



IN THE SUPREME COURT OF THE STATE OF DELAWARE

FAIRSTEAD AFFORDABLE LLC, FCM
AFFORDABLE LLC, JD2 AFFORDABLE
LLC, STUART FELDMAN, JEFFREY
GOLDBERG, FSC EF&F LLC, FAIRSTEAD
CAPITAL LLC, FAIRSTEAD CAPITAL
MANAGEMENT LLC, JD2 REALTY
MANAGEMENT LLC, FA DC LLC, FSC
REALTY MANAGEMENT LLC, and SDF
FUNDING LLC,

Defendants and Counterclaim
Plaintiffs Below / Appellants,

v.

JOHN C. TATUM III and JCT CAPITAL
LLC,

Plaintiffs and Counterclaim
Defendants Below / Appellees.

No. 209, 2026

Case Below:

Court of Chancery of
the State of Delaware
C.A. No. 2022-0970-JTL

APPELLANTS' OPENING BRIEF

Cliff C. Gardner (ID No. 5295)
Tanisha M. Brown (ID No. 7375)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Rodney Square
P.O. Box 636
Wilmington, Delaware 19899-0636
(302) 651-3000

DATED: July 25, 2026

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NATURE OF THE PROCEEDINGS

Defendants Stuart Feldman and Jeffrey Goldberg established Fairstead Affordable LLC to invest in affordable housing, and brought William Blodgett and Plaintiff John Tatum on board to build that business. Even though Fairstead paid them millions in compensation, Tatum and Blodgett decided that they deserved more. In 2020, they secretly began working either to take control of the company or, if that failed, to compete unlawfully with Fairstead Affordable, including by stealing its confidential information and misappropriating the resources of the company and its affiliates (collectively, “Fairstead”).

Confronted with those outrageous demands—but without knowing the full extent of their misconduct—Fairstead terminated Blodgett. A month later, Fairstead accepted Tatum’s resignation, expressly reserving its rights. Subsequently, as Fairstead came to understand how much misconduct there had been, Fairstead retroactively terminated Tatum for cause and informed him that his interests in Fairstead Affordable were forfeit.

Tatum and Blodgett commenced legal proceedings against Fairstead, each demanding millions in damages. In an arbitration brought by Blodgett, the arbitrator held the evidence “overwhelmingly establishe[d]” that Blodgett breached his contractual and fiduciary duties to Fairstead and that Fairstead properly terminated him for cause. Those arbitral findings are binding here on Tatum, Blodgett’s partner.

That should have made this an open-and-shut case: Tatum and Blodgett were partners in their scheme and owed similar duties to Fairstead. Indeed, Fairstead Affordable's operating agreement specifically imposed fiduciary duties on Tatum, its day-to-day manager. Yet the trial court almost entirely excused Tatum's misconduct. Worse, the court held that Fairstead breached its obligations to Tatum when it retroactively terminated him for cause. The court largely let Tatum off the hook while entering a sizable judgment in Tatum's favor against Fairstead.

To reach that extraordinary result, the trial court had to make a series of novel—and erroneous—legal determinations. The court wrongly concluded that Fairstead breached its duties to Tatum by holding Tatum's interests forfeit, holding that Tatum could not be retroactively terminated for cause even though Fairstead had been unaware of the extent of Tatum's wrongdoing when it accepted his resignation while reserving its rights. The court further erred by ruling that Tatum had not breached contractual or fiduciary duties to Fairstead, including because (i) Tatum claimed not to be aware of his partner Blodgett's wrongdoing and because (ii) Tatum purportedly committed his misconduct solely as an employee of Fairstead, not as a member of Fairstead Affordable LLC. Those holdings are contrary to this Court's well-settled precedents holding that partners are chargeable with one another's knowledge and acts and that an individual may be subject to more than one set of fiduciary obligations.

The court further erred by awarding compensation to Tatum for work already covered by his employment agreement, notwithstanding that the claims were time-barred, and by granting him a windfall award of legal fees.

The judgment below is replete with legal error. This Court should correct it.¹

¹ Fairstead has commenced an action against its former counsel arising from certain events described herein. *Fairstead Cap. Mgmt. LLC, et al. v. Paul, Weiss, Rifkind, Wharton & Garrison LLP*, Index No. 156377/2026 (Sup. Ct. N.Y. Cnty). The arguments in Fairstead's briefing on this appeal are advanced without waiver of, or prejudice to, any claim asserted in that action, and Fairstead reserves all rights with respect thereto.

SUMMARY OF ARGUMENT

The trial court's own findings showed that Tatum and Blodgett schemed to assume control of Fairstead while also planning to compete with Fairstead and solicit its employees using Fairstead's own resources. Nevertheless, that court wrongly held that Fairstead was liable to Tatum. It reached that judgment through a series of legal errors:

1. The trial court wrongly held that Fairstead breached Fairstead Affordable operating agreement ("Operating Agreement," A0116) by holding Tatum's interests forfeit, reasoning that Fairstead could not have retroactively terminated Tatum for cause because it was putatively aware of the grounds for termination when Fairstead accepted his resignation months earlier (notwithstanding Fairstead's reservation of rights). That misapplied the after-acquired evidence doctrine: Fairstead was unaware of the full extent of Tatum's misconduct when it accepted his resignation. It also ignored Fairstead's reservation of rights.

2. When the trial court held Fairstead liable for breach of the Operating Agreement—and correspondingly failed to hold Tatum liable for his breaches of duty—it erred by not holding Tatum responsible for the wrongdoing of his partner Blodgett. The trial court found, just as the arbitrator did, that "Tatum and Blodgett formed a common law partnership and operated as joint venturers" in their plan to compete with Fairstead. (Post-Trial Opinion, Ex. A, at 5, cited herein as "PTOxx")

It has long been settled that joint venturers are chargeable with the knowledge and acts of their co-venturers undertaken in furtherance of their partnership. *E.g.*, *Hannigan v. Italo Petroleum Corp. of Am.*, 77 A.2d 209, 216 (Del. 1949). This Court should impute Blodgett's wrongful actions to Tatum under the black-letter law that the trial court ignored.

3. The members of Fairstead Affordable specifically agreed that Tatum owed fiduciary duties. The trial court refused to enforce that express agreement, asserting that it was "unclear what this structure envisions." (PTO91) It compounded its error by declining to hold that Tatum breached the fiduciary duties he owed as a member of Fairstead Affordable on the theory that Tatum committed that misconduct solely as a Fairstead employee. But it is well settled that an individual may owe more than one set of fiduciary duties, and there is no "safe harbor" by which an individual may assert that an act in breach of one set of fiduciary obligations may be disregarded because the individual was acting in a different capacity. *E.g.*, *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983).

4. The trial court further erred by holding that Tatum's misconduct did not constitute breaches of his duties under the Operating Agreement and Tatum's employment agreement with Fairstead ("Employment Agreement," A0108). To so hold, the court ignored its own findings and the Agreements' plain language.

5. The trial court erred in calculating Tatum's damages for Fairstead's putative breach of the Operating Agreement. It misconstrued that Agreement in Tatum's favor, applying an interpretation that not only renders some of the Agreement's language surplusage but that is also commercially unreasonable and contrary to the parties' understanding.

6. The trial court erred in holding that Defendants Feldman and Goldberg violated the Operating Agreement's good faith provision by terminating Tatum for cause. It erred further by awarding Tatum attorneys' fees as damages for that putative breach, contrary to the American Rule.

7. The trial court erred by holding that Tatum was entitled to additional compensation for work within the scope of his Employment Agreement under theories of promissory estoppel and unjust enrichment. That Agreement precludes Tatum from recovering under quasi-contractual theories, and those claims were time-barred in any event. 10 *Del. C.* §8111.

8. The trial court erred by awarding attorneys' fees to Tatum under the Employment Agreement's fee-shifting provision: Tatum did not assert claims under that Agreement. That award also improperly includes \$2 million for services putatively performed by Tatum's wife, who is an attorney but did not charge her husband any fees or keep any time records.

STATEMENT OF FACTS

The trial court’s post-trial opinion includes factual findings based not just on the trial record but also on the arbitrator’s findings in Blodgett’s arbitration. That arbitrator—a former magistrate judge of the Southern District of New York—issued an award finding that (i) Blodgett and Tatum were partners in a scheme to compete with Fairstead and (ii) in furtherance of that scheme, Blodgett breached his contractual and fiduciary duties to Fairstead. (A0088, A0090, A0098-103) The evidence “overwhelmingly establishe[d]” that Blodgett breached his duties “by repeatedly and covertly sending (via personal email) Fairstead’s confidential or internal information” to third parties and recruiting Fairstead employees. (A0098-99) Accordingly, the arbitrator found that Fairstead did not breach Blodgett’s employment agreement by terminating him for cause. (A0102)

The trial court adopted those findings, holding that “Tatum and Blodgett are in privity for purposes of issue preclusion for factual findings relevant to this litigation.” (PTO5) In particular, the court concurred that “Tatum and Blodgett formed a common law partnership and operated as joint venturers.” (*Id.*) As explained *infra*, that should have been dispositive: Tatum is both responsible for his own misconduct and chargeable with Blodgett’s misconduct.

A. In 2016, Tatum Joins Fairstead to Work on Affordable Housing

Blodgett and Tatum worked for Fairstead, a fund complex that invests in affordable housing. Feldman and Goldberg managed Fairstead; Goldberg serves as Fairstead's CEO. (PTO7)

In 2016, Tatum joined Fairstead and signed an Employment Agreement with a Fairstead affiliate. (PTO8) By 2021, Fairstead paid Tatum a \$350,000 salary with bonuses exceeding \$300,000. (A1652; A1656) Tatum also received over a million dollars in distributions from Fairstead's employee co-investment vehicle. (A1547-48 ¶28) Feldman funded much of Tatum's investment in that vehicle. (A1548 ¶29)

Tatum worked on deals involving low-income housing tax credits. (PTO8) Fairstead formed a business to pursue such deals, Fairstead Affordable. (PTO9) Feldman and Goldberg provided guarantees for many Fairstead Affordable deals. (A1208-09 at 983:2-984:23) The company was governed by an Operating Agreement, which imposed fiduciary duties on Tatum as the business's day-to-day manager. (A0132 §6.10(a)) Tatum and Blodgett each directly or indirectly owned minority interests in Fairstead Affordable. (PTO9-10)

Tatum also worked on two other projects for Fairstead: renovation of properties that Fairstead previously acquired (the "Legacy Portfolio") and Fairstead's acquisition of additional properties (the "Hampstead Portfolio"). (PTO12-15)

B. In 2020 and 2021, Blodgett and Tatum Begin Making Plans to Leave Fairstead and Misappropriate Fairstead’s Confidential Information

Tatum and Blodgett believed that they deserved to hold the controlling equity stake in Fairstead Affordable and plotted to secure that stake through a restructuring. (PTO15-20) By early 2020, they began discussing their plan with billionaire members of Blodgett’s family (the “Sussman Office”) who could provide financing for their venture. (A0089; PTO22)

At the same time, Tatum and Blodgett prepared to leave and go into business for themselves. In February 2020, Blodgett began using a personal email account to send confidential Fairstead information to his advisors. (A0089) As the trial court acknowledged, “That is *not* something an employee can legitimately do.” (PTO20)

In April 2021, Blodgett met with another potential source of capital—the family office of his billionaire in-laws (the “Tisch Office”)—sending two executives confidential financial information for Fairstead Affordable. (PTO26) He also sent confidential financial results for all of Fairstead Affordable’s investments to the Sussman Office, and information about one of Fairstead’s confidential investment opportunities to both Offices. (*Id.*) Remarkably, the trial court determined that “Tatum did not know Blodgett was sharing confidential information,” even though Blodgett testified that he was “honest and open” with Tatum. (PTO28; A1190 at 910:11-13)

On May 14, 2021, Blodgett texted Tatum that “we need to be prepared to walk.” (A1693) Tatum responded, “I’ve been ready for awhile.” (A1693-94) Earlier that day, Blodgett had instructed two Fairstead employees who reported to him, William Kreinik and Adam Sussi, to begin developing a business model (the “Model”) for a “new venture,” “Fairstead 2.0.” (A0093) That same day, Kreinik downloaded confidential documents from Fairstead’s server, including two model templates. (*Id.*) The trial court found that “Tatum helped” with the Model. (PTO28-29; *see* A1346 at 1350:21-1351:5)

The gang worked secretly on the Model, including by “using text, personal email accounts, and personal Dropbox access,” which ensured that Fairstead was kept unaware. (PTO28-29) Tatum emailed the others about how “Fairstead 2.0” might be capitalized. Sussi responded that he was “excited” that Tatum was “digging in.” (A1739)

C. In Summer 2021, Blodgett and Tatum Demand Control Of Fairstead And Misappropriate More Confidential Information

Between May and August 2021, Blodgett and Tatum had a series of combative meetings with Feldman, demanding that Feldman give them control of Fairstead Affordable. (PTO29-37)

On May 18, Blodgett met with Feldman, telling him that “[e]veryone says it’s my company” and demanding “a path to full control in 10 years.” (PTO29-30 (citing

A1723)) Feldman understood that proposal “as an attempt to take over” the company and rightly rejected it. (*Id.*)

After Blodgett informed Tatum that Feldman rejected their demand, Tatum downloaded more than 2,300 documents from Fairstead’s server, including confidential models. (A1806; A3747 ¶30; PTO30-31) At trial, Tatum admitted his misconduct, claiming that he “panicked”—but acknowledging he did not want to “rebuild [Fairstead’s] machine from scratch.” (PTO30-31; A0921-22 at 144:23-145:14)

On June 2, Blodgett met again with Feldman. Blodgett proposed that he and “other unidentified ‘key employees’” “would be granted 80-90% of the new Fairstead 2.0 venture,” while “Feldman would be reduced from his existing majority position to 10-20% ‘for no additional consideration,’ which would ‘sunset over time.’” (A0094) The upshot: “Feldman would be responsible for funding Blodgett’s company even after Feldman’s interest had ‘sunset[ed] to zero.’” (*Id.*)

Two days later, Tatum texted Blodgett that he was “done.” (A1733) Tatum told Blodgett that his wife, an attorney, “said she’s willing to work probono for us,” “[s]o our legal team is on board,” and “[s]he will sue anyone and everyone.” (A1728-29)

Shortly thereafter, Kreinik, who was working on the Model, “downloaded 2,800 [Fairstead] files to a USB drive, including project pipeline lists and human resources information.” (PTO34)

On June 23, Blodgett sent the Tisch Office the Model. (*Id.*) A week later, Tatum and Blodgett met with that Office. (A1740) Blodgett testified that Tatum “knew exactly what was going on” and that they were “on the same page.” (A1202-03 at 958:14-960:11) Around this time, Tatum texted Fairstead’s IT department asking for recommendations for “any local tech services company” to set up a New York office, ostensibly for a “friend.” (A3135-36 at 1228:24-1229:22)

In June 2021, Fairstead began investigating Tatum’s and Blodgett’s misconduct. (PTO29, 34)

In July 2021, Tatum used the internet to research “material breach.” Fairstead did not learn about that until after Tatum’s resignation. (A1774)

D. In September-October 2021, Fairstead Terminates Blodgett and Tatum Resigns; Fairstead Continues to Investigate and Reserves All Its Rights

On September 12, 2021, a law firm representing Tatum and Blodgett sent Blodgett an invoice for “Newco Formation” to his Fairstead email. (PTO36) Shortly thereafter, Fairstead terminated Blodgett for cause. (A1764) Fairstead also drafted a letter terminating Tatum for cause, but continued to investigate and did not terminate Tatum at that time. (A1759)

On October 15, 2021, Tatum resigned “without Good Reason.” (A1770; PTO56-57) The trial court found that Tatum “thought [he] left on good terms.” (PTO2) The court’s own findings do not support that conclusion. By that time, Tatum “was deeply skeptical of Feldman and Goldberg” (PTO57), and he had copied many confidential Fairstead documents, which “breached the Confidentiality Provision” of his Employment Agreement (PTO75).

If Tatum resigned “without Good Reason,” the Employment Agreement required that he provide 120 days’ notice. (A0138 §8.8(a)(iii)) Fairstead accordingly treated Tatum’s resignation email as giving that notice. (A1768) Fairstead also expressly reserved “any and all rights, claims and recourse” that it might have against Tatum. (A1769)

Fairstead instructed Tatum to return all Fairstead materials. (A1767-69) After ignoring repeated requests, Tatum stated on January 18, 2022, that he was “returning, without retaining any copies” of the Fairstead materials. (A1778; *see also* A1784 (similar representation from his counsel)) That was not true. Tatum’s complaint revealed for the first time that Tatum had kept “a few documents” which he asserted he was “entitled to retain.” (A022-23 ¶¶319, 321) At trial, Tatum claimed he “subjectively believed” he could keep them. (PTO31)

In each of Fairstead’s letters to Tatum regarding his departure, Fairstead expressly reserved its rights. (A1772; A1777; A1783; A1793)

Following his departure from Fairstead in February 2022, Tatum “ended up deciding not to work with Blodgett.” (PTO40)

E. In June 2022, Fairstead Retroactively Terminates Tatum for Cause and Declares His Interests Forfeit

On June 28, 2022, Fairstead retroactively terminated Tatum for cause prior to May 6, 2021, including because of information about Tatum’s misconduct that Fairstead learned after resignation. (A1794-97) Under the Operating Agreement, if Tatum was terminated for cause prior to the fifth anniversary of Fairstead Affordable’s formation (*i.e.*, May 6, 2021), his interests were forfeit. (A0140 §8.8(a)(v)) Fairstead therefore informed Tatum that his interests were “forfeited and canceled.” (A1796)

F. Tatum Commences This Action

On October 26, 2022, Tatum commenced this action. After trial, the trial court held as follows:

As to Tatum’s claims, the court held that Fairstead breached the Operating Agreement by holding Tatum’s interests forfeit, as well as by violating the terms of the Agreement’s good faith and appraisal provisions. (PTO47, 57, 69) It also held that Tatum established quasi-contract claims for additional compensation on the Legacy and Hampstead Portfolios. (PTO65-68)

As to Fairstead’s counterclaims, the court held that Tatum breached the Employment Agreement’s confidentiality provision, but only awarded Fairstead its

costs of investigating that breach as damages. (PTO78) It held that notwithstanding his misconduct, Tatum did not breach his fiduciary duties under the Operating Agreement, his contractual duties under that Agreement, or his fiduciary duties as a Fairstead employee. (PTO78-79)

The court awarded Tatum \$4,713,484.71 in legal expenses under the Employment Agreement's fee-shifting provision. (Ex. B) This appeal followed.

ARGUMENT

I. THE TRIAL COURT ERRED IN HOLDING THAT FAIRSTEAD BREACHED THE OPERATING AGREEMENT AND THAT TATUM’S INTERESTS WERE NOT FORFEIT; FAIRSTEAD’S RETROACTIVE TERMINATION OF TATUM WAS PROPER

A. Question Presented

Whether the trial court erred by holding that Fairstead breached the Operating Agreement by retroactively terminating Tatum for cause, even though Fairstead was unaware of the full extent of Tatum’s wrongdoing when it accepted his resignation and accepted it subject to a reservation of rights. This question was raised (A1480; A0595-607) and considered below (PTO45-47; Ex. F).

B. Scope of Review

The Court “review[s] questions of law and contractual interpretation *de novo*” and “defer[s] to the Court of Chancery’s factual findings supported by the record and reviews them for clear error.” *Boardwalk Pipeline Partners, LP v. Bandera Master Fund LP*, 288 A.3d 1083, 1111-12 (Del. 2022) (cleaned up).

C. Merits of Argument

1. The Trial Court Incorrectly Applied The After-Acquired Evidence Doctrine

The trial court held that Fairstead’s June 2022 retroactive termination of Tatum for cause was ineffective because it was “grounded ... on Tatum and Blodgett’s plan to leave Fairstead and start a new company,” and that Fairstead “knew the relevant details before accepting Tatum’s resignation” in October 2021.

(PTO46-47) That holding rests on the “after-acquired evidence doctrine,” “which federal courts have applied in the employment discrimination setting.” *Davenport Grp. MG, L.P. v. Strategic Inv. P’rs, Inc.*, 685 A.2d 715, 723 (Del. Ch. 1996). That “doctrine typically applies when an employer uses evidence acquired after an employee’s termination to defend against a claim that it wrongfully terminated that employee.” *Metro Storage Int’l LLC v. Harron*, 275 A.3d 810, 879 (Del. Ch. 2022). If the after-acquired information “evidences proper grounds for discharge, the employer may use it to justify removal” of the employee. *Davenport*, 685 A.2d at 723.

The trial court incorrectly applied that doctrine here. Fairstead’s termination letter was not addressed solely to Tatum’s and Blodgett’s plan to compete. It identified a series of other contractual and fiduciary breaches, including their theft of Fairstead confidential information and resources. (A1794-97) As discussed *infra*, Fairstead was not (and could not have been) aware of the full extent of that wrongdoing when it accepted Tatum’s resignation.

The record established that Tatum and Blodgett committed numerous wrongful acts in furtherance of their partnership. Tatum is chargeable with his own misconduct and with that of his partner Blodgett, as well as with the misconduct of Fairstead personnel whom they recruited into the scheme. (See Part II *infra*) Those

acts included the following substantial misconduct prior to May 6, 2021, which are inextricably intertwined with their subsequent misconduct:

- (i) In 2020, Tatum and Blodgett began secretly talking with the Sussman Office about their plan. Blodgett began sending that office confidential Fairstead information. (A0089; *see* A1654)
- (ii) In 2020, Tatum and Blodgett disclosed to Kreinik that they were “working on a plan” for restructuring Fairstead. (A3832 at 66:11-68:13)
Prior to May 2021, they also brought Fairstead employee Sussi into discussions about their new company. (A2638-39 at 773:17-74:4)
- (iii) On April 9, 2021, Blodgett began forwarding confidential Fairstead information to the Tisch Office, including a valuation reflecting financial projections for Fairstead’s properties, to raise money for Tatum and Blodgett’s new business. (A0092; A1657)
- (iv) On April 23, 2021, Blodgett sent historical Fairstead financial information to the Sussman Office. (A1666)
- (v) On April 27, 2021, Blodgett forwarded to the Sussman and Tisch Offices a business opportunity sent to him at his Fairstead email address. (A1680)
- (vi) On May 8, 2021, Tatum downloaded 4,400 files from Fairstead’s server, including from the “toolbox” folder. (A3745-46 ¶26; PTO75)

- (vii) On May 14, 2021, Tatum and Blodgett texted about the Model. Tatum told Blodgett they could make use of Fairstead models he built. Blodgett tasked Kreinik and Sussi with building the model, and Kreinik downloaded two template models from Fairstead's server. (A0093; A3761 ¶51; A1694) Tatum "helped" with and "provided inputs" to the Model. (PTO29; A1346 at 1350:21-1351:5)
- (viii) On May 14, 2021, Blodgett downloaded 223 files from Fairstead's "toolbox" folder (A3770 ¶67) and sent the Tisch Office a link to a Dropbox folder containing those materials. (A1696)
- (ix) On May 15, 2021, Tatum downloaded three files from Fairstead's server, including an Excel sheet titled "Relationships List." (A3746 ¶28)
- (x) On May 16, 2021, Tatum downloaded confidential files from Fairstead's server, including ownership and organization charts, audits, and income statements. (A3747 ¶29)
- (xi) On May 18, 2021, Tatum downloaded 2,300 files containing confidential information from Fairstead's server, including from the "toolbox" folder. (*Id.* ¶30; PTO75) Tatum saved those files to a USB drive that he later connected to another computer. (A3754-55 ¶39)
- (xii) In late May 2021, Blodgett downloaded approximately 1,100 Fairstead files, including pricing models and due diligence checklists. (A0094)

- (xiii) On June 2, 2021, Tatum, Blodgett, Kreinik, and Sussi met with the Sussman Office, who shortly thereafter connected them with legal counsel. (PTO33)
- (xiv) On June 16, 2021, Kreinik downloaded 2,800 files from Fairstead's server, including "pipeline" lists. (A0094)
- (xv) On June 23, 2021, Blodgett sent the Tisch Office the Model. (A1741; PTO29, 34; A0094; A1345-46 at 1349:3-1350:2) A week later, Blodgett and Tatum met with the Tisch Office. (A1740) Tatum "knew exactly what was going on" and Blodgett was "honest and open" with him. (A1190 at 910:11-13; A1202-03 at 958:14-960:11)

In October 2021, when Fairstead accepted Tatum's resignation, Fairstead was aware of only a fraction of that misconduct. For example, Fairstead could not analyze Tatum's Fairstead laptop until Tatum returned it in January 2022 (PTO39) and could not have known about his USB drive until then. Fairstead could not understand how Tatum and Blodgett were using the confidential Fairstead information that they stole, or that they were providing that information to the Sussman and Tisch Offices. All that was by design: Blodgett and Tatum intentionally kept Fairstead in the dark, including by using personal email.

Fairstead was permitted to rely on that misconduct in retroactively terminating Tatum for cause. Tatum's acts—both his own and Blodgett's acts imputed to him—

plainly constitute “Cause” under the Operating Agreement. (See A0120 Art. II) The arbitrator in Blodgett’s arbitration found the same conduct “overwhelmingly establishe[d]” that Blodgett breached his employment agreement. (A0098)

The trial court’s conclusion that Fairstead “knew the relevant details before accepting Tatum’s resignation” (PTO46-47) ignores the factual record showing that Fairstead did not know and could not have known all “the relevant details,” and it misapplies the after-acquired evidence doctrine by rewarding the wrongdoer Tatum for his lack of candor. By contrast, in that court’s decision in *Metro Storage*, which it cited below (PTO46), the court did not permit a wrongdoer to benefit from his own misconduct. There, a CEO surreptitiously disclosed a business’s confidential information to one of the CEO’s other clients. The CEO objected that the business was foreclosed from treating him as terminated for cause, because he left voluntarily. The court observed that the CEO “should not be able to benefit from concealing his misconduct.” *Metro Storage*, 275 A.3d at 879. Indeed, if the business could not rely on the after-acquired evidence,

then the faithless fiduciary would benefit from his wrongful acts. He would be better off for having breached his duty of loyalty by concealing his misconduct than he would have been if he had been honest and forthright.

Id. So too here: it was entirely proper for Fairstead to retroactively terminate Tatum for cause when it came to understand how Tatum had misused Fairstead’s confidential information and resources to prepare to compete with Fairstead.

Nor does the fact that Fairstead learned more about Tatum's wrongdoing in discovery make that termination improper: rather, it confirms the termination was warranted. In *Davenport* (cited in *Metro Storage*, 275 A.3d at 879), an LP's general partner argued that it had been improperly removed by the limited partners because some of them agreed to removal "before actual knowledge of a bona fide breach." 685 A.2d at 723. The court disagreed, explaining that even if limited partners discovered the breaches afterward, they were "justified in their removal." *Id.* That they did not rely on those breaches at the time "makes no difference" because the general partner breached the partnership agreement and that breach "was ongoing at the time of the removal." *Id.* at 724.

So too here: it should "make[] no difference" when Fairstead learned it had cause to terminate Tatum. *See id.* What matters is that Tatum breached his obligations to Fairstead by partnering with Blodgett to steal Fairstead's confidential information and resources and use them to compete with Fairstead. Tatum, having breached his fiduciary duties, has no equitable basis to challenge his termination for cause. The trial court should have held it effective.

2. The Trial Court Erred In Not Giving Effect To Fairstead's Reservation Of Its Rights

Tatum could not have been surprised by his termination: he knew that he had breached at least the confidentiality provisions of his Employment Agreement. Fairstead's letters unambiguously informed Tatum that it was reserving its rights,

and a sophisticated businessperson like Tatum would understand what that meant. Indeed, Tatum himself was represented by seasoned counsel who repeatedly asserted reservations of rights on his behalf. (*E.g.*, A1784-87)

Yet the trial court did not give effect to Fairstead’s reservation of rights. That was error:

a. Under Delaware law, clear and timely reservations of rights are given effect. *E.g.*, *Gallup, Inc. v. Greenwich Ins. Co.*, 2017 WL 420160, at *8 (Del. Super. Jan. 30, 2017) (insurer did not waive coverage exclusion where insurer “clearly and timely reserved its right to pursue a coverage action”). Here, Fairstead clearly and timely reserved its rights.

b. If the court believed that Fairstead waived its right to terminate Tatum for cause, that was error. “‘Waivers of contractual rights are not lightly found,’ as a waiver ‘must be unequivocal.’” *Schillinger Genetics, Inc. v. Benson Hill Seeds, Inc.*, 2021 WL 320723, at *15 (Del. Ch. Feb. 1, 2021). The Operating Agreement expressly precludes waivers by conduct. (A0151 §12.8) The trial court could not hold that Fairstead waived its rights by accepting Tatum’s resignation subject to an express reservation of rights, or by enforcing the Operating Agreement’s 120-day notice period.

In *Golden v. WorldQuant Predictive Technologies, LLC*, 345 A.3d 813 (Conn. App. 2025), the court gave effect to a reservation of rights under similar

circumstances. A company terminated an executive who provided consulting services to another business during his employment. The executive sought to vacate an arbitral award in the company's favor, arguing that the arbitrator failed to apply the after-acquired evidence doctrine because the company knew that the executive was providing those services prior to his termination and did not rely on that as a basis for termination. The court declined to vacate the award, including because the company learned additional facts about the executive's outside work after the termination, and because "the termination notice provided to the [executive] contained a reservation of rights clause." *Id.* at 835. Here, too, the trial court should have held that Fairstead's reservations of rights preserved its ability to retroactively terminate Tatum for cause. This Court should correct that error.

II. HAVING FOUND THAT TATUM AND BLODGETT “OPERATED AS JOINT VENTURERS,” THE TRIAL COURT ERRED IN NOT HOLDING THAT BLODGETT’S ACTS WERE ATTRIBUTABLE TO TATUM

A. Question Presented

Where the trial court, having found that Tatum and Blodgett acted as common law partners, erred by failing to hold that Blodgett’s knowledge and acts in furtherance of that partnership were chargeable to Tatum. This question was raised (A0859; A1482; A1484; A531-32) and considered below (PTO5-6, 101).

B. Scope of Review

The Court decides issues of law *de novo*. *GWG DLP Master Tr. Dated 03/01/06 v. Estate of Frank*, 2026 WL 439377, at *3 (Del. Feb. 11, 2026).

C. Merits of Argument

The trial court found that “Tatum and Blodgett formed a common law partnership and operated as joint venturers for purposes of their plan to negotiate for a controlling interest in Fairstead’s affordable housing business and, if Fairstead refused, leave Fairstead to start a new business.” (PTO5) The record amply supports that finding. Blodgett’s knowledge and conduct in that partnership are therefore imputed to Tatum.

It is well settled that a joint venturer is “chargeable with full knowledge” of the acts of their coventurers “because of their inter-relationship with each other.” *Hannigan*, 77 A.2d at 216. For example, in *Hannigan*, a syndicate entered into an

agreement with a company under which syndicate members received shares in the company. Syndicate members made up a majority of the company's board. The company issued notes to the syndicate member stockholders in lieu of dividends. A dispute arose over whether the dividends were validly issued and, if not, whether the syndicate members could recover the dividends' value by recovering on the notes. This Court held that if the syndicate directors "deliberately or negligently participated in an invalid dividend declaration," they could not recover on the notes. *Id.* at 216. The syndicate stockholders who were not directors were also barred, because they were charged with the knowledge of their fellow syndicate members:

The remaining members of the Syndicate, whether or not they actually knew the circumstances surrounding this questioned transaction, are nevertheless chargeable with full knowledge thereof because of their inter-relationship with each other. This is so because a Syndicate is no more than a joint adventure or loose form of partnership designed for the accomplishment of a single business transaction and each joint adventurer is, in effect, both a principal for himself and agent for each of his associates.

Id.; accord *Hudson v. A.C. & S. Co.*, 535 A.2d 1361, 1365 (Del. Super. 1987) ("[E]ach joint venturer stands in the position of a partner and the actions of each joint venturer in furtherance of the joint venture are attributable to the other joint venturer."); see also *HMG/Courtland Props., Inc. v. Gray*, 749 A.2d 94, 121 (Del. Ch. 1999) (under New York law, holding one partner liable for other partner's acts taken on behalf of partnership "even if she had no knowledge" of acts).

Here, Blodgett's actions in furtherance of their partnership are "chargeable" to Tatum, "whether or not [Tatum] actually knew the circumstances surrounding" Blodgett's actions. *Hannigan*, 77 A.2d at 216; *accord Hudson*, 535 A.2d at 1365. The trial court erred by not so holding: it incorrectly excused Tatum on the theory that he was "not aware that Blodgett was sharing [Fairstead's] confidential information" with third parties in furtherance of their partnership. (PTO101) Even if the trial court could reasonably have credited Tatum's denial, whether Tatum actually knew of Blodgett's misconduct is irrelevant. As a matter of law, when it came to their partnership, Blodgett's knowledge was Tatum's knowledge and Blodgett's acts were Tatum's acts. *See Hannigan*, 77 A.2d at 216.

Remarkably, the same trial court recently recognized that actions taken by one partner were "attribut[able]" to another partner where the actions were "to advance their joint cause." *26 Cap. Acq. Corp. v. Tiger Resort Asia Ltd.*, 309 A.3d 434, 472 (Del. Ch. 2023). There, a SPAC and a hedge fund "worked as partners" in a de-SPAC transaction: the hedge fund's client was the transaction's target, but no one informed the target that the hedge fund "was playing for the other team." *Id.* at 440. After the transaction fell apart, the SPAC sought specific performance. The SPAC, hoping to show that it had not engaged in inequitable conduct inconsistent with its request for an equitable remedy, "attempted to disclaim responsibility for the hedge fund's actions." *Id.* at 440. The court rejected that effort, holding that because the

SPAC and the hedge fund “acted as partners to gain and exploit their inequitable advantage,” the SPAC could not “dodge ... unfavorable facts” that “center[ed]” on the hedge fund:

[The SPAC] and [the hedge fund], through their principals ... acted as partners in a joint effort to force through a deal on their terms. Put more pejoratively, they engaged in a conspiracy to mislead [the target and its parent]. The actions taken by [the hedge fund] to advance their joint cause are therefore properly attributed to [the SPAC].

Id. at 471-72. Here, however, the trial court allowed Tatum to disclaim responsibility for his partner Blodgett’s wrongful acts. That was error.

The trial court’s failure to apply that fundamental principle of partnership law resulted in an unnecessarily complicated analysis of the claims. Properly applying that rule makes the result straightforward:

- (i) The trial court held that the arbitrator’s factual findings in the Blodgett arbitration were binding on Tatum. (PTO5-6)
- (ii) The facts the arbitrator found regarding Blodgett’s conduct as Tatum’s partner—including misuse of Fairstead’s confidential information to prepare to compete with Fairstead—should have been imputed to Tatum. *Hannigan*, 77 A.2d at 216; 26 *Cap.*, 309 A.3d at 472.
- (iii) Those facts, and Tatum’s own conduct, establish that Tatum breached contractual and fiduciary duties to Fairstead Affordable.

(iv) Accordingly, Fairstead did not breach the Operating Agreement by terminating Tatum for cause and Tatum's interest in Fairstead Affordable was properly held forfeit.

This Court should rectify that error.

III. THE TRIAL COURT ERRED IN HOLDING THAT TATUM WAS NOT LIABLE FOR BREACHING THE FIDUCIARY DUTIES THAT HE OWED TO FAIRSTEAD

A. Question Presented

Whether the trial court erred in holding that Tatum, who was the only member of Fairstead Affordable who owed fiduciary duties, did not breach any fiduciary duties to Fairstead Affordable. This question was raised (A0861-64; A1486-89) and considered below (PTO88-99).

B. Scope of Review

De novo as to “questions of law and contractual interpretation”; factual findings are reviewed “for clear error.” *Boardwalk*, 288 A.3d at 1111-12.

C. Merits of Argument

1. The Trial Court Erred In Not Holding Tatum Liable For His Breaches Of Fiduciary Duty As A Minority Member Of Fairstead Affordable

The Operating Agreement expressly removes fiduciary duties for all members except Tatum’s entity, JCT Capital LLC. (A0132 §6.10(a)) JCT is wholly owned and controlled by Tatum, and so Tatum owes these fiduciary duties himself.²

The parties were free to make that arrangement. As this Court observed, “[t]he courts of this State hold freedom of contract in high—some might say, reverential—

² See, e.g., *Principal Growth Strategies LLC v. AGH Parent LLC*, 2024 WL 274246, at *8-9 (Del. Ch. Jan. 25, 2024); see also A1540 ¶4 (stipulating that Tatum, “through his entity JCT Capital, was an original Member of Fairstead Affordable”).

regard.” *Cantor Fitzgerald, L.P. v. Ainslie*, 312 A.3d 674, 676 (Del. 2024). That is particularly true for LLC operating agreements, which “permit partners to have the broadest possible discretion in drafting their partnership agreements” and provide partners with “a great deal of certainty that their partnership agreement will be enforced in accordance with its terms.” *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 291 (Del. 1999); *see also* 6 Del. C. §18-1101(b) (LLC Act gives “the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements”). Businesses who choose to organize as Delaware LLCs expect those arrangements to be enforceable.

Here, instead of enforcing the Agreement as written, the trial court held it was “frankly unclear what” the Agreement “envision[ed]” by giving Tatum fiduciary duties. (PTO91) That was error: it is not at all “unclear.”

Delaware has long held that non-managing members can owe fiduciary duties if there are (i) “facts suggesting that the purportedly passive member was acting in a managerial capacity” or (ii) “a modification of the LLC agreement.” *CMS Inv. Hldgs., LLC v. Castle*, 2015 WL 3894021, at *18 (Del. Ch. June 23, 2015) (minority LLC member “vested with discretionary power to manage the business of the LLC” owed fiduciary duties); *see also* *Skye Min. Invs., LLC v. DXS Cap. (U.S.) Ltd.*, 2020 WL 881544, at *4 (Del. Ch. Feb. 24, 2020) (declining to dismiss fiduciary duty

claims against minority members who “possessed significant control rights under the [LLC] Agreement”). Here, both alternatives are satisfied:

a. Tatum acted in a “managerial capacity” at Fairstead Affordable. The trial court observed: “Before Tatum joined Fairstead, no one there knew how to do a tax credit deal.” (PTO10 (internal quotations omitted)) As the person most knowledgeable about that business, Tatum ran Fairstead Affordable’s day-to-day operations. Accordingly, he is charged with fiduciary duties as a matter of law.

b. The Operating Agreement also expressly imposed such duties on Tatum. (A0132 §6.10(a)) That differentiates this case from *Kuroda v. SPJS Holdings, L.L.C.*, 2010 WL 925853, (Del. Ch. Mar. 16, 2010), where a minority member was “not a fiduciary” because he “was neither a manager of [the LLC] nor a controlling member”; thus, “[n]o matter how ‘central’ [he] was to the entire business endeavor, his centrality was governed by contractual duties, not fiduciary ones.” *Id.* at *7-8. The court observed, “[h]ad defendants wanted everyone to enjoy a red rose of fiduciary duty, they should not have planted white roses of contractual obligations and now ask me to paint over them.” *Id.* at *8. Here, the parties **did** plant the “red rose of fiduciary duty”: Fairstead Affordable wanted its day-to-day manager to owe fiduciary duties, and its members accordingly bargained to confer such duties on Tatum. (A0132 §6.10(a)) This Court should enforce that bargain.

2. The Trial Court Erred In Holding That Tatum’s Challenged Acts Were Taken As An Employee

Rather than hold Tatum to his fiduciary duties, the trial court held that Fairstead could not “use the Minority Member Duty Provision to claim a breach of the duty of loyalty” because Tatum committed the challenged acts “as an employee.” (PTO92) That holding—for which the court cited no authority—was error:

a. Tatum’s efforts to (i) increase his stake in Fairstead Affordable or (ii) compete with Fairstead Affordable cannot credibly be described as undertaken for purposes of his employment. The Employment Agreement describes Tatum’s duties as “directing the acquisition and execution activities of Fairstead Affordable” and “provid[ing] all other work and services assigned to [him].” (A0108 §1.A) None of Tatum’s challenged acts falls within either bucket. The only beneficiaries of Tatum’s efforts were Tatum, Blodgett, and their partnership—not Fairstead Affordable. *See* Restatement (Second) of Agency §228 (1958) (act is “within the scope of employment” where “it is actuated, at least in part, by a purpose to serve the master”); A0088 (rejecting Blodgett’s “disingenuous insistence that his actions were ‘designed to benefit Fairstead’”).

b. Even if those acts had been within the scope of Tatum’s employment, that would not preclude holding that they breached Tatum’s fiduciary duties to Fairstead Affordable. Tatum’s employment at Fairstead was central to his LLC membership. The Operating Agreement expressly provides that Tatum’s member

interest shall be treated as “in exchange for Tatum’s services as an employee.” (A0138 §8.8(a)) It also provides that the other members can buy out Tatum’s interest if Tatum’s employment ceases. (A0141 §8.9(a)) When Tatum performed those acts, he owed fiduciary duties both as an employee and as an LLC member.

It is well settled that an individual can be subject to more than one set of fiduciary obligations with respect to the same actions. *E.g.*, *Weinberger*, 457 A.2d at 710. “There is no ‘safe harbor,’” *id.*, for an individual in such a situation: an individual cannot assert that he undertook an action in just one fiduciary capacity (*e.g.*, employee) and thus cannot be held accountable if those actions conflict with his other fiduciary obligations (*e.g.*, as an LLC member). The trial court has applied that principle on numerous occasions; why it did not do so here is inexplicable. *E.g.*, *Guilbeau v. Footprint Int’l Holdco, Inc.*, 2026 WL 1329169, at *24 (Del. Ch. May 11, 2026) (citing *Weinberger*). This Court should correct that error.

3. The Trial Court Erred In Holding That Tatum’s Actions Were Not In Breach Of His Fiduciary Duties

Tatum breached his fiduciary duties by partnering with Blodgett to misuse Fairstead’s resources to prepare to compete with Fairstead. The trial court avoided that conclusion in part by refusing to apply well-settled imputation principles governing partnerships. The court acknowledged that if Tatum “disclose[d] any confidential information to third parties or use[d] any of it to compete with Fairstead,” Tatum breached his fiduciary duties. (PTO96) It is undisputed that

Blodgett sent Fairstead’s confidential information to third parties in furtherance of his and Tatum’s partnership and to prepare to compete with Fairstead. (*See, e.g.*, PTO34) Under partnership principles, that conduct is Tatum’s conduct too, and it breaches the duty of loyalty.

Even without imputing Blodgett’s conduct, the court should have held that Tatum breached his duties. While at Fairstead, Tatum (i) downloaded Fairstead’s confidential information “around key events in Fairstead 2.0 planning” (A0100) and (ii) secretly worked with Blodgett and others to create a new company that would compete with Fairstead, including working on the Model that Blodgett sent to the Tisch Office and meeting with members of that office shortly thereafter. (*See* PTO28-29; A1740) Those are not loyal acts.

Fairstead does not dispute that Tatum could take steps to prepare to leave Fairstead. (*Cf.* PTO92) What Tatum could *not* do was misuse Fairstead’s confidential information and resources and solicit Fairstead’s employees to join him. *See, e.g., Enhabit, Inc. v. Nautic Partners IX, L.P.*, 2024 WL 4929729, at *22 (Del. Ch. Dec. 2, 2024) (former CEO “convinced several key employees to join a competing venture while she was” CEO, which “is not the behavior of a loyal fiduciary”). But that is exactly what Tatum and Blodgett did.

This case is readily distinguishable from *Lazard Debt Recovery GP, LLC v. Weinstock*, 864 A.2d 955 (Del. Ch. 2004), which the court cited below (PTO93).

There, the court explained that a fund’s employees did not breach fiduciary duties by resigning without giving notice and beginning a competing business: “an agent can make arrangements or plans to go into competition with his principal before terminating his agency, *provided no unfair acts are committed or injury done [to] his principal.*” *Lazard*, 864 A.2d at 967 (quotations omitted) (emphasis added). Here, however, Tatum and Blodgett unfairly misappropriated Fairstead’s resources and solicited Fairstead employees for their new venture.

4. The Trial Court Erred In Holding That Tatum Did Not Breach His Fiduciary Duties As An Employee Under New York Law

Under New York law—which the parties agreed governed this question—Tatum owed Fairstead fiduciary duties as an employee. (PTO96) Tatum breached those duties based on the conduct described above, either under partnership principles or based on his conduct alone. The trial court’s failure to so hold was error.

The arbitrator held that Blodgett breached fiduciary duties he owed as an employee by stealing Fairstead’s confidential information and soliciting employees in furtherance of his and Tatum’s joint venture. (A0102-03) That was entirely consistent with New York law, which—as the trial court explained (PTO99)—prohibits an employee from “us[ing] his principal’s ... proprietary secrets to build the competing business,” *Bus. Networks of N.Y. Inc. v. Complete Network Sols. Inc.*,

1999 WL 126088, at *3 (N.Y. Sup. Ct. Feb. 19, 1999), *aff'd in part as modified*, 696 N.Y.S.2d 433 (App. Div. 1999), and from “solicit[ing] its ... employees to follow them to their new firm,” *Weiser LLP v. Coopersmith*, 859 N.Y.S.2d 634, 636 (App. Div. 2008). In a separate proceeding, the same trial court explained that “Blodgett used confidential Fairstead information and resources to prepare to compete and when instructing his subordinates to develop a financial model,” which “[e]ven under Delaware law” are breaches of an employee’s fiduciary duties. *Fairstead Cap. Mgmt. LLC v. Blodgett*, 2026 WL 1327565, at *18 (Del. Ch. May 13, 2026). Because Blodgett’s knowledge and conduct are imputed to Tatum, Tatum should also have been held in breach of fiduciary duties that he owed as an employee.

The trial court should have so held on the basis of Tatum’s own acts: Tatum stole Fairstead’s confidential information and helped build a Model using Fairstead’s confidential information that was sent to a potential investor. (A0094; A1346 at 1351:2-4) That is disloyal conduct.

IV. THE TRIAL COURT ERRED BY HOLDING THAT TATUM DID NOT BREACH HIS CONTRACTUAL DUTIES UNDER THE EMPLOYMENT AND OPERATING AGREEMENTS

A. Question Presented

Whether the trial court erred by (i) dismissing Fairstead's claim that Tatum breached the non-solicitation provision of his Employment Agreement and (ii) holding that Tatum did not breach the best efforts, no-conflict, and confidentiality provisions of the Employment Agreement and Operating Agreement where Tatum partnered with Blodgett to misappropriate Fairstead's confidential information and to solicit Fairstead employees to prepare to compete with Fairstead. This question was raised (A0857-61; A1481-86; A0627-35) and considered below (PTO68-84; Ex. E).

B. Scope of Review

De novo as to "questions of law and contractual interpretation"; factual findings are reviewed "for clear error." *Boardwalk*, 288 A.3d at 1111-12.

C. Merits of Argument

1. The Trial Court Erred By Holding That Tatum Did Not Breach The Employment Agreement's Best Efforts Provision

Tatum promised to "devote [his] best efforts and time, effort and loyalty to the business of the Firm, the Related Entities and its affiliates." (A0109 §1(H)) Tatum broke that promise: he did not "devote" his "loyalty" to Fairstead, but instead

joined with Blodgett to misuse Fairstead's confidential information and recruit its employees to prepare to compete with Fairstead. That is the antithesis of loyalty.

The trial court evaded that conclusion by focusing on Tatum's discharge of his duty of care in his work for Fairstead. (PTO71-72) But two things can be true: Tatum could perform competently and still fail to "devote" his "loyalty" to Fairstead.

2. The Trial Court Erred By Holding That Tatum Did Not Breach The Employment Agreement's No-Conflict Provision

Tatum also promised not to "engage in any conduct that creates an actual, potential or apparent conflict between" his interests and Fairstead's. (A0109 §1(H)) Tatum broke that promise as well: his conduct (and Blodgett's) "creates an actual, potential or apparent conflict" between Tatum's and Fairstead's interests.

The trial court concluded that utterly ordinary provision was unenforceable, rationalizing that enforcing it would be tantamount to holding that "[a]n employee could not ask for additional time off, because doing so would put the employee's personal interest (time off) at odds with the company's interest (having the employee work as much as possible)." (PTO73) That hypothetical is not remotely comparable to these facts. Certainly employers and employees may discuss employment terms in good faith, but an employee cannot secretly misappropriate the employer's resources to prepare to compete with the employer. These are not "*legitimate* preparations to compete." (*Id.* (emphasis added))

3. Tatum Breached The Confidentiality Provisions Of The Employment And Operating Agreements And Fairstead Is Entitled To Seek Damages Beyond The Costs Of Investigating Those Breaches

Tatum promised in the Employment Agreement that he would “not reveal to any person or entity any of the trade secrets or proprietary or confidential information of [Fairstead] to any third party” or “take from the premises of [Fairstead], use or permit to be used any Proprietary Information other than for the benefit of the Firm.” (A0110-11 §3(A)(1), (3)) He similarly promised in the Operating Agreement not to “disclose or use any confidential information of or with respect to the Company or its business.” (A0135 §8.3(b)) Tatum broke both promises.

Tatum breached the Employment Agreement’s confidentiality provision by downloading Fairstead’s documents. (PTO75) But the trial court held that “Fairstead failed to prove any damages other than the costs incurred investigating Tatum’s actions” because “[t]he nature of the documents and Tatum’s decision to return them without using them defeats any more significant award.” (*Id.*) The court correspondingly held that Tatum did not breach the Operating Agreement’s confidentiality provision because it “requires that a party ‘disclose or use’ confidential information” and “that did not happen.” (PTO84)

The record before the trial court and that court’s own findings foreclose those holdings:

a. Tatum *did* use Fairstead’s confidential information in furtherance of his and Blodgett’s partnership. Tatum told Blodgett that they could adapt Fairstead models that Tatum had built in 2016 for their competing venture (A1694) and he helped build the Model derived from Fairstead’s confidential information. (See PTO28-29)

b. Tatum is chargeable with Blodgett’s conduct in furtherance of their partnership: Blodgett used Fairstead’s confidential information to prepare to compete with Fairstead. That conduct also violates these confidentiality provisions.

Accordingly, this Court should reverse the trial court’s holding that Tatum did not breach the Operating Agreement’s confidentiality provision and remand for determination of damages caused by Tatum’s breach of the confidentiality provisions.

4. The Trial Court Erred By Holding That Tatum Did Not Breach The Operating Agreement’s Good Faith Provision

Tatum promised in the Operating Agreement to “act honestly and in good faith in its dealing with [Fairstead Affordable] and the other Members.” (A0132 §6.10(b)) He broke that promise as well.

In holding otherwise, the trial court discounted Tatum’s participation as “prepar[ing] some documents to help Blodgett raise funds” and noted that Tatum ultimately did not join Blodgett’s company. (See PTO79-80) Neither ground withstands scrutiny:

a. The record does not show merely that Tatum “prepare[d] some documents.” (PTO79) Tatum was Blodgett’s partner in putting together the new company: he helped build it out (*e.g.*, A1739, A1736) and met with potential investors on at least two occasions. (A1021-22 at 429:1-430:19; A1765; A1740)

The trial court discounts those breaches because “[a]t the time, Tatum and Blodgett believed they were on the verge of reaching agreement on a joint venture with Feldman and Goldberg.” (PTO80) But the testimony that the court cites directly undercuts that assertion: Tatum testified that at a September 2021 meeting, he and Blodgett told potential investors, “we’re leaving.” (A1021 at 427:3-428:22) The court also ignored Tatum’s and Blodgett’s July 2021 meeting with the Tisch Office. (A1740)

b. That Tatum has not joined Blodgett’s company is irrelevant. Tatum’s breach was complete when he, Blodgett, and their accomplices misappropriated Fairstead’s confidential information to prepare to compete with Fairstead.

5. The Trial Court Erred In Dismissing Fairstead’s Claim That Tatum Breached The Non-Solicitation Provision

Tatum promised in the Employment Agreement that he would “not directly or indirectly hire, solicit, induce, or encourage any employee ... to terminate his or her employment with the [Fairstead] Entities, or to join or perform services for any other company.” (A0111 §3(C)) Fairstead reasonably did not want Tatum soliciting

employees to join a Fairstead competitor, but that is what Tatum and Blodgett did. (See A0102-03)

The trial court dismissed on the pleadings Fairstead's claim that Tatum breached this provision, holding that the provision was "not tailored to protect" Fairstead's "legitimate business interest." (Ex. E at 5) Even though New York permits a court to "blue pencil" an overbroad non-solicitation provision so that the provision may be enforced, and even though the Employment Agreement itself provides for judicial modification (A0112 §3(D)), the trial court refused to do that, purportedly because the "entirety of the [provision] is overbroad, and there is no clear indication of what would survive." Ex. E ¶9.

That was error. The provision is reasonable on its face. *See Perella Weinberg P'rs LLC v. Kramer*, 2023 WL 3637941, at *6, 12 (N.Y. Sup. Ct. May 24, 2023) (holding substantially similar provision reasonable), *aff'd in pertinent part*, 218 N.Y.S.3d 297 (App. Div. 2024). Even if it were overbroad, tailoring it would not require a "wholesale drafting exercise." (Ex. E at 5) It merely requires reading the provision to preclude Tatum from surreptitiously recruiting Fairstead's employees to join a competitor, which is what he did. The trial court erred by dismissing that claim on the pleadings.

V. THE TRIAL COURT MISCONSTRUED THE OPERATING AGREEMENT AND THEREFORE ERRED IN CALCULATING THE VALUE OF THE INTERESTS THAT WERE HELD FORFEIT

A. Question Presented

Whether the trial court misconstrued the Operating Agreement and therefore erred in determining the value of the interests that Tatum contends were improperly held forfeit. This question was raised (A0871-74; A1492-96) and considered below (PTO51-53). (If the Court reverses the trial court’s holding that Fairstead did not breach the Operating Agreement (*see* Parts I-III *supra*), it need not reach this issue.)

B. Scope of Review

De novo as to “questions of law and contractual interpretation”; factual findings are reviewed “for clear error.” *Boardwalk*, 288 A.3d at 1111-12.

C. Merits of Argument

Even if Fairstead did not properly hold Tatum’s interests forfeit, the trial court erred in awarding Tatum \$7,864,949 for that putative breach. (PTO47, 54)

The trial court awarded Tatum the value of what it determined to be “Stabilized Deals.” (PTO47, 56) A deal is “Stabilized” if “any construction or stabilization guarantees provided by any Member of the Company have been

released or the conditions for release of the same have been satisfied.” (A0123 Art. II (the “Guaranty Provision”))³

The court held that “twenty-three deals met the Stabilization Test.” (PTO48) With respect to 14 deals—amounting to \$4,955,924—the court held that the Guaranty Provision was satisfied even though certain guarantees had not been released, because those guarantees were given not by LLC members but by their principals and therefore could be disregarded. That was error.

To give “sensible life” to the Guaranty Provision, the court should have read the Operating Agreement “in full and situated in the commercial context between the parties.” *Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co.*, 166 A.3d 913, 926-27 (Del. 2017). Read “in full,” the Agreement contemplates that guarantees would be provided by natural persons who are the principals of LLC members (here, Feldman and Goldberg) and not the members themselves, which are “passthrough LLCs with no balance sheet.” (A1031 at 466:16-17)

a. Section 3.2(b) of the Agreement provides that if a deal requires guarantees, then JD2—a member owned by Feldman and Goldberg—“shall be obligated to ensure that *its direct or indirect principals* shall provide such Deal Guarantees.” (A0124-25 §3.2(b)) The Agreement therefore expressly contemplates

³ The distinction between guarantees that have been released and guarantees whose conditions for release have been satisfied is not germane here and is omitted.

that those principals—Feldman and Goldberg—would make the guarantees. (*Id.*) Those guarantees provided by Feldman and Goldberg should therefore be treated as “guarantees provided by any Member” for purposes of the Provision.

b. The “commercial context between the parties,” *Westinghouse*, 166 A.3d at 927, confirms that reading. Tatum acknowledged at trial that because the members were “passthrough LLCs with no balance sheet,” it would have been a “fool’s errand” to propose that any member serve as a guarantor, because “there was no chance it would ever be accepted.” (A1031 at 466:8-17) Reading the Guaranty Provision to reach only guarantees given by passthrough entities would render it surplusage, because those entities could never give a qualifying guaranty.

c. Tatum himself had that same understanding and did not argue otherwise until *after* he sued:

Fairstead’s Counsel: The idea that you’re now proposing to the Court that the member guarantees [were] actually the member guarantees of the entities in the Operating Agreement that have never made a guarantee, that idea never entered into your mind until well into this litigation after the complaint was filed. Can we agree on that?

Tatum: That’s right...

(A1030 at 462:1-10) Indeed, Tatum’s pleadings expressly recognized that Feldman’s and Goldberg’s guarantees covered 11 of those properties. (See A0753 ¶480) Those “[j]udicial admissions” are “conclusive and binding.” *BE&K Eng’g Co. v. Rocktenn CP, LLC*, 2014 WL 186835, at *7 (Del. Ch. Jan. 15, 2014), *aff’d*, 103 A.3d 512 (Del.

2014). That should have ended the inquiry, but the trial court excused Tatum as purportedly having “misunderstood the legal standard before obtaining discovery in this case.” (PTO53)

In re Aearo Technologies LLC, 346 A.3d 584 (Del. 2025)—which the trial court suggested presented the “same type of interpretive issue” (PTO52) —does not suggest a different result. There, a “corporate parent sought coverage from its subsidiaries’ insurers for defense costs that the parent and its subsidiaries incurred.” *Aearo Techs.*, 346 A.3d at 586. To trigger coverage, the “Named Insured” had to satisfy certain conditions precedent. The court held that because the corporate parent was not a “Named Insured” under the policies, its acts that would have satisfied the condition precedent could not trigger coverage. *Id.* at 596. That construction did not undercut the parties’ shared understanding and was not inconsistent with the commercial context. *See id.* Here, however, the *only* way to give the Guaranty Provision any meaning at all—as Tatum acknowledged, and as he himself believed before he filed this action—is to hold that the pertinent guarantees include those given by Feldman and Goldberg.

If the Court holds that the trial court improperly treated those 14 deals as “Stabilized,” there is no need for remand on that issue: Tatum’s award would be reduced by \$4,955,924 (the value of those deals) to \$2,909,025 (A3786-99).

VI. THE TRIAL COURT ERRED IN HOLDING THAT DEFENDANTS BREACHED THE GOOD FAITH PROVISION, AND FURTHER ERRED IN AWARDING ATTORNEYS' FEES AS DAMAGES

A. Question Presented

Whether the trial court erred in holding that Defendants Feldman and Goldberg breached the good faith provision of the Operating Agreement, and further erred in awarding Tatum attorneys' fees as the measure of damages for that putative breach contrary to the American Rule. This question was raised (A0880-82; A1505-07) and considered below (PTO59-65).

B. Scope of Review

De novo as to “questions of law and contractual interpretation”; factual findings are reviewed “for clear error.” *Boardwalk*, 288 A.3d at 1111-12.

C. Merits of Argument

1. Feldman And Goldberg Did Not Manufacture A Dishonest Reason To Harm Tatum

The trial court held that Feldman and Goldberg breached the good faith provision of the Operating Agreement (A0132 §6.10(b)) by “making [Tatum] run the departure gauntlet” and seeking to “manufacture a dishonest reason to harm Tatum.” (PTO64) The court identified no basis in the record supporting either conclusion and indeed there is none.

Tatum and Blodgett partnered to misuse Fairstead's confidential information and resources to prepare to compete with Fairstead. By September 2021, Fairstead

knew enough about Blodgett’s misconduct to terminate him for cause. Shortly thereafter, Fairstead accepted Tatum’s resignation while reserving its rights, which stabilized its business while it continued investigating. At length, Fairstead terminated Tatum for cause as well: it did not need to manufacture a reason to do so. That Fairstead attempted to avoid conflict with Tatum by offering settlement based on the value of deals to which Fairstead reasonably thought Tatum was entitled — even if the trial court considered the offer a “lowball” (PTO64)—cannot be a breach of good faith. *Cf. Jones v. O. A. Newton & Son Co.*, 317 F. Supp. 705, 714 (D. Del. 1970) (declining to offer settlement not evidence of bad faith).

**2. Tatum Failed To Establish A Breach Of Contract Claim
Where His Only Damages Were Putative Costs Of
Litigating The Claim**

“To prove a breach of contract, a plaintiff must prove that the breach caused compensable harm.” (PTO82) Here, the trial court awarded Tatum as contract damages the attorneys’ fees he putatively incurred litigating his claim, invoking the bad faith exception to the American Rule. (PTO64-65) But litigation costs cannot be the “compensable harm” supporting a contract claim: a party must identify some other harm. To hold otherwise would not only moot the damages requirement—it could always be satisfied by the fact of litigation itself—but it would also swallow the American Rule, which provides with only limited exceptions that “a litigant

must, himself, defray the cost of being represented by counsel.” *In re Delaware Pub. Schools Litig.*, 312 A.3d 703, 715 (Del. 2024).

The American Rule’s bad faith exception does not apply. As this Court explained in *Versata Enterprises, Inc. v. Selectica, Inc.*, that exception serves as a sanction for “either the commencement of an action in bad faith or bad faith conduct taken during litigation, and not from conduct that gave rise to the underlying cause of action.” 5 A.3d 586, 607 (Del. 2010); *accord DeMatteis v. RiseDelaware Inc.*, 315 A.3d 499, 508 (Del. 2024) (bad faith exception “only applies in extraordinary circumstances”). Here, Fairstead cannot be said to have acted in bad faith in commencing this action, because Tatum sued Fairstead. Nor did the trial court point to any misconduct during litigation. The sole conduct to which the court pointed was Fairstead’s putative underlying conduct, which cannot support applying the exception. *Id.*; *Delaware Pub. Schools*, 312 A.3d at 721 n.75 (“American Rule would be eviscerated if every decision holding defendants liable for fraud or the like also awarded attorney’s fees”).

VII. THE TRIAL COURT ERRED BY HOLDING THAT TATUM COULD RECOVER UNDER QUASI-CONTRACT THEORIES FOR CLAIMS GOVERNED BY HIS EMPLOYMENT AGREEMENT

A. Question Presented

Whether the trial court erred by holding that Tatum could recover under quasi-contract theories for work for which he was compensated under his Employment Agreement via claims he brought more than one year after any claims accrued. This question was raised (A0884; A1510-11; A0536-43) and considered below (PTO65-68; Ex. D).

B. Scope of Review

De novo as to “questions of law and contractual interpretation”; factual findings are reviewed “for clear error.” *Boardwalk*, 288 A.3d at 1111-12.

C. Merits of Argument

1. The Legacy And Hampstead Portfolio Work For Which Tatum Sought Compensation Was Covered By The Employment Agreement

The trial court found that “[d]uring his time at Fairstead, Tatum worked on two projects outside of Fairstead Affordable” (PTO12), the Legacy Portfolio, which was held by Fairstead Capital Management (A1209 at 987:20-23), and the Hampstead Portfolio, which was originally held by FA Acquisitions II Member (controlled by Feldman) and is now held by Fairstead Affordable (A0905 at 80:10-12)

The trial court erred in holding that Tatum could recover under quasi-contract theories for that work, because that work is covered by the Employment Agreement:

- That Agreement defines the scope of Tatum’s employment to include “directing the acquisition and execution activities of Fairstead Affordable” as well as “to provide all other work and services assigned to [him], including, but not limited to services” for “any and all company or companies owned by or related to [JD2 Realty Management LLC] or its direct or indirect principals (‘Related Entities’).” (A0108 §1(A))
- Both Fairstead Capital Management and FA Acquisitions II Member are Related Entities as the Employment Agreement defines that term. (*Id.*)
- The Employment Agreement further provides, “No provision ... may be amended, modified, waived or discharged except as agreed to in writing.” (A0112 §4(B)) It is a fully integrated agreement. (*See id* §4(F))
- There is no dispute that Tatum was compensated as his Employment Agreement requires.

Accordingly, Tatum cannot be entitled to any additional compensation for that work.

Nevertheless, the court held that Tatum could recover additional compensation under quasi-contract theories: (i) \$1,077,140.81 for Legacy Portfolio work under a promissory estoppel theory and (ii) \$517,284 for Hampstead Portfolio work under an unjust enrichment theory. (PTO67-68) Both holdings were error.

Under New York law, which the parties agreed governs (PTO65), “[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.” *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 516 N.E.2d 190, 193 (N.Y. 1987). Here, the Employment Agreement—a valid, written contract that governs Tatum’s work on the Legacy and Hampstead Portfolios—precludes recovery in quasi-contract for that same work.

The trial court understood that the Employment Agreement would bar those claims if it applied. (PTO66-67) To avoid that result, the court construed the Agreement’s statement of Tatum’s scope of employment as “contemplat[ing] work for Fairstead Affordable and its affiliates, but not for projects wholly unrelated to Fairstead Affordable, like the Legacy Portfolio.” (PTO67) But that court’s own findings make clear that the Legacy Portfolio was related to Fairstead Affordable: it noted that the Portfolio’s failed inspection “jeopardized Fairstead’s ability to rent the Legacy Portfolio” and “[t]he resulting cash crunch threatened Fairstead’s entire business.” (PTO13)⁴ In any event, the court had no basis for imposing that extra-contractual limitation on the Employment Agreement’s clear terms.

⁴ Indeed, in an action Tatum recently brought seeking advancement, he acknowledges that he “served at the request of Fairstead as an agent and employee of non-party JD2 Realty Management LLC (and/or other entities within the Fairstead organization).” (A3812 ¶35)

The trial court further erred in holding that the injury element of Tatum’s promissory estoppel claim regarding the Legacy Portfolio was satisfied because Tatum “worked on the Legacy Portfolio without any compensation.” (PTO66) Tatum was compensated for his work on that Portfolio and he was compensated pursuant to the Employment Agreement. The court’s holding that Tatum was entitled to additional compensation for work on the Hampstead Portfolio under an unjust enrichment theory is wrong for the same reason.

The trial court also erred in holding that Feldman and Goldberg’s retention of profits from the Hampstead Portfolio would be unjust because they putatively promised a share to Tatum “as part of the overall equity restructuring, but that never happened.” (PTO68) As that court itself found, Goldberg informed Tatum that “an equity restructuring would not happen until 2021,” and “Tatum and Blodgett preempted the timeline by choosing to seek an earlier equity restructuring.” (PTO63; *see also id.* 18-19) That restructuring “never happened” because of Tatum’s own choices. Tatum cannot now claim that he is entitled to the benefits of a promise that he prevented Feldman and Goldberg from fulfilling.

2. These Claims Are Time-Barred

The trial court erred by addressing these claims at all. Both are time-barred.

Tatum pled these claims as seeking “compensation” for services he performed (*see* A0401-497 ¶¶137, 154, 165, 169-73, 242, 507-12, 514, 517-18, 520, 541-42,

545, 547-48) and accordingly they are subject to 10 *Del. C.* §8111's one-year statute of limitations. *See Little Switzerland, Inc. v. Hopper*, 867 A.2d 955, 959 (Del. Ch. 2005) (employee's claim for bonus barred by §8111 because claim arose "as a result of services 'which have been performed'" and not "upon or after" termination). Those claims premised on work completed by 2020 were therefore untimely when Tatum asserted them in 2022.

Tatum's judicial admissions that those claims are for compensation are "conclusive and binding both upon [him] and upon the court." *BE&K*, 2014 WL 186835, at *7. The trial court refused to give those admissions effect, accusing Fairstead of "hypocrisy" because the "fund industry has adamantly maintained that a carried interest" should not be treated as "ordinary income like wages." (Ex. D at 5-6) That unusual extra-record assertion is irrelevant; Tatum did not receive carried interest compensation as a Fairstead employee, and in any event what Tatum pled is "conclusive and binding ... upon the court." *BE&K*, 2014 WL 186835, at *7. Here, Tatum pled these claims for "compensation." That should have been dispositive.

VIII. THE TRIAL COURT ERRED BY HOLDING THAT TATUM WAS ENTITLED TO FEE-SHIFTING UNDER THE EMPLOYMENT AGREEMENT

A. Question Presented

Whether the trial court erred by holding that Tatum was entitled to fee-shifting under the Employment Agreement’s fee-shifting provision where Tatum brought no claims under the Employment Agreement and did not incur “fees” from one of his attorneys, who was also his spouse. This question was raised (A1588-91; A1601-604) and considered below (Ex. B).

(The Court need not reach this issue if it holds for Fairstead on any of its claims on appeal, in which case it should vacate this fee award and remand to the trial court for reconsideration of who is the “prevailing party,” consistent with this Court’s opinion.)

B. Scope of Review

The Court reviews the trial court’s award of attorneys’ fees for abuse of discretion and the trial court’s interpretation of relevant contractual provisions *de novo*. *Bako Pathology LP v. Bakotic*, 288 A.3d 252, 266-67 (Del. 2022).

C. Merits of Argument

1. The Employment Agreement’s Fee-Shifting Provision Is Not Applicable Because This Action Does Not “Arise Out Of” The Employment Agreement

The Employment Agreement’s fee-shifting Provision applies only to actions “arising out” of that Agreement. (A0113 §4(G)) Tatum brought this action asserting

no claims under the Employment Agreement. The trial court nonetheless found that that Agreement is “the source of this dispute” because Fairstead invoked that Agreement “when purporting to terminate Tatum retroactively for cause and to forfeit his member interest in two LLCs,” which was the “catalyst for this litigation.” (Ex. B ¶3b) But it is the Operating Agreement—not the Employment Agreement—that requires forfeiture of Tatum’s Interests. (*See id.* ¶4b)

New York law, which governs the Employment Agreement, confirms that this action does not “aris[e] out of” that Agreement. In *Bull Hill, LLC v. HFZ Member RB Portfolio LLC*, 2024 WL 4202664, (N.Y. Sup. Ct. Sept. 16, 2024), the court rejected an argument that a litigation was a “dispute[] arising *as a result of* or *by reason of*” an LLC agreement and thus subject to its fee-shifting provision where the plaintiffs’ claims were not “contractual claims under the LLC Agreements.” *Id.* at *2. That the LLC agreements were “generally relevant to those claims” was not germane; “the fact remain[ed] that no claims are brought ... under the LLC Agreements, and thus the fee-shifting provisions contained in those agreements do not apply.” *Id.* So too here: Tatum’s claims do not arise out of the Employment Agreement and its fee-shifting provision does not apply. *Id.* at *2. Accordingly, this Court should vacate that fee award.

2. Tatum Cannot Recover “Fees” From His Wife Because She Did Not Charge Him Fees And Had No Fee Arrangement With Him

Alternatively, if the Court holds that this action arises out of the Employment Agreement, it should vacate the award to Tatum of \$2,030,000 in “fees” from his wife. Tatum was never billed for and never paid any fees to his wife, she kept no time records, and there was no engagement letter or other payment arrangement between them. Fairstead is unaware of any Delaware court that has awarded recovery of anything like 1,488 hours of undocumented legal work at \$1400/hour. That award is simply a windfall to the Tatums and this Court should vacate it.

CONCLUSION

For the foregoing reasons, this Court should:

- (i) reverse the trial court's judgment awarding damages to Tatum for Fairstead's purported breach of the Operating Agreement;
- (ii) reverse the trial court's judgment that Tatum did not breach his fiduciary duties and instruct the trial court to require Tatum to disgorge his salary for his period of disloyalty;
- (iii) reverse the trial court's judgment that Tatum did not breach his Employment Agreement and the Operating Agreement, and remanding for an award of damages on those claims;
- (iv) alternatively, if the Court does not reverse the trial court's judgment that Fairstead breached the Operating Agreement, hold that Tatum is entitled to only \$2,909,025 in damages for that breach;
- (v) reverse the trial court's judgment that Defendants Feldman and Goldberg breached the Operating Agreement, and additionally or alternatively vacate its award of attorneys' fees as damages for that putative breach;
- (vi) reverse the trial court's judgment awarding Tatum damages with respect to the Legacy and Hampstead Portfolios; and

(vii) reverse the trial court's order awarding Tatum attorneys' fees under the Employment Agreement, or, in the alternative, vacate that award and remand for reconsideration consistent with this Court's opinion.

/s/ Cliff C. Gardner

Cliff C. Gardner (ID No. 5295)
Tanisha M. Brown (ID No. 7375)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Rodney Square
P.O. Box 636
Wilmington, Delaware 19899-0636
(302) 651-3000
Cliff.Gardner@skadden.com
Tanisha.Brown@skadden.com

*Attorneys for Defendants and
Counterclaim Plaintiffs Below /
Appellants*

DATED: July 25, 2026