



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' REPLY BRIEF

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PRELIMINARY STATEMENT¹

Confronted with a legally flawed judgment below, Tatum focuses on a lengthy, self-serving recharacterization of the factual record. (See AB9-21) But that record and the trial court’s findings establish that Tatum and Blodgett, who were “attached at the hip” (PTO101), worked together to steal Fairstead’s confidential information and resources to start a competing venture while still working at Fairstead. Yet, even though Tatum cannot dispute that there was cause for his termination (PTO74-75; A0120), Fairstead is nevertheless faulted for not firing Tatum at the putatively correct time.

Tatum is chargeable with both his own and Blodgett’s undisputedly disloyal conduct, including:

- Stealing confidential Fairstead information “around key events in Fairstead 2.0 planning.” (PTO30-31; PTO74-75; A0094; A0100)
- Seeking to raise capital for a competing venture and meeting with potential investors for that venture while employed at Fairstead.²

¹ Capitalized terms are as in Appellants’ Opening Brief (“OB”). “AB” indicates Appellees’ Answering Brief.

² *E.g.*, AR0154; AR0156 (October 2020 meeting with Tisch Office); A0997 at 330:7-18 (by May 2021, Tatum knew Tisch Office expressed interest in investing); A1740 (scheduling July 2021 meeting with Tisch Office); A1765 (scheduling September 2021 meeting with investor); AR0159 (texting with Blodgett about “setting up investor meetings”); *Id.* (texting Blodgett Ms. Tatum was “mad” they
(cont’d)

- Helping prepare models for the competing venture. (PTO28-29)
- Surreptitiously communicating about their competing venture using personal emails (PTO20, 29), then deleting text messages and other evidence. (PTO26 n.95; A1025 at 442:15-18)
- Assuring Blodgett that Tatum’s wife would “work probono for us” and “sue anyone and everyone.” (A1728-29)
- Falsely representing in writing, even while represented by counsel, that he had returned Fairstead’s property—which he admitted at trial was untrue. (A1024-25 at 441:15-444:1)

The trial court ignored both that undisputed evidence and black-letter law to excuse Tatum’s wrongdoing, in service of its frequently-expressed sentiment that Delaware courts should not be charged with enforcing “employment-related terms” written into “governance documents.” *Fairstead Cap. Mgmt. LLC v. Blodgett*, 359 A.3d 598, 616-17 (Del. Ch. 2026) (Laster, V.C.). Indeed, in that related case against Blodgett, the court lamented that Delaware courts are “call[ed] on ... to adjudicate employment disputes for the country and potentially the world.” *Id.*³

“only valu[ed] the new company at 200M”). Tatum now claims, without citation, the July 2021 meeting “never happened” (AB40), but Blodgett testified it did. (A1202 at 957:21-958:22)

³ See also *Sunder Energy, LLC v. Jackson*, 305 A.3d 723, 731 (Del. Ch. 2023) (Laster, V.C.) (“For Delaware courts to address these matters is unsustainable”),
(cont’d)

Fairstead’s governance documents do not present the concerns that fuel the trial court’s ire, yet Fairstead was caught in the crossfire and denied its bargained-for contractual protections. That was wrong. As this Court explained in reviewing one of this same trial court’s decisions, “Delaware is a contractarian state that holds parties’ freedom of contract in high regard” and “[w]e are hesitant to establish policy-based rules that have not been considered by the General Assembly.” *Sunder Energy, LLC v. Jackson*, 332 A.3d 472, 487-88 (Del. 2024).

To reach its preferred outcome, the trial court disregarded settled Delaware law at every turn:

1. It misapplied the after-acquired-evidence doctrine and disregarded Fairstead’s express reservation of rights to hold Fairstead could not retroactively terminate Tatum for cause, even though Fairstead didn’t know the full scope of Tatum’s misconduct when it accepted his resignation.

2. The court disregarded the legal consequences of its own finding that Tatum “formed a common law partnership” with Blodgett to compete with Fairstead. (PTO5) There is no dispute that Tatum’s partner Blodgett was properly terminated for cause based on his misconduct (PTO2); under well-settled legal principles,

aff’d in part, rev’d in part, 332 A.3d 472 (Del. 2024); *GI DI Rushmore Parent L.P. v. Stoops*, 2026 WL 1679305, at *18 (Del. Ch. June 10, 2026) (Laster, V.C.) (“post-employment disputes” are “a burden that this court will never have sufficient resources to bear”).

Tatum is chargeable with that same misconduct and was also properly terminated. Instead, Tatum asks this Court to make new law excusing him from his partner's wrongdoing.

3. The court declined to hold Tatum to his fiduciary obligations under the Operating Agreement, holding Tatum acted solely "as an employee." (PTO92) That squarely contradicts Delaware precedent recognizing that individuals may be subject to more than one set of fiduciary obligations, and it contradicts the expectations of businesses around the world relying on Delaware LLC agreements to be enforced according to their terms. Fairstead asks this Court to enforce that Agreement; Tatum urges that it be ignored.

Those errors were followed by a cascade of other legal errors, all operating to Tatum's benefit:

4. Disregarding the clear language of Tatum's contracts—including a provision imposing fiduciary duties on Tatum alone—to hold that he did not breach them;

5. Misconstruing the Operating Agreement, contrary to the parties' undisputed intent, thereby inflating Tatum's award;

6. Holding that Fairstead engaged in bad-faith conduct through the unremarkable act of offering Tatum a settlement;

7. Allowing Tatum to collect extra-contractual damages for work already covered by his Employment Agreement, notwithstanding that the claims were time-barred; and

8. Awarding legal fees to Tatum based on an agreement on which he did not sue, including a windfall award for his spouse's undocumented legal work.

This Court should now correct those errors.

ARGUMENT

I. FAIRSTEAD PROPERLY TERMINATED TATUM FOR CAUSE RETROACTIVELY

A. The Trial Court Misapplied The After-Acquired-Evidence Doctrine

Tatum does not dispute there was cause for his termination, but faults Fairstead for not terminating him quickly enough. But Fairstead was entitled to retroactively terminate Tatum for cause in June 2022 because it did not know the full scope of his misconduct when it accepted his resignation in October 2021.⁴

Start with case law. Fairstead did not “mischaracterize[]” *Davenport Group MG, L.P. v. Strategic Investment Partners, Inc.*, 685 A.2d 715 (Del. Ch. 1996), as Tatum asserts without explanation. (AB23) *Davenport* held LPs were justified in removing a GP even if they discovered the justifying conduct after the removal, because an LP agreement breach “had occurred and indeed was ongoing at the time of the removal justifying [their] action.” 685 A.2d at 724; accord *Metro Storage Int’l LLC v. Harron*, 275 A.3d 810, 875, 879 (Del. Ch. 2022). So too here: Tatum breached his obligations to Fairstead by partnering with Blodgett to steal Fairstead’s employees and resources to compete with Fairstead. (See OB30-43)

The “mend-the-hold” doctrine (AB26) doesn’t help Tatum. That doctrine precludes a party from asserting different contractual justifications for its conduct

⁴ Tatum’s references to Fairstead’s malpractice action (AB2, 25) are misplaced: Fairstead makes no contrary allegation there. (B0001-49)

“once its original ones fail.” *Fortis Advisors, LLC v. Krafton, Inc.*, 354 A.3d 906, 938-40 (Del. Ch. 2026). But Fairstead has never given “shifting *seriatim*” justifications (AB26) for Tatum’s termination. Since Fairstead terminated Tatum in June 2022, Fairstead maintained that Tatum’s misconduct warranted his termination for cause, even if the full scope of wrongdoing was revealed later.

Fairstead’s motivation is irrelevant. As the Blodgett arbitrator—a former federal magistrate judge—observed, where “the facts support a claim of a breach,” “the reason ... is irrelevant.” (A0102) Nevertheless, Fairstead’s “subjective reason” (AB26) was fair. After Tatum egregiously breached his obligations, Fairstead very reasonably didn’t want to pay Tatum money he wasn’t owed. By contrast, in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), because of the “important national policies” implicated by non-discrimination laws, the Supreme Court limited use of after-acquired-evidence in such cases so it couldn’t be deployed to conceal pernicious motivations. *Id.* at 360-61. Those interests aren’t implicated here.

Tatum vaguely asserts “Fairstead knew the relevant information,” and excuses himself by contending that “[m]ost of the alleged misconduct is someone else’s that Fairstead cannot pin on Tatum,” *i.e.*, Blodgett. (AB26 & n.10) As Part II *infra* explains, Tatum cannot escape the acts of the partner he chose. This same trial court elsewhere rejected a party’s attempt to “dodge ... unfavorable facts by arguing that

they center[ed] on” its partner. *See 26 Capital Acq. Corp. v. Tiger Resort Asia Ltd.*, 309 A.3d 434, 472 (Del. Ch. 2023). It should not have allowed that here.

Tatum also suggests without explanation the issue is the availability of an equitable remedy. (AB22) That’s wrong: the issue is whether Fairstead properly retroactively terminated Tatum for cause, such that Tatum’s interests are forfeit under the Operating Agreement. It was proper, and Tatum’s interests are forfeit.

B. Tatum’s Effort To Rewrite The Trial Court’s Analysis Acknowledges That Court’s Legal Error

Tatum asserts the “relevant date” for the trial court’s reasoning is February 10, 2022, the date he left Fairstead, not October 21, 2021, the date Fairstead accepted his resignation. (AB23 n.9) But the trial court looked to October 2021:

The allegations in the counterclaims demonstrate that the defendants knew about the alleged misconduct on which they now rely *before they accepted Tatum’s departure as a resignation* without good reason.

(OB.Ex.F.1 (emphasis added)) Tatum’s brief inserts “[February 10, 2022]” before the word “departure” and omits the court’s explanatory reference to “resignation” to pretend the court meant February 10, 2022. (AB24) The court did not mean February: it thereafter referenced October 2021 (or “September 2021,” a typo not germane here, OB.Ex.F.8-10). Its post-trial opinion also looked to October 21, 2021—the date Fairstead accepted Tatum’s resignation—as the relevant date. (PTO45-46, *accord* PTO38 (citing Fairstead’s acceptance letter))

Looking to February 10, 2022, makes no sense. That Operating Agreement’s 120-day notice period fixed that date, and Fairstead took no relevant action then.

Tatum’s surreptitious effort to push that date forward to 2022 acknowledges the trial court’s error. That court misapplied the after-acquired-evidence doctrine because Fairstead did not know the full scope of Tatum’s misconduct when it accepted Tatum’s resignation in October 2021 while reserving its rights. (OB16-22)

C. The Trial Court Erred By Disregarding Fairstead’s Reservation Of Rights

Tatum discounts Fairstead’s reservation of rights by asserting without citation that “retroactive for-cause termination ... is not a ‘right’ that can be reserved indefinitely.” (AB27) But Tatum expressly argued below that Fairstead waived its right to terminate Tatum for cause. His own counsel called it “a waiver argument.” (AR0068-69 at 68:24-69:5; *see also* B0362)⁵ If Fairstead reserved its rights, it cannot have waived its right to terminate Tatum for cause, particularly where the Operating Agreement precludes waivers by conduct. (A0151 §12.8)

The Court should follow both Delaware precedent giving effect to reservations of rights and the analysis in *Golden v. WorldQuant Predictive Technologies, LLC*, 345 A.3d 813 (Conn. App. Ct. 2023) (OB23-24) giving effect

⁵ The Court of Chancery has framed the after-acquired-evidence doctrine as a waiver doctrine. *PJT Holdings, LLC v. Costanzo*, 339 A.3d 1231, 1260-61 (Del. Ch. 2025), *aff’d*, 2026 WL 958201 (Del. Apr. 9, 2026) (ORDER).

to a reservation of rights in similar circumstances. Tatum’s effort to distinguish *Golden* (AB27 n.11)—noting that employer originally terminated the employee for wrongdoing but added accusations later—does not explain why that difference should matter (and it does not). Fairstead’s October 2021 reservation of rights preserved its ability to act on what it learned from further investigation.

II. TATUM IS CHARGEABLE WITH BLODGETT'S CONDUCT

Fairstead repeatedly preserved its contention that Tatum is chargeable with Blodgett's conduct. (*E.g.*, A1482 ("their bad acts are attributable to each other"); A1522 ("partners" are "responsible for each other's actions"); A1531) The trial court erroneously ruled "Blodgett's conduct is not dispositive in proving Fairstead's claims *against Tatum*." (PTO101 (quoted at AB33)) In any event, "the interests of justice" require this Court to consider Fairstead's contention, Supr. Ct. R. 8, and Tatum does not specifically contend otherwise. (AB30)

A. Tatum Is Chargeable With His Partner's Conduct

The trial court found Tatum and Blodgett "formed a common law partnership" preparing to "leave Fairstead to start a new business" competing with Fairstead. (PTO5) Here, it is undisputed that Blodgett was properly terminated for misconduct undertaken in furtherance of his and Tatum's partnership, and those acts would have constituted fiduciary breaches under Delaware law. *Blodgett*, 359 A.3d at 621; (PTO2) That same wrongdoing should have been charged to Tatum. *See Hannigan v. Italo Petroleum Corp. of Am.*, 77 A.2d 209, 216 (Del. 1949) (joint venturer is "both a principal for himself and agent for each of his associates"). It follows that Tatum was properly terminated and his interests properly held forfeit.

That imputation principle is well settled. Courts routinely apply it to perform such tasks as determining personal jurisdiction, *see Miller Yacht Sales, Inc. v. Smith*,

384 F.3d 93, 95 n.1 (3d Cir. 2004), and assessing whether lawyers practicing in a firm are conflicted. *See Bleacher v. Bose*, 2017 WL 1854794, at *3 (Del. Super. May 3, 2017). It also reflects common sense:

- If Tatum knew what his “attached at the hip” partner Blodgett (PTO101) was doing (and he did), he shouldn’t be heard to assert his own hands are clean. Tatum’s promises to Fairstead would be worthless if he could agree with others to “accomplish indirectly what he could not accomplish directly.” *See Foti v. Cook*, 263 S.E.2d 430, 434 (Va. 1980).
- If Tatum didn’t know what Blodgett was up to, that’s Tatum’s own fault: Tatum should have been more careful about choosing his comrades. *See Capelle v. Hall*, 5 F. Cas. 34, 35 (D. Del. 1875) (“[E]very honest partner is absolutely in the power of any dishonest one with whom he may have rashly associated himself.”).

Tatum asserts that charging him with Blodgett’s wrongdoing will “upend” partnership law. (AB30-33) Not so: Tatum proposes to erect new, bespoke limitations on this well-settled principle to insulate him from its consequences. This Court should reject Tatum’s invitations:

First, Tatum observes a partnership is liable for partners’ torts, and partners are jointly liable for the partnership’s obligations. (AB30-31) That is true, but is not a limitation on imputation among partners. Most acts in furtherance of a partnership

are not tortious, and partners benefit by acting on one another's behalf. Tatum is chargeable with Blodgett's actions whether or not Blodgett himself was held liable for damages. That Fairstead was not awarded damages arising out of Blodgett's own obligations is irrelevant.⁶

Second, Tatum proposes imputation should not apply if a partner later decides his partner's actions were unhelpful, arguing 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.'" (AB31 (quoting PTO28)) But nothing in the trial court's opinion says that Blodgett's misconduct was not in service of their partnership. (PTO28) Arbitration findings that bind Tatum—and common sense—confirm Blodgett's actions to compete with Fairstead were in furtherance of his and Tatum's partnership to do just that. (A0099) Indeed, the arbitrator concluded Blodgett's testimony to the contrary was "disingenuous." (A0088) Blodgett's actions were consistent with others of which Tatum was undisputedly aware, including joint efforts to raise capital for their venture.

Third, Tatum is wrong that applying this well-settled principle would "giv[e] a wronged third party as many bites at the liability apple as there are partners."

⁶ *Contra* AB31 (incorrectly stating arbitrator held the "Tatum-Blodgett joint venture incurred *zero* liability based on Blodgett's conduct"; arbitrator did not address Tatum's obligations to Fairstead).

(AB32) Fairstead is not taking multiple bites: Fairstead has distinct claims against Blodgett and Tatum arising out of obligations they independently owe to Fairstead. Fairstead brought claims against Tatum for fiduciary duty breaches under the Operating Agreement, which expressly imposes those duties on Tatum alone. (A0132 §6.10(a); OB30) Applying imputation here does not violate any rule against suing partners *seriatim* on an identical legal claim; the claims are different. Nor is Fairstead conjuring different sets of facts for Tatum and Blodgett: both of them are bound by the factual findings in the Blodgett arbitration. (See PTO5-6)

Fourth, Tatum argues “[p]artner liability is not an end run around the knowing-participation requirement for accessory liability.” (AB33) But partnership law is different than accessory liability. Partners may be liable for imputed conduct even if not under an aiding-and-abetting theory. *E.g.*, *HMG/Courtland Props., Inc. v. Gray*, 749 A.2d 94, 121 (Del. Ch. 1999) (that partner “was not an aider and abettor does not, however, insulate her from being responsible”).

B. Fairstead’s Authorities Confirm Imputation Is Required

Tatum contends Fairstead’s authorities do not support imputation. (AB32-33) Not so:

1. Tatum asserts 26 *Capital* is just a “knowing participation and conspiracy case” (AB32, *see also* AB29), but that decision only “pejoratively” referred to the partnership as a conspiracy. 309 A.3d at 471-72. 26 *Capital* supports

imputation because that court concluded one partner's actions "to advance their joint cause are ... properly attributed to" the other partner. *Id.* at 472. So too here.

2. Tatum discounts *Hannigan* as narrowly focused on transactions with "syndicate members." (AB32) But *Hannigan* goes further, observing that a joint venturer "is, in effect, both a principal for himself and agent for each of his associates" and is thus "chargeable with full knowledge" of the acts of his co-venturers, "whether or not [he] actually knew the circumstances." 77 A.2d at 216.

3. Tatum is wrong that *Hudson v. A.C. & S. Co.*, 535 A.2d 1361 (Del. Super. 1987) concerns only "allocation of a partnership asset as between the partners." (AB33) *Hudson* held insurance purchased by one joint venturer to cover employees engaged in the joint venture belonged to "both joint venturers" "because of the special relationship of joint venturers," in which "the actions of each joint venturer in furtherance of the joint venture are attributable to the other joint venturer." 535 A.2d at 1365-66. So too here.

III. TATUM BREACHED FIDUCIARY DUTIES AS A MEMBER AND EMPLOYEE

A. The Trial Court Failed To Hold Tatum To His Bargained-For Fiduciary Duties As An LLC Member

The trial court held Fairstead could not claim a breach of the duty of loyalty under the Operating Agreement's Minority Member Duty Provision because Tatum committed the challenged acts "as an employee." (PTO92) That illusory distinction between acts-as-employee and acts-as-member is unsupported by Delaware law. (OB33-34) Exonerating Tatum from those obligations furthers the trial court's expressed preference that Delaware should avoid adjudicating post-employment disputes.

That viewpoint, whatever its merits, has no bearing here because Fairstead did not "insert[] employment-related terms" into "internal governance documents." See *Blodgett*, 359 A.3d at 616-17. Tatum ran Fairstead Affordable's day-to-day operations (PTO10), and so the Operating Agreement sensibly imposed fiduciary duties on Tatum. The trial court exalted its policy preference above the parties' contractual bargain and, in doing so, improperly rendered the Minority Member Duty Provision surplusage.

Tatum claims Fairstead "misstates the decision below" because the trial court putatively assumed "Tatum's conduct was all subject to the Operating Agreement's contractual fiduciary-duty provision" and "concluded that [Tatum] did not breach."

(AB35) Not so. The court analyzed Tatum’s conduct as a departing employee, comparing it to the employee conduct described in *Lazard Debt Recovery GP, LLC v. Weinstock*, 864 A.2d 955 (Del. Ch. 2004). (PTO93) Tatum’s mischaracterization ignores pages of the trial court’s opinion, including where the court states it was “frankly unclear what” the Operating Agreement “envision[ed]” by assigning Tatum fiduciary duties. (PTO91)

Tatum further asserts “Fairstead identifies no breaching action Tatum took as a minority member.” (AB35) That’s wrong: *all* of Tatum’s challenged actions were taken as a member because his employment at Fairstead was central to his membership in Fairstead Affordable. (OB33-34) Tatum even testified that he downloaded valuation documents because they “seemed like something that I had a right to have as a partner in the business.” (A0922 at 145:24-146:6)

B. Tatum Also Breached His Fiduciary Duties As An Employee

Tatum also breached fiduciary duties as a Fairstead employee by taking Fairstead’s confidential information. (PTO74-75) The trial court excused Tatum’s clear fiduciary breaches as “panic[.]” (PTO30-31), but panic does not excuse Tatum’s disloyal conduct. He asserts that the record “supports the trial court’s findings,” but cites only his own post-trial arguments, which present only his own self-serving characterizations. (AB36)

Tatum also ignores Blodgett's misconduct, which, under partnership principles, is Tatum's misconduct too. Blodgett undisputedly sent Fairstead's confidential information, including financial results for all of Fairstead Affordable's investments and a confidential investment opportunity, to third parties in furtherance of their partnership to compete with Fairstead. (*E.g.*, PTO27, 34) Tatum is chargeable with that wrongdoing.

Tatum asserts that "Fairstead identifies no clear error" (AB36), but whether that undisputed conduct constitutes a fiduciary breach is a legal question subject to this Court's *de novo* review. *See Bank of N.Y. Mellon Tr. Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011).

IV. TATUM BREACHED HIS CONTRACTUAL OBLIGATIONS

Best Efforts Provision. Tatum breached this provision of his Employment Agreement because he failed to “devote [his] ... loyalty” to Fairstead by partnering with Blodgett to compete with Fairstead while still a Fairstead member and employee. (OB38-39) In addition to Tatum’s own misconduct, Blodgett undisputedly used Fairstead’s confidential information and solicited Fairstead’s employees for that competing venture. (PTO26-29; PTO34; A0089; A0092; A0099; A102-03) Tatum is chargeable with those acts.

Again, Tatum’s response is that Fairstead “identifies no clear error.” (AB39) But whether that undisputed conduct constitutes a breach of best efforts is a legal question subject to *de novo* review.

No-Conflict Provision. Tatum breached this provision of his Employment Agreement by engaging in “conduct that creates an actual, potential or apparent conflict between” his interests and Fairstead’s. (A0109 §1(H); *see* OB39) The trial court also ignored Blodgett’s conduct in concluding Tatum did not breach this provision. (PTO72-74)

Confidentiality Provisions. It is undisputed that Tatum breached the Employment Agreement’s confidentiality provision. (PTO74-75; AB42) Tatum also breached the Operating Agreement’s confidentiality provision (A0135 §8.3(b)):

1. Blodgett undisputedly sent Fairstead’s confidential information to third parties in furtherance of his and Tatum’s partnership to compete with Fairstead, including sending Fairstead’s “track record” to the Tisch Office. (*E.g.*, PTO34; A0092) Tatum is chargeable with that conduct.

2. “Tatum helped” prepare a model sent by Blodgett to the Tisch Office. (PTO28-29; PTO34; A1346 at 1350:16-1351:5) The model was unquestionably derived from Fairstead’s confidential information. (A1741-58; A3758-61) In May 2021, Blodgett texted Tatum he was “having [Kreinik] put together a 5 year capital needs budget.” (A1694) Tatum responded: “I have some already we can look at. Built them in 2016.” (*Id.*) As the trial court found, “Blodgett recruited Tatum to develop” the Tax Credit Business in “early 2016.” (PTO8) The only reasonable reading of this exchange is that Tatum proposed using models he built for Fairstead in 2016.⁷ Tatum does not argue that the models belonged to anyone other than Fairstead (*see* AB41-42) and Fairstead’s Employee Handbook confirms that models Tatum built at Fairstead are Fairstead’s property (*e.g.*, AR0120-21, AR0148 §§IV.B, VIII.J(6)). Tatum’s attempt to create a sideshow on this point (AB42, Ex.1) should be ignored.

⁷ Tatum asserts these contentions are new on appeal (AB41), but Fairstead made them in its post-trial brief. (A1445-46; A1484)

Tatum’s effort to finely parse his contributions to the Model (AB40-41) illustrates why partners’ acts are imputed to one another. Whatever Tatum’s contribution, Blodgett undisputedly sent that Model to the Tisch Office in furtherance of their partnership. (PTO34) Tatum should not be permitted to disclaim that conduct, particularly when Tatum also met with the Tisch Office.

Good Faith Provision. In concluding that Tatum “act[ed] honestly and in good faith in its dealings with” Fairstead Affordable (A0132 §6.10(b); PTO79-81), the trial court failed to impute Blodgett’s conduct to Tatum and discounted the myriad instances of bad faith Tatum exhibited since 2020, including preparing a model sent to investors and meetings with investors. Tatum asserts that “those are preparatory steps the law protects” and that the Operating Agreement authorizes competition. (AB39-40) But neither protects an employee who secretly misappropriates the employer’s resources to compete with the employer. (See OB35)

Non-Solicitation Provision. The Answering Brief does not dispute that the trial court’s refusal to “blue pencil” the non-solicitation provision in the Employment Agreement was error under New York law. (OB42-43; see AB40-41) Tatum instead argues that “*Blodgett*—not Tatum—solicited Fairstead employees.” (AB40) But Blodgett’s conduct is imputed to Tatum.

Tatum also contends that the trial court “found Tatum solicited no one.” (AB40) The trial court never evaluated whether Tatum breached the non-solicitation provision; it erroneously dismissed that claim on the pleadings.⁸

⁸ *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006) is inapposite because plaintiffs had the opportunity to fully present their case at trial. (AB41) Fairstead’s claim was dismissed on the pleadings.

V. THE TRIAL COURT MISCALCULATED THE VALUE OF DEAL INTERESTS UNDER THE OPERATING AGREEMENT BY RENDERING ITS GUARANTY PROVISION MEANINGLESS

The trial court erred in calculating the Stabilized Deals' value to which Tatum was putatively entitled because it misconstrued the Operating Agreement's Guaranty Provision to exclude Feldman's and Goldberg's guarantees.

Under the Guaranty Provision, a "Deal" is only "Stabilized" if guarantees "provided by any Member of the Company have been released." (A0123) Those are the same guarantees that the Operating Agreement references where it requires JD2 "to ensure that its direct or indirect principals"—*i.e.*, Feldman and Goldberg—"shall provide such Deal Guarantees." (A0124-25 §3.2(b)) The trial court wrongly concluded that the Guaranty Provision did not "pick up that provision" (PTO52); Tatum incorrectly characterizes it as an "illusory requirement" (AB46). If that provision is ignored, then both it and the Guaranty Provision are "meaningless," contrary to standard canons of interpretation. *Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co.*, 166 A.3d 912, 916 (Del. 2017).

The only reason that Fairstead's deals existed at all is because of Feldman's and Goldberg's guarantees. Tatum acknowledged that because the Member entities were "passthrough LLCs with no balance sheet," it would have been a "fool's errand" to propose one as a guarantor because "there was no chance it would ever be accepted." (OB46 (quoting A1031 at 466:8-17)) Tatum is now reaping rewards

from deals which required those guarantees while pretending that those guarantees had to come from entities which could not have supplied them. The only way to honor the parties' intentions is to construe the Guaranty Provision to capture Feldman's and Goldberg's guarantees.

Tatum asserted that only after litigation commenced did he and his counsel give the Operating Agreement "a hard look" and putatively realize that Guarantees could only be given by Member entities. (A1030 at 462:1-14) Tatum now claims that his testimony is "mischaracterized" (AB46), but that's what Tatum testified. That is consistent with his pleadings recognizing that Feldman's and Goldberg's guarantees counted (A0753 ¶480). Those judicial admissions confirm his new theory does not reflect the parties' intent.

Similarly, Goldberg's observation that the Guaranty Provision "should have said affiliate or member" is not the silver bullet Tatum suggests. (AB44 (quoting A1208-09 at 983:22-984:3)) It only confirms the parties' intentions.⁹

Tatum has no plausible response. The trial court hypothesized that the pass-through entity Members *could* have given guarantees (PTO52; AB46-47), but that speculation is divorced from the "commercial context" that the Court should have looked to. *Chi. Bridge*, 166 A.3d at 926-27.

⁹ That intent is also confirmed by Tatum's admission that "Tatum, through his entity JCT Capital, was an original Member of Fairstead Affordable." (A1540)

None of Tatum’s cited evidence (AB44-45) supports a contrary conclusion:

1. Tatum claims “Goldberg testified that entities provide guarantees.” (AB45) Goldberg testified that the *purpose* of a guaranty was so the lender knew a “creditworthy entity or human being is on the hook.” (A1208 at 982:14-19) Here, the Member entities were “passthrough LLCs with no balance sheet,” *i.e.*, not creditworthy, and could not have given guarantees. (A1031 at 466:16-17)

2. Tatum cites no testimony that anyone considered capitalizing the Members so they could become guarantors:

(i) The “strategy document” (AB45 (citing B2170)) discussed “building a strong balance sheet for Fairstead Affordable” so that it might at some point “become the sole guarantor.” (B2170) But Fairstead Affordable is not a Member.

(ii) Tatum asserts Feldman and Goldberg “could have capitalized JD2 Affordable or FCM Affordable to serve as a guarantor” but “‘preferred ... to sign in lieu of ... capitalizing Fairstead Affordable’ (or its Members).” (AB46 (citing A1030-31 at 465:11-466:1)) That testimony refers only to Fairstead Affordable, not Members.

(iii) Tatum asserts his post-trial demonstrative “specifically identified examples of deals that had only entity guarantors,” but none of those entities are Members. (AB45; B0159)¹⁰

¹⁰ Tatum asserts he “received no distributions” (AB11); that’s wrong. The Operating Agreement requires applying distributions to “Unreturned Capital Contributions” (*i.e.*, Feldman’s advances) before paying out cash. (A0876; A1433)

VI. TATUM DID NOT ESTABLISH A BREACH OF THE GOOD FAITH PROVISION

A. Awarding Tatum Legal Fees As His Sole Contract Damages Was Error

Tatum asserts the trial court “exercise[d] its discretion to fashion a remedy” for breach of the Good Faith Provision “that includes attorneys’ fees.” (AB49) This Court has explained that there is “a distinct, narrow category of cases” in which fees are a “*component* of the plaintiff’s damages flowing from the conduct underlying the substantive claim.” *Ban v. Manheim*, 2026 WL 2452686, at *4 (Del. Aug. 21, 2026) (cited by Tatum at AB50) (emphasis added). Here, the remedy did not *include* fees; fees were the *only* remedy. Fees cannot be the sole damages awarded on a contract claim, both because that would moot the damage element of contract claims. (OB49-50) Tatum also failed to specifically plead that he sought fees for putative bad faith pre-litigation conduct as damages, as *Ban* requires.

Tatum asserts that if the Court affirms the prevailing-party fee award under the Employment Agreement, it need not reach this issue. (AB49) Not so: that provision is inapplicable here (*see* Part VIII.A *infra*). In any event, if the Court holds that attorneys’ fees cannot be Tatum’s sole damages, then Tatum does not prevail on this claim, which changes the “prevailing party” analysis.

B. The Trial Court’s Characterization Of Fairstead’s Termination Of Tatum As “Dishonest” Is Premised On An Erroneous Holding

Tatum asserts that the trial court made a “factual finding” that Fairstead manufactured a dishonest reason to terminate Tatum for cause. (AB48) Not so: that

court mischaracterized Fairstead's reasons as "dishonest" because it concluded (erroneously) that Fairstead failed to invoke those grounds at the proper time, even though that court found Fairstead had cause.

Tatum is wrong that the trial court's "breach finding was based on Feldman and Goldberg's dishonesty, not Fairstead's 'lowball' settlement offer." (AB49) That court used settlement negotiations against Fairstead, reasoning that the Good Faith Provision required Feldman and Goldberg to "promote the best interests of the partnership" (PTO62), and concluding that Fairstead's putatively "lowball" settlement offer "did not promote the best interests of Fairstead Affordable and its members." (PTO64) But merely offering settlement cannot be a breach of good faith. *Cf. Jones v. O. A. Newton & Son Co.*, 317 F. Supp. 705, 714 (D. Del. 1970). Tatum doesn't address that.

VII. THE TRIAL COURT ERRED IN AWARDING TATUM COMPENSATION FOR WORK COVERED BY HIS EMPLOYMENT AGREEMENT

A. Tatum’s Extra-Contractual Compensation Claims Were Untimely

Tatum’s compensation claims were untimely under 10 *Del. C.* §8111’s one-year bar.

Tatum does not dispute that he originally pled those claims as seeking “compensation” for services, that those were judicial admissions, and that the trial court refused to give those admissions effect based on extra-record suppositions about Fairstead’s putative “hypocrisy.” (OB54-55; *see* AB54-56) Tatum waived any contrary argument. *See Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999). Section 8111 therefore applies.

Tatum’s claims accrued no later than September 2021 when—as his Verified Complaint alleges—he understood that Fairstead would not provide him the compensation he demanded. (A0216 ¶¶284, 286) Seeking to avoid §8111’s time bar, he struck those allegations in his Verified Amended Complaint, but even that pleading establishes his claims accrued by June 2021. (A0418 ¶222-23) His claims brought in October 2022 (A0159) are untimely.

B. Extra-Contractual Compensation For The Legacy Portfolio Was Improper

The trial court’s interpretation of the Employment Agreement was not a “factual finding.” (AB52) That is a legal conclusion reviewed *de novo*.

Tatum does not dispute that (i) the Employment Agreement defined the scope of Tatum’s employment to include “all other work and services assigned to [him], including, but not limited to” work for “any and all company or companies owned by or related to the Firm or its direct or indirect principals” (A0108 §1(A)) and (ii) his Legacy Portfolio work was for Fairstead Capital Management, an affiliate of JD2. (OB52-54) The Employment Agreement describes JD2 as such. (A0108)

The trial court’s findings further confirm the Legacy Portfolio was related to Fairstead Affordable because its failed inspection “threatened Fairstead’s entire business.” (OB53) The Employment Agreement plainly covered Tatum’s Legacy Portfolio work and the trial court’s contrary construction (PTO67) was incorrect.

Tatum asserts that Fairstead “insists (without citation) that Tatum’s salary and bonus fully compensated him for work on the Legacy Portfolio.” (AB53) But that follows from the fact that the Employment Agreement covered any Legacy Portfolio work. Tatum’s record citations to the contrary—which he asserts “document[] the parties’ agreement” (AB53)—are just his own emails making demands. (B2149; B2153)

Chrysler Corp. (Del.) v. Chaplake Holdings, Ltd., 822 A.2d 1024 (Del. 2003) (AB54) is inapposite. That case affirmed a promissory estoppel award where existing contracts “govern[ed] *other* aspects of the business relationship” and the at-issue “promise[]” was “in addition to the existing relationship.” 822 A.2d at 1033-

34 (emphasis added). Not so here, where the Employment Agreement covers the disputed work.

C. Extra-Contractual Compensation For The Hampstead Portfolio Was Improper

Tatum’s Employment Agreement covers his Hampstead Portfolio work (see A0108 §1(A)) and precludes awarding additional compensation for that work. Tatum asserts Fairstead did not raise this point below (AB52); that’s wrong. (A0556; A0884)

Tatum asserts that he received an interest in the Hampstead Portfolio through his interest in Fairstead Affordable (AB51), but Fairstead’s retention of that interest was not unjust. (OB54)¹¹ The trial court found that Tatum knew an equity restructuring of Fairstead Affordable, which would have accounted for any Hampstead Portfolio interest, “would not happen until 2021.” (PTO63, 68) That restructuring “never happened” because of Tatum’s actions. (*Id.*) It is not unjust for Fairstead to retain that interest when Tatum “preempted” the restructuring. (PTO63)

¹¹ Tatum asserts “Fairstead does not challenge” (AB52) the trial court’s unjust enrichment holding, but Fairstead expressly challenged it. (OB54)

VIII. THE TRIAL COURT ERRED IN AWARDING FEES TO TATUM

A. Tatum Is Not Entitled To Fee-Shifting Under The Employment Agreement

1. Tatum sued under the Operating Agreement, not the Employment Agreement. That alone warrants vacating the fee award. *Bull Hill, LLC v. HFZ Member RB Portfolio LLC*, 2024 WL 4202664, at *1 (N.Y. Sup. Ct. Sept. 16, 2024) (ORDER). (OB56-57) Tatum’s assertion that he lacked “meaningful rights” under the Employment Agreement (AB58 (quoting OB.Ex.B ¶3c)) cannot entitle him to a fee award, particularly where the trial court held he breached that Agreement. (PTO74-75) Nor can Tatum distinguish *Bull Hill*: he suggests that its facts differed (AB60 n.20) but he cannot explain why those differences matter (they do not).

2. If Fairstead is entitled to judgment on any claim, Tatum’s fee award must be vacated and the trial court must reconsider who is the “prevailing party.” (OB56)

B. The Fee Award For Tatum’s Spouse Should Be Vacated

Fairstead does not seek a “categorical” bar (AB61) on attorney-spouse fees. But no court should award \$2 million where there were no contemporaneous time records *and* no fee arrangement *and* the spouse agreed to “work pro bono.” (A1729) No case Tatum cites (AB62) made a comparable award. *See Schwartz v. Chan*, 142 F. Supp. 2d 325, 330-32 (E.D.N.Y. 2001) (\$4,375 for about 25 hours); *Riordan v. Nationwide Mut. Fire Ins. Co.*, 977 F.2d 47, 51, 53 (2d Cir. 1992) (\$174,652);

Rickley v. County of Los Angeles, 2011 WL 13201909, at *5 (C.D. Cal. Dec. 14, 2011) (\$57,090 for 276.8 hours). This award is an unjustifiable windfall for the Tatums.

Fairstead's bills in another matter—based on contemporaneous records—are inapposite. (AB62 n.21) Tatum's own authority remarks that fee awards are not calculated "according to the fees an adversary pays his own attorney." *Schwartz*, 142 F. Supp. 2d at 332.

CONCLUSION

The Court should enter the judgment requested by Fairstead. (OB59-60)

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