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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE CARING PEOPLE CONSOL. LITIG.	No. 264, 2026 No. 268, 2026 Case Below: Court of Chancery of the State of Delaware, C.A. No. 2024-0125-DH

CORRECTED REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL OF APPELLANT/CROSS-APPELLEE JENNIFER DEVINE

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INTRODUCTION[1]

The judgment below should be reversed insofar as it enforced the Devine IUA. First, the trial court held that zero-value incentive units supplied adequate consideration without measuring their value or weighing their adequacy in the balance of equities. Second, it compounded that error by blue-penciling the Devine IUA's non-solicitation clause—after acknowledging that the considerations for blue-penciling were "much less convincing" as to Devine—to salvage a sub-provision that is not independently reasonable. Third, after rejecting Plaintiffs' damages model as an "unsupported windfall," the court substituted its own discounts and allocation untethered to any evidence in the record. And fourth, it reimposed a fresh two-year covenant without conducting the equitable analysis Delaware law requires. Plaintiffs' Answering and Opening Brief (the "Answering Brief") confirms rather than cures the errors below.

On consideration, Plaintiffs concede that this Court distinguishes between consideration at formation and consideration as it informs the balance of equities. Yet the trial court performed neither inquiry, and the developed trial record shows Devine's units were worth zero dollars when she signed, mostly forfeited upon her

[1] All terms not otherwise defined herein shall have the meanings ascribed to them in Appellant/Cross-Appellee Devine's Opening Brief, dated August 17, 2026 ("OB"). D.I. 11. Citations to "AB __" refer to Appellee and Cross-Appellants Caring People Answering and Opening Brief, dated September 16, 2026. D.I. 18.

departure, and payable only upon an improbable sale. Plaintiffs, however, ask this Court to hold, for the first time, that incentive units always suffice as adequate consideration regardless of their actual worth. Plaintiffs' fallback, that Devine "waived" the balance-of-equities argument, ignores that Devine invoked every factor and tied the inadequacy of consideration to reasonableness below.

On enforceability, Plaintiffs recharacterize the trial court's treatment of Section 19 as "not blue-penciling"—a semantic relabeling that ignores the court's own finding that the second part of the clause was "salvable" and offers no authority for severing an employee's overbroad covenant in order to enforce it. Nor is Section 19(b)(ii) independently reasonable: it contains no geographic limitation, reaches a boundless and unknowable universe of "business relation[s]," and, by Plaintiffs' own CEO's admission, would bar Devine from working in states where Caring People does no business. Plaintiffs never asked the trial court to narrow the clause, instead standing on the Devine IUA as written without citing any authority, which is precisely the "no-lose" scenario Delaware courts seek to prohibit.

On damages, Plaintiffs invoke the "reasonable estimate" doctrine, but the trial court rejected their expert's model and then halved New York lost profits and allocated 25% to Devine without tying either figure to any witness testimony, party proposal, or causal analysis. Plaintiffs' new argument that industry benchmark data accounts for other causes cannot isolate the effect of Devine's contacts with two

referral sources from the sales-force exodus, the Amsterdam bankruptcy, and the other disruptions Caring People's own investor reports identified.

On reinstatement, Plaintiffs argue Caring People never received the benefit of its bargain, but the covenant enforced is not the one Plaintiffs drafted or sought to enforce, and the trial court never conducted a Devine-specific equitable analysis before imposing a fresh two-year restraint more than three years after she left.

At every turn, Plaintiffs urge this Court to affirm through analytical shortcuts that Delaware law does not support, while offering little authority for their broad and imprecise arguments. Reversal is respectfully warranted.

On the cross-appeal, the trial court properly exercised its discretion in granting the Motion for Clarification. The Opinion halved New York lost profits to account for causes unrelated to Defendants and confined damages to a defined period, but the original $4.304 million figure applied only the time limitation. The corrected $2.152 million award simply gives effect to the 50% reduction the court had already ordered. Unless otherwise deemed moot for the reasons raised by Devine on appeal, this Court should reject Plaintiffs' interpretation and affirm on this issue.

SUMMARY OF ARGUMENT ON CROSS-APPEAL

1. Denied. Granting the Motion for Clarification was a proper exercise of the trial court's discretion. The Opinion limited recoverable lost profits in two distinct ways: it confined damages to a defined period, and it halved New York lost profits to account for causes of loss unrelated to Defendants. Although the $4.304 million figure in the original Opinion reflected the time limitation, it failed to apply the 50% reduction the court had expressly ordered. The corrected $2.152 million award simply gives effect to both limitations, as the Opinion itself requires.

REPLY ARGUMENT ON APPEAL

I. THE TRIAL COURT ERRED IN HOLDING THAT THE ZERO-VALUE INCENTIVE UNITS ISSUED TO DEVINE SUPPLIED ADEQUATE CONSIDERATION.

A. The Trial Court Was Required to Analyze the Value of the Consideration.

Plaintiffs contend that the trial court properly held consideration for Devine's IUA was adequate. AB at 25–26. But Plaintiffs themselves acknowledge that Delaware distinguishes between two inquiries: (1) "whether consideration was exchanged such that a contract was formed," and (2) whether "consideration informs the balance of equities as the court assesses the reasonableness of the restrictive covenants." *Payscale Inc. v. Norman*, 361 A.3d 886, 893 (Del. 2026); AB at 28. The trial court performed neither inquiry as to Devine. It did not assess whether Devine's zero-value units constituted consideration at formation, and it did not weigh the adequacy of consideration in the equities balance.

Plaintiffs argue that the use of "may" in the phrase "incentive units may be adequate consideration"—the trial court's description of the holding in *North American Fire Ultimate Holdings LP v. Doorley,* 2026 WL 274647 (Del. Feb. 3, 2026) (Op. at 64)—"appears nowhere in that opinion." AB at 26. The precise articulation is irrelevant because *North American Fire* reinforced that consideration

must be "measured." 2026 WL 274647, at *3. In writing off Devine's argument as a "non-starter," the trial court assumed value without measuring the consideration.

North American Fire did not excuse the trial court from evaluating adequacy. Unlike the present matter, *North American Fire* examined units whose value at formation was undisputed. *Id.* at *2, n.11. This Court held incentive units can suffice as adequate consideration in the right circumstances even if the "value is somewhat contingent based on certain factors such as the time period in which the units will vest and the former employee's likelihood of future employment." *Id.* at *3 (citation modified). Nothing in the decision, however, makes them sufficient *regardless* of their actual worth. *See id.* at *2, n.11 ("Neither party disputes that adequate consideration was exchanged at formation and a valid contract existed at that point in time."); *compare with id.* at *3, n.18 (distinguishing cases where "no benefit was received at the time of formation"). Devine has consistently maintained that she received "no benefit" because the incentive units are valueless, not just because they are "somewhat contingent." A155-A158, A1769-A1770; OB at 17-21. The trial court improperly treated the mere presence of possible consideration as if it answered the separate issue of value. Op. at 64.

Plaintiffs emphasize that "contingent rights have value" under *Addy v. Short*, 89 A.2d 136, 140 (Del. 1952), and that the trial record included testimony showing incentive units can carry "very significant value." AB at 27–28. Plaintiffs rely on

self-serving and unverified trial testimony that incentive unitholders in a "comparable Silver Oak deal" made "$20 million plus." AB at 27. Even if true, that testimony concerned a different transaction with a different company. It does not establish the value of Devine's units in this company, at this stage, with this capital structure. Plaintiffs cannot dispute that, when Devine signed the IUA, the 160,000 incentive units she received—40,000 Class B units and 120,000 Class C units—were worth zero dollars. A465 (165:8–23).

Contingent value also presupposes that the contingency has a reasonable prospect of occurring. The unrebutted trial record establishes otherwise: Caring People's CFO testified that the exit value required for Devine to receive anything was "very complicated" to calculate and an improbably high number. A1031–32 (731:14–732:6). Of the 160,000 units issued, 120,000 (75%) were forfeited immediately upon departure. A1948 (Section 3). No witness testified that the remaining Class B units held value at the time the Devine IUA was executed or hold present value, confirming they were illusory.

The trial court was correct in noting incentive units "*may be* adequate consideration." Op. at 64. But Plaintiffs ask this Court to go one step further and hold for the first time that incentive units *always* satisfy consideration regardless of whether they hold any real value. Such a holding would require this Court to either

ignore or reverse its months-old decision in *North American Fire* and years of precedent requiring "that consideration must be measured."

Payscale confirms that adequacy matters to enforceability. 361 A.3d at 893-94. There, this Court identified two functions of consideration: determining whether a contract was formed, and informing the equitable balancing that governs reasonableness. *Id.* Reviewing a pleadings-stage dismissal of a non-compete claim, this Court held the record too thin to deem the consideration "vanishingly small" and reversed. *Id.* at 889. Critically, this Court limited that ruling to whether a "reasonably conceivable claim" was stated, cautioning that the "balancing may shift on a more-developed record." *Id.* at 894-95.

The trial record here is precisely the developed record *Payscale* contemplated, and it called for weighing adequacy in the equities. It is undisputed that Devine's 160,000 units (40,000 Class B and 120,000 Class C) had *zero* value when she signed. A465 (165:8-23). Any payout was improbable, A1031-32 (731:14-732:6), and no witness said otherwise. All 120,000 Class C units, the majority of the incentive unites, were forfeited the moment she left Caring People. A1948 (Section 3). If *North American Fire* and *Payscale* establish that incentive units *can* be consideration, it follows that units worth nothing *cannot*. Units valued at zero at signing, mostly forfeited, and payable only upon an improbable lucrative sale are illusory and are not "valuable consideration." This is true whether the court was

asked to weigh the sufficiency of the consideration to form a valid contract or to balance the equities.

The trial court never assessed whether the Devine IUA was supported by consideration of any value or adequacy. Its opinion dispatched the issue in one paragraph, reasoning that *North American Fire* "reinforced that incentive units may be adequate consideration for a restrictive covenant" and labeling Devine's position "a nonstarter." Op. at 64. With a full trial record before it, the trial court had to make factual findings on whether consideration supported the Devine IUA and, if so, how its adequacy bore on the covenant's reasonableness. *See Payscale*, 361 A.3d at 894. The court made no such findings and enforced the Devine IUA anyway. By ignoring the difference between units with potential value and units that were worthless and disproportionate when granted, the court misapprehended the law, and reversal is required.

B. Devine Did Not Waive the Balance-of-Equities Argument.

Plaintiffs' waiver argument rests on the claim that Devine "put all of her focus on the adequacy of consideration at contract formation" and "did not advance" a balance-of-equities argument tied to the value of consideration. AB at 31–32. The record does not support this characterization.

Devine's Pre-Trial Brief expressly invoked all three factors required to be examined under Delaware law: (i) geographic and temporal reasonableness, (ii)

legitimate economic interest, and (iii) balance of equities. A155–A159. Under the equities prong, Devine argued she "was a devoted employee," "would never encourage any referral source to redirect, cease, or decrease their business from Caring People," and that the equities weighed in her favor. A158–59. In the same brief, Devine argued the IUA "lacks consideration" and that the units held "zero value." A155–56. Read together, as they must be, these arguments fairly presented the position that zero-value consideration, combined with overbreadth and the equities, rendered the IUA unenforceable.

Devine also argued the incentive units were insufficient consideration at trial. Upon the conclusion of the testimony, Devine's counsel stated that the IUA was unreasonable "in this context, where Ms. Devine lost 75 percent of the alleged consideration she received." A1599 (1299:20-22). This language explicitly links the inadequacy of consideration to the reasonableness analysis, the very argument Plaintiffs claim was never raised.

Even if this Court finds the argument imperfectly preserved, the interests of justice support reaching the merits. *See* Del. Supr. Ct. R. 8; *see also North American Fire*, 2026 WL 274647 at *3 n.10 ("its consistent objections to the 'broader issue' (i.e., whether the Agreement was supported by consideration) sufficiently preserved the 'precise argument' it makes on appeal—consideration is evaluated at formation"). The *Payscale* framework clarifying the formation/equities distinction

was decided on March 19, 2026 which was after trial (January 20–23, 2026), after post-trial briefs (February 20, 2026), and after the Memorandum Opinion was issued (March 10, 2026). The question is purely legal, can be resolved on the existing record, and the underlying factual record on value is unrebutted. In addition, this Court has repeatedly recognized that restraints on employees to engage in their chosen livelihood, "give[s] rise to the strong policy interest that justifies the review of unambiguous contract provisions for reasonableness and a balancing of the equities, two exercises typically foreign to judicial review in contract actions." *Sunder Energy, LLC v. Jackson*, 332 A.3d 472, 487 (Del. 2024) (quoting *Cantor Fitzgerald, L.P. v. Ainslie*, 312 A.3d 674 (Del. 2024)).[2] Declining to reach the merits on a technical waiver ground would leave the trial court's single-paragraph dismissal of Devine's consideration argument—which this Court's own precedent requires—uncorrected.

If any party waived the right to argue reasonableness, economic interest, and a balance of equities it was Plaintiffs. Plaintiffs did not even attempt to argue the analysis at the trial level despite having the burden. They offered no analysis in their

[2] Plaintiffs reliance on *Cox Commc'ns, Inc. v. T-Mobile US, Inc.*, 273 A.3d 752 (Del. 2022) and *Moscowitz v. Theory Ent. LLC*, 2020 WL 6304899 (Del. Ch. Oct. 28, 2020) is misplaced. AB at 28. Neither matter involved a non-compete agreement. S*ee Cox Commc'ns, Inc.* 273 A.3d at 756 (interpreted consideration in the context of a settlement agreement); *Moscowitz,* 2020 WL 6304899, at *1 (interpreted enforceability of an award agreement and involved a plaintiff who was a "former attorney and sophisticated businessman").

pretrial or post trial briefs why the trial court, and ultimately this Court, should find the Devine IUA enforceable. *See* A119-20 (165/13,264 words); A1736-37 (359/13,912 words). Plaintiffs did not so much as cite a single case in support of their position when claiming the Devine IUA "is enforceable under Delaware law." A1737.

Plaintiffs continue their unsupported claims that the Devine IUA is enforceable by making sweeping conclusions:

> [E]ven if the adequacy of the consideration was considered, and even putting aside the trial court's factual findings regarding Devine's pervasive misconduct, the record supports that the consideration is adequate in a balancing of the equities at the time of enforcement for the reasons explained above, among others, that the units have the potential for significant value and Devine retains a significant portion of those units.

AB at 32. Just as at the trial level, Plaintiffs offer no authority to support their broad claim that the Devine IUA should be enforced because they cannot. This Court made clear: "Delaware courts ***rarely*** enforce such broad restrictions against employees." *Payscale*, 361 A.3d at 887. At a minimum, some analysis (or even a citation to any authority) was warranted to explain why a restrictive covenant of a former employee with zero bargaining power was reasonable.[3]

[3] If any former employee deserves to have their restrictive covenant reviewed, it is Devine who testified that she left Caring People to spend more time with her children. Op. at 31. At trial, she made clear that the significant cost and burden of defending this action has taken a toll on her and her family. A1266 (966:14-967:8).

II. THE TRIAL COURT ERRED BY ENFORCING AND BLUE-PENCILING A PORTION OF THE NON-SOLICITATION CLAUSE OF THE DEVINE INCENTIVE UNITS AGREEMENT.

A. Section 19(b)(ii) Is Not Independently Reasonable.

Plaintiffs argue that Section 19(b)(ii) is inherently reasonable because its two-year duration is "routinely" upheld and its geographic scope is implicitly limited to the six states where Caring People operates. AB at 37–38 (citing *Weichert Co. of Pa. v. Young*, 2007 WL 4372823, at *3).

Plaintiffs' reliance on *Weichert* is misplaced. There, the court upheld a two-year non-solicitation covenant of a manager of a real estate business with a defined geographic scope tied to the market area, specifically the very office the manager worked out of, and involving an employee who had negotiated the agreement. 2007 WL 4372823, at *3–4. In return, the manager received "$10,000 [annual] bonus, $7,341.39 in severance pay, $4,500 for a recruiting bonus, and $7,692.32 for three weeks' salary and two weeks' vacation." *Id.* at *1.

Here, Section 19(b)(ii) contains no geographic limitation on its face. It bars Devine from encouraging "any customer, supplier, referral source, licensee, licensor, consultant or other business relation of a CP Company during the Restriction Period to cease doing or materially reduce its business with a CP Company." A1952. Plaintiffs' argument that the scope is implicitly limited to six states because Caring People's "business relations" can only exist where Caring People operates is belied

by their own CEO's testimony. He acknowledged that Caring People's referral sources are "infinite" and "constantly changing" (A632–33 (332:20–333:9); A641 (341:15–18)), and that the IUA as written would prohibit Devine from working in California—a state where Caring People has no business. A642–43 (342:16–343:10).

Plaintiffs admit that Section 19(b)(ii) covers at least six states where Caring People does business (AB 37). Those states include Connecticut, Florida, Massachusetts, New Jersey, New York, and Texas. Op. at 51. Devine never worked in five of them, and in the sixth she worked for a submarket, not the entire state. Op. at 5. Plaintiffs try to frame this as a set geographic scope (AB at 37), but fail to recognize how easily it could be expanded and changed. Plaintiffs' CEO conceded the IUA would bar Devine from working across the country despite Caring People having no business there. A642-43 (342:16-343:10). A geographic restriction capable of such expansion is "unworkable" and "facially unenforceable." *Weil Holdings II, LLC v. Alexander*, 2025 WL 689191, at *6 (Del. Ch. Mar. 4, 2025). The cases are not analogous.

Plaintiffs also quote *All Pro Maids, Inc. v. Layton,* 2004 WL 1878784 (Del. Ch. Aug. 9, 2004), for the proposition that an employer "has an interest in the goodwill created by its sales representatives." AB at 38. But *All Pro Maids* reached its conclusion only after an express, fact-specific balancing on a record bearing no

resemblance to this one. The covenant there lasted one year and was limited to "an area defined by specific zip codes where the majority of [ ] clients are located." *All Pro Maids,* 2004 WL 1878784, at *5. Further, the defendants "conceded that if the covenant not to compete is valid, it is reasonable as to time and geography." *Id.* The Devine IUA was already deemed to be unreasonable as to time and geography, and the limited provision enforced included multiple states of which she had no involvement with. Op. at 64.

Section 19(b)(ii) sweeps in a boundless and unknowable group by reaching "*any* customer, supplier, referral source, licensee, licensor, consultant or other business relation of a CP Company during the Restriction Period." A1952. Plaintiffs further argue that Devine "knows exactly what referral sources and customers her covenant protects." AB at 38. This is in direct contradiction to the trial testimony of Plaintiffs' own CEO who acknowledged there is no way Devine could "know who or what business is referring to Caring People at any given time." A641 (341:15-18). Plaintiffs did not distinguish, because they cannot, the unequivocal holding in *Centurion Service Group, LLC v. Wilensky* that an employee's relationships, deal-sourcing ability, and access to buyers, sellers, and vendors were "vague and everyday concerns" that did not show a "particularly strong economic interest." 2023 WL 5624156, at *5 (Del. Ch. Aug. 31, 2023).

Finally, the equities favor Devine. She was a loyal employee who regarded Caring People as her "firstborn." A1230. She worked only in Long Island, though the company operated in six states. Op. at 5. She had no hand in negotiating the covenant, no counsel to review it, and no controlling or ownership stake. A1244-45 (944:7-945:3). And Plaintiffs, despite bearing the burden, offered neither argument nor authority for enforcement. A120; A1737.

Plaintiffs further claim Devine "waived" her arguments on factors (ii) and (iii) on temporal and geographic scope because her post-trial brief only addressed temporal and geographic overbreadth. AB at 36. This is factually incorrect. Devine's Pre-Trial Brief, which is expressly incorporated by reference into the Post-Trial Brief (A1765), argued that the covenant "does not advance a legitimate economic interest" because it included "vague and undefined terms" (A157–58) and that "the balancing of equities weigh[s] in favor of Ms. Devine" (A158–59). Plaintiffs acknowledge this briefing in their earlier argument on consideration (AB at 31), then inexplicably claim Devine did not raise factors (ii) and (iii) two pages later as to the enforceability of the Devine IUA (AB at 36).

B. The Trial Court's Severance of the Devine IUA Constitutes Blue-Penciling.

Plaintiffs' central response to Devine's enforceability argument is that the trial court "did not blue pencil the Devine IUA." AB at 40. They contend that Section 19(b) contains "subsections (a) and (b), further divided into provisions (i) and (ii)"

and that the trial court merely "found Section 19(b)(ii) distinct and enforceable." AB at 40–41. Plaintiffs are wrong. "[B]lue-penciling refers to the practice of modifying, narrowing, or deleting an unenforceable contract or contractual provision *so that the remainder of the agreement is enforceable*. It is often used by courts adjudicating challenges to restrictive covenants." *Newark Shopping Center Owner, L.L.C. v. Saudades Group, LLC*, 2025 WL 655063, at *10 n.119 (Del. Super. Ct. Feb. 26, 2025) (citation omitted).

This characterization cannot be reconciled with the Opinion itself. The trial court found the "first part" of Section 19(b) "far too broad" and expressly stated that "the considerations for blue penciling it are much less convincing given Devine's position in the transaction." Op. at 64. The court then declared "the second part is separate and salvable." Op. at 64–65. The word "salvable" is telling: one does not "salvage" a provision that needs no saving. The trial court was engaging in precisely the kind of equitable analysis that precedes a blue-penciling decision. *Id.* Having found the equitable factors wanting, it proceeded to enforce a narrower provision anyway without explaining why the same factors that counseled against salvaging Section 19(b)(i) somehow supported salvaging Section 19(b)(ii).

Whether the court's action is labeled "blue-penciling," "severability," or "selective enforcement," Delaware law requires the same individualized equitable analysis before enforcing any restrictive covenant against any party. *Sunder Energy,*

LLC v. Jackson, 332 A.3d 472, 485–86 (Del. 2024). The trial court conducted an extensive equitable analysis spanning multiple pages for East—examining equal bargaining power, specific negotiation, valuable consideration, representation by counsel, and the sale-of-business context. Op. at 52–55. That analysis was conspicuously absent for Devine. Instead, the court devoted two sentences: the provision is "separate and salvable" and "I find this provision enforceable." Op. at 64–65. No analysis of bargaining power (Devine had none). A1244-45 (944:7-945:3). No analysis of consideration (the units were worth zero dollars). A465 (165:8-23). No analysis of counsel representation (Devine had none). A1244-45 (944:24-945:3). No analysis of the employment context (Devine was an employee, not a seller). Op. at 5. The disparity speaks for itself.

The trial court did not cite the severability clause in the Devine IUA and Plaintiffs did not direct the court to one. In any event, "an employee's promise not to challenge the reasonableness of his restrictive covenants cannot circumvent this Court's mandate to review those covenants for reasonableness." *Cleveland Integrity Services, LLC v. Byers*, 2025 WL 658369, at *9 (Del. Ch. Feb. 28, 2025) (citing *Kodiak Bldgs. P'rs, LLC v. Adams*, 2022 WL 5240507, at *6 (Del. Ch. Oct. 6, 2022)); *see also Hub Group, Inc. v. Knoll*, 2024 WL 3453863, at *12 n.123 (Del. Ch. July 18, 2024) (citing *Kodiak*, 2022 WL 5240507, at *5). Plaintiffs have not offered one

example where the court has severed an employee's overbroad and unreasonable restrictive covenant in order to enforce it.

C. The Sua Sponte Nature of the Enforcement Compounds the Error.

Plaintiffs elected to stand on the enforceability of the Devine IUA as written. In their Pre-Trial Brief, Plaintiffs argued that "[t]he Devine IUA is a valid and enforceable contract." A119–20. In their Post-Trial Brief, Plaintiffs reiterated that "[t]he [Devine] IUA is enforceable under Delaware law" and that the "geographic scope [was] reasonable." A1736–37. Notably, Plaintiffs cited no authority and provided no legal analysis in support of this position, spending a total of 359 words out of 13,912 on the enforceability of Devine's agreements. At no point did Plaintiffs request that the trial court narrow, reform, or blue-pencil the Non-Solicitation Clause of the Devine IUA.

Where the enforcing party elects not to seek blue penciling and instead staking its case on enforceability as drafted, the trial court's decision to reform the covenant on its own initiative raises the precise concern this Court identified in *Sunder Energy*: "the law should not create a 'no-lose' scenario in which employers receive the benefits of an overbroad covenant and, on those occasions when enforceability is challenged, gain the benefit of a lawful restriction through blue-penciling." 332 A.3d at 486.

Plaintiffs respond that the Amended Complaint alleged conduct falling under the "ceasing to do business with, or materially reducing their business with, the CP Companies" language. AB at 41. But pleading a breach of the Devine IUA generally is not the same as requesting enforcement of a specific sub-provision after the broader provision has been found overbroad. Plaintiffs' complaint asserted the IUA in its entirety. Their briefing asserted the IUA was enforceable as written. Having taken that position, they should be held to it.

The trial court articulated the right standard and twice acknowledged that the equities supporting blue-penciling were missing as to Devine, but then rewrote the very clause it had deemed overbroad. Op. at 64-65. That contradiction is an abuse of discretion requiring reversal.

Delaware courts ordinarily strike unreasonable restrictive covenants rather than rewrite them. *See, e.g.*, *Sunder Energy LLC,* 332 A.3d at 490 (no duty to blue-pencil where "the terms of the [c]ovenants are exceptionally broad, and no apparent effort was made to tailor the provisions to [the Company's] legitimate interests"); *Cleveland Integrity Services, LLC*, 2025 WL 658369 at *8 (declining to blue pencil an overbroad two-year noncompete given its "systemic costs"); *Delaware Elevator Inc. v. Williams*, 2011 WL 1005181, at *11 (Del. Ch. Mar. 16, 2011) (unreasonable covenant should be struck "in its entirety"). The inquiry turns not on the employee's

conduct but "on the covenants themselves and the circumstances surrounding their adoption." *Sunder Energy LLC*, 332 A.3d at 490.

Having found the first half of the clause overbroad, the trial court observed that "the considerations for blue penciling it are much less convincing given Devine's position in the transaction." Op. at 64. It likewise refused to blue pencil the BPA as to Devine, finding "no basis under New York law that would allow blue penciling." Op. at 62. And it recognized that a court reviewing an "uneven agreement" is not bound by a clause encouraging blue-penciling, because an employee's promise not to contest reasonableness "cannot circumvent this Court's mandate to review those covenants for reasonableness." Op. at 54 (quoting *Cleveland Integrity Services, LLC*, 2025 WL 658369 at *9).

That reasoning applies squarely to an IUA Devine never negotiated. Devine did not negotiate the covenant and signed it on East's advice, without counsel, while on vacation. A1244-45 (944:7-945:3). She received no valuable consideration, as she has consistently argued. *See* OB at 17-21. And she played no part in the sale of Caring People and held no controlling or ownership interest. *See* A1876-937. Yet the court, in two brief sentences, declared the "second part [of Section 19] is separate and salvable" and "this provision enforceable." Op. at 64-65. Reforming the covenant without even acknowledging it was exercising discretion contradicts the court's own statement of the law and misapprehends the governing standard.

Plaintiffs offered no authority below for enforcing only the reasonable parts of the Devine IUA. A120; A1737. If Caring People itself saw no need for reformation and stood on the clause as drafted, the court's unprompted rewrite cannot be squared with the rule that blue-penciling is to be used sparingly. The Court should reverse the unprompted blue-penciling of Section 19.

III. THE DAMAGES AWARD AGAINST DEVINE RESTS ON LEGAL AND FACTUAL ERROR.

Plaintiffs invoke the "reasonable estimate" framework, arguing that "[t]he law does not require certainty in the award of damages where a wrong has been proven and injury established." AB at 50 (quoting *Red Sail Easter Ltd. Partners, L.P. v. Radio City Music Hall Prods., Inc.*, 1992 WL 251380, at *7 (Del. Ch. Sept. 29, 1992)). Devine does not dispute that Delaware law permits reasonable estimates. The issue is whether the trial court's estimate was "responsible" and it was not.

The trial court correctly rejected Plaintiffs' full $12.4 million damages model as an "unsupported windfall." Op. at 75. It found that Thompson attributed all revenue decline in New York and New Jersey solely to East and Devine, failed to account for Amsterdam's bankruptcy, departing employees who joined competitors, cancelled staffing contracts, and the company's own investor reports attributing decline to "turnover with the sales team," "loss of sales representatives," and "wage pressure and overall tight labor market[s]." Op. at 74. Thompson conceded that if liability was established only for a "handful of clients," his $12.4 million figure was "inappropriate" and the amount of damages would be up to the trial court. A1518 (1218:7–12); A1520 (1220:10–16).

Having rejected the model, the trial court adopted its own figure by halving New York lost profits and allocating 25% to Devine without tying either reduction to any witness testimony, party proposal, or causal analysis in the record. The 50%

haircut "accounts for the non-negligible level of other disruption to the business." Op. at 75, n.354. The 25% allocation reflects Devine's "limited liability under the sole provision that binds her." Op. at 75–76. Neither is a methodology. Both are conclusory judicial estimates that cannot be traced to any evidence.

An arbitrary and capricious award of damages that is not supported by the evidence must be reversed. *SIGA Technologies, Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1130 (Del. 2015). The court, "when acting as the fact finder, may not set damages based on mere speculation or conjecture where a plaintiff fails to adequately prove damages." *Sorrento Therapeutics, Inc. v. Mack*, 2025 WL 2172268, at *7 (Del. Ch. July 31, 2025) (cleaned up).

Plaintiffs raise a new argument on appeal: that "the CMS data Thompson used already accounts for patient morbidity, facility closures, patients choosing other providers, and other profit-decline factors." AB at 53. Even accepting this premise, industry-wide benchmark data cannot isolate the causal contribution of Devine's specific conduct—contacting two referral sources in Long Island—from the broader New York revenue decline attributable to the mass departure of Caring People's sales force from 57 to 18 in one year (Op. at 37), the Amsterdam's bankruptcy and move-in freeze (Op. at 74, n.349), cancelled staffing contracts, and Caring People's own acknowledgment that it devoted "little to no effort" to Devine's former accounts (Op. at 36–37).

Plaintiffs contend the 75/25 allocation is warranted because East played an "oversized role." AB at 53–54. But "oversized role" is a characterization, not a methodology. The trial court offered no analysis of what portion of Plaintiffs' lost revenue is attributable to Devine's contacts with Amsterdam and the Residences versus East's orchestration of the entire competitive enterprise — including violations of five covenants across the PCA, Holdco Agreement, and East IUA, plus tortious interference.

Plaintiffs argue that "uncertainties in awarding damages are generally resolved against the wrongdoer" under *Metro Storage Int'l LLC v. Harron*, 275 A.3d 810, 859–60 (Del. Ch. 2022). AB at 55. That principle presupposes that the plaintiff has first proven damages and that the only remaining question is precision. It does not relieve the plaintiff of its burden to prove that the defendant caused the damages in the first instance. Here, the trial court itself found that Caring People's revenue decline "cannot be solely contributed to the Defendants" (Op. at 75), yet allocated 25% of an already-discounted figure to Devine without any basis for isolating her individual causal contribution.

IV. THE TWO-YEAR REINSTATEMENT OF THE RESTRICTIVE COVENANT SHOULD BE VACATED.

Plaintiffs argue Devine "began breaching her restrictive covenant nearly as soon as she left Caring People" and therefore "never obtained the benefit of its bargain." AB at 42–43. This argument fails for two independent reasons.

First, the premise is wrong. The covenant enforced against Devine is not the covenant Plaintiffs drafted or sought to enforce. As demonstrated above, the trial court found the first half of Section 19(b) overbroad and enforced only the narrower second half—a provision that differs materially in scope from what Plaintiffs bargained for and what Plaintiffs argued at trial. Reinstating "the full two years" of a judicially narrowed covenant gives Plaintiffs more than the benefit of their bargain.

Second, the equities required a Devine-specific analysis that was never conducted. Reinstatement of a restrictive covenant is an equitable remedy subject to the same three-factor framework that governs initial enforcement. *Sunder Energy LLC*, 332 A.3d at 485. Imposing a fresh two-year restraint in 2026 on a former employee who left in June 2023, whose alleged consideration was zero-value units, whose majority units were forfeited, and whose breach was limited to contacts with two referral sources is disproportionate and unreasonable. This is particularly so where Plaintiffs spent less than 2% of their briefing arguing that Devine's IUA was enforceable and citing no authority. *See* A119–20 (165/13,264 words); A1736–37 (359/13,912 words).

The reinstatement should be vacated with the liability judgment. If any enforceable covenant survives, the injunction should at least be remanded for an analysis specifically addressing the narrowed covenant, the absence of negotiated consideration, the elapsed time since Devine's departure, the actual scope of proven breach, and the hardship imposed by a fresh two-year restraint. *See Sunder Energy LLC*, 332 A.3d at 485–86.

ANSWERING ARGUMENT ON CROSS-APPEAL

I. THE TRIAL COURT PROPERLY GRANTED THE MOTION FOR CLARIFICATION.

A. Question Presented

Whether the trial court abused its discretion by correcting a damages calculation that awarded all of the New York lost profits for the selected period even though the Opinion expressly awarded only half to account for other causes.

B. Scope of Review

The parties agree that the trial court's clarification ruling is reviewed for abuse of discretion. AB 67; *Richards v. Copes-Vulcan, Inc.*, 213 A.3d 1196, 1199–200 (Del. 2019).

C. Merits of Argument

Devine hereby joins, adopts, and incorporates the arguments and analysis set forth in Appellant East's Answering Brief on Cross-Appeal with respect to the Motion for Clarification.

CONCLUSION

Appellant/Cross-Appellee Jennifer Devine respectfully requests that this Court reverse or vacate the Court of Chancery's judgment as to the issues raised in her appeal and affirm the ruling challenged in Appellee/Cross-Appellants' cross-appeal.

Dated: October 19, 2026

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