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IN THE SUPREME COURT OF THE STATE OF DELAWARE

FORTILINE, INC. and PATRIOT SUPPLY HOLDINGS, INC., Plaintiffs-Below/ Appellants, 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, Defendants-Below/ Appellees.	:	No. 300,2025 On Appeal from the Court of Chancery of the State of Delaware C.A. No. 2024-0211-MTZ

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

Appellants/Plaintiffs-below Fortiline, Inc. ("Fortiline") and Patriot Supply Holdings, Inc. ("PSH" and with Fortiline, "Plaintiffs") appeal the Court of Chancery's April 26, 2025 Order Granting in Part Defendants'[1] Joint Motion to Dismiss Plaintiffs' Verified Second Amended Complaint ("Dismissal Order") and the Final Order and Judgment entered on July 7, 2025 ("SJ Order"), which memorialized the rulings set forth in the June 27, 2025 Letter Decision Granting Summary Judgment ("Summary Judgment Opinion").

Plaintiffs commenced this action by filing a Verified Complaint against six of the Defendants. In their pleading, Plaintiffs asserted that the six violated restrictive covenants contained in stock option award agreements (each an "Award Agreement"). The Award Agreements were entered into by each Defendant, while employed by Fortiline, following Fortiline's acquisition by PSH. Plaintiffs sought both injunctive relief and damages. Plaintiffs brought a similar action against Vanegmond and the actions were later consolidated.

[1] "Defendants" means all defendants in this action, 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. If referred to individually, each Defendant will be referred to by his last name.

The Court of Chancery denied Plaintiffs' request for a temporary restraining order in the Vanegmond case based on a finding that the restrictive covenants were likely overbroad and unenforceable.[2]

The Court of Chancery then denied Plaintiffs request for a preliminary injunction, holding that Plaintiffs failed to show a legitimate business interest supporting enforcement of the restrictive covenants due in large part to the protections afforded to far flung affiliates in unrelated businesses. The Court of Chancery found as a result that Plaintiffs failed to show a likelihood of success in demonstrating that the covenants were reasonable.

Following denial of Plaintiffs' request for preliminary injunctive relief, Plaintiffs amended their complaint to add an additional eleven Defendants with similar Award Agreements. In their amended pleading, Plaintiffs continued to assert breach of contract claims based on the same restrictive covenants the Court of Chancery declined to enforce at the preliminary injunction stage, but Plaintiffs chose to drop their request for injunctive relief, instead seeking various measures of damages. Plaintiffs also added an alternative claim for unjust enrichment based on Defendants' alleged violations of the same restrictive covenants on which the breach of contract claims were based.

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[2] The Court of Chancery denied Plaintiffs' request for a temporary restraining order in the original case based *inter alia* on a finding of undue delay in bringing the action.

Following Plaintiffs' amendment, Defendants filed a motion to dismiss Plaintiffs' unjust enrichment claim and a motion for summary judgment with respect to all claims. Defendants also filed a motion to bifurcate liability from damages seeking to postpone damages related discovery pending a ruling on enforceability of the restrictive covenants (whether in contract or unjust enrichment). The Court of Chancery partially granted the motion to bifurcate, expressly directing the Plaintiffs to identify any Rule 56(f) discovery they needed to respond to the dispositive motions. Plaintiffs never identified or sought any additional discovery.

The Court of Chancery entered the Dismissal Order dismissing Plaintiffs' unjust enrichment claim on the basis that the Plaintiffs abandoned the first enrichment theory pled in the Complaint (that Defendants were enriched when they were paid the value of their options in 2018) and improperly sought to amend their complaint in briefing by arguing that Defendants' enrichment occurred when they received the stock options several years earlier. The Court of Chancery held that in so doing, Plaintiffs both waived the theory alleged in the Complaint, and the new theory because it was not pled.

With respect to Plaintiffs' second enrichment theory, the Court of Chancery found that no direct relationship between Plaintiffs' alleged impoverishment (granting the stock options to Defendants in 2016) and the alleged enrichment (the profits they received from their purportedly prohibited investment in their new

employer) could be inferred, and therefore Plaintiffs failed to state a claim for unjust enrichment.

Following oral argument, the Court of Chancery issued the Summary Judgment Opinion holding that the Defendants were entitled to summary judgment on Plaintiffs' remaining claims.

In the Summary Judgment Opinion, the Court of Chancery rejected Plaintiffs' argument that an employer can transform a restrictive covenant into a forfeiture for competition provision of the type analyzed in *Cantor Fitzgerald, L.P. v. Ainslie*[3] and *LKQ Corp. v. Rutledge*[4] (and therefore avoid reasonableness review) simply by dropping claims for injunctive relief and seeking exclusively monetary remedies. The Court of Chancery reasoned that restrictive covenants are reviewed for reasonableness based on what they demand from the employee, regardless of the remedy the plaintiff chooses to seek. The Court of Chancery also held that seeking damages for violating restrictive covenants is not equivalent to seeking the return of a supplemental benefit. Having determined that the restrictive covenants must be reviewed for reasonableness, the Court of Chancery found that the restrictive covenants were unreasonably overbroad and therefore unenforceable.

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[3] 312 A.3d 674 (Del. 2024).

[4] 337 A.3d 1215 (Del. 2024).

The trial court rejected Plaintiffs' argument that severing the restrictive covenants from the Award Agreements would eliminate all consideration for the options and create waste, observing that the stock option plan incorporated by reference into the Award Agreements provided that the options were also granted to attract employees and incentivize high performance.

The trial court rejected Plaintiffs' additional argument that even if the Award Agreements are unenforceable, Plaintiffs are entitled to restitution as a matter of equity. The court noted that both parties agreed that the Plan's severability clause, incorporated by reference in the Award Agreements, meant the Award Agreements remain enforceable even if the restrictive covenants were found unenforceable. The trial court also rejected Plaintiffs' reliance on caselaw awarding restitution where the underlying contract was illegal because here, as the parties agreed, the Award Agreements were not illegal. Further, assuming illegality was the same as unenforceability, the trial court found that Plaintiffs' argument ignored the portion of the principle on which it relied that applied when there is an illegal term in an otherwise enforceable agreement.

The Court of Chancery held that Plaintiffs failed to show any dispute of material fact that would preclude summary judgment, noting that Plaintiffs conducted no further discovery following the order denying the preliminary injunction motions and Plaintiffs' expert report introduced no new issues of fact.

Plaintiffs now appeal. For the reasons set forth herein, the Court of Chancery's rulings should be affirmed.

SUMMARY OF ARGUMENT

I. Denied. Plaintiffs mis-state this Court's holdings in *Cantor Fitzgerald* and *LKQ*. This Court did not hold in either case "that when an employee chooses to breach restrictive covenants, those breaches are enforceable.'" Appellants' Opening Brief ("OB") at 7. *Cantor Fitzgerald* did not involve the enforceability of restrictive covenants, it addressed the enforceability of forfeiture for competition provisions. In *Cantor Fitzgerald*, this Court expressly distinguished between restrictive covenants (which prohibit or restrict competition), and forfeiture-for-competition provisions that do not. This Court held that while restrictive covenants *are* reviewed for reasonableness, a forfeiture-for-competition provision, which does not itself prohibit any activity, was not subject to reasonableness review. In *LKQ*, the Court extended the holding in *Cantor Fitzgerald* beyond the limited partnership context, and held that the same result obtained where a forfeiture-for-competition provision required a claw back rather than relief from a future obligation. What these cases make clear is that the occurrence of the specified competitive activity does not "breach" a forfeiture-for-competition provision. Instead, engaging in the specified conduct is simply a triggering event with respect to the future non-payment or claw back of some supplemental benefit.

a. Denied. The trial court did not misapply *Cantor Fitzgerald* and *LKQ*. Neither of these cases held that it is a "claim" to restrain competition that triggers reasonableness review. Both cases make clear that a contractual restriction on the activity triggers reasonableness review. It is notable that Plaintiffs seek to turn the "employee choice doctrine" on its head by asserting that an *employer may choose* to avoid reasonableness review by not seeking a prohibitory injunction. This is the opposite of employee choice, and not what *Cantor Fitzgerald* or *LKQ* says. In each of these cases, this Court explained that what triggers reasonableness review are contractual provisions that by their terms prohibit competition. The plain language of the restrictive covenants here expressly prohibit competition. Plaintiffs' suggestion to the contrary is belied by their acknowledgement that: "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*." OB at 3 (emphasis added). Additionally, Plaintiffs do not "only seek the return of a supplemental benefit." Plaintiffs seek alleged damages including lost profits and other compensatory damages.

b. Admitted in part and denied in part. The trial court did not "rel[y] heavily on the fact that the Award Agreements do not include liquidated damages or forfeiture-for-competition provisions." *Id*. at 8. In fact, the Award Agreements do contain forfeiture-for-competition provisions, they simply are not applicable on the facts here. *See* A1078 (§ 3(b)), A1080 (§ 6(c)). Defendants agree that the trial court "drew from *Cantor Fitzgerald* and *LKQ*, which held that forfeiture-for competition provisions are distinct from non-compete provisions . . ." and agree that the "Award Agreements contain Defendants' agreements not to compete," but disagree with the Plaintiffs' suggestion that the availability of other remedies means that the Award Agreements do not "prevent[] Defendants from competing," or that Plaintiffs may sidestep reasonableness review of their restrictive covenants by choosing to seek damages rather than injunctive relief.

c. Denied. The trial court did not err by finding that Plaintiffs' expert report introduced no evidence of material facts regarding Plaintiffs' legitimate business interests. While the report may contain "expert opinion" (OB at 8), it does not contain evidence of any fact, much less of a material fact. Furthermore, the expert's general opinions with respect to "how private equity rollups depend on terms like those

contained in the Award Agreements" provides no evidence with respect to the reasonableness of the restrictive covenants at issue here. Finally, the expert's opinion relied exclusively on evidence that the trial court considered at the preliminary injunction stage. Plaintiffs' assertion that the trial court's decision was premature because it was "based on a record where discovery was stayed" is also false. While the Court of Chancery did stay discovery pending the outcome of the dispositive motions, it specifically invited Plaintiffs to request whatever Rule 56(f) discovery the felt was necessary to oppose the motions. Plaintiffs requested none and cannot now be heard to complain that the record was incomplete.

d. Denied. Severing the restrictive covenants from the Award Agreements did not result in waste, and the trial court's conclusion that part of the Award Agreements' consideration was attracting and incentivizing employees did not contradict the terms of the Award Agreements. Waste is a complete failure of consideration, or a gift of corporate assets. It is not clear how Plaintiffs argue that a finding of waste could validate an otherwise invalid contractual provision. Either way, there is no waste. The stock option plan incorporated in the Award Agreements provides that the purpose of the plan was to attract and

incentivize PSH employees and to promote the success of the business. This is sufficient consideration to prevent waste. Plaintiffs' argument that the trial court erred when it "severed the valid provision prohibiting investment in a competitor" (OB at 9) is misplaced. The prohibition on investing was not a "valid provision," it was simply one of a laundry list of prohibited activities in the non-competition provision which the Court found overbroad and unenforceable. Further, the trial court did not do this "without justification or analysis." OB at 9. The trial court analyzed this issue at oral argument, and in the Summary Judgment Opinion noted that the non-competition provision restricts Defendants from investing and held that the non-competition provision was unenforceable. Thus, the trial court addressed this argument.

e. Denied. The trial court did not fail to address Georgia law. The Award Agreements provide that Delaware law applies. Georgia law requires that the court honor the parties' choice of law provision provided the restrictive covenants would not otherwise violate Georgia law.

II. Denied. Plaintiffs' argument is based on the false premise that a contractual provision was breached. For a party to breach a contractual provision, that provision must first be valid. Here, where the restrictive covenants are invalid, there can be no breach. The trial court did not "refuse[] to recognize

any remedy on the theory that the contract lacked an express forfeiture provision"[5] or that "the remedy was subject to a 'reasonableness' review that allowed the court to invalidate the contract." OB at 10. The trial court held that the restrictive covenants (not just the Plaintiffs' chosen remedy) were subject to review for reasonableness and were overbroad and unenforceable. Because the restrictive covenants are not enforceable, Defendants could not have breached them. The remedy Plaintiffs seek is irrelevant.

III. Denied. The trial court did not err "by holding that there was no relationship between Defendants' enrichment and Plaintiffs' impoverishment. As a result, the trial court correctly held that Plaintiffs failed to adequately plead that Defendants were unjustly enriched." OB at 11. Plaintiffs assert that Defendants were unjustly enriched when they breached their Award Agreements through the profits they made from investing in STAline, which impoverished Plaintiffs because these profits were obtained by violating the (unenforceable) Award Agreements. Plaintiffs' claim fails. The fact that the restrictive covenants are not enforceable means Defendants did violate them by investing in STAline, and therefore there is nothing 'unjust' about any profits they have made from such investments.

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[5] The Award Agreements contain express forfeiture provisions. *See* A1078 (§ 3(b)), A1080 (§ 6(c)).

a. Denied. Plaintiffs contend that they adequately pled their second theory of unjust enrichment because their complaint alleges that Defendants received lucrative stock options and agreed not to compete in consideration of the options. Those factual allegations are insufficient to state a claim that Defendants were unjustly enriched by receiving the stock options in 2016. The trial court also correctly held that Plaintiffs, in their brief, abandoned their claim that Defendants were unjustly enriched when they were paid for their options in 2018. Plaintiffs' answering brief in opposition to Defendants' dispositive motions argued that Defendants were enriched "when they received the benefit of the valuable stock options in 2016" and "through any profits they have received as investors in STAline" A1056. Plaintiffs then concluded their enrichment argument by saying that "Defendants realized this enrichment in 2018 when their stock options were cashed out." A1057. Either way, Defendants were not enriched by being paid value of their options because this was an exchange of equal value.

b. Denied. The trial court did not misconstrue the complaint's allegations regarding Defendants' second enrichment theory. Plaintiffs assert that "[t]he trial court held there was no direct relationship between the stock option grant and Defendants' profits from investing in STAline." OB

at 12. The requirement of a relationship between the enrichment and the impoverishment means that an unjustified act resulted in both the enrichment and the impoverishment. *Manti Holdings, LLC v. Carlyle Grp. Inc.*, 2022 WL 1815759, at *12 (Del. Ch. June 3, 2022). Defendants' investing in STAline and going to work for STAline were not unjustified actions because there were no valid promises preventing them from doing so.

STATEMENT OF FACTS

I. Fortiline Is Acquired By PSH And The Defendants Execute The Award Agreements

Fortiline is a in the business of distributing waterworks infrastructure products. A0805-06, A0825 (¶30). Each of the Defendants is a former Fortiline employee. A0820 (¶1), A0816.

In 2016, PSH acquired Fortiline. A0230, A0832 (¶59). Following closing, in 2016 and 2017 PSH entered into Stock Option Award Agreements (the "Award Agreements" each an "Award Agreement") with each of the Defendants. A0805-06 (¶A), A0832 (¶59). The terms of the PSH 2012 Stock Option Plan (the "Plan") are incorporated into the Award Agreements. *Id*., A1085 (§24). The Plan states that the "purpose of this Plan is to attract, retain and motivate" Defendants, and to "promote the success of [PSH's] business by providing them with appropriate incentives and rewards . . . ." A1090 (§1.2).

Each Award Agreement contains identical, broad non-competition, non-solicitation, and confidentiality provisions (the "Restrictive Covenants"). The non-competition section prohibits the Defendants, for a period of one year from the termination of their employment with Fortiline, from:

> engag[ing], directly or indirectly in the Business anywhere in the United States or, . . . directly or indirectly, own[ing] an interest in, manag[ing], operat[ing], join[ing], control[ing], lend[ing] money or render[ing] financial or other assistance to or participat[ing] in or be[ing]

> connected with, as an officer, employee, partner, stockholder, consultant or otherwise, any Person that competes with the Business . . . .

A1081 (§8). The term "Business" is defined as "the business of [PSH] and its Subsidiaries as currently conducted on the date hereof, as conducted within the five (5) years prior to the date hereof, or which the [PSH] Board has authorized [PSH] to develop or pursue (by acquisition or otherwise)." A1083 (§17(b)).

The non-solicitation restrictions in the Award Agreements prohibit the Defendants, for one year after the termination of their employment by Fortiline, from:

> Induc[ing] or attempt[ing] to induce any customer, supplier or other party with whom the Company or any Affiliate do business to cease doing business with the Company or such Affiliates, or in any way interfer[ing] with or attempt[ing] to interfere with the relationship between the Company and its Affiliates and any existing customer, supplier or other party with whom the Company or its Affiliates do business or (b) hir[ing], employ[ing] or in any way, directly or indirectly, interfer[ing] with or attempt[ing] to interfere with any officers, employees, representatives or agents of the Company and its Affiliates, or induce or attempt[ing] to induce[ing] any of them to leave the employ of the Company or its Affiliates, as applicable, or violate the terms of their contracts, or any employment arrangements, with the Company or its Affiliates.

A1081 (§9). This non-solicit restriction applies not only to customers, suppliers and employees of Fortiline (and PSH), but also to those of all "Affiliates" of PSH. The term "Affiliates" is defined as:

> with respect to any specified Person, any other Person which, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, such specified person (for purposes of this definition, "control" (including, with correlative meanings, the terms "controlling," "controlled by" and "under common control with"), as used with respect to any Person, means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of such Person, whether through the ownership of voting securities, by agreement or otherwise). Unless otherwise specifically indicated, when used herein the term Affiliate shall refer to an Affiliate of the Company.

A1090 (§2.2).

Finally, the confidentiality provision in Section 7 of the Award Agreements defines "Confidential Information" as including "sensitive, confidential, proprietary and trade secret information of the Company and its Affiliates," and provides that the Defendants "shall not (during the period of employment and at all times thereafter) disclose to any unauthorized person or use for Participant's own purposes any such Confidential Information . . . ." A1080 (§7).

Section 12 of the Award Agreements states, in part, that PSH "may, in addition to other rights and remedies existing in their favor, apply to any court of competent jurisdiction for specific performance and/or injunctive or other relief in order to enforce or prevent any violations of the provisions hereof . . . ." A1082 (§12).

Last, the Plan contains a severability clause which states that "[i]f any provision of the Plan or any Award is or becomes or is deemed to be invalid, illegal, or unenforceable in any jurisdiction, or as to any Person or Award"[6] then "such provision shall be stricken as to such jurisdiction, Person, or Award, and the remainder of the Plan and any such Award shall remain in full force and effect." A1100-01 (§14.10).

II. PSH Is Acquired And Defendants' Options Are Cashed Out

In 2018, Reece Limited acquired PSH. A0836 (¶73). "In connection with its purchase of PSH, Reece accelerated the options granted pursuant to the Defendants' respective Award Agreements, and, because the options were 'in the money,' paid out the resulting equity value to the Defendants." *Id*.

As a result of the acquisition, PSH's Affiliates include business entities in several different industries, in all fifty states in the United States, Australia, Mexico, and New Zealand, and under various brand names. A0808-09.

[6] The Plan defines an "Award" as "any Option, Stock Appreciation Right, Restricted Stock, or Other Stock Based Award that is granted under this Plan," thus each of the Award Agreements constitutes an "Award" for purposes of the Plan.

III. Defendants Leave Fortiline

Between November 2023 and August 2024, Defendants, unhappy with management's changes, left their employment with Fortiline. A0827-30 (¶¶ 38-56). Defendants all now work at STAline. A0833 (¶ 62).

IV. Plaintiffs Initiate This Action And Are Denied Injunctive Relief

On March 4, 2024, Plaintiffs initiated the action below by filing their verified complaint, a motion for temporary restraining order, and related papers against six of the Defendants. A0001, A0122. The motion sought to enjoin those defendants from breaching the Restrictive Covenants. The court denied the motion on March 19, 2024, because Plaintiffs unreasonably delayed in seeking a TRO. A0011, A0163. Plaintiffs first amended their complaint on April 3, 2024, adding Cook as a defendant. A0012, A0164.

On April 3, 2024, Plaintiffs initiated a second action in the Court of Chancery styled *Fortiline, Inc., et al. v. Timothy L. Vanegmond*, C.A. No. 2024-0358-MTZ (the "Vanegmond Action"), by filing a verified complaint, motion for temporary restraining order, and related papers against defendant Vanegmond. The motion sought to enjoin Vanegmond from breaching the Restrictive Covenants. On April 17, 2024, the court denied the TRO motion because the inclusion of protections for Affiliates rendered the Restrictive Covenants overbroad and unenforceable. B0005.

On April 3, 2024, in the action below, Plaintiffs filed a motion seeking a preliminary injunction. A0013, A0205. On April 26, 2024, the Vanegmond Action was consolidated with the action below. A0019, A0208. On May 2, 2024, Plaintiffs also filed a motion seeking a preliminary injunction against defendant Vanegmond (A0024, A0214) (together the preliminary injunction motions are referred to as the "PI Motions"). The PI Motions sought to enjoin the defendants from breaching the Restrictive Covenants and enjoin Jenkins from breaching the terms of his December 2022 Employee Confidentiality and Non-Solicitation Agreement ("Employee Agreement").

The parties proceeded through discovery. After the close of fact discovery, long after the deadline to respond to those defendants' interrogatory requesting the identification and opinion of any expert witness, and two days prior to filing their opening preliminary injunction brief, Plaintiffs identified the name of an expert witness who would provide an expert opinion for Plaintiffs. Two days later, Defendants moved to preclude Plaintiffs' expert report as untimely. A0059. The next day, Plaintiffs filed their opening preliminary injunction brief and attached their expert report. In his report, Plaintiffs' expert opined that by holding equity in PSH Defendants had an interest in PSH's Affiliates, that Defendants would benefit from the value of PSH's Affiliates, and that therefore PSH had a legitimate business

interest in protecting its Affiliates. *See* A1356-1382. The trial court granted Defendants' motion to preclude the expert report. A0069, B0012-13.

The trial court heard argument on the PI Motions on July 19, 2024. *See* A0084. On September 5, 2024, the trial court issued an order denying the PI Motions because Plaintiffs failed to show that they had a legitimate business interest in enforcing the overbroad Restrictive Covenants. A0805.

On October 18, 2024, Plaintiffs filed their Verified Second Amended Complaint (the "Complaint") adding the remaining eleven Defendants. A0817. The Complaint asserted a breach of contract claim seeking damage against each Defendant and an unjust enrichment claim in the alternative against all Defendants.

The Complaint advanced two theories of unjust enrichment. First that "[e]ach Defendant was enriched when PSH accelerated the options granted pursuant to the Defendants' respective Award Agreements and paid out the resulting equity value to the Defendants in 2018." A0892 (¶ 310). Second that Defendants were unjustly enriched through the breaching of the Award Agreements by the profits they have received from STAline, and Plaintiffs were impoverished because they granted Defendants the options in exchange for the promises they breached. A089-932 (¶¶ 315-316). Plaintiffs sought return of the amounts paid to Defendants in 2018, and damages. A0893 (¶ 319).

V. Defendants File the Motion To Dismiss and Motion For Summary Judgment and the Action is Bifurcated

On November 14, 2024, Defendants filed their Joint Motion to Dismiss the Complaint (the "Motion to Dismiss") seeking dismissal of the claims for breach of contract against the Georgia Defendants, and the unjust enrichment claim against all Defendants. A0895. On December 13, 2024, Defendants filed their Second Renewed Joint Motion for Summary Judgment, seeking summary judgment as to all counts (I through XX) of the Complaint, which motion Defendants amended on January 7, 2025 (the "Motion for Summary Judgment"). A0900.

On December 13, 2024, Defendants moved to bifurcate the validity of the Restrictive Covenants from the remaining issues in the case. A0105. On January 15, 2025, the trial court granted the motion in part, explaining that:

> I believe the most efficient course is to brief and decide the defendants' motions before proceeding to discovery, *subject to any Rule 56(f) discovery the plaintiffs demonstrate they need to oppose the motion*.

B0155-56 (emphasis added). Notwithstanding Court of Chancery Rule 56(f) and the trial court's order, Plaintiffs never identified or requested any discovery relevant to opposing Defendants' dispositive motions.

VI. The Trial Court Grants Defendants' Dispositive Motions and Plaintiffs Appeal

On April 26, 2025, the trial court issued the Dismissal Order granting, in part, Defendants' Motion to Dismiss. OB Ex. C. The court dismissed the unjust

enrichment claim, rejecting Plaintiffs' unjust enrichment theories. *Id*. For the first theory, the court pointed out that in their Complaint, Plaintiffs alleged that Defendants were unjustly enriched when PSH accelerated their options and paid them their equity value in 2018, but in briefing abandoned this theory and argued that Defendants were enriched when they received the stock options in 2016. *Id*. As a result, the Court held the Plaintiffs waived the 2018 enrichment theory and further held that they could not amend their Complaint through briefing. *Id*.

The court further held that Plaintiffs failed to plead a direct relationship between Plaintiffs' impoverishment (granting the stock options to Defendants) and Defendants' enrichment (the profits that Defendants have made from STAline), and that Defendants' unjustified act did not result in Plaintiffs' impoverishment. *Id*.

On May 9, 2025, the trial court heard oral argument on Defendants' Motion for Summary Judgment (A1544), and on June 27, 2025, issued the Summary Judgment Opinion. OB Ex. B.

The court determined that Defendants were entitled to judgment as a matter of law. *Id*. at 6. The trial court rejected Plaintiffs' argument that reasonableness review does not apply to the restrictive covenants here just because Plaintiffs only seek damages. *Id*. at 6-7. The court distinguished restrictive covenants from forfeiture-for-competition provisions, explaining that what an employee promises to do under each type of provision is different, and that Delaware courts should respect

that difference. *Id*. at 10. The court explained that the remedy sought does not change the fact that they seek to enforce restrictive covenants prohibiting competition. *Id*. at 12.

The court rejected Plaintiffs' waste argument observing that the Plan specified that the stock options were not granted solely in exchange for the Defendants' promises not to compete, but also to attract employees to PSH and to incentivize high performance and to promote the success of the business. *Id*. at 15.

The court rejected Plaintiffs' argument that even if the Award Agreements are unenforceable on public policy grounds, and no legal remedy is available, that Plaintiffs should still obtain an equitable remedy based, at least in part, on the fact that both parties agreed the Award Agreements were enforceable notwithstanding severance of the Restrictive Covenants. *Id*. at 16-17. The trial court rejected Plaintiffs' attempt to apply illegality jurisprudence because the Award Agreements are not illegal, and even if such cases were applicable, they clearly differentiate between agreements that were illegal *in toto* and those where there was an illegal term within an otherwise legal agreement. *Id*. at 16.

The court held that Plaintiffs failed to show a dispute of material fact because Plaintiffs took no discovery following the PI Order, supplied no affidavits, and the only thing that was not considered at the preliminary injunction stage was Plaintiffs'

expert opinion, which, even if admissible, did not introduce new evidence. *Id*. at 17-18.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY GRANTED DEFENDANTS SUMMARY JUDGMENT ON PLAINTIFFS' BREACH OF CONTRACT CLAIMS

A. Questions presented

Whether the Court of Chancery correctly held that the Restrictive Covenants are subject to review for reasonableness and cannot support Plaintiffs' breach of contract claims (Counts I through XIX).

B. Scope of Review

"This Court reviews a grant of summary judgment *de novo*. The Court also reviews *de novo* the trial court's formulation and application of legal principles." *Reddy v. MBKS Co.*, 945 A.2d 1080, 1085 (Del. 2008) (citations omitted).

C. Merits of Argument

1. The Restrictive Covenants are subject to reasonableness review because they expressly restrict competition and are distinct from forfeiture-for-competition agreements.

The Court of Chancery held that because the Restrictive Covenants by their terms prohibit competition, they must be reviewed for reasonableness.[7] Plaintiffs

[7] On page 24 of their Opening Brief, Plaintiffs state that "[i]n 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." To be clear, the trial court did not hold that if a contract has a non-competition provision, then reasonableness review always applies. The trial court held that because Plaintiffs seek to enforce restrictive

argue the trial court erred because, in their view, the enforcement provision in the Award Agreements allows Plaintiffs to choose whether to enforce the Restrictive Covenants through either injunctive relief, or through damages, and because Plaintiffs are now choosing to seek only damages, the covenants do not restrict competition and should not have been reviewed for reasonableness. OB at 24-25, 28-29.

Plaintiffs argue that under *LKQ*, Delaware's strong contractarian preference should only be overcome, and reasonableness review applied, if a plaintiff actually seeks to restrict competition, and that, as in *LKQ*, the trial court should have applied the employee choice doctrine here. OB at 26-27. Because Plaintiffs assert that their Complaint does not seek to restrict competition (*i.e.* the Defendants can work for a competitor, they just need to suffer damages as a result), they assert that reasonableness review does not apply to the restrictive covenants. *Id*.

Plaintiffs' argument is belied by the plain language of the covenants they seek to enforce, and by their own statements. The non-competition provision states that "the Participant shall not engage, directly or indirectly in the Business . . . or . . .

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covenants, they must be reviewed for reasonableness, regardless of the fact that Plaintiffs seek damages and not an injunction. The court did not hold, for example, that if a plaintiff seeks to enforce a forfeiture-for-competition provision, and that same contract also contains a non-competition provision, the forfeiture provision is reviewed for reasonableness.

directly or indirectly, own an interest in, manage, operate, joint, control, lend money or render financial or other assistance to or participate in or be connected with, . . . any Person that competes with the Business[.]" This provision plainly states "you shall not compete."

In their brief, Plaintiffs recognize that they seek to enforce a provision that restrains competition. *See* OB at 3 ("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."). They also recognized it many times in the proceedings below. *See*, *e.g.*, A0821 (¶¶ 3, 4), A0860 (¶161), A0861 (¶169); A1012 at 16.

Plaintiffs suggest that the relief they choose to seek somehow transforms a restrictive covenant into a forfeiture-for-competition provision. Plaintiffs incorrectly suggest that in *LKQ* this Court "confirmed that Delaware's strong policy in favor of freedom of contract overcomes the policy concerns regarding restraints on trade when 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." OB at 25.

In *LKQ Corp. v. Rutledge*, 337 A.3d 1215 (Del. 2024), the Court considered whether *Cantor Fitzgerald* applied to forfeiture-for-competition provisions outside

of the limited partnership context, and where the forfeiture provision sought return of a "supplemental benefit." In *LKQ Corp.*, an employee and his former employer entered into a restricted stock unit agreement providing the employee with restricted stock units. The agreement also contained a provision in which the former employee agreed to forfeit his units if he left and competed within a specified time, and the agreement reinforced that forfeiture would trigger a repayment obligation for any stock sold. This Court held that such forfeiture provision was not subject to reasonableness review and explained:

> Like the anticompetition condition in Cantor Fitzgerald's limited partnership agreement, a restricted stock unit agreement "stands on different footing than underlies non-competition covenants" because it "does not restrict competition or a former [employee's] ability to work." And like the Cantor Fitzgerald partners, if a former employee wishes to compete with the employer during the relevant time, the employer "need not confer the deferred benefit" on the former employee, who has "agreed to forfeit that benefit upon engaging in competition."

Id. at *1221. Unlike the forfeiture-for-competition provisions at issue in *Cantor Fitzgerald* and *LKQ*, the Restrictive Covenants, by their terms (as Plaintiffs recognize) explicitly restrict the Defendants' ability to work.

A key distinguishing aspect between forfeiture-for-competition provisions and restrictive covenants is that a former employee does not "breach" a forfeiture-for-competition provision by engaging in competition, engaging in competition is simply a trigger with respect to some "supplemental benefit." Conversely, if, like

here, a claim asserts that a former employee has breached a contractual provision by engaging in the competitive activity specified in provision, that is a restrictive covenant. Sections 7, 8, and 9 of the Award Agreements explicitly prohibit competitive activity. Sections 7, 8 or 9 do not address return of a supplemental benefit. Putting aside the fact that the Restrictive Covenants are not forfeiture-for-competition provisions, Plaintiffs do not seek the return of a supplemental benefit, they seek damages. Compensatory damages and lost profits are not "supplemental benefits."

Plaintiffs seek to flip the concept of the employee choice doctrine on its head. Plaintiffs originally sought injunctive relief against the Defendants and lost. Plaintiffs then chose to seek only damages against the Defendants. This is not an "employee choice," it would be an "employer choice" in that an employer could choose to avoid reasonableness review by choosing not to seek injunctive relief.

2. The Restrictive Covenants were properly reviewed for reasonableness even though the Award Agreements state that the covenants are reasonable.

Plaintiffs do not appeal the trial court's determination that the Restrictive Covenants are overbroad and unenforceable, but they do argue that the trial court erred by evaluating for reasonableness because the Defendants agreed, in section 8 of the Award Agreements, that the Restrictive Covenants are reasonable in scope and that the non-competition provision does not prevent Defendants from earning a

living. OB at 27. Plaintiffs contend that to now allow Defendants to argue that the covenants are unreasonable is equivalent to fraud, citing the trial court's well-known *Abry Partners* case. *Id*.

Plaintiffs' argument runs afoul of settled Delaware law and should be rejected. *See Kodiak Bldg. Partners, LLC v. Adams*, 2022 WL 5240507 (Del. Ch. Oct. 6, 2022) (holding on public policy grounds that contractual provisions purporting to waive a defendant's ability to challenge the reasonableness of restrictive covenants "are ineffective to preclude or circumvent the requisite judicial scrutiny of noncompete provisions before they can be enforced.")

3. The Court of Chancery correctly held that Plaintiffs presented no dispute of any material fact.

The Court of Chancery found that Plaintiffs failed to show a dispute of material fact because Plaintiffs conducted no discovery following entry of the PI Order, presented no additional evidence, submitted no affidavits on personal knowledge, and that their expert report introduced no new evidence. The court concluded that the expert report merely argued the covenants' reasonableness based on evidence considered in the PI Order, and that absent new evidence, the expert's report did not introduce any issue of material fact. Plaintiffs argue that because the expert report was not considered previously, it presented new evidence regarding whether the Award Agreements protected their legitimate business interests, which presents a factual issue that should be decided on a full record.

Plaintiffs' argument fails because their expert's opinion on the reasonableness of restrictive covenants did not introduce any fact issue. An opinion is just that – an opinion, and the facts and documents the expert claimed to rely on in forming his opinion regarding a business justification for the Restrictive Covenants were all part of the record and considered by the Court at the preliminary injunction phase. Having taken no discovery since the preliminary injunction stage, Plaintiffs had no new facts to introduce. For the reasons explained by the trial court, the Restrictive Covenants are far broader than necessary to protect Plaintiffs' legitimate business interests (and Plaintiffs do not appeal this aspect of the trial court's rulings).

Plaintiffs repeatedly call into question the completeness of the record, however even if the record were incomplete (which it is not), any gaps are solely attributable to the Plaintiffs. Rule 56(f) granted Plaintiffs the opportunity to present affidavits stating that they could not present facts essential to justify their opposition. Indeed, the trial court specifically left open the door for Plaintiffs to seek discovery ("I believe the most efficient course is to brief and decide the defendants' motions before proceeding to discovery, subject to any Rule 56(f) discovery the plaintiffs demonstrate they need to oppose the motion."). Plaintiffs sought no such discovery and failed to identify any discoverable facts that might demonstrate a legitimate business interest in enforcing the extraordinarily broad Restrictive Covenants

(because none would). Additionally, such facts would almost certainly be within their possession in the first instance.

4. The Court of Chancery properly severed the unenforceable Restrictive Covenants, which did not constitute waste.

In opposing the Motion for Summary Judgment, Plaintiffs argued that severing the Restrictive Covenants would constitute waste, and therefore the court should have severed the provision authorizing injunctive relief. Plaintiffs also argue the trial court should have severed everything from the non-competition provision save for the prohibition on investment. The Court of Chancery held that severing the invalid Restrictive Covenants from the Award Agreements would not constitute waste because the covenants were not the only consideration provided by the Defendants, as the Plan's terms specify that the stock options served to attract employees and incentivize high performance, citing section 1.2 of the Plan. It also rejected Plaintiffs argument that the Enforcement provision, rather than the unenforceable covenants, should be severed.

Plaintiffs argue the trial court erred in holding that severing the Restrictive Covenants would not constitute waste because, first, the purpose of the Plan's "preamble" cannot be achieved if Defendants are permitted to breach their Award Agreements, and general statements in a preamble have not been found to be the basis of consideration for a restrictive covenant. OB at 31-32. Second, Plaintiffs say the preamble contradicts the controlling terms of the Award Agreements, which

provide that the options were granted in consideration of the Restrictive Covenants. OB at 32.

Regarding waste, Plaintiffs seem to imply that avoiding waste is a basis on which to validate an otherwise invalid restrictive covenant. Undersigned counsel is unable to locate any Delaware case in which waste was a basis for validating an otherwise invalid contractual provision.[8]

Even if Plaintiffs' waste argument is considered, corporate waste is an "extreme test, very rarely satisfied by a shareholder plaintiff, because if under the circumstances any reasonable person might conclude that the deal made sense, then the judicial inquiry ends.'" *See Cambridge Ret. Sys. v. Bosnjak*, 2014 WL 2930869, at 9 (Del. Ch. June 26, 2014) (citation omitted). Plaintiffs' arguments do not meet this extreme test.

The trial court did not err in concluding that the consideration flowing to PSH included continued hard work from Defendants. Article 1, section 2, of the Plan specified that the options granted were to attract and incentivize employees and to promote the success of the business. Continued service of employees is sufficient consideration in exchange for stock options, and there is nothing contradictory about

[8] As noted above, Plaintiffs have conceded that the Award Agreements, through incorporation of the terms of the Plan, contain a valid severability clause, and therefore the existence of invalid provisions does not impact the enforceability of the remaining provisions of the Award Agreements.

there being multiple forms of consideration. *See*, *e.g.*, *Zupnick v. Goizueta*, 698 A.2d 384, 387-88 (Del. Ch. 1997); *Seinfeld v. Slager*, 2012 WL 2501105, at *6 (Del. Ch. June 29, 2012).

The Award Agreement also contains terms to ensure that PSH would receive the benefit of their bargain (continued employee performance) because the options were subject to vesting and would be forfeited upon each Defendants' violation of the Restrictive Covenants. *See* sections 3(b) and 6(c) of the Award Agreements (and the Defendants did continue working for Fortiline).[9] Thus, even after severing the Restrictive Covenants, the grant of options does not constitute waste. *See Steiner v. Meyerson*, 1995 WL 441999, at *8 (Del. Ch. July 19, 1995); *Kerbs v. California E. Airways*, 90 A.2d 652 (1952).

In addition to claiming that the trial court's severance analysis constitutes waste, Plaintiffs argue that it was also improper because "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." OB at 34. Plaintiffs say that this issue was discussed at oral argument but was not

[9] The fact that the options would become automatically forfeited if any of the Defendants breached the Restrictive Covenants undercuts Plaintiffs' contention that the options were not given in consideration for Defendants' continued hard work and that Defendants were paid salaries for their hard work, and the options were for things "in addition to hard work" (without specifying what else they would be for). OB at 30-31.

addressed in the Summary Judgment Opinion. *Id*. Plaintiffs contend that the trial court committed plain error by not preserving the investment prohibition. *Id*.

In the first section of the Summary Judgment Opinion, the court noted that the non-competition provision includes a prohibition against investing in anyone who competes with the Business. OB Ex. B at 2. Thus, as set forth below, the prohibition against investment was unreasonable for the same reasons that the other restrictions contained in the non-competition provision were unreasonable. The trial court did not consider the investment prohibition a standalone clause and implicitly rejected Plaintiffs' argument by finding the covenant unenforceable. Moreover, severing the non-competition provision save for the prohibition on investing would be akin to blue penciling the provision, which the trial court declined to do on multiple occasions, a decision Plaintiffs do not appeal. Plaintiffs' attempt to recast their blue-penciling argument as a severance argument should be rejected for the same reasons the trial court declined to blue pencil the overbroad Restrictive Covenants.

Moreover, if the non-competition provision is modified as Plaintiffs request, it would prevent each Defendant from "directly or indirectly, own[ing] an interest in . . . any Person that competes with the Business. . . ." Thus, the provision would prevent Defendants from investing in Affiliates of PSH, which, for the reasons

explained by the trial court in the PI Order and Summary Judgment Opinion, renders the prohibition overbroad and unenforceable.[10]

Finally, the trial court's severance analysis was consistent with the severability clause and Delaware law. The severability clause states that "[i]f any provision of the Plan or any Award is or becomes or is deemed to be invalid, illegal, or unenforceable in any jurisdiction, or as to any Person or Award" then "*such provision shall be stricken* as to such jurisdiction, Person, or Award, *and the remainder of the Plan and any such Award shall remain in full force and effect*." (emphasis added). The Restrictive Covenants are unenforceable as to each Defendant, therefore the trial court properly struck those provisions and left the remainder of the Plan and Award Agreement in effect. This was also consistent with Delaware law. *See e.g. Wagner v. BRP Group, Inc.*, 316 A.3d 826 (Del. Ch. 2024) ("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.") (quoting *Suppi Constr., Inc. v. EC Devs. I, LLC*, 2024 WL 939851, at *5 (Del. Super. Mar. 4, 2024)). The severability clause and Delaware law do not instruct a trial court to sever unenforceable aspects of provisions but leave some words in place

[10] In other words, the Award Agreements would prevent the Defendants from investing in a plumbing business in Australia. This renders the covenant overbroad for the same reason that Plaintiffs do not have a legitimate business interest in preventing Defendants from working for a plumbing business in Australia.

if they can be strung together to form a provision that would be enforceable on its own.

5. The trial court properly found the Restrictive Covenants overbroad under Delaware law, but even if the trial court should have addressed Georgia law, it was harmless error.

The Trial Court's application of Delaware law to the Restrictive Covenants was appropriate and does not contravene Georgia law. Plaintiffs' contention that the Restrictive Covenants in the Award Agreements are solely governed by Georgia law is not accurate. While Georgia law provides that restraints on trade not in compliance with the Georgia Restrictive Covenants Act ("GRCA") (O.C.G.A. §13-8-50, *et seq*.) are void and unenforceable, Georgia Law does not prohibit applying another State's law where that law provides greater limits on restrictive covenants. *Motorsports of Conyers, LLC v. Burbach*, 892 S.E.2d 719, 726 (2023). Because the Court of Chancery found the Restrictive Covenants overly broad and an unreasonable restraint on trade under Delaware law, there was no need to directly address Georgia law. Georgia's stance is clear; it only prohibits the application of another State's law if that would result in enforcement of a restrictive covenant that would be deemed unreasonable under the GRCA. Restated, Georgia law provides that restrictions in excess of those permitted by the GRCA are void and unenforceable. *See* O.C.G.A. §13-8-2 and §13-8-53(d).

Because the Award Agreement explicitly provides a choice of law provision, requiring Delaware law, the restrictive covenants for the Georgia Defendants must comply with both Georgia and Delaware law.

> So a Georgia court that is asked to apply foreign law to determine whether to enforce a restrictive covenant must first apply the GRCA to determine whether the restrictive covenant complies with it. This includes an analysis of whether the restrictions at issue are "reasonable in time, geographic area, and scope." OCGA § 13-8-53 (a). If the court applies the GRCA and concludes that the restrictive covenant is reasonable, the court can honor the choice-of-law provision and apply the foreign law to determine the enforceability of the restrictive covenant. If, on the other hand, applying the GRCA shows that the restrictive covenant is unreasonable, the restrictive covenant is against public policy, see OCGA § 13-8-2 (a) (2), and the court may not apply foreign law to enforce it, see OCGA § 1-3-9.

Motorsports of Conyers, LLC, 892 S.E.2d at 726; *see also Acousti Eng'g of Fla. v. Jernigan*, 2024 WL 4535279, at *3 (N.D. Ga. Aug. 27, 2024) ("With these principles in mind, the Court will first determine whether the restrictive covenants are contrary to Georgia's public policy. If not, Florida law shall apply to all the terms in the Employment Agreement."). Here, even if the Restrictive Covenants complied with the GRCA, the Court of Chancery still correctly honored the parties' choice of Delaware law to govern enforceability of the restrictive covenant.

Where, as here, the Restrictive Covenants are unreasonable and unenforceable under Delaware law, there is no practical need to first evaluate whether they might

also be unenforceable under Georgia law. Even if the Restrictive Covenants did pass the GRCA test, that would simply be a first step before the analysis under Delaware law conducted by the Court of Chancery, and the Restrictive Covenants still fail under Delaware law.

6. The trial court correctly held that Plaintiffs were not entitled to restitution.

In granting Defendants summary judgment, the trial court held that Plaintiffs were not entitled to restitution. The trial court rejected Plaintiffs' reliance on cases awarding damages in equity where the underlying contract was illegal because "[b]oth parties agree that under the Plan's severability clause, the Award Agreements remain enforceable even if the restrictive covenants are unenforceable" and "[e]ven assuming illegality is the same as unenforceability, different rules apply when there is 'an illegal term within an otherwise legal agreement'" an issue which Plaintiffs ignored.

Plaintiffs maintain this was error because, under the plain language of the Restatement (Second) of Contracts, only a promise, and not the entire agreement, needs to be unenforceable to be entitled to restitution and Plaintiffs meet the Restatement's exceptions. Plaintiffs also argue that the trial court mischaracterized its summary judgment answering brief. Plaintiffs are wrong.

As an initial matter, the substance of Plaintiffs' restitution argument should not be considered as it was not raised below. In briefing below, Plaintiffs argued

that "Courts of equity may award damages for amounts paid under a contract that is alleged to be unenforceable or illegal" and "even if the Court finds that the Award Agreements are unenforceable on public policy grounds for the purpose of awarding a legal remedy, Plaintiffs are still entitled to restitution from Defendants as a matter of equity." A1042. Plaintiffs did not argue that for a party to be entitled to restitution, only the Restrictive Covenants, and not the entire Award Agreement, need be unenforceable. This argument is waived. Sup. Ct. R. 8. Plaintiffs are also not entitled to restitution because it is a remedy in which liability is based on a defendant's unjust enrichment. *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999) ("For a court to order restitution it must first find the defendant was unjustly enriched at the expense of the plaintiff."). For the reasons explained by the trial court in the Dismissal Order and below, Plaintiffs failed to state a claim for unjust enrichment. Separately, Plaintiffs cannot obtain restitution because the Award Agreements and the Plan governed the relationship among the parties with respect to the stock options, even after severance of the Restrictive Covenants. *Gone GB LTD. v. Intel Servs. Div., LLC*, 2022 WL 17494811, at *9 (Del. Super. Ct. Dec. 8, 2022) ("Moreover, the Agreement governs the relationship between the parties and makes restitution and unjust enrichment claims unavailable."). The inquiry should end here, and the Dismissal Order should be affirmed.

Plaintiffs also argue that they "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;" the trial court "erroneously claimed that Plaintiffs argued that the Award Agreements were 'illegal,' but that is incorrect;" and that under the rules governing partially illegal agreements, the Award Agreements would be considered void, entitling Plaintiffs to restitution. OB at 41-42. These contentions are without merit.

In Plaintiffs' answering brief in opposition to the Motion for Summary Judgment, they explicitly argued that "[i]f the Court finds that the Covenants in the Award Agreements are unenforceable for the purpose of specific performance or injunctive relief, the entire agreement would not be unenforceable because the Plan contains a valid severability clause." A1027. Plaintiffs' statement to the contrary is incredible. In any event, Plaintiffs cannot have it both ways (argue that the severability clause severs unenforceable provisions, but also that the severability clause cannot work to sever the provisions that Plaintiffs do not want severed).

Similarly, the trial court did not "erroneously claim[] that Plaintiffs argued that the Award Agreements were 'illegal.'" OB at 41. The court said that "Plaintiffs invoke this Court's ability to award damages in equity where the underlying contract was illegal." Those are two different things. The court was clearly saying that

Plaintiffs were relying on caselaw from the trial court where damages were awarded in equity where the contract was illegal.

The trial court also did not err by holding that the Plaintiffs failed to show entitlement to restitution under the rules governing partially illegal agreements. In their summary judgment answering brief, Plaintiffs quoted *Lighthouse Behav. Health Sols., LLC v. Milestone Addiction Counseling, LLC*, 2023 WL 3486671, at *10 (Del. Ch. May 17, 2023), which sets forth the same three exceptions in the Restatement applicable to entirely unenforceable contracts. The *Lighthouse* case then explained the rules governing the enforceability of an illegal contract when dealing with an illegal term within an otherwise legal agreement. Plaintiffs did not cite, or argue the application of, these rules below. They cannot argue they are applicable now. Sup. Ct. R. 8. Regardless, the contracts are not illegal, so these rules do not apply.

II. THE COURT OF CHANCERY CORRECTLY DISMISSED PLAINTIFFS' UNJUST ENRICHMENT CLAIM

A. Question Presented

Whether the trial court correctly dismissed Plaintiffs' claim for unjust enrichment (Count XX).

B. Scope of Review

The Court reviews a trial court's granting of a motion to dismiss *de novo*. *Origis USA LLC v. Great Am. Ins. Co.*, 2025 WL 2055767, at *11 (Del. July 23, 2025).

C. Merits of Argument

1. <u>The trial court correctly rejected Plaintiffs' first unjust enrichment theory.</u>

Plaintiffs allege two distinct theories of unjust enrichment. The first is that "[e]ach Defendant was enriched when PSH accelerated the options granted pursuant to the Defendants' respective Award Agreements and paid out the resulting equity value to the Defendants in 2018." A0892 (¶ 310).

This theory was dismissed because Plaintiffs abandoned it in briefing. Defendants argued in their opening summary judgment brief that paying Defendants the equity value of their stock options for Defendants to give up their options was not an enrichment but an exchange of equal value. Plaintiffs responded by arguing that Defendants were enriched when they *received* the stock options in 2016 and then realized this enrichment in 2018. As a result, the trial court held that Plaintiffs

waived the unjust enrichment theory that was pled, and that Plaintiffs could not maintain their new theory because it was not pled.

Plaintiffs argue the trial court erred because, although Count XX does not allege that Defendants were enriched from receiving the stock options, it incorporates the preceding paragraphs of the Complaint by reference, and paragraph 59 of the Complaint alleges that Defendants received lucrative stock options. Therefore, Plaintiffs contend, Defendants were put on notice that Plaintiffs claim they were enriched when they received the stock options *and* the payout. This argument must be rejected for the simple fact that Plaintiffs did not allege anywhere in the Complaint that Defendants were enriched from receiving the stock options. Paragraph 59, in the background of the Complaint, states that "[a]s consideration for entering into their Award Agreements, each Defendant received lucrative stock options." This does not put Defendants on notice that Plaintiffs claimed that Defendants were unjustly enriched when they received the stock options in 2016.

Plaintiffs also argue that the trial court erred in concluding that Defendants being paid the equity value of their options was an exchange of equal value. First, it is not clear the trial court concluded that. The Dismissal Order says, "Defendants pointed out they received no enrichment when their options were redeemed for cash: that was an even exchange of value. In opposition, Plaintiffs abandon the 2018 enrichment theory . . . ." The court may have been explaining why Plaintiffs changed

their enrichment theory in briefing. In any event, paying Defendants the value of their options in exchange for their options *was* an exchange of equal value. In their Complaint, Plaintiffs allege that "[i]n connection with its purchase of PSH, Reece accelerated the options granted pursuant to the Defendants' respective Award Agreements, and, because the options were 'in the money,' paid out the resulting equity value to the Defendants." A0836 (¶ 73). If the trial court did in fact agree with Defendants that this was an exchange of equal value, it was supported by the Plaintiffs' own allegation, and they cannot now complain that it was incorrect.

2. The trial court correctly held that there was no relationship between Defendants' enrichment and Plaintiffs' impoverishment.

Plaintiffs' second theory of unjust enrichment is that "Defendants have also been enriched through the breaching of their Award Agreements, including the profits that they already have received and may receive in the future from their investments in STAline. Defendants have also been inequitably enriched by investing in STAline and benefiting from that investment[.]" A0892 (¶ 315).

The trial court rejected this theory because there was no direct relationship between Plaintiffs' alleged impoverishment (granting of the stock options) and Defendants' alleged enrichment (profits from Defendants investments in STAline).

Plaintiffs argue that the trial court erred because it misconstrued the relationship between the impoverishment and the enrichment. Plaintiffs say that,

contrary to the Dismissal Order, they "pled that the STAline profits were related to Plaintiffs' lost revenue resulting from Defendants' actions which Plaintiffs paid them not to take."

Plaintiffs do not expressly state what their impoverishment is in the paragraphs asserting their second enrichment theory. Assuming *arguendo* that the Court did misinterpret Plaintiffs' allegations, dismissal should be affirmed because the requirement of a relationship between the enrichment and the impoverishment means that an unjustified act resulted in both the enrichment and the impoverishment. *Manti Holdings, LLC v. Carlyle Grp. Inc.*, 2022 WL 1815759, at *12 (Del. Ch. June 3, 2022). Even if this issue were adequately pled and argued below, any error was harmless error because the Restrictive Covenants are unenforceable and therefore Defendants' actions in investing in STAline and going to work for STAline were not unjustified because there were no valid promises preventing them from doing so.

Even if Plaintiffs adequately pled their enrichment theories and whether there is a relationship between the enrichment and the impoverishment, dismissal of the unjust enrichment claim should be affirmed because the Award Agreements and Plan remain enforceable after severing the Restrictive Covenants. The existence of express contracts governing the stock option award precludes recovery in unjust enrichment relating the stock option award. *Stone & Paper Invs., LLC v. Blanch*,

2020 WL 3496694, at *12 (Del. Ch. June 29, 2020) ("If a contract comprehensively governs the relevant relationship between the parties, then the contract must provide the measure of the plaintiff's rights, and any claim of unjust enrichment will be denied.") Permitting the Plaintiffs to recover in unjust enrichment would in effect be the same as finding the Restrictive Covenants enforceable.

CONCLUSION

For the foregoing reasons, Defendants-below/Appellees respectfully request that the Court affirm the Court of Chancery's decision.

COLE SCHOTZ P.C.

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