



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

Appeal from Court of Chancery
C.A. No. 2022-0970-JTL

**APPELLEES JOHN C. TATUM AND JCT CAPITAL LLC'S
CORRECTED ANSWERING BRIEF**

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NATURE OF PROCEEDINGS¹

This is a value-destroying business divorce. When the two operating partners decided to leave to pursue other opportunities after they could not get a fairer deal, the two money partners set out to make their “departure[s] as lengthy, painful, and costly as possible.” PTO43, 63.

This appeal concerns one of the operating partners, Appellee John Tatum. After Tatum left Appellant Fairstead Affordable, the company he co-founded, Fairstead’s owners, Appellants Stuart Feldman and Jeffrey Goldberg, first elected to repurchase Tatum’s equity but then reneged, accused him of misconduct, retroactively terminated him for cause, and seized his equity instead of paying for it.

The Court of Chancery, in a 103-page opinion following a five-day trial, rejected Fairstead’s claims, discredited Feldman’s and Goldberg’s testimony, and found almost entirely for Tatum. The Vice Chancellor reviewed reams of evidence and found that, contrary to Fairstead’s false accusations, Tatum “performed exemplary work throughout his tenure at Fairstead Affordable.” PTO94. By contrast, Feldman and Goldberg “manufactur[ed] a dishonest reason to harm Tatum” and forfeit his equity. PTO64.

¹ Unless otherwise noted, all emphasis added; internal citations and quotation marks omitted. The Post-Trial Opinion is cited “PTO___”; Appellants’ Opening Brief is cited “OB___.”

On appeal, Fairstead insists eight errors warrant reversal, but nearly every argument is a disguised disagreement with the Vice Chancellor's factual findings. Fairstead cannot manufacture legal error or show the trial court's factual findings were wrong, much less clearly erroneous.

Fairstead's main argument is that it should have been allowed to retroactively terminate Tatum for cause because it was "unaware of the full extent of Tatum's misconduct when it accepted his resignation." OB.17. The trial court twice rejected the factual premise of Fairstead's claim, finding at the pleading stage and confirming after trial that Fairstead "knew the relevant details before accepting Tatum's resignation." PTO46-47; OB.Ex.F.1. Goldberg "admitted at trial" that Fairstead invoked retroactive for-cause termination only because "Tatum rejected [Fairstead's] lowball buyout offer." PTO41. The trial court acted within its discretion to deny Fairstead a do-over.

Fairstead's representations to this Court claiming ignorance are striking because Fairstead's trial strategy was to insist that "Fairstead had real-time evidence supporting termination of ... Tatum for Cause" long before his last day on February 10, 2022. A1427; A0812. Worse, Feldman and Goldberg recently sued Fairstead's former counsel for malpractice, alleging that Fairstead knew about Tatum's supposed "misconduct" but strategically declined to invoke cause based on counsel's (allegedly deficient) advice. B0032-36 ¶¶123-38. These inconsistent factual

assertions are further evidence of Fairstead's lack of credibility. B0442-47 ("Fairstead's Credibility Problems"); B0579-86 (more "Credibility Problems").²

More pernicious is Fairstead's new appellate theory attempting to impute the other operating partner's conduct to Tatum, such that Tatum's compliance with his own contractual and fiduciary obligations turns on someone else's conduct that Tatum knew nothing about and "would not have supported." PTO28.

Below, Fairstead argued aiding-and-abetting and conspiracy, doctrines that impose individual liability for another person's misconduct based on knowing participation. The trial court rejected those accusations on the facts, finding Tatum "did not know" about Blodgett's conduct and "would not have supported" it. PTO28, 99-102. Fairstead does not challenge those findings on appeal.

Instead, Fairstead pivots and argues that it never had to prove knowing participation in the first place because, supposedly, partnership law imputes one partner's conduct to every other partner even without knowing participation. OB.25-29. If Blodgett stole documents, Tatum breached his *own* Employment Agreement; if Blodgett solicited employees, Tatum breached his *own* fiduciary duties; Fairstead was justified in retroactively terminating *Tatum* for cause based on *Blodgett's* conduct even though Tatum knew and did nothing wrong.

² Fairstead apparently believes it can "reserve[]" a "right" to make contradictory factual claims to different tribunals. OB.3 n.1.

Fairstead did not present this extreme imputation-of-conduct theory below, the trial court did not address it, and this Court should therefore decline to entertain it for the first time on appeal. Supr. Ct. R. 8.

Fairstead's appellate theory is also meritless. Fairstead rolls it out as an "open-and-shut" application of "black-letter" partnership law that "the trial court ignored." OB.2, 5. Hardly. Partnership law imposes joint-and-several liability on partners for partnership obligations, including liabilities arising from one partner's tortious acts within partnership business. Partnership law does not, however, transform one partner's tortious acts into the acts of every other partner to create additional, individual liability for everyone.

Fairstead's brief uses words like "liable" and "chargeable" to pitch an argument that sounds close enough to an accurate statement of partnership law. In reality, Fairstead conflates the allocation of *liability* with the imputation of *conduct*. Fairstead's unprecedented imputation-of-conduct rule would upend risk allocation among partners and between partners and third parties. None of Fairstead's legal authorities support such a rule; partnership law does not circumvent the knowing-participation requirement of aiding-and-abetting and conspiracy.

Fairstead also obscures the punchline: an arbitrator found Blodgett's breaching conduct caused *no harm* and awarded Fairstead *zero damages*. Tatum's liability as Blodgett's partner cannot exceed Blodgett's liability (zero).

* * *

The Vice Chancellor did not misunderstand legal principles, misapply precedent, misinterpret unambiguous contract language, or fail to enforce contractual or fiduciary obligations. Fairstead asserts “facts” that the trial court rejected, improperly imputes Blodgett’s conduct to Tatum, mischaracterizes the decision below, and raises new (meritless) arguments on appeal. The Vice Chancellor faced similar submissions, parsed the record, assessed credibility, and found Tatum’s account is true and Fairstead’s is not.

This Court should affirm.

SUMMARY OF ARGUMENT

1. **Denied.** The trial court did not abuse its discretion by rejecting Fairstead's retroactive for-cause termination, a possible equitable remedy available when the employer did not know of the employee's misconduct before departure and can show that if it "had known about [the misconduct], then [it] would have terminated [the employee] for cause." *Metro Storage Int'l v. Harron*, 275 A.3d 810, 879 (Del. Ch. 2022). Fairstead did not—and cannot—establish either precondition. Fairstead also waived any purported "right" to retroactive termination by electing buyout rights despite claiming awareness of "offenses that would easily serve as grounds to have fired [Tatum] for cause." A1781-83.

2. **Denied.** Fairstead advances a meritless interpretation of partnership law not advocated below. Fairstead told the trial court that Tatum was complicit in Blodgett's breaching conduct as his common-law partner and co-conspirator; the trial court disagreed, finding that Tatum "did not know" about and "would not have supported" Blodgett's breaching conduct. PTO28. Fairstead pivots on appeal, arguing that Blodgett's conduct should be imputed to Tatum *regardless* of Tatum's knowledge. But partnership law allocates liabilities; it does not impute conduct. And Tatum's liability cannot exceed Blodgett's (zero).

3. **Denied.** The trial court enforced Tatum's contractual and common-law fiduciary duties but found based on an extensive factual record that Tatum

committed no misconduct constituting breach. Fairstead mischaracterizes the decision below, disregards the Vice Chancellor's factual findings without identifying clear error, and wrongly imputes Blodgett's conduct to Tatum.

4. **Denied.** The trial court correctly found that Tatum did not breach contractual "Best Efforts," "No Conflict," "Good Faith," "Non-Solicitation," or "Confidentiality" provisions. Again, Fairstead mischaracterizes the decision below, disregards the Vice Chancellor's factual findings without identifying clear error, and wrongly imputes Blodgett's conduct to Tatum.

5. **Denied.** The trial court correctly interpreted unambiguous contract language to hold that "guarantees provided by any Member of the Company" refers to guarantees provided by the three entities defined as "Members of the Company," not unspecified "affiliates."

6. **Denied.** The trial court correctly found, based on an extensive record and credibility determinations, that Feldman and Goldberg breached the Operating Agreement's Good Faith provision. The trial court did not abuse its discretion by shifting \$500,000 in attorneys' fees under the bad-faith exception.

7. **Denied.** The trial court did not abuse its discretion by fashioning equitable remedies to prevent Fairstead's unjust enrichment and to enforce Fairstead's promises with respect to two portfolios "wholly unrelated to Fairstead Affordable."

PTO67. Fairstead's contrary arguments misstate the record and disagree with the Vice Chancellor's factual findings.

8. **Denied.** The trial court correctly enforced the parties' fee-shifting bargain after finding that this "action" is one "arising out of" Tatum's Employment Agreement. The Vice Chancellor did not abuse his discretion by awarding "reasonable legal fees," including the value of legal services provided by Tatum's lead counsel (his wife).

STATEMENT OF FACTS³

Fairstead does not argue that any of the trial court's factual findings were "clearly erroneous."

1. Tatum Co-Founds and Builds Fairstead Affordable

John Tatum co-founded Fairstead Affordable LLC with William Blodgett, Stuart Feldman, and Jeffrey Goldberg to do Low-Income Housing Tax Credit ("LIHTC") deals under the Fairstead brand. PTO01, 08-09. Before Tatum joined Fairstead, "no one there 'knew how to do a tax credit deal.'" PTO10. Tatum "built" the LIHTC business "from scratch." PTO01.

In April 2016, Tatum signed his Employment Agreement making him "responsible for directing the acquisition and execution activities of Fairstead Affordable" A0108 §1(A). The parties also signed the Fairstead Affordable Operating Agreement. A0117 (the "Operating Agreement"). Tatum's entity (Appellee JCT Capital LLC) owned 5.25% of Fairstead Affordable. A1542 ¶15.

"With Tatum leading the charge, the tax credit business boomed." PTO01. Between 2016 and 2022, Tatum created a successful LIHTC business worth hundreds of millions of dollars. PTO01, 12; B0414; B0490-93.

³ See generally B0050-88; B0200-01; B0413-47; B0488-517; B0568-86.

2. The Hampstead and Legacy Portfolios⁴

Tatum worked on two portfolios unrelated to Fairstead Affordable: the Hampstead Portfolio and the Legacy Portfolio. PTO12-15, 65-68; B0418-20; B0494-97.

Tatum acquired the Hampstead Portfolio for Feldman for a contractual promote. PTO14. Tatum originally held his promote personally, but Feldman and Goldberg convinced him to consolidate it into Fairstead Affordable (and later forfeited it). PTO14-15; B0553-54; B0625-26.

Tatum re-developed the Legacy Portfolio because Fairstead promised him a promote. PTO13-14; B0494-96; B0624-25. The promote crystalized when Feldman bought out the minority investors. B2157-65; B2168; B2195. But Feldman never paid. PTO14. Fairstead subsequently took the position that Tatum held “no written or enforceable agreement” for his interest. B2474.

3. Fairstead Affordable’s Flawed Economics and Governance

Fairstead Affordable’s economics and governance were flawed. B0415-17; B0497-99. Goldberg contributed no capital and knew nothing about LIHTC deals yet owned 30% because he controlled access to Feldman. PTO07. Feldman had unilateral control but also knew nothing about Fairstead Affordable’s business, and nobody could speak with him except Goldberg. PTO07, 15. Meanwhile, Tatum and

⁴ The Legacy Portfolio is also called the “New York Section 8 Portfolio.”

Blodgett owned 15% combined, had no decision-making rights, and, contrary to the Operating Agreement, received no distributions. PTO12; A0126 §§4.1, 4.2.

4. Attempts to Restructure Fairstead Affordable

Tatum and Blodgett wanted to remain partners with Feldman and Goldberg at Fairstead Affordable, so they tried to negotiate a restructuring that would give them fairer economics and more control. PTO15-19; B0420-28; B0497-501. “Goldberg encouraged them to come up with a proposal.” PTO16. Goldberg denied soliciting proposals, but the Vice Chancellor “reject[ed] Goldberg’s denial.” PTO16 n.49.

Tatum also focused on obtaining equity for employees. PTO15-18; B0420-22. Some, including development professionals William Kreinik and Adam Sussi, threatened to leave because Goldberg failed to deliver on equity promises. Goldberg also “denie[d]” making equity promises, “but the employees’ account is more credible.” PTO16 n.50.

Tatum shared restructuring ideas with Goldberg. PTO17-18. Tatum envisioned a 50/50 split, with Feldman retaining his 50% stake. PTO16-18 & n.51, 24; B2199-201; B2204; B0573-74 & B0628-819 (Appendix C: “Tatum’s contemporaneous writings”). Again, Goldberg “denied knowing that Tatum and Blodgett wanted substantial ownership and control, but that testimony was not credible.” PTO18. “The contemporaneous documents show that Goldberg both

knew what Blodgett and Tatum wanted *and* was trying to steer them toward possibilities that Feldman might find acceptable.” PTO18; B2155; B2182-93.

With Goldberg dragging his feet, Tatum and Blodgett accepted they might have to start their own business. PTO19-29.

Although Blodgett and Tatum were “attached at the hip” in their efforts, “their conduct diverged at critical points.” PTO101. Goldberg recognized at deposition: “at first, [I] was assuming that John had more influence on Will than I now believe to be the case ... Just seeing a lot of the discovery materials.” B2540 704:7-20.

Blodgett sent confidential Fairstead information to his family offices and advisers. PTO26-27. “Tatum was not included on any of these emails.” PTO28. Although “Tatum and Blodgett were partners in their potential venture,” “the record demonstrates convincingly that Tatum did not know Blodgett was sharing confidential information and would not have supported it.” PTO28. Blodgett worked with his own advisers to develop a parallel negotiating strategy. B0577-79.

Blodgett instructed Kreinik and Sussi to create a business model with cash-flow projections for use in the re-negotiation or new business. PTO28, 87. Although Tatum “helped,” PTO29, by “discuss[ing] the inputs,” A1346 1350:21-1351:5, “Sussi and Kreinik created the model,” PTO34.

Blodgett discussed the model with Goldberg as part of restructuring negotiations. B0575; B2206; B2212. Blodgett later sent the model to TFMG

without Tatum's knowledge, stating that the model was created by "Adam [Sussi] and Billy [Kreinik]." A1741. When Sussi set up a meeting with TFMG to discuss "Model/Guarantees," he excluded Tatum. B2222-23.

5. Tatum Downloads Fairstead Documents

In May 2021, Tatum "panicked" and downloaded personal and Fairstead documents to a USB. PTO30-31; B0568-73; B0091-106; B2550-59. Tatum "subjectively believed he was entitled to keep much of the information, either because it was his personal information or because he had prepared it and it represented his work product." PTO31. Before leaving Fairstead, "Tatum returned the USB drive without using any of the information." PTO31. "There is no evidence that Tatum transferred the information to another device." PTO31-32. Tatum "credibly denied" doing so. PTO77. "Tatum made an error in judgment when downloading the information, but he later realized his mistake and did not misuse any of it." PTO32.

Blodgett and Kreinik also downloaded documents. But "Tatum never coordinated or discussed downloading Fairstead files with Kreinik," PTO87, nor did Tatum "use[] or disclose[] any of the confidential information that Blodgett and Kreinik separately downloaded." PTO83.

6. Fairstead Pretends to Negotiate a Smooth Departure and Potential Joint Venture

On June 10, 2021, Tatum wrote an emotional email alerting Goldberg that he was planning to resign and proposing a transition plan. PTO33; B2208; B2210. “Goldberg instructed Fairstead’s IT department to begin monitoring Fairstead’s systems for any suspicious downloading activity,” PTO33, and Fairstead “learned of [Tatum’s] downloading activity by at least June 24, 2021,” B0032 ¶123. Fairstead hired Jones Day and Paul Weiss to investigate. PTO34; B0019 ¶79; B2215. Paul Weiss lawyers spent months combing through Tatum’s emails and electronic devices for “evidence” of “misconduct.” B2250; B2276; B2278; B2321; B2330; B2367.

Meanwhile, “Blodgett told Feldman that he wanted to leave Fairstead and that he thought that Tatum, Kreinik, and Sussi were also going to leave.” PTO34. Feldman and Goldberg gave “mixed messages” about the terms on which they would authorize them to leave together. PTO36.

Feldman and Blodgett met several times to negotiate a potential joint venture. PTO32, 34-36; B2229-30. Blodgett prepared proposals with help from his advisers. B0577-79. Tatum separately gave input but did not participate in negotiations. B2213. Feldman denied these joint-venture negotiations, A1300; A1314-16, but the

Vice Chancellor found that Feldman’s “testimony was not credible,” PTO35 n.142; B0579-80.⁵

Goldberg “wanted a smooth transition,” so he prepared a “transition plan for Blodgett, Tatum, Kreinik, and Sussi” that contemplated “announcing that Blodgett would leave at year-end ‘to pursue other opportunities ... with Fairstead serving as investor and operational partner in the new to-be-announced venture.’” PTO35 (quoting B2228). By June 30, Fairstead General Counsel Seth Hoffman and Goldberg created a “NewCo” term sheet and “strategized about how to use” their investigation of Tatum “in the ‘NewCo’ negotiations,” including whether to invoke “[p]enalty provisions” in Tatum’s equity documents. PTO77; B2220.

“Goldberg worked with Tatum on a transition plan.” PTO45. By August’s end, Tatum, Blodgett, and Kreinik each believed they were nearing an agreement and amicable exit. PTO36; B2241; B2238; B2243; B2233.

Feldman and Goldberg ignored their lawyers’ advice to “inform Tatum that there was no planned transition.” PTO36 n.149, 37-38; B2234-35; B2245. They also ignored advice to inform Tatum of Fairstead’s investigation and to request the return of Fairstead materials “to document that Fairstead protects its assets.” B2245; B2234-35. “Feldman and Goldberg decided to keep the investigation secret and did not ask Tatum to return the documents they knew he downloaded.” PTO36-37

⁵ Fairstead apparently *still* denies joint-venture negotiations. OB.42.

n.149. “They saw value in holding that card to play later.” *Id.* “If Tatum’s downloading threatened Fairstead or caused real harm, Feldman and Goldberg would have acted differently.” PTO78.

7. Feldman “Tries to Squeeze Blodgett”

On September 14, 2021, Feldman terminated Blodgett for cause, forfeited his equity, and offered to rescind the for-cause termination only if Blodgett agreed to one-sided joint-venture terms. B2248-49. Feldman flatly denied using for-cause termination for leverage, A1315 1229:15-19, but the trial court did not credit his testimony, finding that “[i]t was an obvious pressure tactic,” PTO37; B0581. Goldberg’s contemporaneous memorandum-to-file confirms that they used for-cause termination as “leverage” to obtain better “economics” in a joint venture. B2313.

Although Paul Weiss drafted a for-cause termination letter for Tatum, A1761, Fairstead decided not to invoke cause for strategic reasons, including because Fairstead wanted to enforce the four-month notice period, delay triggering Tatum’s restrictive covenants, B0033 ¶128, restrict Tatum’s public statements, B2311, and for Tatum to “stabilize” the business, PTO38; A0812.

8. Fairstead Makes Tatum Run “the Departure Gauntlet”

In October 2021, Fairstead accepted what it characterized as Tatum’s voluntary resignation; Tatum agreed to abide by Fairstead’s characterization and the

notice period if Fairstead met its obligations to Tatum. PTO38-39; A1770; A1767, B2304, B2309, B2311; B2317-18; A1771.

On December 23, 2021, Fairstead “sent a letter accusing Tatum of improperly retaining Fairstead documents based on a forensic examination.” PTO39; B2318-20.⁶

In January 2022, Tatum returned the USB without using or disclosing any of the documents he downloaded. PTO39, 76; A1778-80; A1784. Tatum retained a handful of documents “he thought he might need if litigation ensued.” PTO39-40. Fairstead “failed to prove that any of the documents were competitively sensitive or that Tatum acted improperly by keeping them.” PTO40 & n.167. Fairstead also “failed to prove that Tatum’s downloading and retention of documents caused Fairstead any material harm.” PTO78.

February 10, 2022, was Tatum’s last day. PTO40; A1549 ¶41.

On March 10, 2022, Tatum asked Fairstead to document his post-termination interests, including his promotes. B2374-76.

On April 5, 2022, Fairstead informed Tatum that it was aware of “numerous offenses that would easily serve as grounds to have fired [Tatum] for cause.” A1781-83. Nonetheless, Fairstead elected its buyout rights under the Operating Agreement.

⁶ Tatum did not receive this letter until June 2022 because his then-lawyer did not forward it. B2462. *Contra* OB.13 (accusing Tatum of “ignoring” correspondence).

PTO41; A1783.⁷ Instead of complying with the contractual appraisal and repurchase obligations, Feldman and Goldberg tried to bully Tatum into accepting a “lowball” offer that barely returned Tatum’s own contributed capital. PTO41; B2455-56. Fairstead now blames Paul Weiss for this strategy. B0036-37 ¶¶139-142.

On June 28, 2022, Fairstead retroactively terminated Tatum for cause and seized his equity, citing alleged breaches of Tatum’s Employment Agreement and associated common-law duties. A1794-97; B2461-72 (Tatum’s response). “Goldberg admitted at trial that Fairstead only decided to take this hardline position after Tatum rejected the lowball buyout offer.” PTO41, 63-64; B2451-54; B2457-60.

9. Tatum Sues and Fairstead Counterclaims

Tatum sued, A0159; A0638, and Fairstead piled up counterclaims accusing Tatum of misconduct, including conspiring with Blodgett to attempt a “hostile takeover,” working for Blodgett’s company to steal a corporate opportunity, soliciting Fairstead’s employees, and stealing Fairstead’s confidential information to compete, A0280.

Fairstead was forced to withdraw its accusations that Tatum worked for Blodgett’s company and usurped a corporate opportunity. B0391. Fairstead never

⁷ By contrast, Fairstead formally notified Blodgett his equity was forfeit. B2449-50.

had any factual basis for those accusations—and had reason to know they were untrue. B0410; B0444; B2476; B2493; B2520; B2523.

10. Blodgett and Fairstead Litigate

Blodgett and Fairstead separately litigated before an arbitrator and the Vice Chancellor. Tatum lacks a full record of the arbitration, partly because Fairstead objected to Tatum receiving its filings. A0942 226:4-6.

The arbitrator rejected most claims against Blodgett, found *no harm*, awarded *zero damages*, and called Feldman’s “tactics” “calculated, overreaching, even repulsive.” A0102, A0105-06; B0879; B0899. Fairstead proved only that Blodgett sent confidential Fairstead documents to his family offices and solicited three employees. PTO100-01. Fairstead spent its *entire* cross-examination of Tatum establishing that Tatum was ignorant of Blodgett’s breaching conduct. A2514-A2531; A0942 225:2-227:1.

The Vice Chancellor held that Fairstead breached the governing contract by forfeiting Blodgett’s equity. *Fairstead Cap. Mgmt. v. Blodgett*, 359 A.3d 598, 624 (Del. Ch. 2026). The damages phase is ongoing.

11. The Trial Court Rules in Tatum’s Favor and Awards Fees

After a five-day trial, the Vice Chancellor found that Fairstead breached numerous contractual obligations, including because Feldman and Goldberg made Tatum “run the departure gauntlet” and acted in bad faith by “manufactur[ing] a

dishonest reason to harm Tatum.” PTO64. The trial court agreed with Tatum on the value of his forfeited equity. PTO47-56.

The trial court rejected Fairstead’s misconduct accusations and made extensive factual findings supporting its conclusions that Tatum did not breach contractual or fiduciary obligations:

- “Tatum performed exemplary work throughout his tenure at Fairstead Affordable.” PTO94. Tatum “worked diligently for Fairstead until his last day at the company,” PTO72, and “devoted his best efforts as a Fairstead employee.” PTO71, 79, 93-94.
- Tatum did not misappropriate, misuse, or disclose Fairstead confidential information. PTO30-32, 76-78, 83-84, 95-96. And he did not authorize the use of Fairstead confidential information to create a model. PTO88.
- Tatum did not solicit Fairstead employees. PTO81-83, 94-95, 101-02.
- Tatum caused Fairstead no harm. PTO74, 76-78, 80, 82, 93-95. Rather, “he took steps to ensure that his departure would not harm the company.” PTO81.

When determining the preclusive effect of the Blodgett arbitration, the trial court found that Tatum and Blodgett formed a joint venture “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.” PTO04-06.⁸

The trial court rejected Fairstead’s aiding-and-abetting and conspiracy claims, specifically finding that Tatum was ignorant of Blodgett’s conduct:

⁸ The trial court’s determinations that (i) a joint venture formed, and (ii) Tatum is bound by the arbitration are on shaky legal ground but had little practical effect.

- Blodgett’s and Tatum’s “conduct diverged at critical points.” PTO101.
- Tatum “did not know” about and “would not have supported” Blodgett’s breaching conduct. PTO28.
- Tatum did not assist Blodgett’s efforts to solicit Fairstead employees. PTO101.

Although the trial court found that Tatum breached the document-handling provision of his Employment Agreement by “download[ing] Fairstead documents” onto a USB that he returned, it awarded only the cost of Fairstead’s investigation. PTO75. “That was not a big win for Fairstead” considering that “Tatum had conceded from the outset that he downloaded information in violation of the Employment Agreement.” OB.Ex.B ¶4d.

Thereafter, the trial court issued a fees opinion finding that this “action” is one “arising out of” Tatum’s Employment Agreement and subject to that agreement’s prevailing-party fee-shifting provision. The trial court awarded “reasonable legal fees,” including the value of legal services provided by Tatum’s spouse, Ms. Sara Shaw Tatum, who served as lead counsel and was “omnipresent” throughout the litigation. OB.Ex.B ¶7n.

ARGUMENT

I. FAIRSTEAD IS NOT ENTITLED TO RETROACTIVE FOR-CAUSE TERMINATION

1. Question Presented

Whether the trial court abused its discretion by denying Fairstead retroactive for-cause termination.

2. Standard of Review

“Whether ... an equitable remedy exists or is applied using the correct standards is an issue of law and reviewed *de novo*,’ but ... ‘application of those facts to the correct legal standards ... are reviewed for an abuse of discretion.’” *Bäcker v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 95 (Del. 2021). This Court does “not overturn the Court of Chancery’s factual findings unless they are clearly erroneous,” *id.* at 94, and “give[s] substantial deference to factual determinations based on live testimony,” *Energy Transfer v. Williams Cos.*, 346 A.3d 1089, 1108 n.83 (Del. 2023).

3. Merits of Argument

Fairstead sought a declaration validating its retroactive for-cause termination of Tatum. A0339. To merit that unusual relief, Fairstead was required to prove (1) it was wrongfully denied the opportunity to invoke cause while Tatum was still employed because he concealed misconduct; (2) Fairstead would have invoked cause before Tatum’s last day (February 10, 2022) had it known about concealed

misconduct; and (3) Fairstead acted promptly upon learning of concealed misconduct to retroactively invoke cause. *Metro Storage*, 275 A.3d at 828; *Kulick v. Gamma Real Est.*, 2022 WL 4467341, at *9-10 (S.D.N.Y. Sept. 23, 2022).⁹ Fairstead’s statement that it “‘make[s] no difference’ when Fairstead learned it had cause to terminate Tatum” is not the law. *Contra* OB.22 (mischaracterizing *Davenport*).

Retroactive for-cause termination is a “fact intensive” inquiry, *Veronis Suhler Stevenson Holdings v. Cole*, 2015 WL 3946503, at *10-11 (N.Y. Sup. Ct. June 25, 2015), and the “requirements of the after-acquired evidence doctrine” are “stringent,” *Fortis Advisors v. Krafton*, 354 A.3d 906, 938-39 (Del. Ch. 2026); B0227-39; B0357-76. “It is the employer’s burden to prove that it would have fired the employee upon discovery of the evidence.” *Golden v. WorldQuant Predictive Techs.*, 235 Conn. App. 377, 403 (2025).

Moreover, since the Vice Chancellor’s 2022 *Metro Storage* decision, Delaware courts have cabined the retroactive for-cause doctrine. “When an employer faces a contractual payout it wishes to avoid, it is heavily ‘incent[ivized] to go rummaging through the employee’s history to find any reason it can to

⁹ The relevant date is Tatum’s *termination* date (February 10, 2022), not—as Fairstead insists—the date Fairstead purported to accept Tatum’s *resignation* (October 21, 2021). Fairstead could have terminated Tatum for cause before February 10, 2022, but chose not to.

announce that the termination was really for cause.” *Fortis Advisors*, 354 A.3d at 942; *Robinson v. Kelly Cable of N.M.*, 2025 WL 3516162, at *7 (Del. Super. Dec. 8, 2025).

At the pleading stage, the trial court dismissed Fairstead’s claim for retroactive for-cause termination because Fairstead could not satisfy the doctrinal preconditions: Fairstead’s complaint demonstrated that Feldman and Goldberg “knew about the alleged misconduct on which they now rely before they accepted Tatum’s [February 10, 2022] departure.” OB.Ex.F.1.

At trial, Fairstead offered no evidence supporting retroactive for-cause termination and did not contest that Tatum’s post-termination equity rights should be determined as though he voluntarily resigned. A0814-15. Instead, Fairstead tried to explain away its strategic decision *not* to invoke cause despite knowledge of Tatum’s alleged misconduct. A1427; A0812. After trial, the Vice Chancellor reaffirmed that Fairstead “knew the relevant details before accepting Tatum’s resignation” long before Tatum’s last day in February 2022. PTO46-47.

On appeal, Fairstead claims the trial court misapplied the after-acquired evidence doctrine, but its real argument is factual: that, contrary to the trial court’s factual findings, Fairstead “was unaware of the full extent of Tatum’s wrongdoing when it accepted his resignation.” OB.16-17. Fairstead could have tried to prove that assertion at trial but chose not to.

Despite drafting a for-cause termination letter in September 2021, Fairstead decided *not* to invoke cause so it could benefit (at Tatum’s expense) by enforcing a four-month notice period and delaying the start of Tatum’s one-year restrictive covenants. OB.Ex.F.1; B0032-36 ¶¶123-138. Indeed, Fairstead elected in December 2021 to keep Tatum on the payroll “until the conclusion of his Notice Period, despite what appears to be material breaches of his Employment Agreement and the Operating Agreement.” A1776-77.

Fairstead’s recent lawsuit against Paul Weiss confirms that Fairstead’s decision was strategic, not the result of ignorance, contrary to its representations to this Court:

- “Fairstead had learned of [Tatum’s] downloading activity by at least June 24, 2021.” B0032 ¶123; A1774 (by December 23, 2021).
- “By early September 2021, Paul Weiss also had evidence that Tatum and Blodgett enlisted their subordinates Kreinik and Sussi to work on financial models for the competing business.” B0032 ¶123.
- “Paul Weiss’s own September 23, 2021 email update [to Fairstead] on the status of its document review made Tatum’s role in the conspiracy unmistakable.” B0032 ¶125.
- Thus, “[t]he documentary record supported a retroactive for-cause termination based on Tatum’s misconduct and disloyalty” no later than September 2021. B0032 ¶124.

Fairstead attempts to smear Tatum with a bulleted list of “misconduct.” OB.18-20. Fairstead’s accusations are irrelevant to retroactive for-cause

termination; what matters is that Fairstead knew the relevant information but strategically chose not to invoke cause.¹⁰

The trial court was also validated in rejecting retroactive for-cause termination because Fairstead gave shifting *seriatim* justifications (B0443-44), which the “mend-the-hold” doctrine forbids, *Fortis Advisors*, 354 A.3d at 938. Fairstead originally claimed it knew nothing of Tatum’s “misconduct” until June 28, 2022, A0342 ¶183, then insisted that it retroactively invoked cause because (supposedly) Tatum “was not acting in good faith” during pre-litigation settlement efforts, PTO58; A0813-14, and now claims to this Court only that it did not know “the full extent” of Tatum’s “misconduct,” OB.16-17. The trial court did not credit Fairstead’s pretextual explanations and found instead that Fairstead’s subjective reason for invoking cause was Tatum’s “reject[ion]” of Fairstead’s “lowball buyout offer.”

¹⁰ The trial court considered these accusations and rejected them; Fairstead identifies no clear error. Most of the alleged misconduct is someone else’s that Fairstead cannot pin on Tatum (*infra*.30-33); Tatum did not “misuse” or “steal” Fairstead confidential information, nor send it to Blodgett’s family offices (*contra* OB.20); Tatum did not use confidential Fairstead information to build a model (PTO34, 88); the May 8 downloads related to Tatum’s work (PTO75); nobody knows anything about Tatum’s May 15 or 16 downloads, including whether they also related to Tatum’s work, because Fairstead developed zero evidence about them; and discussing a restructuring with colleagues and consulting employment counsel are not only permissible but arguably *protected* conduct.

Separately, alleged “misconduct” post-dating May 6, 2021, cannot justify forfeiture because Tatum’s equity fully vested on that date, meaning it could not be forfeited under any circumstances. A0140 §8.8(a)(iv)(B)(v).

PTO41, 63-64. A “court of equity will not permit a party to use the after-acquired evidence doctrine to fabricate Cause where the evidence shows the termination decision was made for different reasons.” *Fortis Advisors*, 354 A.3d at 942; *PJT Holdings v. Costanzo*, 339 A.3d 1231, 1260-61 (Del. Ch.), *aff’d*, 2026 WL 958201 (Del. Apr. 9, 2026) (ORDER).

Finally, retroactive for-cause termination derives from a remedial doctrine; it is not a “right” that can be reserved indefinitely.¹¹ On April 5, 2022, Fairstead formally elected its contractual buyout right with knowledge of what it characterized as “numerous offenses that would easily serve as grounds to have fired [Tatum] for cause.” A1781-83. Having pursued a contractual right incompatible with retroactive for-cause termination, Fairstead cannot “reserve” a non-existent “right” to a do-over.

¹¹ In *Golden v. WorldQuant Predictive Technologies* (OB.23-24), the employer terminated the employee *for cause* and the question was whether the employer waived the ability to add additional accusations during subsequent litigation. 235 Conn. App. at 380-81 & n.4.

II. BLODGETT’S BREACHING CONDUCT CANNOT BE IMPUTED TO TATUM

1. Question Presented

Whether Blodgett’s breaching conduct can be imputed to Tatum to prove that Tatum breached his own contractual and fiduciary obligations, notwithstanding the trial court’s unchallenged finding that Tatum did not knowingly participate in Blodgett’s breaching conduct.

2. Standard of Review

Questions of law are reviewed *de novo*; factual findings for clear error. *Energy Transfer*, 346 A.3d at 1108.

3. Merits of Argument

a. This Court Should Decline to Entertain Fairstead’s New Imputation-of-Conduct Theory, Which Fairstead Never Presented to the Trial Court

The Court should decline to consider Fairstead’s extreme argument that Blodgett’s breaching conduct can be imputed to Tatum absent Tatum’s knowing participation because Fairstead never presented this argument to the trial court. Supr. Ct. R. 8.

Below, Fairstead tried a “knowing participation” case, using terms like “complicit” and “conspiracy,” and relying on conspiracy and knowing-participation cases. A0859 (arguing “Tatum was ... complicit in Blodgett’s ... disclosures,” and citing “elements of a conspiracy”); A1482 (citing “elements of conspiracy,” arguing

that Tatum “conspired,” and claiming co-conspirators’ “bad acts are attributable to each other”); *id.* (citing conspiracy case and arguing “acts of one partner are attributable to another”); A1484 (arguing, “[t]hrough his common law partnership with Blodgett ... Tatum was also complicit in and liable for” Blodgett’s disclosures); B0866-67 (relying on conspiracy cases, arguing “Tatum is jointly responsible for Blodgett’s and Kreinik’s misconduct by ‘secretly working hand in hand with’ Blodgett and Kreinik”). The cases Fairstead cited were conspiracy cases (*26 Capital Acquisition v. Tiger Resort Asia, infra*.³², and *Krenowsky v. Haining*, 1988 WL 90825, at *9 (Del. Ch. Aug. 30, 1988)). Fairstead cited none of its appellate authorities (*Hannigan v. Italo Petroleum, HMG/Courtland Properties v. Gray*, or *Hudson v. A.C. & S. Co., infra*.³²⁻³³).

To be sure, Fairstead argued that Tatum and Blodgett “formed a common law partnership,” A1437, and “joint venture,” A1428; A1482; 1531. But Fairstead never claimed (as it does now) that the existence of a joint venture relieved Fairstead of its obligation to prove Tatum’s knowing participation to establish Tatum’s *individual* liability.

The closest Fairstead came below to its new appellate imputation-of-conduct theory was its claim in supplemental briefing that, “[e]ven if Tatum could separate himself from Blodgett for some acts (he cannot) he would still be liable for Blodgett’s wrongdoing.” A1531 (citing only conspiracy case). But that is only a

claim that Tatum could be *liable* for a partnership obligation, not that Blodgett's conduct should be *imputed* to Tatum to prove that Tatum individually breached.

If, as Fairstead claims, there exists a “black-letter” partnership rule imputing not only one partner's *liabilities* but also his *actions* to others absent knowing participation (OB.5), why didn't Fairstead tell the trial court so? And why did Fairstead spill so much ink trying to establish Tatum's knowing participation if all that was required to hold Tatum individually liable was a joint venture and an “open-and-shut” application of partnership law? OB.2.

The Vice Chancellor rejected Fairstead's aiding-and-abetting and conspiracy claims because Tatum did not knowingly participate in Blodgett's breaching conduct. PTO28, 99-102. Fairstead does not challenge those rulings on appeal. By contrast, the trial court did not have a chance to address Fairstead's new-on-appeal argument that knowing participation is not required to impute one partner's conduct to another to prove separate breach. *Contra* OB.5 (accusing trial court of “ignore[ing]” “black-letter law”). This Court should decline to entertain Fairstead's theory for the first time on appeal. Supr. Ct. R. 8.

b. Partnership Law Allocates Liabilities; It Does Not Impute Conduct

Fairstead's new-on-appeal argument is also meritless. Partnership law (i) makes the partnership liable for torts committed by one partner within the “ordinary course of the business of the partnership,” N.Y. P'ship Law §24; *cf.* 6 *Del. C.* §15-

305(a); and (ii) makes all partners jointly and severally liable for partnership obligations, N.Y. P'ship Law §26; 6 Del. C. §15-306(a); accord 68 C.J.S. Partnership § 209. The justification is that “losses” caused by torts committed by one partner should be allocated to the partnership as a cost of doing business. *Id.* If a partner is liable, and *if* his tortious conduct is within the ordinary course of the business of the partnership, then a third party could potentially recover from the partnership, including the other partners, for that *liability* without regard to the other partners’ knowledge of the wrongdoer’s actions. *Id.* (“*liability* attaches” even without knowledge); *id.* (“impute[s]” “*liability* for fraudulent wrongs”).

Neither condition was met here. The informally constituted Tatum-Blodgett joint venture incurred *zero* liability based on Blodgett’s conduct. A0105-06. Tatum’s liability for Blodgett’s conduct cannot exceed Blodgett’s own. PTO101 n.353 (quoting 68 C.J.S. Partnership § 209 (“The liability of the other partners is no greater or less than the liability of the one causing the injury.”)). Moreover, the record indicates that Blodgett’s misconduct was not within the ordinary course of business for the Tatum-Blodgett partnership; the trial court found that Tatum “would not have supported” it. PTO28.

Unhappy with its pyrrhic victory in arbitration, Fairstead invites the Court to take an unprecedented step beyond established partner-liability rules to obtain another bite at the liability apple. Fairstead uses words like “liable” and

“chargeable” to make its argument sound like a passable application of partnership law, but Fairstead is not asking this Court to allocate liabilities (there are none here). Rather, Fairstead insists on an extreme legal fiction under which (i) each partner is deemed to have undertaken every act of every other partner, and (ii) each partner individually can be held strictly liable for breaching his own contractual or fiduciary obligations based on a potentially infinite number of imputed acts.

Fairstead’s imputation-of-conduct rule would fundamentally upend risk allocation among partners and between partners and third parties by giving a wronged third party as many bites at the liability apple as there are partners, even if the primary wrongdoer is not liable and none of the other partners knew about the misconduct. That contravenes the black-letter rule that “neither the partnership nor its members may be held liable for the wrongful act of a partner for which that partner himself or herself is not liable.” 68 C.J.S. Partnership § 209.

None of Fairstead’s authorities support such an extreme legal fiction:

- *26 Capital Acquisition Corp. v. Tiger Resort Asia Ltd.*, 309 A.3d 434 (Del. Ch. 2023), is a knowing participation and conspiracy case.
- *Hannigan v. Italo Petroleum Corp. of America*, 77 A.2d 209, 216 (Del. 1949), concerned a 78-member syndicate of investors whose representatives allegedly constituted a majority of a corporation’s board, and determined that syndicate members were chargeable with their board representatives’ knowledge about a transaction when evaluating the syndicate members’ rights with respect to the transaction.
- *HMG/Courtland Properties v. Gray*, 749 A.2d 94, 121 (Del. Ch. 1999), imposed liability on one partner for “authorized acts of [another partner] on

behalf of the partnership” of which the liable partner was unaware, but through which the liable partner was unjustly enriched. Thus, the court allocated a partnership liability incurred through one partner’s authorized wrongful conduct; it did not impute the wrongdoer’s conduct to the innocent partner.

- *Hudson v. A.C. & S. Co.*, 535 A.2d 1361, 1365 (Del. Super. 1987), addressed whether insurance purchased by and maintained in the name of one joint venturer covered the joint venture, making the case about allocation of a partnership asset as between the partners.

Unlike partnership law, other legal doctrines impose individual liability for another person’s conduct: aiding-and-abetting and civil conspiracy. Both require knowing participation. Partner liability is not an end run around the knowing-participation requirement for accessory liability. This point was so obvious to the Vice Chancellor that he observed only in passing: “[w]hile Tatum could be vicariously liable for Blodgett’s tortious actions, Blodgett’s conduct is not dispositive in proving Fairstead’s claims *against Tatum*”—which require a showing of knowing participation. PTO101.

III. THE TRIAL COURT CORRECTLY FOUND THAT TATUM DID NOT BREACH HIS FIDUCIARY DUTIES

1. Question Presented

Whether the trial court correctly found that Tatum did not breach his contractual or common-law fiduciary duties.

2. Scope of Review

Factual findings are reviewed “for clear error”; questions of law are reviewed *de novo*. *Energy Transfer*, 346 A.3d at 1108.

3. Merits of Argument

Fairstead argues the trial court should have found Tatum liable for breach of fiduciary duty as a minority member of Fairstead Affordable and an employee under New York law. OB.30-37. Apart from Fairstead’s legally erroneous imputation of Blodgett’s actions to Tatum, *supra*.30-33, Fairstead’s appeal is fundamentally an attack on the Vice Chancellor’s factual findings. *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 50 (Del. 2006).

a. The Trial Court Enforced Tatum’s Contractual Fiduciary Duties

Fairstead accuses the trial court of excusing Tatum from the Operating Agreement’s contractual fiduciary duties because he “committed the challenged acts ‘as an employee,’” rather than as a minority member. OB.30-34. Fairstead’s purported “legal errors” are no such thing: the Vice Chancellor enforced the

fiduciary-duty provision, made extensive factual findings, and concluded that Tatum engaged in no misconduct constituting breach.

First, the trial court interpreted the contractual fiduciary-duty provision to impose a duty of loyalty requiring Tatum to “act in subjective pursuit of the best interests” of Fairstead Affordable, and to “avoid any conflicts of interest that could cause even a person acting in subjective good faith to act disloyally.” PTO91. The trial court then concluded that Tatum did not breach. PTO92-96. Fairstead misstates the decision below. *Contra* OB.30-32.

Second, the trial court observed that Tatum acted as an employee subject to common-law fiduciary duties, not as a minority member subject to the contractual fiduciary-duty provision. PTO92. Fairstead identifies no breaching action Tatum took as a minority member. Regardless, the trial court proceeded to “[a]ssum[e]” that Tatum’s conduct was *all* subject to the Operating Agreement’s contractual fiduciary-duty provision and again concluded that he did not breach. PTO92-96.

b. Fairstead Disagrees with the Trial Court’s Factual Findings But Identifies No Clear Error

Fairstead agrees that “Tatum could take steps to prepare to leave Fairstead,” OB.35, but insists that Tatum breached by misusing confidential information and soliciting employees. OB.34-37.¹² The trial court correctly rejected both

¹² Fairstead relies on the same conduct for its Delaware minority-member and New York common-law employee fiduciary-duty claims.

accusations, and Fairstead identifies no clear error.

First, after assessing Tatum’s credibility and the documentary and forensic evidence, the trial court found that Tatum did not misuse or disclose Fairstead confidential information. *Supra*.11-13, 19-21. The record supports the trial court’s findings. B0568-73; B0091-106; B2550-59. Fairstead never identified, *specifically*, confidential information that Tatum supposedly misused or disclosed. Fairstead’s overreaching but unsubstantiated accusations “did more to undercut [Fairstead’s] credibility than to impeach Tatum’s or suggest wrongdoing on his part.” PTO40 n.167.

On appeal, Fairstead focuses on a single model and asserts (without citation) that Tatum “stole” Fairstead’s confidential information and “helped build” a model “that was sent to a potential investor.” OB.37. But the trial court found that “Sussi and Kreinik created the model,” PTO34, and Tatum did not “[tell] Kreinik to use Fairstead files for that purpose.” PTO88; *supra*.19-21.

Second, the trial court found that Tatum did not solicit employees to join a venture he himself never joined. PTO82. Tatum’s contemporaneous writings contemplate “the team” staying behind at Fairstead. B2213. The Vice Chancellor found that “Feldman and Goldberg caused their own employees to leave by failing to give them equity compensation and treating them poorly,” and “Kreinik and Sussi

were going to leave no matter what Tatum did.” PTO82. After Tatum left, nearly the entire executive team left for other employers. A1306-07 1193:20-1196:21.¹³

¹³ This case is not in the same factual universe as *Enhabit v. Nautic Partners*, where a former executive engaged in rampant misconduct and caused significant damage to her former employer. 2024 WL 4929729, at *5-12, *21-24 (Del. Ch. Dec. 2, 2024). *Contra* OB.35.

IV. THE TRIAL COURT CORRECTLY FOUND THAT TATUM DID NOT BREACH HIS CONTRACTUAL OBLIGATIONS

1. Question Presented

Whether the trial court correctly concluded that Tatum did not breach contractual “Best Efforts,” “No Conflict,” “Good Faith,” “Non-Solicitation,” and “Confidentiality” provisions.

2. Scope of Review

Factual findings are reviewed “for clear error”; questions of law are reviewed *de novo*. *Energy Transfer*, 346 A.3d at 1108.

3. Merits of Argument

Fairstead’s contract claims reprise its fiduciary-duty arguments and fail for the same reasons. Both rest on alleged misuse of confidential information and solicitation of employees—conduct the Vice Chancellor found did not occur. Fairstead cannot show clear error.

a. The Trial Court Enforced the “No Conflict” Provision and Correctly Found No Breach

Fairstead claims the trial court found the Employment Agreement’s “No Conflict” provision (A0109 §1(H)) “unenforceable.” OB.39. That misstates the decision. The court interpreted the provision, enforced it, and found no breach. PTO73-74. Fairstead argues that the provision barred Tatum from secretly misappropriating Fairstead’s confidential information. OB.39. The Vice Chancellor determined that Tatum did no such thing. *Supra*.11-13, 19-21.

b. Fairstead Disagrees with the Trial Court's Factual Findings But Identifies No Clear Error

Fairstead argues Tatum breached the Employment Agreement's "Best Efforts" and "Non-Solicitation" provisions and the Operating Agreement's "Good Faith" and confidentiality provisions. Again, Fairstead disputes the trial court's factual findings but identifies no clear error.

First, Fairstead's "Best Efforts" (OB.38-39, A0109 §1(H)) and "Good Faith" (OB.41-42, A0132 §6.10(b)) arguments duplicate its fiduciary-duty arguments; Fairstead claims Tatum failed to act with "loyalty" under the former and "honestly and in good faith" under the latter by misusing confidential information and soliciting employees. The trial court found that Tatum did neither. *Supra*.11-13, 19-21.

With respect to the Good Faith provision, Fairstead also argues that Tatum improperly prepared to compete. There is nothing nefarious about discussing potential office space (A1736), brainstorming business strategies (A1739), and meeting with a potential investor (A1021 428:13-22). *Contra* OB.41-42. Those are preparatory steps the law protects. That is doubly true considering the trial court's finding that Tatum and Blodgett "believed they were on the verge of reaching

agreement on a joint venture with Feldman and Goldberg” when the investor meeting occurred. PTO80.¹⁴

Regardless, the Operating Agreement expressly authorized Fairstead Affordable’s Members—including JCT Capital—to compete with Fairstead, and states that doing so “shall not constitute a breach of this Agreement or result in a breach of any duties or obligations to the Members hereunder.” A0135 §8.3(a). Tatum could not have breached the Operating Agreement’s Good Faith provision through conduct that agreement authorized.

Second, Fairstead argues the trial court erred by dismissing its claim under the Employment Agreement’s “Non-Solicitation” provision (A0111-12 §3(C)). OB.42-43; OB.Ex.E. But Fairstead litigated non-solicitation through trial under other breach claims—and lost because the Vice Chancellor found Tatum solicited no one. *Supra*.19-21.

Fairstead’s only citation (OB.43) is to the arbitrator’s finding that *Blodgett*—not Tatum—solicited Fairstead employees. The trial court found: “[t]he record also does not show that Tatum substantially assisted Blodgett in soliciting Kreinik and Sussi for a rival business.” PTO101. Fairstead’s claim that *Tatum* “surreptitiously

¹⁴ The trial court did not “ignore” a meeting with TFMG; Fairstead cites emails attempting to schedule a meeting that never happened. *Contra* OB.12, 42 (citing A1740). Regardless, the trial court found that Tatum did not share confidential information with TFMG and was unaware Blodgett had done so. *Supra*.20-21.

recruit[ed] Fairstead employees” (OB.43) is both uncited and contrary to the trial court’s factual findings.

Because Fairstead litigated the issue through trial and failed to prove solicitation, “[n]owhere have the appellants shown that the result would have been any different had the [Vice] Chancellor” rewritten the provision at the pleading stage and “proceeded in the manner that they now advocate.” *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d at 53.

Third, the Operating Agreement’s confidentiality provision prohibits “use” or “disclos[ure]” of confidential information. PTO83-84; A0135 §8.3(b). After making extensive factual findings, the trial court found that Tatum did not use or disclose Fairstead confidential information and therefore did not breach. PTO95-96; *supra*.11-13, 20-21.

Fairstead responds that Tatum is “chargeable with Blodgett’s conduct” and misused Fairstead information to build “the Model” supposedly “derived from Fairstead’s confidential information.” OB.41. As explained, *supra*.30-33, 19-21, neither assertion has merit.

Fairstead argues, for the first time on appeal, that a May 2021 text shows Tatum misused “Fairstead models.” OB.41 (citing A1694). The cited text message refers to generic “models” that Tatum built “in 2016,” the year he joined Fairstead. A1694.

There is no evidence that the referenced “models” are “Fairstead models.” No witness was questioned about Tatum’s reference to 2016 models. Fairstead never identified the models, determined whether Tatum built them before joining Fairstead in 2016, or established the models contained Fairstead confidential information. After reviewing Fairstead’s brief, Tatum requested that Fairstead substantiate its representation to this Court that the referenced models were “Fairstead models.” Exhibit 1. Fairstead responded: “[t]he statement is supported by the record,” without elaboration. *Id.* This is another example of Fairstead asserting as “fact” a claim that was never proven (or outright rejected) below.

Finally, Fairstead’s remand request to attempt to prove additional damages for “Tatum’s breach of the confidentiality provisions” should be rejected. OB.40-41. The trial court found that Tatum breached the Employment Agreement’s broadly worded provision (A0111 §3(A)(3)) by downloading and retaining documents—something Tatum admitted in his original complaint, A0202-03 ¶203; OB.Ex.B ¶4(d), and awarded Fairstead its investigation costs. PTO74-78. The record supports the remedy; Fairstead cannot show abuse of discretion when it never tried to quantify other damages. B0876-77.

V. THE TRIAL COURT CORRECTLY FOUND THE VALUE OF TATUM'S INTERESTS

1. Question Presented

Whether the trial court correctly held that the contract term “Members of the Company” refers to the three entities defined as the “Members of the Company.” PTO51-53.

2. Standard of Review

This Court reviews questions of contract interpretation *de novo*. *In re Aearo Techs.*, 346 A.3d 584, 594 (Del. 2025). “To the extent the trial court’s interpretation of contract language rests on findings concerning extrinsic evidence, ... this Court must accept those findings unless they are unsupported by the record and are not the product of an orderly and logical deductive process.” *Energy Transfer*, 346 A.3d at 1113.

3. Merits of Argument

Tatum was entitled upon voluntary departure to “Stabilized Deals,” defined by the Operating Agreement as deals where (1) “substantial completion of any construction has been achieved,” (2) “the Deal is eligible for permanent financing,” and (3) “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.” PTO47.

The trial court correctly held that “guarantees provided by any Member of the Company” are guarantees provided by the three entities defined to be “Members” of Fairstead Affordable: JCT Capital, JD2 Affordable, and FCM Affordable. PTO51; B0459-61; B0541-42; B0619-23; B0154-59.

Fairstead argues that the Guaranty Provision should be interpreted expansively to include guarantees provided by affiliates like Feldman and Goldberg. OB.44-47. The trial court correctly rejected Fairstead’s invitation to re-write the parties’ bargain.

First, the Guaranty Provision is unambiguous and should be enforced according to its plain terms, as the trial court recognized. *Cox Commc’ns v. T-Mobile US*, 273 A.3d 752, 760 (Del. 2022). The provision’s reference to “guarantees provided by any Member of the Company” “do[es] not permit more than one reasonable reading.” *In re Aeero Techs.*, 346 A.3d at 596.

Even Fairstead agreed the text is unambiguous, PTO51, and that Fairstead’s interpretation requires re-writing the contract. Goldberg testified that the Guaranty Provision “should have said *affiliate* or *member*” to capture guarantees provided by Feldman and Goldberg. A1208-09 983:22-984:3. However, the parties knew how to draft expansive provisions when they wanted to; another provision (§3.2(b), A0124-25) includes “Members *or related persons*” and “*direct or indirect principals*” of Members.

Fairstead's argument (OB.45) that the Operating Agreement contemplated only guarantees made by "natural persons who are the principals of LLC members" is pulled from thin air. Goldberg testified that entities provide guarantees, A1208 982:14-19, and his *own* strategy document contemplates that Fairstead Affordable (the entity) would eventually become the sole guarantor, B2170. During post-trial argument, Tatum specifically identified examples of deals that had only entity guarantors. B0159. Fairstead steadfastly ignores this reality and continues to make contrary representations in briefing.

If no Member provided a guarantee, JCT Capital's interests sensibly vested upon substantial completion of construction and eligibility for permanent financing. B0130. For deals where Fairstead Affordable was the only guarantor, Fairstead agreed below that there was no guarantee provided by a Member and that vesting occurred once the construction and financing milestones were satisfied.

Second, Fairstead claims that Feldman and Goldberg were required to provide guarantees, that the Members "could never give a qualifying guaranty," and that "commercial context" requires its expansive reading. OB.45-46. The trial court found otherwise and correctly rejected Fairstead's "commercial context" argument.

Contrary to Fairstead's claim, Feldman and Goldberg "retained full control over how any guarantees would be issued" and "chose not to structure their affairs in a way that would prevent the Stabilization Test from being met." PTO52. They

could have caused a Member to be a co-guarantor, or guaranteed a guarantee provided by a Member. *Id.* Although JD2 Affordable and FCM Affordable were “passthrough LLCs with no balance sheet,” OB.45, that was because Feldman and Goldberg decided not to capitalize them. They could have capitalized JD2 Affordable or FCM Affordable to serve as a guarantor. A1030-31 465:11-466:1. But Feldman and Goldberg “preferred ... to sign in lieu of ... capitalizing Fairstead Affordable” (or its Members). A1030-31 465:16-18. The trial court found: “[t]he parties could have structured their affairs differently but chose not to. That was a business decision, not a basis to rewrite the agreement’s definition of ‘guarantee.’” PTO53. Fairstead does not even attempt to argue that finding is clearly erroneous.

Fairstead also overstates the obligation imposed by §3.2(b), OB.45-46, which creates only the illusory requirement that Feldman and Goldberg provide guarantees if “the Company” (*i.e.*, Feldman and Golberg) decides doing so is necessary. Fairstead’s argument that the Guaranty Provision has no “meaning at all” unless it is construed to include guarantees provided by Feldman and Goldberg (OB.47) ignores the trial court’s factual findings, which identify numerous ways to give the provision meaning without re-writing it. PTO52-53.

Finally, Tatum never “understood” that the Guaranty Provision referred to guarantees provided by Feldman and Goldberg. A1029 459:8-20. *Contra* OB.46 (mischaracterizing Tatum’s testimony). When drafting his complaint, Tatum

focused only on whether there were *any* remaining guarantees besides those provided by Fairstead Affordable. A1030 462:10-463:15. “Once [Tatum] reviewed the actual agreements, it was clear that none of the Members remained obligated on the disputed deals.” PTO53. The trial court found that “Tatum credibly explained that he misunderstood the legal standard before obtaining discovery,” and an “early characterization, corrected during litigation, cannot override the plain meaning of the contract.” PTO53. “Judicial admission[s]” are “restricted to unequivocal statements as to matters of fact,” and do not extend to “legal opinion[s].” *BE & K Eng’g Co. v. RockTenn CP*, 2014 WL 186835, at *7 (Del. Ch. Jan. 15, 2014), *aff’d*, 103 A.3d 512 (Del. 2014). And there can be no estoppel where the trial court never relied on Tatum’s “early characterization.” PTO53; *Motorola v. Amkor Tech.*, 958 A.2d 852, 859 (Del. 2008).

VI. THE TRIAL COURT CORRECTLY FOUND FAIRSTEAD BREACHED THE GOOD FAITH PROVISION, AND THE BAD-FAITH EXCEPTION APPLIES

1. Questions Presented

Whether the trial court (i) clearly erred in finding that Feldman and Goldberg acted dishonestly in violation of the Good Faith provision, or (ii) abused its discretion by shifting \$500,000 in fees under the bad-faith exception.

2. Standard of Review

The trial court's factual findings that Feldman and Goldberg acted dishonestly are reviewed for clear error. *Bäcker*, 246 A.3d at 96. This Court reviews a trial court's bad-faith fee-shifting for abuse of discretion. *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 227 (Del. 2005).

3. Merits of Argument

a. Feldman and Goldberg Violated the Good Faith Provision

Feldman and Goldberg made Tatum “run the departure gauntlet” and “manufactur[ed] a dishonest reason to harm Tatum,” retroactively terminate him for cause, and seize his equity instead of paying for it. PTO64. These factual findings of dishonesty and bad faith are reviewed for clear error, but Fairstead identifies none. Fairstead insists that “it did not need to manufacture a reason” to invoke for-cause termination, OB.49, but that does not undermine the trial court's factual finding that Fairstead *did* manufacture a dishonest reason to do so, PTO64. And the trial court's

breach finding was based on Feldman and Goldberg’s dishonesty, not Fairstead’s “lowball” settlement offer. *Contra* OB.49.

b. The Bad-Faith Exception Applies

The trial court did not abuse its broad discretion to award fees “where equity requires.” *Scion Breckenridge Managing Member v. ASB Allegiance Real Est. Fund*, 68 A.3d 665, 686-87 (Del. 2013); PTO64. If the Court affirms the prevailing-party fee award, *infra*.57-62, it need not reach Fairstead’s contrary arguments.

Tatum suffered harm when Feldman and Goldberg wrongfully seized millions of dollars of his equity. *Contra* OB.49-50.

The Vice Chancellor acted within his discretion to impose damages measured by part of litigation costs for breach of the Good Faith provision. PTO64-65. *Contra* OB.50. Tatum pled a claim for breach of the Good Faith provision, A0762, A0788-95, A1538, A1555, and generally sought an equitable remedy (“Vested Deals”) based on Fairstead’s bad-faith pre-litigation misconduct, B0448-52; B0520-26; B0608-11. Thus, Fairstead was on notice throughout that Tatum sought damages specifically to remedy Fairstead’s bad-faith pre-litigation misconduct. The trial court rejected Tatum’s request for Vested Deals (PTO56-57) but awarded the lesser remedy of certain attorneys’ fees, exercising its discretion to fashion a remedy that includes attorneys’ fees as a form of damages where “the action giving rise to the suit involved bad faith, fraud, conduct that was totally unjustified or the like.”

Scion, 68 A.3d at 687; *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 546 (Del. 1998); *Montgomery Cellular*, 880 A.2d at 228.

The Vice Chancellor then directed the parties to quantify the award, and Fairstead did so without arguing waiver or lack of a fair opportunity to defend its conduct. B0927-29; A1593-95; B2142-43. *Compare Young Min Ban, v. Manheim*, 2026 WL 2452686, at *4 (Del. Aug. 21, 2026) (finding waiver where party argued in trial court that it had been deprived of fair notice that opponent intended to seek fees as damages for pre-litigation conduct).

VII. THE TRIAL COURT CORRECTLY AWARDED TATUM HIS PROMOTES

1. Question Presented

Whether the trial court correctly found that (i) Tatum's Employment Agreement does not preclude quasi-contract claims for the Legacy Promote; and (ii) the promote claims are timely.

2. Standard of Review

“Whether ... an equitable remedy exists or is applied using the correct standards is an issue of law and reviewed *de novo*,’ but ... ‘application of those facts to the correct legal standards ... are reviewed for an abuse of discretion.’” *Bäcker*, 246 A.3d at 95. The timeliness of Tatum's promote claims is a mixed question of law and fact reviewed for clear error (facts) and *de novo* (law). *Scharf v. Edgcomb Corp.*, 864 A.2d 909, 916 (Del. 2004).

3. Merits of Argument

a. The Hampstead Portfolio

Fairstead's appellate argument is based on the false factual premise that Tatum was promised but never owned an interest in the Hampstead Promote. OB.52, 54. Below, Fairstead agreed that Tatum owned an interest at the time he left Fairstead: “Tatum received ... a 5.25% interest in the Hampstead promote via JCT Capital's interest in Fairstead Affordable.” B2532-33; B0553-54.¹⁵ It was only

¹⁵ Only the *promote* is owned by Fairstead Affordable. *Contra* OB.51.

“[a]fter disputes arose with Tatum” that “Feldman and Goldberg claimed that Tatum had forfeited his equity interest in Fairstead Affordable,” including his promote. PTO14.

Fairstead does not challenge the trial court’s exercise of discretion to remedy Feldman’s and Goldberg’s unjust enrichment. PTO67-68. Rather, Fairstead argues that Tatum’s Employment Agreement bars relief entirely. OB.53. Fairstead did not raise that argument below about the Hampstead Portfolio, only the Legacy Portfolio. A1511-12; B0874-76. Why not? Tatum’s Employment Agreement cannot bar recovery of an interest everyone agreed Tatum owned at the time he left Fairstead.

b. The Legacy Portfolio

Tatum’s Employment Agreement does not preclude enforcement of Fairstead’s promise to pay the Legacy Promote. For a contract to preclude quasi-contract claims, it must “clearly cover[] the dispute between the parties” and “fully detail all applicable terms and conditions.” *Clark-Fitzpatrick v. Long Island R.R. Co.*, 70 N.Y.2d 382, 389 (1987).

The trial court correctly found that Tatum’s Employment Agreement covered work for “Fairstead Affordable and its affiliates, but not for projects wholly unrelated to Fairstead Affordable, like the Legacy Portfolio.” PTO66-67. Fairstead objects to this factual finding but cites only the trial court’s observation that the Legacy Portfolio was related to Fairstead’s *distinct* legacy business. OB.53.

Fairstead also insists (without citation) that Tatum’s salary and bonus fully compensated him for work on the Legacy Portfolio. OB.54. Again, Fairstead disregards the trial court’s finding that Tatum “worked on the Legacy Portfolio without any compensation,” understanding based on Goldberg’s promises that he would receive a promote. PTO66. Tatum’s year-end review documents the parties’ agreement that Tatum’s salary and bonus were “[t]ied to” other work. B2149; B2153.

Because Tatum’s Employment Agreement was “silent” regarding Fairstead’s separate promise to pay the Legacy Promote, it could not preclude Tatum’s quasi-contract claims. *Joseph Sternberg v. Walber 36th St. Assocs.*, 594 N.Y.S.2d 144, 146 (1993); *Union Bank, N.A. v. CBS Corp.*, 2009 WL 1675087, at *7-8 (S.D.N.Y. June 10, 2009) (“agreements must *specifically address* what happened here in order for the agreements to bar ... quasi-contract claims”). Fairstead cannot point to a provision of the Employment Agreement “clearly cover[ing]” and “fully detail[ing] all applicable terms and conditions” of Tatum’s work on the Legacy Portfolio because there is none. *Clark-Fitzpatrick*, 70 N.Y.2d at 389. The Employment Agreement preserved the parties’ discretion, which they often exercised.¹⁶ That is

¹⁶ Fairstead’s actions confirm the Employment Agreement did not exclusively govern. The Employment Agreement entitled Tatum to “7.5% of the developer fee received by Fairstead Affordable for deals [he] source[d],” *with no vesting*. A0109 §1(F). Tatum never sought (and Fairstead never honored) the 7.5% deal fee because the parties had other agreements.

what happened here, where Goldberg separately promised Tatum a promote interest, documented that promise in writing, and induced Tatum's reliance on that promise. B0461-63; B0546-54; B0624-26. Where separate promises are made, courts enforce them. *E.g., Chrysler Corp. (Del.) v. Chaplake Holdings, Ltd*, 822 A.2d 1024, 1034 (Del. 2003) (affirming promissory estoppel award where parties entered contracts "governing" some "aspects of the business relationship," but one party made additional "promises ... in addition to the existing relationship").

c. No Time-Bar

The trial court correctly held Tatum's promote claims timely. OB.Ex.D. For quasi-contract claims, courts apply the doctrine of laches and consider the analogous statute of limitations "but with more flexibility to depart from the statute based on equitable considerations." OB.Ex.D ¶9.

Section 8106 is the analogous statute of limitations. OB.Ex.D ¶13. That statute establishes a three-year limitations period for "action[s] 'to recover damages ... based on a promise'" or "arising out of contractual or fiduciary relations." OB.Ex.D ¶¶ 10, 13; B0301-11. As the trial court correctly recognized, a promote constitutes "a contractual promise to pay a party a sum of money based on an actual or synthetic equity interest in an entity or a project." OB.Ex.D ¶14. Section 8106 therefore applies, and Tatum's promote claims fall comfortably within its three-year period. *See, e.g., Lindsey v. M.A. Zeccola & Sons*, 26 F.3d 1236, 1245-46 (3d Cir.

1994) (observing where “claims [are] for promises of future payments, they f[a]ll within section 8106,” and applying three-year statute because plaintiff was “not suing for back wages,” but “for a [promised] commission”).

Fairstead argues that §8111’s one-year wage-and-hour limitations period should apply. OB.54-55. That statute “is directed to claims alleging a breach of a duty to pay wages, salary or overtime for work performed” and does not govern promote claims because a promote claim “is different” from a wage-and-hour claim because, unlike a weekly paycheck, it is often unclear when a promote must be paid and therefore when a claim accrues. OB.Ex.D ¶¶13-14.¹⁷

Even if §8111 applied, Tatum’s claims would be timely. Tatum’s March 10, 2022, letter to Fairstead requested that Fairstead document his “interests in the promote for the New York Section 8 [Legacy] Portfolio.” B2375. Fairstead did not disavow Tatum’s interest until April 5, 2022, and only by implication. A1781-83. It was not until September 25, 2022, that Fairstead stated its position that Tatum held “no written or enforceable agreement” for the Legacy Promote. B2474. Tatum had no claim for his interest in the Hampstead Promote until June 28, 2022, when Fairstead forfeited it. A1794-97. Tatum sued on October 26, 2022, within a one-year limitations period. B0311-15.

¹⁷ Even Fairstead cannot say when the promote claims accrued, vaguely suggesting 2020 because that is when work was completed. OB.55. But promotes are not paid when work is completed; they are a promise for future equity splits.

Finally, “if there is doubt as to which of two statutes of limitations applies, that doubt should be resolved in favor of the longer period.” *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 559 (Del. 2002). Applying a time-bar to reverse the trial court’s equitable awards when Tatum did not sleep on his rights would be profoundly unjust, particularly considering Fairstead’s strategic ambiguity about whether it would honor its post-termination obligations to Tatum. *E.g.*, B2453 n.2.

VIII. THE TRIAL COURT CORRECTLY SHIFTED FEES

1. Question Presented

Whether the trial court (i) correctly found that the preconditions to the parties' fee-shifting bargain exist, and (ii) abused its discretion by awarding the value of legal services provided by Tatum's lead counsel (his wife).

2. Standard of Review

This Court reviews an award of attorneys' fees for abuse of discretion, and the interpretation of a contractual fee-shifting provision *de novo*. *Scion*, 68 A.3d at 675. Factual findings are reviewed for clear error. *Energy Transfer*, 346 A.3d at 110.

3. Merits of Argument

a. The Employment Agreement's Fee-Shifting Provision Applies to this "Action"

Fairstead agreed in Tatum's Employment Agreement that, "[i]n any action arising out of this Agreement the prevailing party shall be entitled to an award of its reasonable legal fees." OB.Ex.B ¶2; A0113 §4(G). "When a contract is the source of the conduct or events that caused the litigation, the dispute 'arises out of' that agreement for purposes of a fee-shifting provision in the contract." OB.Ex.B ¶3a (citing *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 389 (2d Cir. 2007));

Flatiron Acquisition Vehicle v. CSE Mortg., 2022 WL 413229, at *9 (S.D.N.Y. Feb. 9, 2022).¹⁸

The trial court determined that the Employment Agreement “is the source of this dispute,” including because Fairstead relied on it to terminate Tatum for cause and to assert affirmative claims against him. OB.Ex.B ¶3b; A1794-97; B0917-21; B2136-41. “Fairstead was the aggressor; Tatum the responder.” OB.Ex.B ¶4c. Given its findings as to the “catalyst” of this dispute, the Vice Chancellor enforced the unambiguous language of the parties’ fee-shifting bargain to award Tatum fees. OB.Ex.B ¶3b.

Fairstead disputes that this case arose out of the Employment Agreement but identifies no factual or legal error. Fairstead argues that (i) Tatum commenced litigation and brought “no claims under the Employment Agreement,” and (ii) the Operating Agreement “requires forfeiture” of Tatum’s equity, not the Employment Agreement. Neither argument has merit.

First, as the trial court observed, “Tatum did not have meaningful rights under the Employment Agreement,” so he could not assert claims under it. OB.Ex.B ¶3c. Regardless of the formal structure of the claims and counterclaims, this dispute “arose” from Fairstead’s June 28, 2022, letter forfeiting Tatum’s equity based on

¹⁸ New York law governs. A0112 §4(C).

alleged breaches of the Employment Agreement, A1794-97, not from Tatum’s complaint.¹⁹

Moreover, Tatum could not have prevailed on his affirmative claims to recover his equity without disproving Fairstead’s accusations that he breached his Employment Agreement and resulting common-law obligations. Under New York law, “the nature—not the nomenclature—of a claim is controlling.” *Diamond D Enters. USA v. Steinsvaag*, 979 F.2d 14, 18 (2d Cir. 1992). Where, as here, a party must disprove counterclaims to prevail on affirmative claims, the claims and counterclaims logically rise and fall together for purposes of fee-shifting. OB.Ex.B ¶3c; *Edgewater Growth Cap. Partners LP v. H.I.G. Cap.*, 68 A.3d 197, 241 (Del. Ch. 2013). Courts also have discretion to award the entire fee where, as here, overlapping claims preclude meaningful segregation. OB.Ex.B ¶5a (citing *Adstra v. Kinesso*, 2025 WL 1070034, at *5 (S.D.N.Y. Apr. 9, 2025)).

Second, the Operating Agreement’s definition of “Cause” (A0120) rests on breaches of the *Employment Agreement* and resulting employment obligations, which is why Fairstead cited the Employment Agreement to justify invoking

¹⁹ Fairstead effectively interprets “arising out of” to mean “to enforce.” Other fee-shifting formulations—but not “arising out of”—limit compensable fees to claims to enforce the agreement itself. *E.g.*, *Bako Pathology v. Bakotic*, 288 A.3d 252, 280 (Del. 2022) (“any legal proceeding to construe, apply, interpret, enforce or defend ... rights *in this Agreement*”); *Surf’s Up Legacy Partners v. Virgin Fest*, 2025 WL 3232923, at *5 (Del. Super. Nov. 19, 2025) (“any action ... to enforce any provision of this Agreement”).

retroactive for-cause termination. A1795. That the Operating Agreement contained the forfeiture provision is irrelevant; Fairstead “used the LLC operating agreements’ definition of ‘Cause’ to litigate Tatum’s obligations under the Employment Agreement.” OB.Ex.B ¶3c. *Contra* OB.57.²⁰

b. Ms. Tatum’s Time is Compensable

The trial court did not abuse its discretion by awarding the value of legal services provided by Ms. Tatum. Fairstead never challenged (i) Ms. Tatum’s hourly rate, (ii) her estimated time, or (iii) the overall reasonableness of her fees. OB.Ex.B ¶7m; A1574. Instead, Fairstead claims that Ms. Tatum’s time is categorically non-compensable because Tatum did not pay his wife out-of-pocket and she did not maintain contemporaneous time records. OB.58. The trial court correctly rejected both arguments.

First, the fee-shifting provision authorizes an award of “reasonable legal fees” and does not limit an award to fees “incurred” out-of-pocket. OB.Ex.B ¶7a. *Compare Scion*, 68 A.3d at 683 (“reimburse” for fees “incurred”); *Duncan v. STTCPL*, 2020 WL 829374, at *15 (Del. Super. Feb. 19, 2020) (“actual out-of-pocket costs, fees and expenses incurred”). The preceding sentence of §4(G)

²⁰ In *Bull Hill v. HFZ Member RB Portfolio* (OB.57), the party seeking fees denied being bound by the agreements containing fee-shifting provisions, and the alleged misconduct could not have arisen “as a result of” the agreements because it predated them. 2024 WL 4202664, at *1 n.2, *2 (N.Y. Sup. Ct. Sept. 16, 2024).

authorizes recovery of fees “incurred as a result of” a breach by Tatum; the prevailing-party provision contains no such limitation. A0113 §4(G); OB.Ex.B ¶7a. Rather, “[t]he only limitation contained in [§4(G)] is that the attorney’s fees be reasonable,” meaning that the trial court was authorized to “determine[] whether the fees requested [were] reasonable.” *Energy Transfer*, 346 A.3d at 1118.

Fairstead comes nowhere close to showing abuse of discretion. The trial court cited ample authority supporting recovery of fees not paid out-of-pocket, including contingency fees and the value of in-house counsel’s time. OB.Ex.B ¶¶7h, 7j. Tatum and his wife shared litigation risk like attorney and client do under a contingency-fee arrangement, and Ms. Tatum’s work imposed an opportunity cost like that of in-house counsel’s time. Where, as here, the Court is concerned “principally [with] enforcing the parties’ agreement to make the prevailing party whole,” *Aveta v. Bengoa*, 2010 WL 3221823, at *6 (Del. Ch. Aug. 13, 2010), those analogies reinforce that the trial court did not abuse its discretion. “There are times when an attorney-spouse may be the only attorney ... available to the plaintiff. Were fees categorically barred in such cases, a meritorious claim might not be brought at all.” *Rickley v. Cnty. of Los Angeles*, 654 F.3d 950, 953-56 (9th Cir. 2011).

Regardless, the trial court found as a factual matter that “the Tatums incurred the economic cost of Ms. Tatum’s work by any measure,” as Ms. Tatum left her law-firm position to work on this litigation for several years before returning after post-

trial proceedings. OB.Ex.B ¶7l; B2119 ¶¶3-6. Without compensating that time, “the Tatums would not be made whole.” OB.Ex.B ¶7l.

Second, the trial court correctly recognized that contemporaneous time records are unnecessary under New York law. OB.Ex.B ¶7n. “[C]ourts may award attorney’s fees based on contemporaneous *or reconstructed* time records.” *Schwartz v. Chan*, 142 F. Supp. 2d 325, 331 (E.D.N.Y. 2001); *Riordan v. Nationwide Mut. Fire Ins. Co.*, 977 F.2d 47, 53 (2d Cir. 1992).

Ms. Tatum reconstructed her time by allocating hours to tasks. B2124 ¶18; B2127-32. The trial court found that she “provided a credible and conservative measure of the number of hours spent on a case where she was omnipresent.” OB.Ex.B ¶7n. Fairstead does not challenge that finding.²¹

Finally, if this Court vacates the award for Ms. Tatum’s time, the windfall will belong to Fairstead. Ms. Tatum will have spent years litigating this case without compensation, subsidizing the true cost of Fairstead’s misconduct contrary to the parties’ fee-shifting bargain.

²¹ Fairstead paid much higher hourly rates, and its lawyers billed significantly more hours; Fairstead seeks nearly \$20 million in fees in the Blodgett arbitration. B0950; B0961-73; B0976-1648.

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