IN THE SUPREME COURT OF THE STATE OF DELAWARE

HEARTLAND PAYMENT SYSTEMS, LLC, Appellant/Cross-Appellee, v. INTEAM ASSOCIATES, LLC. and LAWRENCE GOODMAN, III, Appellees/Cross-Appellants.	PUBLIC VERSION C.A. No. 582, 2016 Case Below Court of Chancery of the State of Delaware C.A. No. 11523-VCMR

<u>APPELLANT'S REPLY/ANSWERING BRIEF ON APPEAL</u>

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HEARTLAND'S REPLY ARGUMENT[1]

In its Verified Complaint, inTEAM made the following allegation: "[i]n the [Co-Marking Agreement], each of [Heartland] and School-Link (later, inTEAM) agreed to cross-market and support the other's products and services as ***complementary*** to each other[.]" A1287 (emphasis added). Accepting this allegation should have resulted in a contractual interpretation whereby the parties' respective software products would not perform the same functions. Such an interpretation makes sense and explains why Heartland and inTEAM entered into a Co-Marketing Agreement in 2011.

Nonetheless, the trial court created a contractual interpretation in which both Heartland's software and inTEAM's software can plan menus (Ex. A at 44), generate production records (*id*. at 44-45), and analyze the same nutrients (calories, saturated fat, and sodium). *Id*. at 48-50. Of course, products that perform the exact same functionality are not complementary; they are competitive. This interpretation is inconsistent both with inTEAM's original allegations and the plain language of the agreements at issue in this appeal.

Indeed, under the trial court's interpretation, the non-compete provision protecting the business that Heartland purchased is meaningless. Accepting it

[1] All capitalized terms have the same meaning ascribed to them in Heartland's Opening Brief on Appeal. Trans. ID 60107303.

would mean that inTEAM could immediately develop a product designed to compete with the WebSMARTT product Heartland paid $17 million to acquire. Even worse, Heartland would have then been ***required*** to market inTEAM's competing software to its customers as a direct alternative to WebSMARTT. A1287 ¶ 10 (alleging that Heartland "committed" to market DST). This interpretation makes no sense, and, as a result, it cannot be correct as a matter of Delaware law.

Contrary to inTEAM's litigation inspired narrative, inTEAM was never at the forefront of developing unique state agency software. In fact, the only software actually defined in the applicable agreements as "state compliance software" is WebSMARTT. A302. Heartland paid $17 million to acquire this core software product. Ex. A at 11-13.[2] Acquisition of such a product was consistent with Heartland's business strategy. Earlier in 2010, Heartland "initiated [its] K to 12 School Services product through the acquisition of the K to 12 School Services business operated by Lunchbox. Lunchbox serve[d] approximately 4,400 schools.

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[2] In a lengthy footnote, inTEAM claims that "[t]here is no support in the record for [Heartland's] claims that WebSMARTT was SL-Tech's 'core software product . . ." Trans. ID 60247773 at 46 n.15. inTEAM ignores the documents Mr. Goodman helped to create when he was preparing to sell the SL-Tech business. SL-Tech's Business and Investment Plans Summary expressly states: "***Our core product is WebSMARTT***—comprehensive K-12 foodservice accountability software, including point of service and back office (back of the house) functionality." A38 (emphasis added); A2211-12; A2219-20.

Lunchbox develops, manufactures, sells, services and maintains computer software designed ***to facilitate accounting and management functions*** of food service operations of K to 12 schools. School districts [could] use Lunchbox for point-of-sale (POS) platforms for their cafeteria serving line, free and reduced meal application processing, inventory, ***menu planning, nutritional analysis*** and online payments." AR23 (emphasis added).

Although inTEAM tries to insinuate that "the $17 million purchase price paid by [Heartland] represented consideration for material assets other than WebSMARTT's menu planning software, and the exclusion of menu planning functions from inTEAM's and Mr. Goodman's restrictive covenants is entirely consistent with [Heartland's] acquisition strategy in 2011" (Trans. ID 60247773 at 46 n.15), this statement is both unsupported and incorrect as demonstrated by Heartland's acquisition of Lunchbox in 2010—a product described in Heartland's 10-K as nearly identical to WebSMARTT. AR23; A2643-45. As Mr. Lawler testified during trial, Heartland's interest in acquiring menu planning products starting with LunchBox in 2010 was to provide schools with a fully-integrated software solution offering both front-of-house and back-of-house functionality. A2644; A2653-54.

Thus, Heartland acquired the K-12 accounting and management software and other assets of the SL-Tech business, and Goodman retained the consulting and analytics division of the business called inTEAM. The two parties also agreed on a form of Co-Marketing Agreement whereby they would share information and market each other's ***complementary products***. A1287; A1977-78. At the time of contract formation, this structure made sense because inTEAM's DST software was designed to perform forward-looking financial modeling based on data collected from software products like WebSMARTT (A2843-45; A3019; A884); hence the name, Decision Support Toolkit. The thought was that schools using menu planning software would purchase the new inTEAM software to enhance efficiency and reduce costs. A204; A2844-45; A2850-53; A3019.

To ensure that Goodman and his new inTEAM business would not simply recreate the software they had just sold, Heartland insisted on the inclusion of various non-compete provisions specifically designed to protect WebSMARTT's functionality. A380; A317; A293-94. As recognized in inTEAM's Answering Brief (Trans. ID 60247773 at 9 n.2, 19), both parties knew that the USDA standards were going to change, so, in order to best protect its newly acquired software, Heartland used language in the non-compete provisions that did not reference USDA classifications. A380; A317; A293-94. Accordingly, the non-compete provisions were drafted to refer to WebSMARTT's functionality—specifically the ability to facilitate the accounting and management of transactional data functions and management of food service operations at K-12 schools. A380; A317; A293-94; *see also* A2670; A2684-88.

Almost immediately after selling his "core" WebSMARTT product, Goodman experienced a classic case of buyer's remorse. In 2012, he began to develop a new product known as the Menu Compliance Tool (Ex. A at 29; A2459-60)—a product so similar to WebSMARTT that inTEAM's own employees identified the products as competitive (A915; A966; A2465) as they impermissibly encroached on "WebSMARTT territory." Every witness who testified at trial recognized that the Menu Compliance Tool was a new and different software program, and that its functionality was not included in the FDDs attached to the Co-Marketing Agreement in 2011. A2301; A2462; A2627.

Over time, inTEAM and Goodman increased the functionality of the Menu Compliance Tool. Ex. A at 29. The ability to plan menus was added (A2462-64; A1598), as was the ability to analyze many of the same nutrients analyzed by WebSMARTT. Ex. A at 29, 48-49; A2948-49. Administrative review functionality was added in 2014. Ex. A at 29. By the time of the trial in this case, inTEAM's software could perform nearly identical functions as Heartland's

WebSMARTT software. A1808-12; A2941-42; A2948-49. It is undisputed that no inTEAM software had such functionality in 2011. A2223-24; A2462-66. Nor did inTEAM list such functionality in the FDDs attached to the Co-Marketing Agreement. A2300-02; A2615-20; A3417-19.

Simply put, inTEAM's original view of the contracts embodied in its Verified Complaint was the correct one. In 2011, Heartland and inTEAM envisioned that they would sell complementary products. Heartland would sell the menu planning tools that would be used to actually run the K-12 food service operations and inTEAM would try to sell the same customers analytics and modeling tools the customers could use to improve efficiency. When Goodman realized there was no market for the analytics product, inTEAM and Goodman created a new software program designed to compete with and/or replace WebSMARTT.[3] To provide cover for their competitive actions, they concocted a contractual interpretation no reasonable commercial party would ever agree to—an

[3] Much as they did before the trial court, inTEAM and Goodman spend pages of their brief discussing Heartland's acquisition of LunchByte and its Nutrikids product. Trans. ID 60247773 at 28-31. It is unclear why. The trial court conclusively held that Nutrikids had nothing to do with the Co-Marketing Agreement at issue in this litigation. Ex. A at 64 ("As an initial matter, Nutrikids is not subject to the Co-Marketing Agreement, and any claim regarding obligations towards that product fail.").

interpretation where Heartland paid $17 million to compete with Goodman's new inTEAM Business the very next day.

As explained below and in Heartland's Opening Brief on Appeal, no reasonable party would ever agree to the deal now cast by inTEAM—an illogical arrangement where inTEAM could, the day after closing, recreate the very software functionality it just sold and then force the purchaser to market its new competitive product alongside the product the purchaser had just acquired. The only way the trial court was able to reach such an absurd result was by ignoring the plain contractual language and by accepting extrinsic evidence and the *post hoc* litigation driven testimony of Goodman and his employees. This is no way to interpret an unambiguous contract under Delaware law. The trial court's contractual interpretation should be reversed and this action remanded for further proceedings.[4]

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[4] In its Answering Brief, inTEAM points to various events that occurred following trial and accuses Heartland of both withholding certain documents and continuing to violate certain non-compete obligations. Trans. ID 60247773 at 3, 55 n.19. Such statements are not properly considered in this appeal because such evidence was not before the trial court, and inTEAM has made no effort to supplement the record on this appeal. As Heartland has explained to the trial court, inTEAM's allegations are baseless.

I. THE TRIAL COURT ERRONEOUSLY INTERPRETED THE NON-COMPETE PROVISIONS TO ABSOLVE INTEAM AND GOODMAN OF BREACH

A. The Non-Compete Provisions Prohibit the Creation of Software Designed to Analyze Nutrients

In a desperate effort to preserve the trial court's erroneous contractual interpretation, inTEAM now argues that the trial court found the non-compete provisions ambiguous and correctly relied on extrinsic evidence. Below, however, inTEAM argued the provisions were unambiguous. *See* A3568 (inTEAM refers to the "unambiguous language of the parties' contracts" in its Answering Post-Trial Brief); A3556 ("Mr. Goodman complied with the unambiguous terms to which the parties agreed."); A3619 (inTEAM references "the CMA's unambiguous terms" in its Motion for Reargument). Regardless of inTEAM's shifting positions, however, the non-compete provisions at issue unambiguously prevent inTEAM and Goodman from developing software with an ability to analyze nutrients. To the extent the trial court found the provisions ambiguous—a conclusion not expressly set forth in the opinion—such holding should be reversed.

Moreover, even if the provisions were ambiguous (they are not), this action would need to be remanded because (1) the trial court considered extrinsic evidence that could not possibly inform the intent of the parties in 2011; and, (2) the trial court failed to consider all available extrinsic evidence to reach its conclusion. *Seaford Golf & Country Club v. E.I. DuPont de Memours & Co.*, 925 A.2d 1255, 1264 (Del. 2007) (reversing and remanding because "the trial court did not assess or take into account the facts undercutting the conclusion that the court ultimately reached. Nor did the trial court set forth reasons why the equally reasonable contrary inference permitted by those facts should be rejected.").

1. The Non-Compete Provisions are Unambiguous and Prevent inTEAM and Goodman from Creating Software to Analyze Nutrients

As an initial matter, the non-compete provisions are not ambiguous, and the trial court appears to have agreed. In considering the non-compete provision in the APA, the trial court found—without resorting to extrinsic evidence—that the "non-competition provision prohibits SL-Tech and Goodman from engaging, directly or indirectly, on their own behalf or on behalf of any Person, in providing (1) any Competitive Services or Products, or (2) any business that School-Link conducts in the United States as of September 30, 2011." Ex. A at 13. The trial court then found that "the non-competition obligations of SL-Tech and Goodman under the Asset Purchase Agreement are limited by and understood with reference to a carve-out defined [by the definition of "inTEAM Business"] and further described in Exhibit C of the Co-Marketing Agreement." *Id*. at 14-15. Accordingly, the trial court examined the definition of inTEAM Business with reference to the FDDs to determine what functionality the "inTEAM Business" was intended to include in 2011. *Id*. at 17-19, 41-42.

It is undisputed that the "inTEAM Business" as defined in the 2011 agreements does not include an ability to analyze nutrients. Trans. ID 60247773 at 20; A3564-65 (noting that simplified nutrient assessment data was added to inTEAM's software in 2012). The trial court did not find such functionality included in the FDDs, and inTEAM has admitted that no FDD attached to the Co-Marketing Agreement reflects an ability to input or analyze nutrients. A2615-20; A3417-19. Such functionality is not part of the so-called "inTEAM Carve-Out" defined by the trial court.

Accordingly, to determine whether inTEAM and/or Goodman breached their non-compete obligations, the trial court should have should have engaged in the following two-part inquiry: (1) is the functionality of inputting and analyzing nutrients covered by the definition of Competitive Services or Products (or similar definition of "HPS Business" in the Co-Marketing Agreement); or (2) is the functionality of inputting and analyzing nutrients included in the business that School-Link conducted in the United States as of September 30, 2011? Ex. A at 13.

As explained *infra* Section (I)(C), SL-Tech undisputedly had software that could analyze calories, saturated fat, and sodium, and carbohydrates at Closing. Ex. A at 48-50; A1808-12; A2941-42; A2948-49. These are the same nutrients analyzed by inTEAM's later-developed Menu Compliance Tool. A2478; A2948. Accordingly, Goodman was prohibited from developing such software because that was the business of SL-Tech—and not inTEAM—as of September 30, 2011.

With respect to whether inTEAM's provision of software analyzing certain nutrients fits within applicable definitions, the inquiry is limited to whether software with such functionality facilitates the accounting and management of transactional data functions and management of food service operations at K-12 schools—the express language contained in the definitions. It is irrelevant whether the agreements define "nutrient analysis" because the non-compete is not tied to any USDA standards. Of course, the trial court never found the phrase "transactional data functions" ambiguous, and there can be no dispute that analyzing the calories, saturated fat, sodium and carbohydrates in various menu items facilitates the accounting and management of food service operations at K-12 schools. Accordingly, products that can input and analyze such data would be covered by the non-compete protecting the SL-Tech business purchased by Heartland.

Contrary to inTEAM's position on appeal, the trial court never expressly found any non-compete provision ambiguous and readily interpreted various provisions—including the definition of inTEAM Business—without resort to extrinsic evidence. Ex. A at 44-45. A provision cannot suddenly change from unambiguous to ambiguous depending on the context. For some unknown reason, however, the trial court decided to define "nutrient analysis"—a term not included in any agreement—and resorted to extrinsic evidence to do so. This is improper under Delaware law because the extrinsic evidence is being used to alter the intent of the parties. *See Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997) ("If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity."); *BLGH Holdings LLC v. enXco LFG Holding, LLC*, 41 A.3d 410, 414 (Del. 2012) ("Where, as here, the plain language of a contract is unambiguous *i.e.*, fairly or reasonably susceptible to only one interpretation, we construe the contract in accordance with that plain meaning and will not resort to extrinsic evidence to determine the parties' intentions."). If the parties had wished to define the non-compete obligations by reference to USDA standards or "nutrient analysis" functionality, they could have done so. By relying on extrinsic evidence to graft a requirement into the agreements that no party anticipated, the trial court committed legal error. Such an interpretation should be reversed.

2. Assuming *Arguendo* that the Non-Compete Provisions are Ambiguous, the Trial Court's Consideration of Extrinsic Evidence Was Flawed

As explained above, the non-compete provisions are unambiguous, so the inquiry should end. Assuming the non-compete provisions are ambiguous, however (something not expressly stated by the trial court), then extrinsic evidence may be considered to ascertain the objective intent of a reasonable third party at the time of contracting. *City Investing Co. Liquidating Trust v. Cont'l Cas. Co.*, 624 A.2d 1191, 1198 (Del. 1993) (noting that extrinsic evidence may be relied on when "the language used by the parties is subject to different meanings and is, thus, ambiguous, or more precisely, not reflective of the parties shared intent."); *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 740 (Del. 2006) ("[T]he true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.") (internal quotations omitted). The trial court erred in its analysis, however, by failing to consider all the available evidence and by accepting evidence that could not possibly guide interpretation.

First, the trial court used extrinsic evidence to interpret a term not included in any agreement (the phrase "nutrient analysis"). This was improper because consideration of the extrinsic evidence was unnecessary—the phrase was not even in the contracts. *See Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. 1982) (noting in insurance context that "[w]hen the language of [a contract] is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented."). The only proper extrinsic evidence that should have been considered was extrinsic evidence addressing the phrase "transactional data functions" or "management of foodservice operations"—the language expressly used in the applicable definitions. inTEAM never presented any evidence, extrinsic or otherwise, on the definitions of these phrases. When the trial court decided to examine extrinsic evidence, it became obligated to explain why it chose to rely on some extrinsic evidence regarding nutrient analysis, a term absent from the agreements (inTEAM's evidence), while rejecting other extrinsic evidence regarding the definition of a term actually listed in the agreements: transactional data functions (Heartland's evidence). *Seaford Golf & Country Club*, 925 A.2d at 1263-64 (when a "material ambiguity" exists, the trial court must "address the undisputed facts that . . .

undercut[] the conclusion that the Court ultimately reached" and "set forth reasons why the equally reasonable contrary inference permitted by those facts should be rejected."); *SI Management L.P. v. Wininger*, 707 A.2d 37, 43 (Del. 1998) ("unless extrinsic evidence can speak to the intent of all parties to a contract, it provides an incomplete guide with which to interpret contractual language.") The trial court failed to engage in such analysis, and, as a result, this action should be remanded to allow the trial court to evaluate all the available extrinsic evidence and allow the trial court to explain why it ignored evidence expressly defining what is meant by the phrase "transactional data" functions. *See, e.g.*, A2822; A2837-39.

Second, when considering extrinsic evidence, the only "relevant extrinsic evidence is that which reveals the parties' intent ***at the time they entered into the contract***. In this respect, backward-looking evidence gathered after the time of contracting is not usually helpful." *Eagle Indus., Inc.*, 702 A.2d at 1233 n.11 (citing *Demetree v. Commonwealth Trust Co.*, 1996 WL 494910 (Del. Ch. Aug. 27, 1996)).[5] Nonetheless, the trial court considered the USDA guidelines from

[5] Although inTEAM contends that this Court cannot consider Heartland's argument on the appropriate type of extrinsic evidence (Trans. ID 60247773 at 41 n.11), inTEAM is wrong because Heartland expressly argued to the trial court that considering any USDA classification was inappropriate. A3356; *see also* A3481 (pointing-out USDA classifications are "irrelevant"); A3484 ("The non-compete provision is not tied to any particular USDA certification. In fact, the parties never referenced USDA classifications anywhere in the APA."). Thus, Heartland

March 2016. Ex. A at 50. No rationale is provided as to why the trial court chose to rely on such *post hoc* evidence, and, of course, the evidence examined could not possibly be used to evaluate the parties' intent at the time of contracting because it was created approximately five years after the contract was formed. A2459 (final regulations in mid-2012); Ex. A at 8.

Although inTEAM tries to defend the trial court's consideration of 2016 USDA guidelines by asserting that "[s]ince the enactment of the HHFKA in 2010, USDA regulations have distinguished between 'nutrient analysis' and a 'Simplified Nutrient Assessment'" (Trans. ID 60247773 at 40), this is incorrect. Numerous trial witnesses testified that the regulations defining a "Simplified Nutrient Assessment" were not created ***until 2012*** (A2311; A2459; A2938), and the trial court expressly stated that "[i]n 2012, the USDA provided three options to school districts to submit information to their state agencies for six cent certification . . . Option 2 allowed districts to submit menus, the USDA worksheet, and a Simplified Nutrient Assessment in lieu of nutrient analysis." Ex. A at 8. Simply put, the USDA regulations defining "nutrient assessment" were not in existence when

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preserved its argument that the trial should not have considered USDA classifications of any kind, let alone classifications created in 2016. Further, this argument is included in a footnote, and this Court has repeatedly found that arguments presented in footnotes are improper. *See* Supr. Ct. R. 14(d)(iv) ("Footnotes shall not be used for argument ordinarily included in the body of a brief"); *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1265 (Del. 2012).

Heartland acquired SL-Tech, and, are therefore not "industry terms" the Court can rely on to aid interpretation. As Heartland argued to the trial court, they are irrelevant. Regulations that were not in existence at the time of agreements were formed cannot inform the intent of contracting parties, and, of course, the parties expressly decided not to define the non-compete obligations by reference to USDA guidelines. A380; A317; A293-94. By injecting USDA guidelines into the contractual analysis, the trial court altered the parties' bargain and committed reversible error. *Eagle Indus., Inc.*, 702 A.2d at 1232; *BLGH Holdings LLC*, 41 A.3d at 414.

B. inTEAM and Goodman Cannot Develop Menu Planning Software Under the Non-Compete Provisions

In Delaware, contracts are interpreted according to how a reasonable third person in the position of the parties would view the contractual language. *See, e.g.*, *Lorillard Tobacco Co.*, 903 A.2d at 740. Accordingly, Delaware courts will reject contractual interpretations that "no reasonable person would have accepted." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010); *Blankenship v. Alpha Appalachia Holdings, Inc.*, 2015 WL 3408255, at *17 (Del. Ch. May 28, 2015) (rejecting interpretation that no reasonable person would have accepted); *Finger Lakes Capital Partners, LLC v. Honeoye Lake Acquisition, LLC*, 2015 WL 6455367, at *18 (Del. Ch. Oct. 26, 2015) ("[t]he law will not enforce an unreasonable interpretation that 'produces an absurd result or one that no reasonable person would have accepted when entering the contract.'") (quoting *Osborn*, 991 A.2d at 1160).

Here, the trial court adopted a contractual interpretation whereby inTEAM is permitted to perform the exact same functionality as Heartland. Not only is such an interpretation inconsistent with inTEAM's original allegation in its Verified Complaint (A1287), such an interpretation would immediately erode the value of Heartland's $17 million investment. Essentially, the trial court held that Heartland paid $17 million for the privilege of competing with inTEAM and marketing inTEAM's competing products to Heartland's own customers. No reasonable, objective third party would accept such an interpretation, so it cannot be correct as a matter of law.

As evidence that the parties intended to split the functionality of inTEAM's products and Heartland's products between data analytics and foodservice accountability software respectively, one need look no further than the introductory paragraphs of the Co-Marketing Agreement. inTEAM's software (DST phases 1 and 2) is expressly defined as a "data warehousing and analysis tool and related professional, maintenance and support services ('DST Phase 1'); and . . . the DST Phase 2 modeling and pro-forma forecasting tools and related professional, maintenance and support services ('DST Phase 2')." A302. In contrast, Heartland's software program WebSMARTT is defined as "accountability hardware and software for foodservice accountability, related hardware and related professional, maintenance and support services ('WebSMARTT'), including such software licensed for use at the state-wide level." *Id*. Unsurprisingly, inTEAM completely ignores this clear language from the body of the contract, instead preferring to focus on the more nebulous FDDs attached to the contract. Trans. ID 60247773 at 42-44.

Of course, the FDDs cannot be interpreted without reference to the Co-Marketing Agreement itself because doing so would violate Delaware law. *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985) ("[A] court must construe the agreement as a whole, giving effect to all provisions therein.") (citations omitted). Only by examining the FDDs with reference to the description of the products in the recitals of the Co-Marketing Agreement can one determine what functionality the FDDs are meant to describe. That is why all of the FDDs introduced at trial refer to ***modeling*** functionality. Although inTEAM tries to distance itself from the introductory sections of the FDDs (Trans. ID 60247773 at 44), these sections expressly refer to modeling and provide context to the developers building the software. A2919. Ignoring these sections as inTEAM suggests would be inconsistent with the canons of contractual interpretation in Delaware. *See Axis Reinsurance Co. v. HLTH Corp*., 993 A.2d 1057, 1062-63 (Del. 2010) (where two provisions of a contract have "distinct and independent purpose[s] and function[s]," courts should "harmonize[] the affected contract provisions" and not interpret one at the expense of the other); *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1184-85 ("The cardinal rule of contract construction is that, where possible, a court should give effect to all contract provisions"). After all, they undisputedly form part of the contracts that are subject to interpretation.

The only way to harmonize the FDDs with the definition of WebSMARTT in the Co-Marketing agreement is to conclude that DST Phase 2 is a modeling tool—not a menu planning tool. Any contrary interpretation would result in DST encroaching on the definition of WebSMARTT in the Co-Marketing Agreement. Although inTEAM correctly notes that certain FDDs refer to menu planning, that is unsurprising because DST was designed to extract data from software programs like WebSMARTT for analysis and future-looking modeling. A2843-45; A3019; A884. In that way, the products were designed to be complementary; not competitive. A884; A2847; A2871; A3028-31. Not only has inTEAM admitted that the products were intended to be complementary numerous times in briefing and during trial (*see, e.g.*, A1978; A1981; A1988; A2100; A2218; A3413; A3588), inTEAM even referenced the complementary relationship of the products in its Verified Complaint in order to justify its allegations against Heartland in the first place. A1287 ("In the [Co-Marking Agreement], each of [Heartland] and School-Link (later, inTEAM) agreed to cross-market and support the other's products and services as complementary to each other[.]").

By simply analyzing the data generated by WebSMARTT, DST does not compete with WebSMARTT. Not only is such an interpretation supported by a harmonious interpretation of the agreements, but it is also supported by myriad extrinsic evidence adduced at trial. *See, e.g.*, A884; A942; A2847; A2871; A3028-31.

In short, no objective third party would read the contracts in the manner advocated by inTEAM. Under such interpretation, Heartland paid $17 million to develop competing (not complementary) software with inTEAM and agreed to market such software to its more diverse and wide-ranging customer base, including the WebSMARTT customers Heartland inherited as part of its acquisition of SL-Tech. Under inTEAM's interpretation, the non-compete provisions protecting Heartland would be rendered meaningless. Such an interpretation cannot be correct as a matter of law.

Liab. Ins. Co., 51 A.3d 442, 451 (Del. 2012) ("[N]o part of an agreement should be rendered superfluous."); *Axis Reinsurance Co.*, 993 A.2d at 1063 ("[A] court will not adopt [an] interpretation that leads to unreasonable results, but instead will adopt the construction that is reasonable and that harmonizes the affected contract provisions."); *E.I. du Pont de Nemours & Co.*, 498 A.2d at 1113 ("[T]he meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall scheme or plan."); RESTATEMENT (SECOND) OF CONTRACTS § 203 (1981) ("In the interpretation of a promise or agreement or a term thereof, ... an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, *or of no effect*....") (emphasis added).

C. Goodman is Governed by Temporal Restrictions that the Trial Court Failed to Recognize or Apply

Finally, there can be no dispute that Goodman should be prohibited from developing software with an ability to analyze nutrients, plan menus, generate production records, or perform USDA compliance. Although Goodman tries to seek refuge in the trial court's definition of "inTEAM Business" as containing some "future release" for menu planning and production records (Trans. ID 60245870 at 47), this argument only serves to highlight why the trial court's interpretation of the "inTEAM Business" is flawed. Such interpretation would read the words "as currently conducted" out of the non-compete provisions in the Asset Purchase Agreement and Consulting Agreement, and, as a result, cannot be correct as a matter of law. *Intel Corp.*, 51 A.3d at 451 ("[N]o part of an agreement should be rendered superfluous."); *Council of Dorset Condo. Apartments v. Gordon*, 801 A.2d 1, 7 (Del. 2002) ("A court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole."). Only Heartland's interpretation—an interpretation in which DST is limited to data analytics and modeling software—operates to harmonize all provisions of the Asset Purchase Agreement and Consulting Agreement.

As an initial matter, there is no basis to dispute that the applicable non-compete provisions prohibit Goodman from developing software with an ability to analyze nutrients of any kind. Indeed, inTEAM has admitted in both the trial court and on appeal that the ability to analyze nutrients is not referenced in any FDD and was added in 2012 as an "augmentation." A2615-20; A3417-19; Trans. ID 60247773 at 20. Accordingly, the ability to analyze nutrients cannot be included in the "inTEAM Carve-Out" as defined by the trial court. Because: (1) SL-Tech was in the business of developing such products (A2370-71); and, (2) such functionality is not included in the inTEAM Carve-Out, Goodman is prohibited from developing such functionality. inTEAM fails to address this argument in its opposition brief, even though Heartland applied such analysis in its Opening Brief. Trans. ID 60107303 at 41 ("[t]his analysis, however, overlooks that Goodman is not permitted to participate in 'any business that School-Link conducts as of the Closing Date'").

With respect to the other functionality (menu planning and production records), the analysis is similar. Goodman does not dispute that inTEAM had no software products at Closing capable of planning menus, generating production records, analyzing nutrients, or performing USDA compliance. A2223-24; A2300-2302. Instead, he argues that inTEAM was "developing" some of these functionalities. Ditch contradicted this argument at trial:

> Q. Okay. And, Mr. Ditch, the development of DST Phase 2 started sometime after September 30th, 2011; right?
>
> A. By "development" you mean implementation, ***then yes***.

A2615-16 (emphasis added).

Of course, the non-competition provisions prohibit Goodman from developing software with an ability to analyze nutrients just as clearly as they prohibit him from selling such software. A380; A317; A293-94. Nonetheless, inTEAM's current argument would lead to an outcome where Goodman could develop certain functionality, but merely refrain from marketing it, because the "inTEAM Business" "as currently conducted" at Closing was limited to developing—not selling—certain software. Such an interpretation makes the non-competition agreements effectively meaningless.

Simply put, under the trial court's interpretation—one in which inTEAM may develop and sell software with the same functionality as WebSMARTT—it is impossible to harmonize the "future release" of DST with the phrases "as currently conducted" or "as of the Closing Date" in the non-compete provisions. Consistent with Heartland's interpretation, the only way to harmonize the provisions is by using a definition of "inTEAM Business" where the functionality of inTEAM's software is limited to data analytics and modeling tools. Such an interpretation of the "inTEAM Business" is consistent with the plain language of the agreements and available documentary evidence. A204; A272; A884-85; A942; A1978 ("These covenants are contained in the [Co-Marketing Agreement], through which [Heartland] and SL-Tech agreed to cooperate with and support each other in the marketing, sales and development of their complementary businesses and product lines."). Under this Court's precedents, a contract must be interpreted in a way that harmonizes all terms. *Intel Corp.*, 51 A.3d at 451 ("[N]o part of an agreement should be rendered superfluous."); *Council of Dorset Condo. Apartments*, 801

A.2d at 7 ("A court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole."). Because the trial court's interpretation failed in that endeavor, its interpretation is incorrect as a matter of law.

II. HEARTLAND DID NOT IMPROPERLY COMPETE WITH INTEAM

A. Heartland Cannot Indirectly Compete with inTEAM's Administrative Review Software When Such Software is Not Identified in the Co-Marketing Agreement

The trial court relied exclusively on extrinsic evidence to conclude that the "inTEAM Carve-Out" allows inTEAM to develop administrative review software. Ex. A at 45-46. This reliance on extrinsic evidence is inconsistent with the trial court's refusal to examine extrinsic evidence to determine what other functionalities fall within the inTEAM Carve-Out. Importantly, the phrase "administrative review" is never used in the Co-Marketing Agreement or in the FDDs—a fact inTEAM does not dispute in its answering brief. Relying on extrinsic evidence to add functionality to the "inTEAM Carve-Out" that is never explicitly referenced in the contractual agreements is contrary to the intent of the contracting parties.

Moreover, the trial court's holding contradicts substantial evidence that administrative review functionality could not have been intended by the parties when they entered into the Co-Marketing Agreement because such functionality was not developed until 2014 as part of inTEAM's Menu Compliance Tool.

1. The Co-Marketing Agreement is Unambiguous and Does Not Identify Administrative Review Software

As an initial matter, the trial court implemented an inconsistent approach to analyze the functionalities included in the inTEAM Carve-Out. Specifically, when evaluating the parties' competing interpretations of the inTEAM Business and whether menu planning is included in the definition, the trial court stated: "I need not consider any extrinsic evidence because I find that the contract unambiguously includes menu planning in the inTEAM Carve-Out." Ex. A at 44. Similarly, when analyzing whether production record functionality is included in the inTEAM Carve-Out, the trial court stated that it need not consider extrinsic evidence because the functionality "is included, unambiguously, in the Functional Design Documents." *Id*. at 45.

In holding that the Co-Marking Agreement and FDDs "unambiguously includes menu planning" and "production records", the trial court refused to consider any extrinsic evidence to interpret the definition of the inTEAM Business. This approach prevented the trial court from considering extrinsic evidence submitted by Heartland.

Yet, in order to define certain "unique state value added functionality" included in the inTEAM Carve-Out, the trial court looked beyond the language of the contract and relied solely on extrinsic evidence offered by inTEAM to add functionality not listed anywhere in the parties' agreement. Not only is the reliance on extrinsic evidence contrary to the trial court's treatment of the Co-Marketing Agreement as unambiguous for purposes of determining other functionalities included in the inTEAM Carve-Out, the trial court's approach ignores the evidence that shows that administrative review functionality was not developed by inTEAM until three years after the parties entered into the Co-Marketing Agreement. In fact, the only state accountability software identified by the Co-Marketing Agreement is WebSMARTT. A302.

Rather than deny the trial court's inconsistent use of extrinsic evidence, inTEAM instead attempts to justify it. Trans. ID 60247773 at 51 ("To the extent the trial court used the phrase 'administrative review software,' it was a shorthand description of products offering "unique state value added functionality[]" . . . ."). Despite inTEAM's effort to glaze over the inconsistency of the trial court's analysis, inTEAM acknowledges that the trial court refused to consider extrinsic evidence when determining the other functionalities included in the inTEAM Carve-Out, yet relied on extrinsic evidence to determine that administrative review functionality was included.

Despite inTEAM's preference for the contrary, a provision cannot be both ambiguous and unambiguous. Either the inTEAM Carve-Out was ambiguous, requiring the court to consider all available extrinsic evidence to determine what functionalities are included in the contract, or the carve-out was unambiguous, rendering the court's reliance on extrinsic evidence erroneous. Yet the trial court's approach to interpreting the Co-Marketing Agreement and the inTEAM Carve-Out was inconsistent because the trial court refused to consider extrinsic evidence to determine whether certain functionalities were included in the inTEAM Carve-Out, yet relied exclusively on extrinsic evidence to include administrative review software in the inTEAM Carve-Out.

Contrary to the trial court's analysis, the more appropriate way to interpret the agreements under Delaware law would have been to consider the unambiguous contractual language to determine whether administrative review software was covered by the definition of "inTEAM Business." Here, administrative review software is never mentioned—a sign that the functionality was never intended to be protected by the definition of inTEAM Business. Rather, the only recognized accountability software licensed for use at a state-wide level is WebSMARTT. A302. The trial court's interpretation should be reversed.

2. Assuming *Arguendo* that the Co-Marketing Provisions are Ambiguous, the Trial Court's Consideration of Extrinsic Evidence Was Flawed

Because the Co-Marketing Agreement is unambiguous, the trial court's decision to resort to extrinsic evidence constitutes reversible error. *Eagle Indus., Inc.*, 702 A.2d at 1232; *BLGH Holdings LLC*, 41 A.3d at 414. Assuming, however, the contract was ambiguous, then extrinsic evidence may be considered to determine the objective intent of a reasonable third party at the time of contracting. *City Investing Co. Liquidating Trust*, 624 A.2d at 1198. But by failing to consider all the available extrinsic evidence to determine the functionalities included in the inTEAM Carve-Out and instead relying solely on testimony about functionality not included anywhere in the agreements, the trial court did not properly consider all available extrinsic evidence. *Seaford Golf & Country Club*, 925 A.2d at 1264.

Although the trial court relied on evidence from inTEAM witnesses to determine that administrative review software was included in the inTEAM Carve-Out (despite the fact that administrative review is mentioned nowhere in the contract), it failed to explain why it ignored contrary evidence that the parties could not have intended administrative review software to be included in the inTEAM Carve-Out because inTEAM did not even develop such functionality until three years after the sale. In fact, when Goodman was asked if the FDDs include a reference to the functionality of the Menu Compliance Tool—the module that now contains the administrative review software—he admitted that the functionality was not discussed. A2300-02; *see also* A2462-64 (testimony by Ms. Griffin regarding developing functionality for inTEAM's Menu Compliance Tool).

If the trial court determined that the inTEAM Carve-Out was ambiguous, then it should have examined all available extrinsic evidence and explained why it relied on certain evidence (the testimony from inTEAM's witnesses) and not other available evidence (demonstrating that administrative review software was not was developed until 2014 as part of the Menu Compliance Tool). *Seaford Golf & Country Club*, 925 A.2d at 1263-64; *SI Management L.P.*, 707 A.2d at 43. Because the trial court failed in this endeavor, this action should be remanded for further proceedings.

B. The Trial Court Erred in Calculating the Length of the Injunction Against Heartland

Assuming *arguendo* that Heartland breached the Co-Marketing Agreement (it did not), the trial court abused its discretion when calculating the length of the injunction. Determining the start of Heartland's alleged indirect competition with inTEAM based on Heartland's receipt of an unsolicited email from Colyar contradicts the language of the non-competition agreement in Section 9.1.1 of the

Co-Marketing agreement, which prohibits Heartland from "engag[ing], directly or indirectly, on its own behalf or as a principal or representative of any person, ***in providing any services or products competitive with the inTEAM Business***." A317.

Although inTEAM argues that Colyar's initial communication to Heartland is "merely one step" in the indirect competition that the trial court found (Trans. ID 60245870 at 55), the trial court's opinion clearly depends on this email from Colyar as the beginning of the relationship between Heartland and Colyar and the starting point for Heartland's alleged breach of the non-competition provision. Ex. A at 81 ("Heartland's breach began on March 17, 2014, when the relationship with Colyar first began."). It is the use of this email to calculate the length of the injunction that amounts to abuse of discretion because nothing in the language of the unambiguous non-competition provisions suggests that receipt of an unsolicited email, or even discussions with a competitor of inTEAM regarding potential opportunities, amounts to a violation. The trial court's holding explicitly refers to Heartland's "assisting a direct competitor of inTEAM's administrative review software" as conduct arising to a breach of the non-competition agreement (*id*. at 53), yet the court points to a date before any "assistance" could have been provided to calculate the length of the injunction. *Id*. at 81.

inTEAM's allegation that Heartland "did not decline Colyar's invitation in recognition of its contractual obligations" (Trans. ID 60247773 at 54-55) further highlights the error in the trial court's determination that March 17, 2014 was the beginning of Heartland's alleged indirect completion with inTEAM. Under inTEAM's theory, Heartland's violation of the non-competition provision was triggered from its failure to object to Colyar's interest in collaboration, thus imposing an affirmative obligation on Heartland that cannot be found anywhere in Section 9.1.1 of the Co-Marketing Agreement. Receiving an unsolicited email from a third party should not constitute a breach of the Co-Marketing Agreement, just as the trial court should not impose an obligation to object to communications from a third-party, because the language of the non-competition agreement does not support such a result.

Moreover, inTEAM fails to explain the inconsistency in the trial court's reliance on an email to support the start of Heartland's alleged competition against inTEAM yet refusal to find a breach by inTEAM based on similar evidence. A1969 (email from inTEAM employee to Kentucky requesting POS invoice for "competitive market research purposes"); Ex. A at 71-73 (finding email was not a breach). Rather, inTEAM merely recites that the trial court did find competition by Heartland by preponderance of evidence but did not find competition by inTEAM by preponderance of evidence. Trans. ID 60247773 at 55-56. But of course, as Heartland's opening brief discusses in detail, it is the very existence of the trial court's inconsistent holdings regarding similar evidence that highlights the error in the calculation of the injunction.

Under the trial court's holding, Heartland indirectly breached its non-competition obligations by "team[ing] with Colyar" and "assisting a direct competitor of inTEAM's administrative review software" (Ex. A at 53), the same conduct that the court held to constitute a breach should dictate the starting part of the injunction. Thus, the logical starting date is when Heartland ***provided*** a service or product to (or with) Colyar—in this case, when Heartland "teamed" with Colyar to provide a joint proposal to the State of Texas on June 19, 2015. Ex. A at 32. Accordingly, assuming Heartland did somehow breach its obligations, the length of any injunction should be less than three months, starting on June 19, 2015 and extending until September 8, 2015 (when Heartland announced Texas had not selected its proposal with Colyar).

III. HEARTLAND SHOULD HAVE BEEN AWARDED $600,000 IN DAMAGES

A. Heartland Should be Awarded the Full Amount Paid to Goodman Under the Consulting Agreement

Contrary to inTEAM's mistaken belief, this issue involves an issue of contractual interpretation that is reviewed *de novo*. *Honeywell Int'l Inc. v. Air Prod. & Chems., Inc.*, 872 A.2d 944, 950 (Del. 2005) ("To the extent those issues involve the interpretation of contract language, they are questions of law that this Court reviews de novo for legal error."). This narrow issue of contractual interpretation is nuanced, but straightforward: does Section 3 of Goodman's Consulting Agreement allow Heartland to recover all compensation paid to Goodman in the event Goodman breaches Section 11 (the non-solicitation provision)?

In attempting to rebut Heartland's contractual interpretation, Goodman cites virtually no authority, and instead simply argues that that the parties could have drafted a different contractual provision. Trans. ID 60247773 at 58. Of course, just because the provision could have been drafted differently in hindsight does not operate to preclude Heartland's requested relief.

In fact, Heartland's contractual interpretation is the only one that makes any sense. Heartland agreed to pay Goodman $600,000 "up-front" for a five year non-solicitation provision and included language that would allow Heartland to recover any compensation paid to Goodman in the event of breach. If the language of Section 3 was not intended to have this effect, it would be superfluous. Indeed, Delaware law would excuse Heartland's payment obligation in the event of Goodman's material breach. *BioLife Sols., Inc. v. Endocare, Inc.*, 838 A.2d 268, 278 (Del. Ch. 2003), *as revised* (Oct. 6, 2003) ("A party is excused from performance under a contract if the other party is in material breach thereof."). The interpretation advocated by Goodman would render the language at issue superfluous, so that interpretation cannot be correct as a matter law. *Intel Corp.*, 51 A.3d at 451; *Council of Dorset Condo. Apartments*, 801 A.2d at 7.

Goodman's interpretation is also nonsensical. Under his interpretation, he could have breached the non-solicitation provision one day after Heartland finished paying him the entirety of the $600,000, and Heartland would be entitled to no damages whatsoever. This makes no sense. Rather, the parties bargained for a provision that would allow Heartland to recover any compensation paid to Goodman in the event he breached Section 11. (Trans. ID 60107303 at 49-50). Inclusion of this provision made economic sense because the damages associated with a breach of a non-solicitation provision would have been difficult to calculate at the time of contracting. Goodman should not be able to escape liability by advocating that the provision should have been more precise. Heartland's damages should be increased to $600,000.

HEARTLAND'S ANSWER TO INTEAM'S SUMMARY OF ARGUMENT ON CROSS-APPEAL

1. **Denied**. As recognized by the trial court on several occasions, inTEAM failed to preserve its present argument on appeal. None of the contractual interpretation arguments presented to this Court were presented to the trial court, and, accordingly, Supreme Court Rule 8 and this Court's precedents preclude consideration of the arguments now. Even if this Court decides to wade into an argument never fully developed before the trial court, the plain language of the Co-Marketing Agreement prohibits inTEAM from recovering its attorneys' fees under the facts presented.

I. THE COURT OF CHANCERY CORRECTLY HELD INTEAM WAS NOT PERMITTED TO RECOVER ITS ATTORNEYS' FEES UNDER THE CO-MARKETING AGREEMENT

A. Question Presented

Should inTEAM be permitted to recover its attorneys' fees under the Co-Marketing Agreement when it: (1) failed to present many of its current arguments to the trial court; (2) the Co-Marketing Agreement expressly limits Heartland's liability (not just damages) to Fees paid by inTEAM (an amount that undisputedly equals zero); and, (3) the trial court considered all the record evidence and found no evidence of willful misconduct sufficient to overcome the parties' agreed upon limitation of liability?

B. Scope of Review

"Under Supreme Court Rule 8, a party may not raise new arguments on appeal." *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 678 (Del. 2013) (citing *Riedel v. ICI Ams. Inc*., 968 A.2d 17, 23–25 (Del. 2009)). Although issues of contractual interpretation are subject to *de novo* review (*see, id*.), "[a]fter a trial, findings of historical fact are subject to the deferential 'clearly erroneous' standard of review . . . Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *CDX Holdings, Inc. v. Fox*, 141 A.3d 1037, 1041 (Del. 2016).

C. Merits of Argument

1. inTEAM has Waived its Contractual Interpretation Argument

"Under Supreme Court Rule 8, a party may not raise new arguments on appeal." *Scion Breckenridge*, 68 A.3d at 678. Nonetheless, that is exactly what inTEAM is trying to do here. At no point before the trial court, did inTEAM argue that the purported fee shifting provisions should be considered separate and apart from § 11.2. In fact, the entirety of inTEAM's argument addressing attorneys' fees consisted of only one paragraph claiming (without any support or analysis) that inTEAM was entitled to fees. A3467-68. Moreover, and as recognized by the trial court, a review of inTEAM's post-trial briefs demonstrates that (1) inTEAM only advanced a claim of willful misconduct in connection with its claim for damages (which was rejected by the trial court), and, (2) inTEAM never actually cited ***any evidence*** of willful misconduct at all. Ex. A at 82. inTEAM cannot use this appeal to advance an argument never before presented to the trial court. *Scion Breckenridge*, 68 A.3d at 678.

As articulated by the trial court in its letter opinion denying inTEAM's motion for reargument:

> In its motion, inTEAM states it "argued consistently that Section 11.2 of the CMA does not limit [Heartland]'s liability because [Heartland]'s breaches of the CMA resulted from willful misconduct."

> First, inTEAM presented this argument in support of its claim for damages, not fee-shifting. In that argument, inTEAM stated that "the record proves that [Heartland] intentionally and maliciously refused to honor its obligations." inTEAM pointed to no specific facts or evidence in the record to support its conclusory statement. Second, inTEAM identifies no fact or law that the Court misapprehended. Instead, inTEAM points to evidence of the partnership between Heartland and Colyar as proof of Heartland's willful misconduct, as well as an e-mail discussing a product, Nutrikids, that is not subject to the Co-Marketing Agreement and, therefore, not relevant to the issue of damages for breach of the Co-Marketing Agreement. The Court considered all evidence presented at trial and determined that inTEAM did not meet its burden of proving willful misconduct in Heartland's breach of the Co-Marketing Agreement.

Ex. B at 3-4.

Simply put, a close review of inTEAM's trial court briefs confirms that it failed to preserve its new argument supporting fees. This Court should refuse to consider inTEAM's untimely arguments in this appeal.

2. Even if this Court Decides to Consider inTEAM's Argument, inTEAM Would Still Not Be Entitled to Fees

Assuming this Court decides to address inTEAM's newly discovered argument (which it should not), inTEAM still would not be entitled to its attorneys' fees. As Heartland explained to the trial court (A3377), Section 6.5 of the Co-Marketing Agreement must be viewed with reference to Section 11.2. Indeed, both sections address ***liability***. Section 6.5 provides (in part) that "the breaching Party shall be ***liable*** and pay to the non-breaching Party the reasonable and verifiable legal fees and costs . . ." A315 (emphasis added). Section 11.2 provides that "in no event ***shall the liability of a Party*** arising out of or relating to this Agreement, whether in contract, tort ***or otherwise***, . . . exceed the Fees previously paid by the other Party pursuant to this Agreement." A319 (emphasis added). Contrary to inTEAM's belief, both provisions deal with liability. The commonly accepted definition of "liability" would necessarily include attorneys' fees. *See 59TH St. Assocs. v. Reliance MediaWorks Ltd.*, 2016 WL 6208289, at *1 (S.D.N.Y. Oct. 18, 2016) (finding that damages cap applies to attorney's fees unless "expressly carved out from the cap[.]"); *Nest & Totah Venture, LLC v. Deutsch*, 31 A.3d 1211, 1229 (D.C. 2011) (concluding "that the liability cap applies to the recovery of [appellee]'s attorneys' fees."); *Brown v. Union Station Venture Corp. No. P-5*, 727 A.2d 878, 882-83 (D.C. 1999) (finding a partnership agreement capped liability, which included attorney's fees); Merriam Webster's Dictionary (defining "liability" as "something for which one is liable" or "pecuniary obligation") (*available at* www.merriam-webster.com/dictionary/liablity); Black's Law Dictionary (10th ed. 2014) (defining liability as "[a] financial or pecuniary obligation.").

In an effort to avoid this result, inTEAM argues that Section 11.2 applies only to monetary damages. Trans. ID 60247773 at 60. To reach this conclusion, inTEAM appears to rely on the heading of Section 11.2 rather than the language of the provision itself. inTEAM's interpretation is improper, however, because the parties expressly provided in the Co-Marketing that "[t]he Section headings contained in this Agreement are inserted for convenience only and shall not affect in any way the meaning or interpretation of this Agreement." A323 (Section 13.8). Accordingly, Section 11.2 is not limited to "damages" as inTEAM claims, but is limited to "liability"—a much broader concept. *Behnke v. New Jersey Highway Auth.*, 97 A.2d 647, 654 (N.J. 1953) (citations and internal quotation marks omitted). ("Liability is a word of most comprehensive significance, including almost every character of hazard or responsibility, absolute, contingent or likely. It connotes legal responsibility—the state of one who is bound or obliged in law and justice to do something."); *Krenger v. Pennsylvania R. Co.*, 174 F.2d 556, 559 (2d Cir. 1949). ("[L]iability is quite differentiated from a mere duty to pay damages and serves as the correlative of power and the opposite of immunity or exemption.").

The authorities cited by inTEAM to support its newly conceived position are inapposite. In *Cantor Fitzgerald, L.P. v. Cantor*, the Court of Chancery awarded attorney's fees as a remedy for a breach of the duty of loyalty under the bad faith exception to the "American Rule" that "absent express statutory provisions to the contrary, each party involved in litigation will bear only their individual attorneys' fees no matter what the outcome of the litigation." 2001 WL 536911, at *4-5 (Del. Ch. May 11, 2001). There, the *Cantor* court pointed to the particularly "egregious" behavior of the defendants that triggered the application of the bad faith exception regardless of the contract's provisions, clarifying that "this result is limited to these special facts and should not be read as stating a broad new principal, heretofore unknown, that expenditures for attorneys' fees and expenses will always be considered a component of more general damages." *Id*. at *5 n.18. In contrast, here, inTEAM points to the actual contractual justifications in an attempt to shift fees. Nonetheless, as clarified above, Section 11.2 expressly applies to the "liability of a Party," limiting all possible liability without providing any exception or distinction for the fees referred to in Section 6.5.

inTEAM also cites to the Black's Law Dictionary definition of "damages" recited in the dissent in *First Health Settlement Class v. Chartis Speciality Ins. Co.*, 111 A.3d 993, 1006 (Del. 2015). Trans. ID 60245870 at 61. But of course, any argument that attorneys' fees are not subject to the same limitations as damages generally is inapplicable here because Section 11.2 extends to "the liability of a Party"; it is not limited to damages as inTEAM argues. Furthermore, reliance on Black's Law Dictionary alone establishes that liability is a much broader concept than damages. *Compare* Black's Law Dictionary (defining "liability" as "[a] financial or pecuniary obligation."); *with id*. (defining "damages" as "money claimed by, or ordered to be paid to, a person as compensation for loss or injury.").

Left with the contractual reality that it must meet the exceptions set forth in Section 11.3, inTEAM makes one last attempt to argue that Heartland engaged in a pattern of willful misconduct sufficient to justify fee shifting. Of course, the trial court "considered all evidence presented at trial and determined that inTEAM did not meet its burden of proving willful misconduct in Heartland's breach of the Co-Marketing Agreement." Ex. B at 4. inTEAM offers no reason as to why this conclusion was clearly erroneous. Indeed, Heartland offered various arguments as to why its conduct did not amount to willful misconduct, and the Court agreed with Heartland. A3514-15. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Bank of N.Y. Mellon Trust Co. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011).

Neither the plain language nor the evidence adduced at trial supports awarding attorneys' fees and costs to inTEAM.[6] The trial court properly construed

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[6] Assuming inTEAM prevails on its newfound argument (which it should not), this action would need to be remanded for further proceedings because inTEAM has never submitted evidence of the attorneys' fees it now seeks. This is particularly important because inTEAM alleged that Heartland had breached a number of provisions in the Co-Marketing Agreement, yet only prevailed on one of

the contracts and evaluated the evidence, and inTEAM has simply offered no justification why the trial court's analysis should be disturbed on appeal.

CONCLUSION

For the reasons set forth above and in Heartland's Opening Brief on Appeal, this Court should reverse, award Heartland $600,000, vacate the injunction issued against Heartland, find both inTEAM and Goodman liable for breach, and remand this action for further proceedings. Further, this Court should not award inTEAM its claimed attorneys' fees. inTEAM waived this argument in the trial court, and has presented no basis upon which to overturn the trial court's refusal to grant inTEAM any attorneys' fees or costs.

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the many allegations. Surely, inTEAM would not be permitted to recover the entirety of its attorneys' fees in such circumstances.