, which held that forfeiture-for-competition provisions are distinct from non-compete provisions because the former are not enforceable through injunctive relief and do not act as restraints on competition. But the trial court's distinction elevates form over substance and is irreconcilable with Delaware's reverence for contracts. The Award Agreements contain Defendants' agreements not to compete, and the enforcement provision allows Plaintiffs to seek "other rights and remedies" besides an injunction. The Award Agreements therefore allow Plaintiffs to seek damages for breach of those agreements without preventing Defendants from competing.

c. The trial court also erred by finding that Plaintiffs' expert report, considered at the summary judgment stage, introduced no evidence of material fact regarding Plaintiffs' legitimate business interests. However, the report presents unrebutted expert opinion on how private equity rollups depend on terms like those contained in the Award Agreements. More importantly, the trial court's ruling was based on a record where discovery was stayed. The court's conclusions about Plaintiffs' legitimate business interests were therefore premature and, at a minimum, reversal is warranted so that a full record can be developed on Plaintiffs' business interests.

d. The trial court severed the relevant provisions of the Award Agreements but held that doing so would not result in corporate waste because the equity award plan suggested that the consideration Plaintiffs received was attracting and incentivizing Defendants. But this contradicts the plain terms of the Award Agreements which provide that Defendants received the stock options "in consideration of" Defendants' promises not to compete, solicit, or use confidential information. Delaware law provides that where general terms are not aligned with specific operative terms, the specific operative terms control. By severing out the covenants, the trial court deprived Plaintiffs of the consideration they were supposed to receive. Beyond the not-to-compete provision, the ruling also severed the valid provision prohibiting investment in a competitor. The trial court did that without justification or analysis. The investment prohibition does not restrict competition and should have been left intact.

e. Separately, under Delaware's choice-of-law principles, Georgia law applies to Plaintiffs' claims against the Georgia Defendants. Plaintiffs demonstrated in briefing how the Award Agreements' one-year restrictive period complied with Georgia law and therefore the Georgia Defendants failed to prove they were entitled to summary judgment. The trial court did not address Georgia law and instead applied Delaware law to all of Plaintiffs' claims. Reversal is therefore necessary to honor Delaware's choice-of-law principles, which when applied, would look to Georgia law for certain Defendants. Under Georgia law, the Award Agreements are valid and enforceable contracts.

II. Black letter law provides that when a party breaches a contract, that breach is compensable as a matter of law or equity. Here, it is undisputed that Defendants breached the contracts. However, the trial court refused to recognize *any* remedy on the theory that the contract lacked an express forfeiture provision and that like express liquidated damages, the remedy was subject to a "reasonableness" review that allowed the court to invalidate the contract. That conclusion is inconsistent with the plain language of the Award Agreements, which specifically provide that in the event of a breach Plaintiffs may seek an injunction "*in addition to other rights and remedies existing in their favor* . . ." (A1082 (§12) (emphasis added).) It is plain from this provision that when an employee chooses to breach the contract, monetary remedies are available, even if an injunction is not. The trial court erred when it focused on and stopped at the competition analysis and ignored that Plaintiffs seek an appropriate monetary remedy for breach of contract. The decision below should be reversed so that a remedy can be imposed.

III. The trial court erred by holding that there was no relationship between Defendants' enrichment and Plaintiffs' impoverishment, and therefore, Plaintiffs failed to adequately plead that Defendants were unjustly enriched.

a. The Complaint pled that Plaintiffs granted Defendants stock options and that the options were redeemed for cash paid to the Defendants. The trial court held that Plaintiffs failed to plead that Defendants were enriched by the stock option award. This is incorrect because Plaintiffs pled that Defendants received "lucrative stock options" and that Defendants agreed not to compete "[i]n consideration of the [o]ption[] granted." (A0832 (¶59), A1081 (§8).) The Complaint also explained the mechanics of the Award Agreements and how Defendants were further enriched through cash payments they received on account of each of the Defendants' options. The trial court claimed that Plaintiffs "abandoned" the enrichment theory in Plaintiffs' brief opposing Defendants' motion to dismiss, but that is incorrect. Plaintiffs' brief actually restated the Complaint's allegations that Defendants received lucrative stock options and that those options were paid out in cash. Plaintiffs therefore pled that Defendants were unjustly enriched by the stock option grants and payments and that Plaintiffs were impoverished by Defendants' competition notwithstanding those payments. Under the applicable liberal pleading standard, Plaintiffs stated a valid claim.

b. The trial court similarly misconstrued Plaintiffs' allegations regarding Defendants' additional enrichment from their prohibited investment in a competitor, STAline Waterworks, Inc. ("STAline"). The trial court held there was no direct relationship between the stock option grant and Defendants' profits from investing in STAline. But the Complaint alleged that the STAline profits are related to the impoverishment of Plaintiffs because Defendants' taking of Fortiline's customers resulting in a Fortiline revenue decline and a corresponding STAline revenue increase. Plaintiffs therefore pled a direct relationship between their impoverishment and the enrichment resulting from Defendants' investing in a competitor and taking Plaintiffs' customers as part of a raid on Plaintiffs' business and breach of their express covenants.

STATEMENT OF FACTS

The facts here are critical, shocking and compelling. The contract language is clear and Defendants' intentions to destroy Fortiline are undeniable.

A. The Parties and the Award Agreements

Defendants[2] were employees of Fortiline and held positions as regional vice presidents, branch managers, or senior sales representatives. Today, Fortiline is the third largest wholesale distributor of waterworks utility products in the United States. (A0825 (¶29).)

In 2016, a private equity firm, Advent International, through a portfolio company, MORSCO, acquired Fortiline through its parent holding company, PSH. In connection with Fortiline's acquisition, PSH granted "lucrative stock options" to Defendants under the terms of PSH's 2012 Stock Option Plan (the "Plan") to purchase equity in PSH. (A0832 (¶59); *see* A1076; *see* A1089.) The terms of these grants were reflected in the Award Agreements.

B. Relevant Provisions Under the Award Agreements and the Plan

The stock options in the Award Agreements were granted "in consideration of" various promises made by Defendants. (A1077.)

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[2] The eight defendants from the preliminary phase of this action are referred to as the "Original Defendants," and the eleven defendants added in the Second Amended Complaint are referred to as the "New Defendants."

Defendants promised that they would not disclose or misappropriate Plaintiffs' confidential information. (A1080 (§7).) Defendants also promised, during the term of their employment and for one year thereafter, that they would not "directly or indirectly, *own an interest in*, manage, operate, join, control, *lend money or render financial or other assistance to* or participate in or be connected with, as an officer, employee, partner, stockholder, consultant or otherwise, any Person that competes with the Business." (A1081 (§8) (emphasis added).) Finally, Defendants promised not to solicit Plaintiffs' employees or customers. (A1081 (§9).)

With respect to enforcement, the Award Agreements provide:

> Because the Participant's services are unique and because the Participant has access to Confidential Information, the parties hereto agree that *money damages* would not be an *adequate remedy* for any breach of this Agreement. Therefore, in the event of a breach or threatened breach of this Agreement, the Company or its successors or assigns may, in addition to *other rights and remedies existing in their favor*, apply to any court of competent jurisdiction for specific performance . . . .

(A1082 (§12) (emphasis added).) The Award Agreements therefore contemplate specific performance as one possible remedy, but they also contemplate money damages as a remedy.

The Award Agreements further incorporate the provisions of the Plan (A1085 (§24)), including a severability clause which states that if any provision of the Award Agreements is deemed unenforceable then such provision should be stricken and the remainder of the Award Agreements "remain in full force and effect." (A1100 (§14.10).)

In 2018, Reece Limited ("Reece"), acquired PSH, and its subsidiary Fortiline. (A0836 (¶73).) In connection with this acquisition, PSH canceled the Plan, accelerated the options in the respective Award Agreements, and paid out the net equity value to Defendants. (A1341). Collectively, Defendants received net consideration of $2,517,679.04 in cash through this payout, plus the value of the option exercise price of the shares because they never had to pay the option exercise price. (A1281.) In connection with that cash payout, Defendants executed surrender agreements that effectuated the payout (the "Surrender Agreements") and reaffirmed their continuing obligations under the Award Agreements. (A1345.) These surrender agreements were sent under cover of a letter that expressly reminded Defendants of the continuing application of their promises not to compete, solicit, or misuse confidential information. (A1339.)

The terms in the Award Agreements as affirmed in the Surrender Agreements were essential to Reece's decision to acquire Fortiline because Fortiline's managers and salesmen are critical to Fortiline's business. (A1351; A1377-78.) Industry relationships are the salesmen's greatest contribution to Fortiline's business, and securing customers drives Fortiline's revenues. (A1351.) Thus, Reece needed to protect its investment by ensuring the regional vice presidents, branch managers, and senior salesmen would not undermine Fortiline's business after the acquisition. (*Id.*)

C. STAline and Tysinger's Plan to Steal Fortiline's Business and Encourage Breach of the Award Agreements

In April 2023, years after being bought out, Fortiline's founder, Timothy Tysinger ("Tysinger"), formed STAline, which distributes the same products as Fortiline, relies on many of the same vendors, and targets the same customers in many of the same markets. (A1278.) In fact, it is well-known that the "STA" in "STAline" stands for "Second Time Around," referring to Tysinger's second venture into the waterworks business. (*See*, *e.g.*, A1183.)

Tysinger claims that he started STAline to provide a workplace for his old Fortiline friends that were dissatisfied (A1272-73), but the record—despite being devoid of *any* discovery against the *eleven* New Defendants—shows a much more malignant intent. Indeed, Tysinger orchestrated Defendants' breaches and, apart from Spahn, each of the Original Defendants admitted that Tysinger recruited them to join STAline. (A1015.) When McCall resigned on November 3, 2023, for example, Tysinger congratulated him for initiating the mass exodus from Fortiline. (A1405.) After McCall, the other Defendants joined STAline at various times in 2023 and 2024. (A0827-30.)

Tysinger and those affiliated with STAline, including Defendants, have worked to drive Fortiline out of business by stealing Fortiline's confidential information, employees, and customers. (A0826.)

D. Misappropriation of Fortiline's Resources and Confidential Information

Defendants and STAline openly misappropriated Fortiline's confidential business information. By way of example, on January 12, 2024, before he lost access to his Fortiline email address, Peterson sent a series of files to his personal email address. (A1284.) One of those files was a spreadsheet titled "Trey Initiatives 07.07.20." (A1286-96.) This spreadsheet mirrored similar information found in Fortiline's spreadsheets including Fortiline's confidential information regarding the necessary startup funds for a new waterworks business branch. (*Id.*)

Tysinger even enlisted Fortiline's former banker to misappropriate Fortiline's confidential information, including a confidential Fortiline management presentation that disclosed revenue information and other financial metrics, growth strategies, and comments about Fortiline's industry competitors. (A1309-35.) Tellingly, the banker said in his transmittal email that the Fortiline management presentation "can provide a good 'go-by' for what we are trying to develop." (A1298.)

E. **Defendants Breach Their Award Agreements**

Defendants have actively targeted Fortiline's business in breach of their Award Agreements.[3] Indeed, the Original Defendants have admitted to working for a competitor, and several have admitted to investing in STAline[4] and soliciting Fortiline's customers.[5] Although discovery was stayed before Plaintiffs could depose the eleven New Defendants, their admissions would likely be the same. (*See*, *e.g.*, A1398-99 (partially redacted STAline investor list showing several of the New Defendants—West, O'Tuel, McClelland, Weiser, Maza, Stilley, and Horn—have invested in STAline in violation of the Award Agreements).)

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[3] Plaintiffs' Opening Brief in Support of their Motions for Preliminary Injunction and Omnibus Answering Brief in Opposition to Defendants' Motion for Summary Judgment and Motion to Dismiss both detail the extensive (albeit incomplete) record of ways Defendants have breached their Award Agreements. (A0235-44; A0854-57; A1014-17.)

[4] Roberts, Vanegmond, Cook, Antos, Peterson, Jenkins, West, O'Tuel, McClelland, Weiser, Maza, Stilley, and Horn (together, the "Investor Defendants").

[5] A0235-44; McCall A1456 (competing), A1456-57 (soliciting); Roberts A0354 (competing), A0363 (investing), A0370 (soliciting); Vanegmond A0286 (investing), A0293-94 (competing); Spahn A0476 (competing), A0477-79 (soliciting); Cook A0546 (competing), A0552-54 (investing); Antos A0592 (competing), A0598 (investing), A0608 (soliciting); Peterson A0663 (competing), A0680 (investing), A0687 (soliciting); Jenkins A0777 (competing), A0778 (investing)).

F. <u>Defendants' Actions Have Caused Immense Harm to Fortiline</u>

STAline has specifically targeted Fortiline to steal its business. More than half of STAline's employees come from Fortiline. (A1465.) Between its founding in April 2023, and this filing, Tysinger, with the help of Defendants and other STAline associates, has decimated Fortiline's workforce by poaching over 130 Fortiline employees as of April 2025, including senior operations and sales personnel.[6] (A1280.)

Remedying this incomparable employee turnover has come at great expense to Fortiline. (*Id.*) Notably, Fortiline has lost relationships with numerous customers due to the departures of the sales representatives that joined STAline, resulting in hundreds of millions in lost annual revenue. (*Id.*) Fortiline has also had to expend substantial time and energy to maintain its reputation with vendors because of the employee departures. (A1282.) Management has spent countless hours to remedy this continuing disruption to Fortiline's branches and offices. (*Id.*)

The inequity of Defendants' brazen and deliberate breaches is nauseating, and principles of both law and equity require compensation.

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[6] Since the lower court's ruling, another eight employees have left to join STAline, including one that also signed an Award Agreement.

G. Litigation Between the Parties

Plaintiffs filed their original complaint on March 4, 2024, with a motion for temporary restraining order and to expedite the proceedings. (A0001.) On March 19, 2024, the trial court denied Plaintiffs' motion for a temporary restraining order on the papers. (A0158.)

On April 3, 2024, Plaintiffs filed an amended complaint adding several new defendants, along with a motion for preliminary injunction. (A0164; A0205.) On April 26, 2024, the trial court granted Plaintiffs' unopposed motion to consolidate this action with a related action against Defendant Vanegmond. (A0208.) On May 2, 2024, Plaintiffs filed a motion for preliminary injunction against Defendant Vanegmond to be considered together with the original motion for preliminary injunction. (A0214.) On September 5, 2024, the trial court denied Plaintiffs' motions for preliminary injunction. (A0805.)

On October 18, 2024, Plaintiffs filed the Second Amended Complaint (the "Complaint") adding the eleven New Defendants and seeking damages for Defendants' breaches of their Award Agreements instead of an injunction, as well as adding a claim for unjust enrichment in the alternative. (A0817.) On November 14, 2024, Defendants moved to dismiss Plaintiffs' unjust enrichment claim and five of the Defendants that reside in Georgia[7] moved to dismiss Plaintiffs' breach of contract claims (the "Motion to Dismiss") under Rule 12(b)(6). (A0895.) The remaining fourteen Defendants did not move to dismiss the breach of contract claims. On January 7, 2025, Defendants moved for summary judgment as to all of Plaintiffs' breach of contract and unjust enrichment claims (together with the Motion to Dismiss, the "Motions"). (A0900.)

In their briefing opposing the Motions (the "Answering Brief"), Plaintiffs argued that the breach of contract claims should not be subject to reasonableness review because Plaintiffs sought monetary relief. (A0217.) Drawing from this Court's rulings in *Cantor Fitzgerald* and *LKQ*, Plaintiffs argued the employee choice doctrine should apply to Plaintiffs' claims because (i) the remedy sought would not restrict Defendants' ability to work, (ii) Plaintiffs are only seeking contractual damages, and (iii) not awarding damages would result in corporate waste due to Plaintiffs' loss of consideration in the Award Agreements. Plaintiffs also argued that if the provisions allowing Plaintiffs to seek an injunction were held to be unenforceable, then only the injunctive relief provision should be severed while preserving the other provisions that allow Plaintiffs' to seek damages. Plaintiffs further argued that the Award Agreements' prohibition on investing in a competitor

[7] Jenkins, Vanegmond, Hibbard, Horn, and McLean (together, the "Georgia Defendants").

should remain intact regardless of whether any other provisions were found to be unenforceable. Additionally, Plaintiffs argued that, if the Award Agreements are unenforceable, Plaintiffs are nonetheless entitled to restitution under the Restatement of Contracts in order to avoid disproportionate forfeiture. Plaintiffs also argued that Georgia law applied to Plaintiffs' claims against the Georgia Defendants and those Defendants failed to prove the covenants were invalid under Georgia law.

Finally, concerning Plaintiffs' unjust enrichment claim, Plaintiffs argued that Defendants were enriched in two ways. First, that Defendants were enriched when they were awarded stock options in 2016 and received cash payments for those options in 2018. Second, that the investor Defendants have been enriched through their taking of Plaintiffs' customers and business which financially benefitted STAline. That financial benefit is directly related to Plaintiffs' impoverishment from lost revenue.

H. The Trial Court's Rulings

On April 26, 2025, the trial court granted Defendants' motion to dismiss Plaintiffs' unjust enrichment claim (the "Order"). (Ex. C at 3.) The court held that Plaintiffs failed to plead that Defendants had been enriched by the stock option award and the payout, instead holding that the cash payout was an exchange of equal value. The court also ruled there was no connection between the granting of the stock options and the investor Defendants' enrichment.

The trial court heard oral argument on the remaining summary judgment motion on May 9, 2025. On June 27, the trial court issued a letter decision granting Defendants' motion for summary judgment (the "Letter Decision"). (Ex. B.) The Letter Decision ruling applied a reasonableness review to Plaintiffs' breach of contract claims and held the covenants were overbroad and unenforceable. The ruling rejected Plaintiffs' comparison to *Cantor Fitzgerald* and *LKQ*, holding that the agreements in those decisions were distinguishable because they did not prevent the employee from competing and only withheld, or clawed back, supplemental benefits. The trial court further held that severing the covenants would not result in corporate waste because the preamble to the Plan suggested that the purpose of the Plan was to attract and incentivize talent, thereby leaving Plaintiffs' consideration intact. The ruling also denied restitution, holding that the Restatement did not apply because the Award Agreements were otherwise enforceable notwithstanding the severance of the covenants. The ruling did not address the issue of Georgia law.

Respectfully, reversal is warranted.

ARGUMENT

I. THE TRIAL COURT ERRED BY HOLDING THAT THE AWARD AGREEMENTS WERE UNENFORCEABLE UNDER A REASONABLENESS ANALYSIS

A. Question Presented

Did the trial court err by holding that the Award Agreements should not be enforced as written but should instead be reviewed for reasonableness, thus holding the Award Agreements could not support a breach of contract claim? (Preserved at A1020-23, A1027-41, A1048-54.)

B. Standard of Review

This Court reviews contract interpretation questions that hinge on public policy grounds *de novo*. *Cantor Fitzgerald*, 312 A.3d at 685.

C. Merits of Argument

1. Under *Cantor Fitzgerald* and *LKQ*, Reasonableness Review Does Not Apply Because Enforcement of the Award Agreements for damages does not restrict competition

The trial court held that the Award Agreements restrict competition and therefore "implicate public policy interests that call for reasonableness review." (Ex. B at 17.) In so holding, the court misapplied *Cantor Fitzgerald* and *LKQ* and disregarded the type of relief Plaintiffs seek, expressly stating several times that the remedy sought does not matter, and instead holding that if a contract has a non-competition provision, then reasonableness review always applies.

But *LKQ* affirmed the principle that Delaware "uphold[s] the freedom of contract and enforce[s] as a matter of fundamental public policy the voluntary agreements of sophisticated parties." 337 A.3d at 1221. This Court explained that, like *Cantor Fitzgerald*'s forfeiture-for-competition agreement, the repayment obligation in *LKQ* stood "on different footing than underlies non-competition covenants' because 'it does not restrict competition or a former [employee's] ability to work[, or] . . . deprive the public of the employee's services.'" *Id.* at 1222 (citations omitted).[8]

LKQ confirmed that Delaware's strong policy in favor of freedom of contract overcomes the policy concerns regarding restraints on trade <u>*when*</u> the plaintiff is seeking to recover a supplemental benefit from a former employee and the damages sought would not prevent him from competing or making a living. Here, because Plaintiffs only seek damages, as opposed to an injunction, the relief sought does not restrict competition.

[8] Other courts have applied the employee choice doctrine to provide relief even when the non-compete agreement does not include a forfeiture clause. *See, e.g.*, *Lenel Sys. Int'l, Inc. v. Smith*, 106 A.D.3d 1536, 1539–40 (N.Y. App. Div. 2013) ("Contrary to the contention of defendant, the absence of an explicit forfeiture-for-competition clause in the Option Agreements does not prevent plaintiff from seeking rescission of the stock options under the circumstances of this case.").

The trial court disagreed, holding that courts must look to "what the provision demands of the employee, not what the company seeks as a remedy for its breach." (B at 11.) But this narrow reading is wrong for two reasons. First, it ignores that the Award Agreements represent a promise which can be enforced through injunctive relief <u>or</u> damages under the enforcement provisions. (A1082 (§12).) The covenants therefore do not restrict trade when monetary damages are sought. Here, Plaintiffs' prayer for relief is for damages. (A0894.) If the trial court had ruled in favor of Plaintiffs, Defendants would still be free to work for STAline, they would only be required to return the supplemental benefit paid to them and pay any other appropriate damages.

Second, the trial court's narrow reading elevates reasonableness review over Delaware's strong contractarian principles. As *LKQ* explained, Delaware has a strong preference for honoring parties' agreements due to its "wealth-creating and peace-inducing effects, which are undercut if citizens cannot rely on the law to enforce their voluntarily-undertaken mutual obligations." 337 A.3d at 1221. Such a strong preference should only be overcome, and reasonableness applied, if the countervailing concern about restrictions on competition are in play. Because restrictions on competition are not at play here, the trial court erred by excising Delaware's contractarian principles in favor of reasonableness review. As in *LKQ*, the employee choice doctrine should have been applied and the Award Agreements should be reviewed using standard contract interpretation principles. Doing so would result in a finding that the Award Agreements are enforceable, and allow Plaintiffs to recover damages while leaving Defendants free to choose their employer.

But even the trial court's reasonableness conclusion was wrong. In Section 8 of the Award Agreements, Defendants "expressly acknowledge[d] and agree[d] that each and every restraint imposed by [the Award Agreements] is <u>*reasonable*</u> with respect to the subject matter, time period, and geographical area." (A1081 (§8 (emphasis added)).) Further, Defendants agreed that the non-compete provision did not "preclude [Defendants] from earning a livelihood, nor [does it] <u>*unreasonably*</u> impose limitations on [Defendants'] ability to earn a living." (*Id.* (emphasis added).) To allow Defendants to now argue that these provisions are unreasonable and to breach them with impunity when monetary damages are sought in compliance with the employee choice doctrine would be to condone lying in a contract and allow them to profit from those lies when they have not paid back the supplemental benefit paid to them by Plaintiffs. *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1058 (Del. Ch. 2006) ("For the plaintiff in such a situation to prove its fraudulent inducement claim, it proves itself not only a liar, but a liar in the most inexcusable of commercial circumstances: in a freely negotiated written contract.").

2. **The Award Agreements Allow Plaintiffs to Seek Damages <u>Instead of Injunctive Relief</u>**

The Letter Decision relied heavily on the fact that the Award Agreements do not contain liquidated damages or forfeiture-for-competition provisions. (Ex. B at 12-14.) The ruling drew from *Cantor Fitzgerald* and *LKQ*, which held that forfeiture-for-competition provisions are distinct from non-compete provisions because the former are not enforceable through injunctive relief and do not act as restraints on competition. (*Id.*)

The Award Agreements do not <u>*require*</u> enforcement through injunction. Specifically, Section 12's enforcement provision contemplates "other rights and remedies" apart from injunction, including "money damages." (A1082.) Indeed, a contractual recognition that injunctive relief may be necessary because damages may not be adequate is not a waiver of a right to seek damages. *See, e.g.*, *Concord Steel, Inc. v. Wilmington Steel Processing Co.*, 2009 WL 3161643, at *14 (Del. Ch. Sept. 30, 2009) (awarding monetary damages for breach of non-compete agreement even though the agreement provided that "monetary damages would not provide an adequate remedy"); *Reeve v. Hawks*, 136 A.2d 196, 202 (Del. Ch. 1957) (holding that monetary damages may be awarded even though the injunctive relief sought is denied). Additionally, Section 3(b) provides that Defendants forfeit any vested options if they breach the Award Agreements. Although Section 3(b) does not apply here because the options were paid out in 2018, that section, along with Section 12, demonstrates that the Award Agreements are enforceable through multiple remedies. As one learned treatise states, "[a]lthough the parties may, in their contract, specify a remedy for a breach, that specification does not necessarily exclude other legally recognized remedies." 17A Am. Jur. 2d Contracts § 708 (quoted in *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 176 (Del. 2002) ("[T]his Court has held that, even if a contract specifies a remedy for breach of that contract, 'a contractual remedy cannot be read as exclusive of all other remedies [if] it lacks the requisite expression of exclusivity.'").) The Award Agreements therefore allow Plaintiffs to seek damages without preventing Defendants from competing.

3. Plaintiffs' Unrebutted Expert Report Presented Evidence That The Award Agreements Furthered Plaintiffs' Legitimate Business Interests

The Letter Decision held that Plaintiffs' expert report by David Lorry offered no new evidence that would present a factual issue that would render summary judgment inappropriate. (Ex. B at 17-18.) The report was not considered at the preliminary injunction stage, but was introduced by Defendants in their opening brief in support of their motions. (A0953; A1355.)

As Plaintiffs explained in their briefing, the report shows how companies within a private equity rollup structure, like Plaintiffs, can create value by sharing best practices, collaborating on projects, and exchanging growth strategies.

(A1380.) The report noted how the companies within Reece sell goods to each other and the divisions collaborate to bid for joint projects. (A1381.) The report concluded that because Reece operates its divisions as an integrated business, it was reasonable for Plaintiffs to enforce the Award Agreements. (A1382.)

Because the report was not considered previously, it presented new evidence regarding whether the Award Agreements furthered Plaintiffs' legitimate business interests. This new evidence presents a factual issue that should be decided on a full record, rendering the trial court's grant of summary judgment premature. *Germaninvestments AG v. Allomet Corp.*, 225 A.3d 316, 336 (Del. 2020) (holding that the lower court erred by granting a motion to dismiss when expert testimony submitted with respect to a question of law "would have been helpful in identifying and explaining the issues based upon the facts and nuances in the case").

4. The Trial Court's Severance Analysis Results in Corporate Waste and Erroneously Struck The Investment Prohibition

The trial court also erroneously severed the covenants entirely, eliminating any consideration Plaintiffs received under the Award Agreements. The result is corporate waste. The trial court pointed to the Plan's preamble and suggested that the actual consideration Defendants contributed was their hard work and motivation. (Ex. B at 14-15.) But this is contradicted by the preamble's other terms and the Award Agreements' controlling specific terms which provide that the stock options were granted "in consideration of" the covenants. (A1081 (§8).) To state the obvious, Defendants' salaries were for their hard work. The stock options—not conditioned on continued employment—were for things in addition to hard work and while Defendants did, Plaintiffs did not receive the benefit of their bargain.

Delaware law provides that "[a] clear and unambiguous severability clause permits the Court to sever the invalid language while enforcing the remainder of the agreement that does not violate the law." *Suppi Constr., Inc. v. EC Devs. I, LLC*, 2024 WL 939851, at *5 (Del. Super. Mar. 4, 2024). But severance should be narrow and specific because "to strike the entire clause would be contrary to the parties' intention as expressed in the Contract. . . . The Court should excise only the invalid portion, if possible, in order to give effect to the parties' intention." *Id.*

Assuming *arguendo*, that the Award Agreements are unenforceable, the Plan contains a valid severability clause. Therefore, any unenforceable provisions in Section 12 regarding enforcement through injunctive relief should be severed and the remainder of the contract, including the covenants, should remain enforceable, and, when breached, permit Plaintiffs to recover money damages for Defendants' breaches of their promises. Otherwise, if the covenants are stricken completely, then the "conditions ensuring that the grants do not constitute waste" will have vanished. *LKQ*, 337 A.3d at 1222.

The trial court held that severing the covenants in their entirety would not constitute corporate waste because the preamble to the Plan purportedly provides that the consideration Plaintiffs received was attracting employees and incentivizing high performance from Defendants. (Ex. B at 15-16.) That conclusion is wrong for several reasons.

First, the Plan's preamble also states that the Plan's purpose is to "promote the success of the Company's business[.]" (A1090.) Certainly, the Plan's purpose cannot be achieved, nor its consideration fulfilled, if Defendants are permitted to breach their agreements with impunity and prevent the success of Plaintiff's business. Additionally, general statements in a plan's preamble have not been found to be the basis of consideration when the contract at issue involves non-compete provisions. *See Int'l Bus. Machines Corp. v. Martson*, 37 F.Supp.2d 613, 615 (S.D.N.Y. 1999) (analyzing a similar non-compete agreement with virtually identical language in the related plan preamble and enforcing the related non-competes notwithstanding the agreement's preamble) (cited with approval in *LKQ*, 337 A.3d at 1223 n.39). Indeed, the restricted stock unit agreement in *LKQ* contained similar language regarding that agreement's purpose but such language was not used by this Court to supplant that agreement's consideration. (*See* Ex. E.)

The trial court's conclusion also contradicts the controlling terms of the Award Agreements, which provide that the stock options were granted "[i]n consideration of" the promises in the covenants. (A1081 (§8).) "Generally, recitals are not a necessary part of a contract and can only be used to explain some apparent doubt with respect to the intended meaning of the operative or granting part of the instrument. If the recitals are inconsistent with the operative or granting part, the latter controls." *Llamas v. Titus*, 2019 WL 2505374, at *16 (Del. Ch. June 18, 2019) (citations omitted); *see also DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005) ("Specific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one.").

Here, if the preamble to the Plan can be interpreted as describing the consideration contributed by Defendants (it cannot), such description contradicts the specific operative terms that provide that the stock options were granted "in consideration of" the covenants. Accordingly, the trial court erred by relying on the Plan's preamble and concluding that severance of the covenants would not result in corporate waste.

LKQ reaffirmed that "Delaware courts have required stock grants to ***include conditions*** ensuring that the grants do not constitute waste or a gift of corporate assets" and that stock option plans "must contain consideration passing to the corporation, which could take variable forms, such as the retention of services of a valued employee, or the gaining of services of a new employee." *LKQ*, 337 A.3d at 1222 (emphasis added) (citations omitted). If companies cannot obtain damages for breach, then "[b]usiness entities would be discouraged from offering employees additional benefits if [Delaware courts do] not respect their contracts." *Id.* Failing to award damages here would result in corporate waste because the options were awarded "in consideration of" promises made in the Award Agreements. (A1081 (§8).)

Separately, even if the covenants as a whole are unenforceable as overbroad under the trial court's reasonableness review, a separate clause in Section 8 prohibits Defendants from investing in a competitor. (*Id.*) This provision does not ask Defendants to not work for a competitor, does not keep Defendants' services out of the market, and therefore does not implicate Delaware's reasonableness review. Rather, this is a straightforward contract term and should be enforced. Plaintiffs' claims for breach of contract can be sustained by this provision alone.

This issue was discussed extensively during oral argument, but the Letter Decision ignored it completely. (A1569-74, A1598-99.) Instead, the trial court's severance analysis took a battle ax to the covenants rather than a surgeon's knife as required by law, and therefore, it failed to properly leave the valid investment prohibition intact.[9] The trial court's approach to severance and its failure to preserve the investment prohibition is plain error.

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[9] Exhibit D shows an Award Agreement with the severed provisions highlighted, which can be compared to the severance proposed in Plaintiffs' Answering Brief. (*See* A1029.)

5. The Trial Court Ignored Delaware Choice of Law Principles by Applying Delaware Law to Plaintiffs' Claims Against the Georgia Defendants

Under Delaware's choice of law principles, Delaware will defer to the law of another state if that state has a greater interest in the subject matter. *See RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 897 (Del. 2021). Plaintiffs and Defendants briefed that Georgia law applies as to the Georgia Defendants because the Award Agreements were performed in Georgia, Georgia's legislature has specifically addressed enforcement of covenants with the Georgia Restrictive Covenants Act (the "GRCA"), and non-compliance with the GRCA would offend Georgia policy. (A0957-63; A1048.)

The sole argument Defendants made regarding the GRCA was that the Award Agreements' restrictive period effectively lasted longer than the five-year limitation imposed by the GRCA. (A0963-65 (citing O.C.G.A. § 13-8-57(d)).) Plaintiffs demonstrated in their briefing and at oral argument, however, that the Award Agreements' restrictive period *did* comply with the GRCA because the Georgia Defendants' small ownership percentage did not qualify them as sellers and as such they were restricted from competing for one year after they left Plaintiffs' employ. (A1050-52; A1603-13, A1619-20 (discussing GRCA §§ 13-8-57(d) and 13-8-57(b)).) As a result, the Award Agreements are enforceable against the Georgia Defendants.

Notwithstanding the Georgia law set before it, the trial court's ruling failed to address Georgia law at all, instead applying Delaware law to Plaintiffs' claims against the Georgia Defendants. The ruling provided no analysis or reasoning as to its choice to apply Delaware law. Reversal is therefore needed to conduct a trial for damages since the Award Agreements are enforceable under Georgia law.

II. <u>THE TRIAL COURT ERRED BY HOLDING PLAINTIFFS WERE NOT ENTITLED TO LEGAL OR EQUITABLE REMEDIES UNDER THE AWARD AGREEMENTS</u>

A. <u>Question Presented</u>

Whether the trial court erred by ignoring the remedy sought and concluding that Plaintiffs are not entitled to damages under the Award Agreements or equitable restitution under the Restatement of Contracts. (Preserved at A1023-27, A1041-48.)

B. <u>Standard of Review</u>

This Court reviews questions of law in summary judgment appeals *de novo*. *Verrastro v. Bayhospitalists, LLC*, 208 A.3d 720, 724 (Del. 2019).

C. <u>Merits of the Argument</u>

1. <u>The Award Agreements Provide for Damages as a Remedy</u>

The Award Agreements do not require injunctive relief. Instead, they allow Plaintiffs to seek injunctive relief "<u>*in addition to other rights and remedies existing in their favor*</u>," including damages. (A1082 (§12) (emphasis added).) The trial court ruled that Plaintiffs are not entitled to damages because the covenants in the Award Agreements are unenforceable per se, and the Award Agreements are enforceable with those provisions severed. This is erroneous because the provisions Defendants breached are the ones severed from the Award Agreements in their entirety, which allows them to break their promises with no consequences. The Award Agreements represent Defendants' promises, and it is not contested that Defendants broke those promises. Because Defendants breached their promises, Plaintiffs are entitled to damages under blackletter law for breaching the contractual provisions that actually matter here.

2. The Trial Court's Denial of Restitution Misapplied the Restatement of Contracts

The trial court ruled that restitution under the Restatement of Contracts is not available because the Award Agreements, as a whole, are enforceable notwithstanding the covenants' severance. (B at 16.) That is wrong because the Restatement does not require that an entire contract be unenforceable before restitution is available; it only requires that a promise is unenforceable. Because the trial court held that the relevant promises in the Award Agreements are unenforceable, Plaintiffs are entitled to restitution under the Restatement.

Courts of equity generally are able to fashion a remedy at law where injunctive relief is unavailable. 1 J. Pomeroy, *A Treatise on Equity Jurisprudence* § 237(e) (5th ed. 1941). The Restatement provides that a party is entitled to restitution "in return for a promise that is unenforceable on grounds of public policy" if (1) denial of restitution would cause disproportionate forfeiture, (2) the party was excusably ignorant of the facts or of legislation of a minor character, in the absence of which the promise would be enforceable, and he was not equally in the wrong with the promisor, or (3) allowance of the claim would put an end to a continuing situation that is contrary to the public interest. (Restatement (Second) of Contracts § 197

(1981).) Again, the plain language of the Restatement does not require that the ***entire agreement*** be unenforceable, only that a ***promise*** be unenforceable.

The Restatement's exceptions have been applied by Delaware courts in various contexts, including disputes over insurance claims that are void due to violation of public policy. *See, e.g.*, *Geronta Funding v. Brighthouse Life Ins. Co.*, 284 A.3d 47, 60-61, 71-72 (Del. 2022) (citing Restatement (Second) of Contracts §§ 197-99 (1981) and adopting its "fault-based" analysis in considering whether a party is entitled to restitution).

With respect to the first exception, Plaintiffs issued stock options to Defendants and later paid Defendants the value of those options "in consideration of" various promises reflected in the Award Agreements, which were reaffirmed in the Surrender Agreements. (A1081 (§8); A1345 (§9).) The trial court held those promises unenforceable, leaving Plaintiffs without consideration for the value of the option granted and for the cash paid to Defendants to redeem them when Reece acquired Plaintiffs. Denial of restitution here would cause disproportionate forfeiture because Plaintiffs will have lost the supplemental benefit provided to Defendants, receiving nothing in return. Plaintiffs therefore are entitled to restitution to avoid forfeiture.

As to the second exception, a party that cannot enforce a contract nevertheless "has a claim in restitution" when he is "excusably ignorant of the facts or of legislation" and is less in the wrong. Here, Plaintiffs were excusably ignorant when they signed the Award Agreements in 2016 because they did not know that enforcement of the covenants would be held to violate public policy in 2024. *See Kodiak Bldg. Partners, LLC v. Adams*, 2022 WL 5240507 (Del. Ch. Oct. 6, 2022) (establishing precedent used by the trial court to strike the Award Agreements as unenforceable). Additionally, Plaintiffs are less in the wrong because Plaintiffs fulfilled their promises by paying Defendants cash for their options, while Defendants broke their promises. Restatement § 198 ("In the second type of case, the claimant is regarded as being less in the wrong because he has been the victim of misrepresentation or oppression practiced on him by the other party.").

Turning to the third exception, allowing restitution in this case would end a situation contrary to the public interest because, as discussed above, it would avoid corporate waste and would discourage other large groups of employees from ignoring their contracts and leaving for a competitor with confidential information to destroy their former employer's business. Plaintiffs therefore meet all of the Restatement's exceptions and are entitled to restitution.

The trial court held that restitution is not available because "both parties agree that under the Plan's severability clause, the Award Agreements remain enforceable . . . ." (Ex. B at 16.) The ruling mischaracterizes Plaintiffs' Answering Brief, which carefully argued that the Award Agreements are enforceable as written. (A1024.) Plaintiffs never argued that the Award Agreements would be enforceable without the covenants or that any viable agreement would remain if the covenants were severed in their entirety. That ruling is flawed for several additional reasons.

First, the Restatement does not require that the entire agreement be unenforceable, only that the promise be unenforceable. *Geronta Funding*, 284 A.3d 47, 68 (Del. 2022) ("a party has no claim in restitution for performance that he has rendered under or in return for *a promise* that is unenforceable on grounds of public policy unless denial of restitution would cause disproportionate forfeiture") (emphasis added). The court's erroneous denial of restitution results in a forfeiture "after [Plaintiffs have] relied substantially . . . on the expectation of [the] exchange." *Ainslie v. Cantor Fitzgerald, L.P.*, 2023 WL 106924, at *11 (Del. Ch. Jan. 4, 2023), *rev'd and remanded*, 312 A.3d 674 (Del. 2024).

Second, the trial court erroneously claimed that Plaintiffs argued that the Award Agreements were "illegal," but that is incorrect. (Ex. B at 16.) Plaintiffs cited case law that applied the Restatement's exceptions in the context of illegal agreements (A1043), but Plaintiffs were careful to note that they did not view the contracts as illegal even if they were sometimes described as illegal, instead referring to them as potentially "unenforceable." (A1042 (n.22).)

Third, the trial court held that, even assuming the Award Agreements were partially illegal, different rules apply depending on whether an agreement is <u>*wholly*</u> illegal versus <u>*partially*</u> illegal, and Plaintiffs failed to show why they were entitled to restitution under the rules governing partially illegal agreements. (Ex. B at 16 (citing *Lighthouse Behav. Health Sols. v. Milestone Addiction Counseling, LLC*, 2023 WL 3486671, at *11 (Del. Ch. May 17, 2023)).) In *Lighthouse*, the court held that when dealing with a partially illegal agreement, "[f]irst, the Court must determine whether the contract's illegal terms are so 'central to the parties' agreement' that the plaintiff cannot prove its breach-of-contract claim without them. <u>*If they are, then the contract is void despite any lawful terms expressed therein*</u>." *Lighthouse*, 2023 WL 3486671, at *11 (emphasis added).

Here, the trial court's ruling struck the covenants as unenforceable and accordingly granted summary judgment on Plaintiffs' breach of contract claims. Therefore, the unenforceable terms were "so central to the parties' agreement" that Plaintiffs could not "prove [their] breach of contract claim[s] without them." *Id.* Accordingly, under *Lighthouse*, the Award Agreements would be considered void and Plaintiffs are therefore entitled to restitution.

III. THE TRIAL COURT ERRED BY FINDING THAT PLAINTIFFS FAILED TO PLEAD DEFENDANTS WERE ENRICHED AND BY FINDING THAT THERE WAS NO RELATIONSHIP BETWEEN THE INVESTOR DEFENDANTS' ENRICHMENT AND PLAINTIFFS' IMPOVERISHMENT

A. Question Presented

Whether the trial court erred by dismissing Plaintiffs' unjust enrichment cause of action at the pleading stage when Plaintiffs did plead the necessary elements of an unjust enrichment claim in their Complaint. (Preserved at A1055-63.)

B. Standard of Review

This Court reviews dismissal of a complaint under Rule 12(b)(6) *de novo*. *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 167–68 (Del. 2006).

C. Merits of the Argument

The pleading standards on a motion to dismiss under Court of Chancery Rule 12(b)(6) are minimal and plaintiff friendly. "When the Court considers such a motion: (i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are well-pleaded if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and (iv) dismissal is inappropriate unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof." *Adviser Invs., LLC v. Powell*, 2023 WL 6383242, at *4 (Del. Ch. Sept. 29, 2023) (citations omitted).

To plead an unjust enrichment claim in a court of equity, a plaintiff must allege "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law." *Buttonwood Tree Value Partners, L.P. v. R. L. Polk & Co.*, 2023 WL 9053173, at *8 (Del. Ch. Dec. 29, 2023).

As an alternative to Plaintiffs' breach of contract claims, the Complaint pled unjust enrichment by Defendants. First, that the Defendants were enriched when the Plaintiffs granted them stock options, which enrichment was supplemented when the options were redeemed in cash when Reece bought the Plaintiffs. (A0832 (¶59), A0891-92 (¶¶309-14).) Second, that the Investor Defendants were enriched by their STAline profits, which are directly related to Fortiline's lost revenue resulting from Defendants' breaches of the covenants. (A0892-93 (¶¶315-17).)

The trial court erroneously held that the Complaint "first" pled that Defendants were enriched by the payout but then stated that the payout represented "an even exchange of value." (C at 3 (citing A0892 (¶310)).) The ruling then concluded that Plaintiffs' Answering Brief "abandoned" the "theory" that enrichment only occurred by this payout in favor of a theory that the court construed from whole-cloth that the grant of the options was the enrichment. (Ex. C at 3.) The court dismissed the claim, concluding that this option grant theory was unpled, contending that the Plaintiffs sought to amend their pleadings through briefing, and going a step further to contend the payout theory was waived through the brief's discussion of enrichment based on the grant of the options. (*Id.*) That was a heavy-handed analysis under Rule 12(b)'s plaintiff-friendly dictates, and it resulted in a deprivation of an alternate remedy to a party that was almost destroyed by bad actors.

The trial court erred because it ignores what Plaintiffs pled concerning the option award. Plaintiffs alleged Defendants were enriched by the "lucrative stock options" they received in exchange for entering into the Award Agreements. (A0832 (¶59).) Although Count XX for unjust enrichment does not explicitly restate that the options were granted, it "incorporate[d] the preceding paragraphs as if fully set forth" in that claim, including the those that made allegations about the option award. (A0891 (¶308).) The Complaint therefore put Defendants on notice of allegations that they were enriched through one agreement, which granted them "lucrative stock options" as consideration, which options were then redeemed in cash. (A0832 (¶59).)

Plaintiffs pled how they were enriched in 2016 and how the Defendants were enriched by receipt of the option award that lead to their cash payout. (A1056-57 (citing A0832 (¶59), A0892 (¶310).) Plaintiffs' briefing further explained how the payout worked, describing how when Reece purchased Plaintiffs, it took the value of the shares under the purchase price, subtracted the applicable exercise price, and then paid out the net resulting equity value to Defendants. (A1013.) There is no separate option grant and payment theories, nor a "2016 vs 2018 theory of enrichment"—to use the language of the trial court's dismissal opinion—nor did the briefing amend the pleadings or abandon any theory. Rather, the Complaint and the briefing put Defendants on notice of Plaintiffs' claim that Defendants were enriched when they received "lucrative stock options," which were then paid out. By granting Defendants' motion to dismiss the unjust enrichment claim, the trial court disregarded Delaware's plaintiff-friendly standard.

Additionally, even if the Complaint only pled that Defendants were enriched by the cash payout, the trial court's ruling that this payout represents an "even exchange of value" reveals that the court misconstrued the option grant and payout. Defendants did not just receive the value of their stock options when they were paid the cash. They received the upside of the premium that Reece paid per share when it acquired Plaintiffs. (A0836 (¶73); A1002, A1056 ("Defendants realized this benefit when their stock options were cashed out in 2018 in the amount of $2.5 million <u>*net of the additional amount paid to enable them to exercise those options*</u>.").) In other words, the Defendants received a premium on top of what they received when they were granted stock options. The trial court therefore erred by concluding that cash payout was an exchange of equal value, and certainly this construction of the Complaint in a way least favorable to Plaintiffs is plain error under Delaware's pleading standards.

Separately, Plaintiffs alleged how Defendants' actions, in breach of their Award Agreements, have impoverished Plaintiffs in many ways, including hundreds of millions in lost revenue. (A1280, A0857-58 (¶¶152-55), A0892-93 (¶¶315-17).) The Complaint further alleged that "[t]here is a direct relationship between Defendants' enrichment and Plaintiffs' impoverishment because the profits resulted from Defendants' wrongful competition with Fortiline, as well as their solicitation of Fortiline's customers and employees, and their misappropriation of Fortiline's confidential information." (A0893 (¶317).)

The trial court misconstrued the Complaint's allegations regarding this relationship between the impoverishment and the enrichment, erroneously finding that Plaintiffs alleged the Investor Defendants' STAline profits were connected to the impoverishment of the option award. (Ex. C at 3.) Plaintiffs pled no such connection between the Investor Defendants' STAline profits and the grant of the stock options. Rather, Plaintiffs pled that the STAline profits were related to Plaintiffs' lost revenue resulting from Defendants' actions which Plaintiffs paid them not to take. (A0893 (¶317).) The trial court therefore misread Plaintiffs' pleadings regarding the relationship between the impoverishment and the enrichment. Certainly, the court did not construe the allegations in the Complaint in a manner most favorable to Plaintiffs, instead construing the allegations against them, contrary to law. Reversal is therefore necessary to allow Plaintiffs' well-pled unjust enrichment claim to go forward. *See Buttonwood Tree Value Partners, L.P. v. R. L. Polk & Co.*, 2023 WL 9053173, at *12 (Del. Ch. Dec. 29, 2023) (denying a motion to dismiss and holding that even an attenuated relationship between an impoverishment and an enrichment "should be addressed on a record").

CONCLUSION

For the foregoing reasons, the trial court should be reversed and the case remanded for further proceedings consistent with this Court's decision.

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