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

APPELLANTS' REPLY BRIEF

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PRELIMINARY STATEMENT

Nothing Defendants say in their Answering Brief detracts from this Court's holdings that a contract that restricts an employee's competition is enforceable when the benefit to the employee is a supplemental equity award and entry into the agreement is not a condition to employment.

Nevertheless, Defendants argue these contracts are not enforceable under a reasonableness analysis and "what triggers reasonableness review are contractual provisions that by their terms prohibit competition." (AB 8.) If Defendants were right, both *Cantor Fitzgerald* and *LKQ*—which had restrictive covenants, the breach of which triggered damages—would have come out differently. Delaware enforces contracts by their terms, and non-compete provisions in supplemental benefit contracts are enforceable without reasonableness review when the relief sought does not restrict the employee's chosen employment. Rather than meaningfully address this now well-established rule, Defendants use ellipses to hide the true facts. They even manufacture an erroneous waiver argument.

Regarding the use of ellipses, Defendants suggest the purpose of the stock option Plan in this case "is to attract, retain and motivate" Defendants, and to "promote the success of PSH's business by providing them with appropriate incentives and rewards . . . ," from which Defendants argue continued service is sufficient consideration in exchange for stock options and that Plaintiffs therefore received their bargain through Defendants' continued employment. (AB 15 & 34-35.) The fallacy of this argument is exposed by the full section of the Plan with the portion Defendants deleted: "The purpose of this Plan is to attract, retain and motivate the officers, directors, employees and consultants of the Company and its Subsidiaries and Affiliates, and to promote the success of the Company's business by providing them with appropriate incentives and rewards *<u>either through a proprietary interest in the long-term success of the Company or compensation based on fulfilling certain performance goals</u>*." (A1090 (emphasis added).) Because the plain purpose of the Award Agreements was not based on performance goals but on giving Defendants a proprietary interest in the long-term success of the Company, Plaintiffs clearly did not receive the benefit of their bargain. Ellipses cannot shield this.

Defendants also argue that Plaintiffs did not cite relevant law permitting restitution where there are illegal terms in an otherwise legal agreement, and that Plaintiffs have therefore waived their restitution argument. (AB 43.) This is just wrong. Plaintiffs cited the law and argued how it applied. (A1042-A1048.)

Defendants' briefing tactics would not be necessary if they had a good response to *Cantor Fitzgerald* and *LKQ*, which dictate that the Award Agreements are enforceable. Because there is no dispute that Defendants breached the Award Agreements, Plaintiffs are entitled to damages for breach of contract. Even if certain terms are deemed unenforceable and severable from the Award Agreements (they should not be), Plaintiffs are entitled to an equitable remedy or one for unjust enrichment.

Defendants' theory is that (1) as sophisticated, high level employees, they can receive stock options in consideration of promises not to compete, solicit customers, or use Plaintiffs' confidential information, (2) they were entitled to have those options cashed out (at which time they signed Surrender Agreements, confirming they would abide by the covenants), and (3) they can then engage in an intentional scheme to collectively breach those covenants and cause great harm to Plaintiffs with no consequence. According to Defendants, Plaintiffs have no remedy, justice has been served, and there is nothing unjust about intentionally and willfully breaking promises after accepting money for them. If this were Delaware law (it is not), there would be no reason for businesses to award stock options or for investors to buy Delaware businesses whose value derives from talent of highly compensated and sophisticated individuals as that purchased value could be destroyed overnight by executives simply walking out the door, leaving no remedy.

Respectfully, for the reasons set forth in Plaintiffs' Opening Brief and this Reply Brief, the Court should reverse the Summary Judgment Order and Dismissal Order.

ARGUMENT

I. THE AWARD AGREEMENTS ARE ENFORCEABLE UNDER DELAWARE'S FREEDOM OF CONTRACT PRINCIPLES

1. The Covenants in The Award Agreements Are Enforceable in a Contract Damages Action

Defendants devote only four pages of their 49-page Answering Brief to *Cantor Fitzgerald* and *LKQ*, arguing that violating a competition provision is not a breach of contract but is instead merely a "trigger" concerning some supplemental benefit, that the provisions of the Award Agreements Defendants breached "explicitly restrict the Defendants' ability to work," and that compensatory damages and lost profits are not "supplemental benefits." (AB 26-30.)

Defendants' arguments are premised on the trial court decision in *Cantor Fitzgerald*—which this Court reversed—and they ignore that *LKQ* applied the employee choice doctrine broadly based on Delaware's sacrosanct and reverential view that contracts should be enforced as written and not ignored for public policy reasons absent an extreme and compelling basis for ignoring the parties' promises.

The trial court held in *Cantor Fitzgerald* that for there to be a breach of the applicable contract, "the underlying promise must be enforceable," noting that the court could not find the no breach condition "was triggered by a breach without finding that the allegedly breached Restrictive Covenants are valid." *Ainslie v. Cantor Fitzgerald, L.P.*, 2023 WL 106924, *2 (Del. Ch. Jan. 4, 2023) (holding that the applicable restrictive covenants were "facially overbroad and void against public policy" and that as a result "they are not valid promises that can give rise to a breach, and so failure to comply with them cannot trigger the No Breach Condition."), *rev'd* 312 A.3d 674 (Del. 2024). In reversing, this Court noted that "the distinction between a restrictive non-competition covenant that precludes a former employee from earning a living in his chosen field and an agreement that allows a former partner to compete but at the cost of relinquishing a contingent benefit is, in our observation, significant." *Cantor Fitzgerald*, 312 A.3d at 691. In other words, restrictive covenant provisions in a contract are enforceable and not subject to reasonableness review if they do not prevent an employee's choice of work.

This Court confirmed in *LKQ* 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 1215, 1221 (Del. 2024). This Court then "endorsed the employee choice doctrine, meaning that the reviewing court should treat the [restrictive covenant] provision as an enforceable term subject to <u>*ordinary breach of contract defenses*</u>." *Id*. at 1217 (emphasis added). This Court explained that provisions imposing a remedy but that allow the employee to work at a job of his choice are enforceable. *Id*. at 1222. Because non-compete provisions that grant non-injunctive contractual remedies are enforceable, the reviewing court should determine if those provisions are breached, and if so, award damages provided for under the contract. *See LKQ Corp. v. Rutledge*, 126 F.4th 1247, 1250 (7th Cir. 2025) (recognizing that while enforcement "would allow LKQ to claw back a substantial sum" and "would subject Rutledge to a hardship. But, as the Delaware Supreme Court has now explained, the employee choice doctrine is 'broad,' and Delaware 'enforce[s] as a matter of fundamental public policy the voluntary agreements of sophisticated parties.'") (quoting *LKQ,* 337 A.3d at 1221).

Defendants refuse to acknowledge that damages can be awarded for a breach of a noncompete provision in a supplemental option contract and seek to limit this Court's holdings to cases involving express forfeiture-for-competition provisions. (AB 29-30.) But courts applying similar principles have long held that the absence of a forfeiture-for-competition provision does not prevent a plaintiff from receiving a remedy when an agreement is breached. *See, e.g.*, *Lenel Sys. Int'l Inc. v. Smith*, 106 A.D.3d 1536, 1539 (N.Y. App. Div., 4th Dept. 2013) ("The absence of an explicit forfeiture-for-competition clause in the Option Agreements does not prevent plaintiff from seeking rescission of the stock options . . .").

The damages Plaintiffs seek are like those in *LKQ*. Defendants were paid wages and commissions and admitted they did not <u>*have*</u> to sign the Award Agreements to keep their jobs or as a condition of employment; instead, as sophisticated employees, they were given supplemental equity options to encourage them to preserve and protect the long-term value of Plaintiffs' businesses. The

Award Agreements provide that in consideration of these options granted, Defendants would observe the terms of the covenants. The Award Agreements then provide that if breached, Plaintiffs may seek rights and remedies existing in their favor. (A1082.)

Defendants claim, without citation, that "supplemental benefits" are not damages. (AB 30.) But Delaware courts have awarded damages for breach of a non-compete provision. *See, e.g.*, *Base Optics Inc. v. Liu*, 2015 WL 3491495, at *16 n.122 (Del. Ch. May 29, 2015) ("Because lost profits are the type of damages most likely to result from a breach of a non-compete provision, I consider lost profits to be in the nature of direct damages . . . ."). Awarding damages would be consistent with *Cantor Fitzgerald* and *LKQ* because it would cause Defendants to return supplemental benefits they received in exchange for promising not to compete.

This Court explained that the employee choice doctrine applies "freedom of contract principles, leaves the ex-employee free to make a living as he chooses, and allows the employee to calculate the cost of choosing to join a competitor. As a result, the employee should be held to that choice." 337 A.3d at 1220 (citations and quotation marks omitted). There is no contention that Defendants have not breached the terms of the Award Agreements (evidence shows that they knew they were and did so intentionally). (OB 18.) With a proven breach of an enforceable term of a contract, the Court should allow Plaintiffs to prove damages. *See W.R. Berkley*

Corp. v. Hall, 2005 WL 406348 at *5 (Del. Super. Feb. 16, 2005) (finding that an employee is "simply contractually obligated" to pay damages under a breached stock option agreement when the employee left to compete as the defendant's employment and his ability to move or seek a new job was not abridged).

Defendants' only contractual point is that their continued services as employees was sufficient consideration in exchange for stock options and that the express linkage of the options to the covenants should be ignored. (AB 34-35.) As Defendants' story goes, continued employment is sufficient consideration in exchange for stock options even though Plaintiffs did not receive the express and specific consideration stated in the Award Agreements, and thus, there is no waste. Stated differently, Defendants can break their promises with no consequences. (AB 34-35.) This entire argument is premised on the notion that continued employment was why Plaintiffs granted the options (based on the Plan's supposed purpose presented with ellipses). More importantly, this is the purpose of the Plan, not the consideration. The Award Agreements expressly state the consideration Plaintiffs were to receive—*i.e.*, compliance with the covenants—which Plaintiffs have not received, so this point fails. (*See* OB 33 (agreement's specific terms govern over the preamble's general terms).)

2. Plaintiffs Demonstrated a Legitimate Business Interest in The Covenants

Defendants claim there can be no fact dispute because Plaintiffs did not take any discovery after the preliminary injunction hearing. (AB 24 & 31-32.) This argument fails to appreciate the relevant facts: whether Plaintiffs had a legitimate business interest in proposing the covenants. But Plaintiffs' legitimate business interest is a material fact, and it is in dispute. The trial court ruled there was no fact dispute because Plaintiffs received no responses to discovery (referring to D.I. 209; (OB Ex. B at 17 n.62)), but there was no response because the trial court expressly prohibited it when it granted Defendants' motion to stay discovery. (A0108.)

Plaintiffs served discovery after the preliminary injunction hearing because in denying it, the trial court determined Plaintiffs had not shown it had a legitimate business interest that would justify restraining Defendants from competing with and soliciting from every business under PSH's business umbrella. (A0816.) The trial court reached this conclusion, in part, by ignoring an unrebutted expert report that provided an opinion explaining how the covenants protected Plaintiffs' business interest based on the facts in the record. (A1380-82.) Having been accused of not proving this issue to justify likelihood of success, and having their expert's report rejected and not even considered, Plaintiffs amended their complaint, added eleven new defendants, and served discovery. (A0096; A0106-07.)

The trial court stayed this discovery and allowed Plaintiffs to move for summary judgment. It was wrong to hold that Plaintiffs did not present evidence of a material fact issue because they failed to receive new discovery when the court prohibited the plaintiff from taking discovery (and then cited that lack of response as somehow justifying the grant of summary judgment). *See, e.g.*, *Fleischman v. Huang*, 2007 WL 2410386, at *3 (Del. Ch. Aug. 22, 2007) ("Before the Court considers a motion for summary judgment, the non-moving party should normally have some opportunity for discovery."). Further, Plaintiffs' opposition brief noted existing issues of material fact. (A1020-23.)

Defendants contend Plaintiffs' expert report only presented opinion, not facts. (AB 31-33.)[1] But the expert report evaluated evidence and discussed how companies within a rollup structure—like Plaintiffs—can create value by sharing best practices, collaborating on projects, and exchanging growth strategies. (A1380.) This report's interpretation of the evidence goes directly to Plaintiffs' legitimate business interest, a material fact in determining whether the scope of the covenants is reasonable if this Court decides a reasonableness review is proper (it is not). Therefore, it was reversible error for the trial court to grant summary judgment. *See Mann v. Oppenheimer & Co.*, 517 A.2d 1056, 1060 (Del. 1986) ("When the

[1] Defendants contend Plaintiffs do not appeal the trial court's ruling on Plaintiffs' legitimate business interests (AB 32), but that is incorrect. (OB 30.)

Court of Chancery grants summary judgment notwithstanding genuine issues of material fact, this Court must reverse.”).

3. The Trial Court’s Severance Analysis Was Overbroad, Implicates Corporate Waste, and Frustrates the Essential Purpose of the Contract

When the trial court severed the covenants and the specific enforcement provision, it destroyed any consideration Plaintiffs received for their stock options. This implicates the corporate waste reasoning in *LKQ*. 337 A.3d 1215, 1222. Separately, the trial court severed Section 8 in its entirety, including a provision prohibiting Defendants from investing in a competitor. The investment prohibition is not a restraint on trade and is not subject to reasonableness review. Defendants make various arguments in favor of the trial court’s severance. All fail.

Defendants miss the mark when they argue that avoiding corporate waste is not a reason to “validate an otherwise invalid restrictive covenant.” (AB 34.) This Court reasoned that avoiding corporate waste as a policy reason to apply the employee choice doctrine where stock grants are involved. 337 A.3d at 1222. As explained, “[b]usiness entities would be discouraged from offering employees additional benefits if we did not respect their contracts. And, for RSU agreements, ‘Delaware courts have required stock grants to include conditions ensuring that the grants do not constitute waste or a gift of corporate assets.’” *Id.* (citation omitted). This policy consideration has direct bearing here. If Plaintiffs are deprived of the material consideration they were supposed to receive under the Award Agreements, then other companies desiring their stock grants to be governed by Delaware law will be discouraged from entering into those agreements.

Defendants suggest corporate waste is an "extreme test" that cannot be satisfied here. (AB 34.) On the contrary, if the Award Agreements are severed in a way that grants Defendants their valuable stock options for free, it is not reasonable to "conclude that the deal made sense" and that it resulted in anything but corporate waste. *Cambridge Ret. Sys. v. Bosnjak*, 2014 WL 2930869, at *9 (Del. Ch. June 26, 2014) (citation omitted).

Defendants repeat the ellipses-based argument that the actual consideration Plaintiffs received was Defendants' "continued hard work." (AB 34.) This argument fails because as articulated in the Award Agreements, the specific language controls over the general language in the Plan. (OB 32-33.) The *LKQ* plan contained similar language but the Court did not interpret that language to supplant the parties' actual consideration or to assuage this Court's corporate waste concerns. (OB 32.)

Defendants also claim the Award Agreements' vesting and forfeiture provisions show that the consideration given by Defendants ensured continued hard work. (AB 35.) But Sections 3(b) and 6(c) provide that the options may be forfeited if Defendants breach the <u>*covenants*</u> not if they do not work hard. These sections affirm the Award Agreements' plain terms, specifically that the options were granted in consideration of the covenants. Were this Court to adopt Defendants' reasoning, any option award would be unenforceable if its plan alluded to an incentive to make employees work hard. If anything, the trial court should have limited the severance to the injunctive relief provision and retained the remaining provisions, including the right to seek damages.

Defendants next argue that Section 8's investment prohibition was properly severed because keeping the provision intact would be akin to blue penciling, and the trial court was not required to "leave some words in place" to give effect to the investment provision. (AB 35-38.)[2] But the investment prohibition is not subject to reasonableness review because it does not restrain competition. This Court was clear in *LKQ* that Delaware only applies reasonableness review if an employee is restrained from competing. 337 A.3d at 1221. Defendants cite no case law in which a Delaware court reviewed a clause prohibiting investing in a competitor under reasonableness review. Here, keeping the provision intact is not blue-penciling because the investment prohibition is not a non-compete or non-solicit provision. Keeping it intact "permits the Court to sever the invalid language while enforcing

[2] Defendants also claim the Plan's severance provision requires severing Section 8 entirely (AB 37), but again, Defendants conveniently omit key contrary language. The provision states that "such provision shall be construed or deemed amended to conform to applicable laws . . ." (A1100 (§14.10).) It therefore is entirely consistent with the Plan's terms to narrowly sever Section 8 to keep the investment prohibition.

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). The investment prohibition therefore is not subject to reasonableness review and is valid.

Severance should always 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." *Suppi Constr., Inc.*, 2024 WL 939851, at *6. The trial court easily could have left the valid investment prohibition intact. Its failure to do so was error.

4. 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 Georgia law because Georgia has a greater interest in the subject matter. *See RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 897 (Del. 2021); (OB 35-36). Defendants made this exact argument when they moved for summary judgment. (A0957.) Defendants have thus waived any argument that Delaware law should apply to the Georgia Defendants. *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived.").

Nonetheless, Defendants argue Delaware courts need not consider Georgia law if the Award Agreements are unenforceable under Delaware law, relying on

Motorsports of Conyers, LLC v. Burbach, which considered what law would apply when a "*Georgia court* [] is asked to apply foreign law to determine whether to enforce a restrictive covenant[.]" 892 S.E.2d 719, 726 (G.A. 2023) (emphasis added); (AB 39). This issue was not presented to the trial court and therefore should not be considered by this Court. Supr. Ct. R. 8.

Defendants are also wrong on the merits of this argument. This Court is not in Georgia, and the question is not what a Georgia court would do when asked to apply foreign law, but rather what law Delaware courts should apply. Under Delaware's choice of law principles, "when a different state's law would govern in the absence of a choice of law provision, and if that state has established legal rules reflecting a different policy toward restrictive covenants than Delaware's, then this court will defer to that state's law notwithstanding the presence of a Delaware choice of law provision." *Sunder Energy, LLC v. Jackson*, 305 A.3d 723, 747 (Del. Ch. 2023), *aff'd in part*, *rev'd in part on other grounds*, 332 A.3d 472 (Del. 2024).

The Supreme Court of Georgia has held that "Georgia law remains the touchstone for determining whether a given restrictive covenant is enforceable in our courts, even where the contract says another state's law applies." *Motorsports*, 892 S.E.2d at 720. As Defendants argued below, Georgia has established legal rules governing covenants, the Award Agreements would be "performed" in Georgia, and "Georgia has the most significant relationship to the transaction and the parties."

(A0959-61.) Under Georgia law, the covenants are enforceable against the Georgia Defendants.

Defendants rely on *Motorsports* to suggest that if the covenants are enforceable under Georgia law, then Delaware law can be applied to avoid them. But the very case they rely on for this proposition expressly rejected this notion as one they have never decided. *Motorsports*, 892 S.E.2d at 728 n.7 ("We do not decide here whether, and under what circumstances, a Georgia court could decline to apply the parties' choice of foreign law if that law would invalidate a restrictive covenant that would be enforceable under Georgia law."). Thus, Defendants' argument on this notion fails. The Summary Judgment Order should be reversed against the Georgia Defendants.

II. PLAINTIFFS ARE ENTITLED TO LEGAL OR EQUITABLE REMEDIES UNDER THE AWARD AGREEMENTS

1. The Award Agreements Provide for Damages

The Award Agreements permit Plaintiffs to pursue damages if Defendants breach the covenants. (OB 37-38; A1082 (§12).) Defendants do not contest that damages are an available remedy. Instead, they argue that: (1) Plaintiffs waived an argument they, in fact, expressly made; (2) restitution is only a remedy available for unjust enrichment; and (3) the Award Agreements as severed govern the parties' relationship and as a result unjust enrichment is not available. (AB 42.)

These arguments are wrong: (1) Plaintiffs argued extensively for restitution in both their briefs and at oral argument (A0998-A0999, A1023-A1041, A1044-A-1048, A1061-A1063; A1578-A1603); (2) restitution is available as a matter of law or equity when a contract does not provide for a proper remedy; and (3) the idea that the Award Agreements as severed capture the parties' contractual expectations has no basis in fact or law.

The judgment below should be reversed because the trial court refused to give Plaintiffs any remedy for Defendants' conduct, which should shock the conscious of any court as Defendants willfully broke their promises after taking money for them and then orchestrated a scheme to form a competing business and take Plaintiffs' employees and customers, causing millions of dollars in damages.

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

The trial court erred by ruling that Plaintiffs are not entitled to restitution because the Award Agreements are only partially unenforceable. The Restatement of Contracts provides for restitution in situations where a *promise* is unenforceable, and does not require the entire agreement to be unenforceable. Plaintiffs meet each of the Restatement's requirements for restitution.

Defendants claim that this argument was waived because Plaintiffs' answering brief on summary judgment only argued restitution was warranted if the Award Agreements were entirely unenforceable (AB 41), but this is not correct. Plaintiffs' briefing below made explicit arguments on unenforceable *promises*, not just unenforceable contracts. (A1044; A1046; A1048.) Whether Plaintiffs were entitled to restitution due to unenforceable promises was therefore presented to the trial court and not waived. Additionally, contrary to Defendants' contention (AB 43), Plaintiffs cited *Lighthouse Behavioral Health Solutions, LLC v. Milestone Addiction Counseling, LLC*, 2023 WL 3486671 (Del. Ch. May 17, 2023), and argued that if the covenants were unenforceable, then Plaintiffs could not prove their breach of contract claims without them. (*See, e.g.*, A1044 ("Denial of restitution here would cause disproportionate forfeiture because Plaintiffs will have lost the $2.5 million paid to Defendants in 2018 and received nothing in return.").) Therefore, Plaintiffs properly presented to the trial court their right to restitution under the Restatement for unenforceable contractual promises.

Defendants' contention that restitution is unavailable unless there is a claim for unjust enrichment (AB 41) is likewise incorrect. First, Plaintiffs pled a valid claim for unjust enrichment. Second, Delaware courts award restitution even where there is no viable claim for unjust enrichment. *See*, *e.g.*, *Segovia v. Equities First Holdings, LLC*, 2008 WL 2251218, at *6, *22 (Del. Super. May 30, 2008) (awarding breach damages on a restitution or "restoration" theory of recovery when unjust enrichment was not available); *see also* 66 Am. Jur. 2d Restitution and Implied Contracts § 2 ("Generally, the phrase 'unjust enrichment' is used in law to characterize the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise *to a legal or equitable obligation* to account therefor. *It is a general principle, underlying various legal doctrines and remedies*[.]") (emphasis added). That the parties have a partially enforceable contract is irrelevant because restitution can be awarded without a claim for unjust enrichment.

Contrary to Defendants' assertion (AB 42), Plaintiffs never conceded that the Award Agreements could be enforceable without the covenants. Plaintiffs 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 (emphasis added).) Plaintiffs argued that the severance should be surgical and only the injunctive relief provision of the contract should be severed based on the rulings in this case. (A1028.) Under such circumstances, the Award Agreements remain enforceable for breach damages. (A1029.)

III. PLAINTIFFS PLED A CLAIM FOR UNJUST ENRICHMENT

The Complaint pled the elements of unjust enrichment by pleading that Defendants were enriched when Plaintiffs granted stock options and when those options were redeemed for cash. (OB 44 (citing A0832 (¶59), A0891-92 (¶¶309-14).) The Complaint alleged that, in exchange, Defendants promised to comply with the covenants and that when the options were redeemed, the Defendants signed Surrender Agreements that reaffirmed their commitment to comply with the covenants for a one-year period after they left Plaintiffs' employment. (*See* A0832-33 (¶¶64-66); A0837 (¶74); A0891-92 (¶¶309-10).) The Complaint also pled Defendants were enriched by not complying with the covenants and that those breaches caused Plaintiffs' harm. (A0892-93 (¶¶315-17).) This claim was pled in the alternative to Plaintiffs' breach of contract claims.

The idea that there is no "direct relationship" that the trial court "could reasonably infer" simply makes no sense. But more importantly, that is not the Rule 12(b)(6) standard. Remarkably, neither the Dismissal Order nor Defendants' Answering Brief even cite Rule 12(b)(6) and neither referred to its standards or analyzed them. Indeed, the trial court cited a decision—*Buttonwood Tree Value Partners, L.P. v. R.L. Polk & Co*., 2023 WL 9053173, at *9 (Del. Ch. Dec. 29, 2023)—that did cite the legal standard and concluded an unjust enrichment claim should survive a motion to dismiss even when the claim plead an "attenuated" relationship between the enrichment and impoverishment. *Id.* at *12.

Defendants did not even discuss this case even though Plaintiffs did. (OB 48.) Instead, they chose to pursue the convoluted argument that there were multiple theories of unjust enrichment, one in 2016 and one in 2018, and that the benefits received by breaching the covenants have no relationship to the harm caused. These arguments do not engage on the Rule 12(b)(6) standard of review. Plaintiffs, however, did plead an unjust enrichment claim.

1. <u>Plaintiffs Pled That Defendants Were Enriched</u>

Defendants claim the trial court was correct when it found that Plaintiffs never pled Defendants were enriched when they received the stock options, and that Plaintiffs never "put Defendants on notice" of that claim. (AB 45.) The Complaint, however, pleads that Defendants were enriched by the "lucrative stock options" they received in exchange for entering into the Award Agreements. (A0832 (¶59).) Defendants' argument that the Complaint did not put them on notice that they were enriched is baseless.

Defendants also argue that the cash payout represents an "exchange of equal value." (AB 46.)[3] This was not pled in the Complaint and reflects a misunderstanding of what was paid to Defendants through the cash payout. The Complaint alleged 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).) As explained in Plaintiffs briefing, this payout not only represented the value of the original option award, but also the premium that Reece paid per share when it acquired Plaintiffs. (OB 46 (citing A1056 ("Defendants realized this benefit when their stock options were cashed out in 2018 in the amount of $2.5 million net of the additional amount paid to enable them to exercise those options.")).) The cash payout was not an exchange of equal value, and Plaintiffs therefore adequately pled enrichment regarding the cash payout. Plaintiffs also pled that when this cash payment was made, Defendants signed the Surrender Agreements. (*See* A0837 (¶74).) Those Surrender Agreements (and the cover letter that accompanied them) included an agreement that after receipt of the payment, Defendants would continue to comply with the covenants. (A1338-46.)

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[3] Defendants admit that "it is not clear the trial court concluded that[]" the cash payout was an exchange of equal value. (AB 45.) If the trial court did so conclude, that conclusion was not based on the pleadings and is reversible error.

2. There Was A Relationship Between Defendants' Enrichment And Plaintiffs' Impoverishment

Defendants argue they were not unjustly enriched 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)." (AB 46.) The Complaint pled the enrichment from the STAline profits was directly related to Defendants' solicitation of Plaintiffs' customers and employees, which is a breach of their promises under the Award Agreements. (A0892-93 (¶¶315-16).) Defendants have not contested that they have violated their promises in the Award Agreements (and the Surrender Agreements), including soliciting Plaintiffs' customers. The Complaint went on to plead that this enrichment had a direct relationship to Plaintiffs' impoverishment. (A0893 (¶317).) The Complaint pled a direct relationship between Plaintiffs' impoverishment from its lost customers and employees and Defendants' enrichment from STAline's profits.

Defendants argue that any erroneous reading of the pleadings by the trial court was harmless error because the covenants were held to be unenforceable, and therefore, Defendants actions "were not unjustified" because the covenants' promises were invalid. This ignores the equitable purpose of an unjust enrichment claim. It also ignores that Defendants' actions were unjustified because they engaged in a scheme with Tysinger to enrich themselves at Plaintiffs' expense. *Principal Growth Strategies, LLC v. AGH Parent LLC*, 2024 WL 274246, at *12

(Del. Ch. Jan. 25, 2024) (denying a motion to dismiss an unjust enrichment claim, holding "The complaint asserts that the defendants engaged in a scheme to enrich themselves rather than suffering the consequences of their decisions. That satisfies this element.").

Finally, Defendants argue that Plaintiffs' unjust enrichment claim should be dismissed because the partially enforceable Award Agreements govern the parties' relationship. Delaware courts, however, will not dismiss an unjust enrichment claim when a contract does not comprehensively govern the parties' dispute. *Narrowstep, Inc. v. Onestream Media Corp.*, 2010 WL 5422405, at *16 (Del. Ch. Dec. 22, 2010) (finding complaint alleged sufficient facts for the court to plausibly infer that contract documents did not comprehensively govern the relationship between the parties as to some issues). Here, assuming *arguendo* that the covenants were properly severed (which they were not), then the Award Agreements would not govern Defendants' investment in STAline or Defendants' solicitation of Plaintiffs' customers and employees as part of a deliberate scheme to destroy Plaintiffs' business. (A0820 (¶1); A0853 (¶140).) As a result, Plaintiffs have pled that Defendants have acted inequitably by taking employees, information, and customers to STAline in a deliberate scheme to form a business modeled on Fortiline and that conduct has caused Plaintiffs harm. Thus, the Dismissal Order should be reversed.

CONCLUSION

This Court should reverse the trial court and remand this case for further proceedings consistent with this Court's decision.

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