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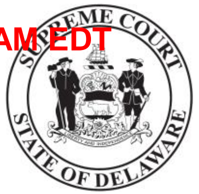

IN THE SUPREME COURT OF THE STATE OF DELAWARE

INTEAM ASSOCIATES, LLC and LAWRENCE GOODMAN, III, Plaintiff/Counterclaim Defendants Below-Appellants, v. HEARTLAND PAYMENT SYSTEMS, LLC, Defendant/Counterclaim Plaintiff Below-Appellee.	No. 330, 2018 APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. NO. 11523-VCMR **PUBLIC VERSION FILED AUGUST 24, 2018**

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

On August 27, 2017, this Court issued an Opinion reversing in part, but otherwise affirming, the Court of Chancery's post-trial rulings in this action. *See Heartland Payment Sys., LLC v. inTEAM Assocs., LLC*, 171 A.3d 544, 572 (Del. 2017) (hereinafter, "Supr. Ct. Op."). On appeal, this Court explicitly affirmed the Court of Chancery's holdings that (1) Heartland Payment Systems, LLC ("Heartland") breached its non-competition and exclusivity covenants to inTEAM Associates, LLC ("inTEAM"), and (2) Heartland's breaches entitled inTEAM to entry of an injunction prohibiting Heartland from further competing with inTEAM. *See id.* at 547, 569-72. For example, the Court wrote:

- "We reverse the Court of Chancery's finding that Goodman and inTEAM did not breach their non-compete obligations under various agreements, ***but otherwise affirm the court's decision***." *Id.* at 547 (emphasis added). *See also id*. at 572 ("Otherwise, the judgment of the Court of Chancery is affirmed.").

- "[T]he Court of Chancery ***properly found*** that Heartland breached its contractual obligations by collaborating with an inTEAM competitor …." *Id.* at 547 (emphasis added).

- "The Court of Chancery's conclusion [that Heartland breached its non-compete and exclusivity covenants] ***is supported by the record and thus was not in error***." *Id.* at 570 (emphasis added).

This Court reversed only one of the Court of Chancery's legal determinations – the holding that inTEAM and its CEO, Lawrence Goodman, III did not breach

their non-competition obligations – and remanded the action with instructions for the trial court to determine "what relief, if any, to grant for inTEAM's and Goodman's violation of the non-compete." *Id.* at 572. The Court made clear, however, that Heartland's claim remained subject to the affirmative defenses inTEAM and Mr. Goodman raised but which the trial court did not reach in its prior decision. *See id.* The Court did not reverse the Court of Chancery's post-trial fact findings or holdings relating to Heartland, nor did it direct the trial court to reconsider its prior rejection of Heartland's affirmative defenses.

On remand, after further briefing but without any additional submission of evidence (despite inTEAM's and Mr. Goodman's request to permit supplemental discovery on their affirmative defenses and re-open the record on Heartland's contempt of the injunction affirmed by this Court), the Court of Chancery issued an "Order Crafting Remedy Following Remand." *See inTEAM Assocs., LLC v. Heartland Payment Sys., LLC*, 2018 WL 1560058 (Del. Ch. Mar. 29, 2018) (Ex. A, the "Remand Order"). This decision was erroneous in the following critical respects:

1. Contrary to this Court's Opinion and the law of the case, the Court of Chancery vacated the "existing injunction against Heartland" (and therefore declined to address the issue of Heartland's continuing violation of that injunction and the consequent need for further relief) (Remand Order ¶¶ 12, 18);

2. Contrary to this Court's Opinion, which affirmed both the Court of Chancery's findings that Heartland breached its contractual obligations and the entry of an 18-month injunction against Heartland (thereby rejecting Heartland's affirmative defenses), the Court of Chancery entertained Heartland's affirmative defense of "unclean hands" on remand to effectively void the effect of Heartland's misconduct, mistakenly stating that the Supreme Court's decision required the Court of Chancery to "reexamine the argument" (Remand Order ¶¶ 8-12, 12 n.2, 18);

3. Contrary to this Court's Opinion and without the submission of any additional evidence, the Court of Chancery interpreted the appellate ruling as impliedly overturning the Court of Chancery's prior factual conclusion that inTEAM openly developed and sold products that competed with Heartland (Remand Order ¶ 17, 17 n.4), and then not only vacated the prior injunction against Heartland (thus insulating Heartland from liability for its contempt of that injunction), but also determined, contrary to its own post-trial findings, that inTEAM's affirmative defenses were not applicable (Remand Order ¶¶ 16-18); and

4. The Court of Chancery ruled erroneously as a matter of law that Mr. Goodman's unclean hands defense was inapplicable to Heartland's claim for money damages (Remand Order ¶ 16).

inTEAM and Mr. Goodman filed a Motion for Reargument from the Remand Order, which the trial court denied in a Letter Opinion dated April 27, 2018. *See*

inTEAM Assocs., LLC v. Heartland Payment Sys., LLC, 2018 WL 1989516 (Del. Ch. Apr. 27, 2018) (Ex. B, the "Letter Opinion"). On May 29, 2018, the Court of Chancery entered a Final Order and Judgment. *See* Ex. C (the "Final Order and Judgment"). inTEAM and Mr. Goodman thereafter commenced this appeal from the Court of Chancery's Remand Order, the Letter Opinion and the Final Order and Judgment.

SUMMARY OF ARGUMENT

1. On remand, the Court of Chancery violated this Court's mandate and the law of the case in several material respects:

a. In its Opinion, this Court affirmed Heartland's misconduct and the subsequent relief awarded, and these issues were not subject to modification on remand by the Court of Chancery. The Court of Chancery also should have entertained inTEAM's requests to address the continuing violations by Heartland of the injunction affirmed by this Court, instead of nullifying that issue by improperly voiding the injunction.

b. In its Opinion, this Court did not suggest that Heartland was entitled on remand to re-raise affirmative defenses (without the submission of any additional evidence) to void the consequences of Heartland's misconduct, or instruct the Court of Chancery to re-examine these issues. Rather, this Court affirmed the finding of Heartland's misconduct and its consequences. It was reversible error for the Court of Chancery to contradict the prior rulings affirmed by this Court.

c. This Court's Opinion did not overturn, expressly or impliedly, the post-trial factual findings made by the Court of Chancery and the wealth of supporting evidence that inTEAM and Mr. Goodman were "transparent" in disclosing to Heartland the development of software with functions that Heartland later alleged was a breach of inTEAM's and Mr. Goodman's non-competition

obligations. On appeal, this Court concluded that those functions violated the non-competition covenants but otherwise affirmed the Court of Chancery's post-trial decision in all respects. Heartland did not challenge – and this Court did not reverse – the Court of Chancery's finding that Heartland had knowledge of inTEAM's competitive software functions. This Court instead advised the Court of Chancery to consider inTEAM's and Mr. Goodman's affirmative defenses, which the Court of Chancery did not apply after trial because it found no breach of the non-compete provisions. Nonetheless, on remand, the Court of Chancery misinterpreted this Court's Opinion as overturning the prior factual findings, and thus violated this Court's mandate. Based on this reversible error, the Remand Order incorrectly vacated the trial court's previous injunction against Heartland, thereby depriving inTEAM of its right and ability to secure relief for Heartland's contempt of the injunction, and awarded damages in Heartland's favor against Mr. Goodman.

2. Had the Court of Chancery properly considered its post-trial fact findings, Heartland's knowledge of the competitive software functions would have barred all relief to Heartland on its counterclaims for breach of contract based on the application of inTEAM's and Mr. Goodman's affirmative defenses of laches, acquiescence, waiver and estoppel. In addition, the doctrine of unclean hands, which the Court of Chancery found on remand was properly applied against Heartland, is a broad defense that empowers the trial court to deny any relief, equitable or legal,

to a party who acts in bad faith. The Court of Chancery incorrectly denied Mr. Goodman's affirmative defenses and awarded damages in Heartland's favor against Mr. Goodman.

STATEMENT OF FACTS

In its prior Opinion, the Court discussed in great detail the underlying facts, the language of the parties' contracts, the functions performed by inTEAM's software offerings, and the relevant statutes and regulations governing federal subsidization of state school lunch programs. *See* Supr. Ct. Op., 171 A.3d at 547-57, 560-68. inTEAM and Mr. Goodman provide here the pertinent facts concerning the Court of Chancery's errors on remand. To the extent trial evidence is relevant to the Court's consideration of inTEAM's and Mr. Goodman's affirmative defenses, those facts are discussed in more detail below in connection with those defenses. *See* § II.C.1., *infra*.

I. THE COURT OF CHANCERY'S POST-TRIAL OPINION.

In the action below, inTEAM, as successor-in-interest to School-Link Technologies, Inc. ("School-Link"), alleged that Heartland breached non-competition and exclusivity covenants contained in a Co-Marketing Agreement, dated September 30, 2011 (the "CMA"). Heartland counterclaimed that inTEAM and Mr. Goodman breached reciprocal non-competition and non-solicitation obligations under the CMA, an Asset Purchase Agreement, dated September 12, 2011 (the "APA"), and a Consulting Agreement between Heartland and Mr. Goodman. These contracts were executed in connection with Heartland's

acquisition of substantially all of School-Link's assets except for certain products and services that School-Link continued to develop and market through inTEAM.

On September 30, 2016, following a four-day trial, the Court of Chancery issued an 86-page Memorandum Opinion deciding the parties' claims and counterclaims. *See inTEAM Assocs., LLC v. Heartland Payment Sys., Inc.*, 2016 WL 5660282 (Del. Ch. Sept. 30, 2016), *aff'd in part, rev'd in part*, 171 A.3d 544 (Del. 2017) (hereinafter, "Post-Trial Op."). The trial court held that Heartland breached its non-competition and exclusivity covenants in the CMA, while also ruling that inTEAM and Mr. Goodman did not breach their non-competition covenants in the APA or CMA. *See id.* at *14-18. The trial court issued an injunction against HPS, of approximately 18 months' duration, that extended the non-competition covenant to March 21, 2018 "to give inTEAM the full benefit of its bargain." *Id.* at *27.

inTEAM, Mr. Goodman and Heartland all asserted affirmative defenses to the breach of contract claims alleged against them at trial. Before finding Heartland liable for breaching its non-competition and exclusivity obligations, the trial court considered and rejected each of Heartland's affirmative defenses, including an unclean hands defense. *See id.* at *23. The Court of Chancery rejected Heartland's argument that inTEAM was guilty of unclean hands because inTEAM purportedly concealed its development of competing software, finding that "the evidence on

which Heartland relies actually undercuts Heartland's argument." *Id.* at *23. Instead, the trial court, after considering all of the evidence presented at trial, held that "Heartland fail[ed] to prove that inTEAM was not being transparent" with Heartland concerning the development, marketing and sales of software with competing functions. *Id.* *See also id.* at *26 ("I agree that there is 'evidence establishing that [Heartland] has long been aware that inTEAM developed and sold software with the functions [Heartland] now alleges are wrongfully competitive ….'").

Since the Court of Chancery found that Heartland failed to prove that inTEAM or Mr. Goodman breached their non-competition covenants, the court had no occasion to rule on the affirmative defenses to that claim.

II. THIS COURT'S OPINION.

On appeal, this Court explicitly affirmed the Court of Chancery's holding that Heartland breached its non-competition and exclusivity covenants, and determined that this entitled inTEAM to entry of an injunction prohibiting Heartland from further competing with inTEAM. *See* Supr. Ct. Op., 171 A.3d at 547, 569-72. The Court held that "[t]he Court of Chancery's conclusion [that Heartland breached its non-compete and exclusivity covenants] ***is supported by the record and thus was not in error***." *Id.* at 570 (emphasis added). The Court reversed only one of the Court of Chancery's legal determinations – the holding that inTEAM and Mr.

Goodman did not breach their non-competition obligations – and remanded the action with instructions for the trial court to determine "what relief, if any, to grant for inTEAM's and Goodman's violation of the non-compete." *Id.* at 572. The Court made clear, however, that Heartland's counterclaim remained subject to the affirmative defenses inTEAM and Mr. Goodman raised but which the trial court did not reach in its prior decision. *See id.* The Court did not reverse the Court of Chancery's post-trial fact findings or holdings relating to Heartland, nor did it direct the trial court to reconsider its prior rejection of Heartland's affirmative defenses.

III. THE REMAND ORDER.

In the Remand Order, however, the Court of Chancery interpreted this Court's Opinion as impliedly overturning the evidentiary finding that inTEAM openly and transparently developed and sold products that competed with Heartland. *See* Remand Order ¶ 17 ("I read the Supreme Court's opinion as a reversal of both the conclusion that Goodman did not breach the non-compete ***and the finding that Heartland had knowledge of Goodman's and inTEAM's actions***.") (emphasis added). Applying this misreading of the Court's holding, the Court of Chancery:

- Ruled the prior injunction against Heartland should be vacated on that basis, thus ensuring that Heartland's continuing violation of the injunction would not be addressed and that no applications for a new injunction or to extend the existing injunction would be entertained (*id.* ¶¶ 12, 18);

- Held that Heartland's claim for damages against Mr. Goodman is not barred by the knowledge-based affirmative defenses of laches, waiver, acquiescence or equitable estoppel (*id.* ¶ 17); and

- Awarded damages against Mr. Goodman in the amount of $399,997.08, equal to 27 months of consulting fees dating back to July 2012 – a period of time during which the trial court previously found Heartland was fully aware of Mr. Goodman's competitive activities (*id.* ¶ 15).

All of these holdings in the Remand Order relied upon or were influenced by the Court of Chancery's misreading of this Court's prior decision as well as the conclusion that this Court reached a different factual determination concerning Heartland's knowledge of inTEAM's and Mr. Goodman's competitive activity. The trial court's central premises are erroneous, and hence the holdings which directly flow from these conclusions are as well. In sum, the Court of Chancery misinterpreted and misapplied this Court's Opinion and mandate in a manner that materially affected the Remand Order.

ARGUMENT

I. THE COURT OF CHANCERY INCORRECTLY APPLIED THIS COURT'S MANDATE ON REMAND.

A. Question Presented.

Did the Court of Chancery misinterpret and misapply this Court's ruling and directions, in violation of the Court's Opinion and mandate, the law of the case and the collateral estoppel doctrine, when it (1) reversed its own post-trial legal conclusions and factual findings, that were undisturbed on appeal, concerning Heartland's misconduct and the injunction issued against Heartland (and thus refused to entertain or address Heartland's continuing violations of the injunction), (2) sustained Heartland's unclean hands defense to vacate the injunction affirmed by this Court, after this Court affirmed the Court of Chancery's rejection of the same defense after trial, (3) held that Mr. Goodman's equitable affirmative defenses did not bar Heartland's claims for relief, when the Court of Chancery found after trial that Heartland had knowledge of inTEAM's competitive activities, and (4) awarded damages to Heartland equal to 27 months of consulting fees paid to Mr. Goodman despite Heartland's knowledge of inTEAM's competitive activities and the trial court's finding that Heartland was guilty of unclean hands? *See* A3512-A3524, A3801-A3814.

B. Scope Of Review.

The trial court's application of an appellate court's mandate upon remand implicates the law of the case doctrine and is subject to *de novo* review. *See Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 36, 38-39 (Del. 2005).

C. Merits Of Argument

1. *On Remand, The Court Of Chancery Was Required To Comply With The Mandate And The Law Of The Case.*

"It is well-settled that when an appellate court remands for further proceedings, the trial court must proceed in accordance with the appellate court's mandate as well as the law of the case established on appeal." *Cede & Co.*, 884 A.2d at 38. On remand, "[t]he trial court must implement 'both the letter and the spirit of the mandate ... taking into account the appellate court's opinion ... and the circumstances it embraces.'" *Id.* (quoting *Piambino v. Bailey*, 757 F.2d 1112, 1119 (11th Cir. 1985)).

The law of the case doctrine "embraces the same principles arising from the mandate rule" and "posits that 'findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the trial court or in a later appeal.'" *Id.* at 38-39 (quoting *Ins. Corp. of America v. Barker*, 628 A.2d 38, 40 (Del. 1993)). The law of the case "requires that there must be some closure to matters already decided in a given case by the highest court of a particular jurisdiction, particularly when (with a different composition of jurists) that same

court is considering matters in a later phase of the same litigation." *Gannett Co., Inc. v. Kanaga*, 750 A.2d 1174, 1181 (Del. 2000). The only exceptions to the law of the case doctrine apply to "a prior decision that is clearly wrong, produces an unjust result or should be revisited because of changed circumstances." *Cede & Co.*, 884 A.2d at 39.

Here, the Remand Order violates both this Court's mandate and the law of the case in multiple respects.

2. *The Remand Order Incorrectly Vacated The Injunction Against Heartland, Thereby Insulating Heartland From Liability For Its Contempt Of The Post-Trial Final Judgment.*

The Court of Chancery had no basis on which to reconsider or reverse its prior holding and vacate the injunction previously entered against Heartland and affirmed by this Court. By vacating the injunction, the trial court committed reversible error. Vacating the injunction against Heartland violated this Court's Opinion and mandate, since the Court expressly ***affirmed*** the Court of Chancery's post-trial entry of the injunction. *See* Supr. Ct. Op., 171 A.3d at 568-71. This Court directed the trial court on remand to determine the appropriate remedy (if any) for inTEAM's breach of contract and adjudicate any affirmative defenses available to inTEAM; the mandate did ***not*** authorize Heartland to re-argue affirmative defenses against what this Court held was a properly-entered injunction. *See id.* at 572. Indeed, in its appeal, Heartland challenged only the ***duration*** of the injunction, and did not argue

that the injunction was barred *in toto* by any of Heartland's affirmative defenses. *See* A2382-A2384. Having not raised these issues on appeal, Heartland could not properly have requested that the trial court vacate the injunction on remand. *See Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del. 2004) ("Most importantly, however, Rule 14(b)(vi)(2) provides that '[t]he merits of any argument that is not raised in the body of the opening brief [is] deemed waived and will not be considered by the Court on appeal.'").

By vacating the injunction and thus refusing to address Heartland's continuing violations, the Court of Chancery denied inTEAM the right and ability to obtain meaningful relief against Heartland. Following remand from this Court, inTEAM sought supplemental discovery concerning Heartland's contemptuous activity in violation of the injunction, in part to support inTEAM's and Mr. Goodman's unclean hands defense. *See* A3090-A3340. The Court of Chancery denied inTEAM's motion, holding that it was limited in the remand proceeding to consider only the evidence presented at trial. *See* A3356-A3357. At the same time, however, the trial court recognized that, if there was sufficient evidence that Heartland was violating the injunction, inTEAM could renew contempt proceedings after the remand was concluded. *See* A3357.

After obtaining additional evidence of Heartland's contempt, inTEAM filed a Renewed Motion for Rule to Show Cause on February 13, 2018, to preserve

inTEAM's right to pursue relief for Heartland's violations of the injunction following appeal. *See* A3650-A3800.[1] By vacating the injunction, however, the Court of Chancery completely absolved Heartland of its past misconduct. Reversing that error, and remanding the action for further proceedings, is necessary to ensure that the injunction is renewed and inTEAM can bring its motion before the trial court and secure the full benefit of the injunction that Heartland brazenly ignored.

3. *The Court of Chancery's Post-Trial Holding That Heartland Breached The CMA, And The Fact Findings And Analysis Supporting That Legal Determination, Were Affirmed And Are The Law Of The Case.*

After trial, the Court of Chancery held that Heartland breached its non-competition and exclusivity covenants, and in so doing expressly found that none of the affirmative defenses asserted by Heartland barred inTEAM's claims. *See* Post-Trial Op. at *22-23. In particular, the trial court held that Heartland failed to establish an unclean hands defense, which was based on Heartland's contention that inTEAM "conceal[ed] its prohibited development of the Menu Compliance Tool+." *Id.* at *23. Relying on trial testimony and a June 8, 2012 e-mail from inTEAM executive Erik Ramp to Heartland executive Terry Roberts (A1543), the Court of

[1] On April 28, 2017, the Court of Chancery denied an earlier Motion for Rule to Show Cause on the grounds of insufficient evidence (*see* A2983-A2995), but inTEAM had garnered and submitted significant additional evidence since that time.

Chancery rejected Heartland's claim that "inTEAM was not being transparent." Post-Trial Op. at *23. The trial court also found "that there is evidence establishing that ***[Heartland] has long been aware that inTEAM developed and sold software with the functions [Heartland] now alleges are wrongfully competitive.*** " *Id.* at *26 (emphasis added). After concluding that Heartland breached the CMA, the Court of Chancery granted an injunction of approximately 18 months' duration, prohibiting Heartland from competing further with inTEAM, as relief. *See id.* at *26-27.

On appeal, this Court affirmed the holding that Heartland breached its non-competition and exclusivity covenants, finding that the Court of Chancery's conclusion that Heartland breached its obligations "is supported by the record and thus was not error." Supr. Ct. Op., 171 A.3d at 570. The Court did not overrule, consider or discuss the trial court's rejection of Heartland's affirmative defenses – including the finding that inTEAM was not guilty of unclean hands – because Heartland never challenged that aspect of the post-trial ruling. *See* A2379-2382. Instead, Heartland appealed only the Court of Chancery's interpretation of Heartland's non-competition covenant and use of extrinsic evidence. *See id.* In addition to affirming the trial court's finding of liability against Heartland, this Court also upheld the entry of the injunction against Heartland. *See* Supr. Ct. Op., 171 A.3d at 570-71.

The Court reversed the Court of Chancery's post-trial judgment in only one respect, finding that the trial court erred as a matter of law in its interpretation of the parties' contractual terms. *See* Supr. Ct. Op., 171 A.3d at 558-68. The Court reviewed the non-competition covenants *de novo* and determined that inTEAM and Mr. Goodman breached their contracts by offering "Competitive Products" as defined by the parties. *See id.* at 559. While the Court held that inTEAM and Mr. Goodman breached their contracts by offering competitive products, the Court did not opine – either explicitly or implicitly – that inTEAM or Mr. Goodman at any time concealed their activities from Heartland. To the contrary, the Court acknowledged that inTEAM's Menu Compliance Tool+ "was the first USDA-approved menu planning tool for Six Cent Certification" under public regulations requiring certification for software with "simplified nutrient assessment" functions. *Id.* at 554.

Finally, the Court remanded the action and directed the Court of Chancery to determine "what relief, ***if any***, to grant for inTEAM's and Goodman's violation of the non-compete," while expressly permitting inTEAM and Mr. Goodman to reassert the affirmative defenses upon which the trial court did not previously rule. *Id.* at 572 (emphasis added). This included the laches, acquiescence, waiver, and estoppel defenses arising from Heartland's prior knowledge of inTEAM's and Mr. Goodman's conduct.

Therefore, this Court did ***not*** reverse the Court of Chancery's post-trial fact findings or holdings relating to Heartland, nor did it direct the trial court to reconsider its prior rejection of Heartland's affirmative defenses – in fact, Heartland never challenged those aspects of the Court's judgment in its appeal. As a result, those findings stand as a matter of law. *See, e.g.*, Supr. Ct. R. 14(b)(vi)(A)(3) ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal."); *Sullivan v. Mayor of Town of Elsmere*, 23 A.3d 128, 134 (Del. 2011) (trial court holdings not challenged on appeal are the law of the case). Since the Court expressly upheld the trial court's conclusion and affirmed its ruling that Heartland was liable for breaching the CMA, the factual and legal analysis supporting that holding – including the Court of Chancery's rejection of Heartland's unclean hands defense on the basis that inTEAM was "transparent" with Heartland – is the law of the case.

On remand, the Court of Chancery re-considered ***Heartland's*** affirmative defenses, reversing its prior finding that Heartland failed to prove an unclean hands defense that would defeat inTEAM's claim that Heartland breached the CMA. (Remand Order ¶¶ 12, 18.) In so doing, the Court of Chancery violated this Court's Opinion and mandate.

4. *The Remand Order Incorrectly Concluded That This Court Impliedly Reversed Findings Relating To InTEAM's and Mr. Goodman's Affirmative Defenses On Appeal.*

After holding that inTEAM and Mr. Goodman breached their non-competition covenants, the mandate from this Court was clear – to "fashion a remedy adequate to compensate Heartland" and to address the affirmative defenses previously asserted by inTEAM and Mr. Goodman but on which the trial court did not rule. The Remand Order misinterprets this Court's Opinion and contradicts the mandate.

The foundation of the Remand Order is the trial court's inference that this Court concluded in its Opinion, contrary to the post-trial findings supported by the trial record, that Heartland and inTEAM "each took steps to conceal their respective violations [of non-compete obligations] from each other." *Id.* ¶ 11. ***This Court's Opinion, however, neither stated nor implied any such thing.*** Nonetheless, the Court of Chancery inferred incorrectly: "I read the Supreme Court's opinion as a reversal of both the conclusion that Goodman did not breach the non-compete ***and the finding that Heartland had knowledge of Goodman's and inTEAM's action***." *Id.* ¶ 17 (emphasis added).

In particular, the Court of Chancery disclaimed its prior reliance on the June 8, 2012 e-mail from Mr. Ramp to Mr. Roberts (A1543) as evidence that inTEAM was "transparent" with Heartland concerning the functions of Menu Compliance

Tool+. The trial court did so based entirely upon an inference that this Court's Opinion reached a different factual determination concerning Heartland's knowledge of inTEAM's and Mr. Goodman's competitive activity:

> In the post-trial memorandum opinion, I found that this email, sent eleven days after the federal guidelines became effective, demonstrated Heartland's knowledge of Goodman and inTEAM's actions. … Although the Supreme Court ***does not*** explicitly overrule this point, ***the only logical conclusion*** is that it agreed with Heartland that Ramp's email, along with other evidence presented by Heartland, reflect concealment rather than disclosure. ***Otherwise, waiver would have been the necessary outcome in the Supreme Court's opinion.***

Remand Order ¶ 17, n.4 (citation omitted, emphasis added).

However, this Court offered no basis for the Court of Chancery to question the prior ***factual*** conclusion that Mr. Ramp's June 8, 2012 e-mail to Mr. Roberts established Heartland's knowledge of inTEAM's and Mr. Goodman's activities. The Court's Opinion does not even mention this e-mail, let alone opine that the e-mail "reflect[s] concealment rather than disclosure."

While acknowledging that this Court's Opinion "does not explicitly overrule this point," the Remand Order posited that the "only logical conclusion" to be drawn from the Court's Opinion is that Mr. Goodman ***must*** have concealed his actions. *Id.* This is not accurate, since this Court found that inTEAM violated the non-compete while still acknowledging that inTEAM's products were openly approved by the

USDA to perform functions identified by public regulations (*see* Supr. Ct. Op., 171 A.3d at 554) – regulations of which the trial court found Heartland was fully aware. Thus, the trial court's reasoning that its inference was the "only logical conclusion" is unfounded. This Court's Opinion gave the Court of Chancery no reason to reconsider its earlier findings and to "read the Supreme Court's opinion as a reversal of … the finding that Heartland had knowledge of Goodman's and inTEAM's actions." Remand Order ¶ 17. To the contrary, this Court affirmed the holdings that were based upon the trial court's determination that inTEAM openly competed with Heartland.

Further, the "only logical conclusion" inferred by the Court of Chancery, based on an assumption that "waiver would have been the necessary outcome," is not sensible in the circumstances. If the Court of Chancery was referring to inTEAM's and Mr. Goodman's breach of the non-compete provisions, this Court stated that it expressly did not consider their affirmative defenses at all, but rather left it to the Court of Chancery to adjudicate them. *See* Supr. Ct. Op., 171 A.3d at 572. If the Court of Chancery was referring to Heartland's appeal from the finding that it breached its own covenants, this Court affirmed that holding and thus rejected Heartland's affirmative defenses. And if the Court of Chancery was referring to Mr. Goodman's breach of the non-solicitation provision, this Court acknowledged that Mr. Goodman's affirmative defenses were not the subject of the appeal. *See id.*

The Court of Chancery commented in a footnote that, to the extent its post-trial opinion rejected Heartland's unclean hands defense, the holding "relied heavily on my finding that inTEAM did not breach its non-compete obligations" and should be re-examined in light of this Court's reversal. Remand Order ¶ 12, n.2. However, a finding that inTEAM breached its contract with Heartland does not *a priori* establish unclean hands. *See SmithKline Beecham Pharms. Co. v. Merck & Co.*, 766 A.2d 442, 449 (Del. 2000) (recognizing that "not all breaches [of contract] necessarily amount to the imposition of the unclean hands doctrine"). Further, nothing in this Court's Opinion reverses the Court of Chancery's prior findings at trial and consequent holding that inTEAM did not conceal the activities found to have breached its non-competition covenant.

In actuality, this Court had no reason to even consider whether inTEAM or Mr. Goodman concealed any competitive activity, since Heartland did not challenge on appeal the trial court's rejection of Heartland's unclean hands defense or the trial court's finding that Heartland was aware of inTEAM's competitive conduct. Instead, this Court instructed the trial court to address inTEAM's and Mr. Goodman's affirmative defenses on remand ***without*** reversing or directing the trial court to reconsider any of the fact findings made at trial.

The Court of Chancery, however, rejected Mr. Goodman's affirmative defenses against Heartland's breach of contract claim based on a misinterpretation

of this Court's Opinion. While the trial court previously found that inTEAM and Mr. Goodman were "transparent" with Heartland, and that Heartland "has long been aware" of inTEAM's and Mr. Goodman's competitive activities (Post-Trial Op. at *23, *26), the Remand Order held that Mr. Goodman cannot prove the affirmative defenses of laches, waiver, acquiescence or equitable estoppel because, in the trial court's view, this Court "concluded that … Goodman and inTEAM took evasive steps to conceal their behavior from Heartland." Remand Order ¶ 17. Again, nothing in this Court's Opinion even suggests that the Court reached a different fact conclusion than the Court of Chancery after trial; rather, this Court ***affirmed*** the Court of Chancery's holding that Heartland breached its contractual obligations.[2]

In short, the Court of Chancery reached a conclusion on remand diametrically ***opposite*** to the holding and fact finding in its earlier opinion based on the evidence presented at trial – *i.e.*, that inTEAM did ***not*** conceal its competitive activities from Heartland but, rather, was "transparent." The trial court also reversed, *sua sponte*, its own prior holding that inTEAM was ***not*** guilty of unclean hands. It did so based on a conclusion that this Court's Opinion constituted a "reversal" of its factual

[2] The Remand Order cites pages 555 and 568 (at footnote 90) of this Court's Opinion to support the notion that this Court "concluded that … Goodman and inTEAM took evasive steps to conceal their behavior from Heartland." Remand Order ¶ 17. Neither these pages nor any other portion of the Court's Opinion – which does not mention the words "evasive" or "conceal" – reflects any such conclusion.

conclusions in these respects. The Court's Opinion did no such thing, however, and the Remand Order and its conclusions are erroneously based on a misinterpretation of this Court's Opinion and mandate.

5. *Collateral Estoppel Also Bars The Court Of Chancery's Reconsideration Of Its Prior Fact Findings On Remand.*

Alternatively, the Remand Order violates the doctrine of collateral estoppel, which bars Heartland from re-litigating factual issues that were previously tried and resolved by the Court of Chancery. Collateral estoppel applies in remand proceedings, in conjunction with the law of the case doctrine, to prevent re-litigation of facts already adjudicated by the trial court. *See Izquierdo v. Sills*, 2004 WL 2290811, at *4 n.28 (Del. Ch. June 24, 2004) ("[W]hen the estoppel is operative in proceedings in the same case on remand, courts frequently speak in terms of the law of the mandate or the law of the case rather than collateral estoppel but the underlying principle is the same.") (quoting *Cowgill v. Raymark Indus., Inc.*, 832 F.2d 798, 802 (3d Cir. 1987)).

Collateral estoppel applies if: (1) the issue previously decided is identical to the issue at bar; (2) the prior issue was finally adjudicated on the merits; (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in a prior action. *Id.* Here, all of these

elements are satisfied. First, Heartland's argument on remand (*i.e.*, that inTEAM and Mr. Goodman concealed from Heartland their prohibited development and sale of the Menu Compliance Tool+ software) is the exact same argument that the Court of Chancery previously rejected after trial. *See* Post-Trial Op. at *23. Second, the issue was finally adjudicated on the merits because this Court expressly affirmed the Court of Chancery's holding that Heartland breached the CMA, in which the trial court analyzed and rejected Heartland's unclean hands defense based on the finding that inTEAM was "transparent" with Heartland. Finally, there is no disputing that Heartland had a full and fair opportunity to litigate the issue at trial, is the party bound by the trial court's fact findings, and also had a full and fair opportunity to litigate the issue (if it so chose) in connection with the prior appeal to this Court. Since on remand Heartland was collaterally estopped from re-litigating the Court of Chancery's fact finding that Heartland had full knowledge of inTEAM's and Mr. Goodman's competitive activities, the Remand Order's reliance upon directly contrary factual conclusions (based on an erroneous conclusion that this Court's Opinion previously reversed them) was improper and constituted reversible error.

II. MR. GOODMAN'S AFFIRMATIVE DEFENSES BAR HEARTLAND'S CLAIMS FOR RELIEF.

A. Questions Presented.

Do Mr. Goodman's affirmative defenses of laches, acquiescence, waiver, and estoppel, applied to the Court of Chancery's post-trial fact findings that Heartland had full knowledge of Menu Compliance Tool+'s competitive functions, bar any award of relief to Heartland? *See* A3407-A3422, A3432-A3433, A3512-A3526, A3809-A3814. Relatedly, did the Court of Chancery err in its Remand Order by rejecting these defenses based upon its erroneous conclusion that this Court reversed "the finding that Heartland had knowledge of Goodman's and inTEAM's actions"? Remand Order ¶ 17; *see* A3809-A3814. Further, did the Court of Chancery err in its Remand Order by awarding damages to Heartland even though the court found Heartland guilty of unclean hands? *See* A3809-3814.

B. Scope Of Review.

When a trial court adjudicates an affirmative defense as a matter of law, this Court reviews the ruling *de novo*. *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co., Inc.*, 866 A.2d 1, 22 (Del. 2005). To the extent the trial court's post-trial findings of fact are considered, appellate review "is limited to a search for substantial evidence supporting them." *Bartley v. Davis*, 519 A.2d 662, 664 (Del. 1986). The trial court's fact findings are accepted if they "are the product of an orderly and logical deductive process … even though independently [the appellate

court] might have reached opposite conclusions," and will be overturned only "when … clearly wrong and the doing of justice requires." *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

C. Merits Of Argument

1. *The Trial Record Fully Supports The Court Of Chancery's Fact Finding That inTEAM And Mr. Goodman Were "Transparent" With Heartland.*

The Court of Chancery should have denied all relief to Heartland because (1) this Court's Opinion did not reverse the factual finding at trial that "Heartland had knowledge of Goodman's and inTEAM's actions," and (2) at all relevant times, Heartland was fully aware of inTEAM's development, marketing and sale of the Menu Compliance Tool+ module in DST. Despite this knowledge, Heartland did nothing for years to enforce its contractual rights against inTEAM or Mr. Goodman until inTEAM notified Heartland that it breached the CMA.

In its post-trial opinion, the Court of Chancery rejected, as a factual matter, Heartland's claim that inTEAM concealed "its prohibited development of the Menu Compliance Tool+":

> Heartland argues that inTEAM "violated conscience or good faith or other equitable principles in [its] conduct" ***by concealing its prohibited development of the Menu Compliance Tool+***, and as a result, "the doors of equity should shut against [inTEAM]." The Co-Marketing Agreement, however, allowed inTEAM to develop its Menu Compliance Tool+. ***Further, the evidence on***

> ***which Heartland relies actually undercuts Heartland's argument***. On June 8, 2012, the same year the Menu Compliance Tool+ was approved as a Menu Planning Tool, Erik Ramp, Vice President of Operations at inTEAM, e-mailed Roberts at Heartland to "make sure [he] was clear about what [inTEAM was] doing with menu compliance." Ramp informed Roberts that inTEAM was "building a menu compliance tool for use under Option #2 to certify menus submitted under the new regulations," which expressly included menu planning and analysis of certain nutrients, namely calories, saturated fat, and sodium. Ramp went on to assure Roberts that inTEAM was "not building full nutrient analysis software like what you have in the POS." He added that the product may be sold to both states and districts. And he ended by stating that the new software is an add-on to DST. ***This is exactly what inTEAM proceeded to do. Thus, Heartland fails to prove that inTEAM was not being transparent.***

Post-Trial Op. at *23 (emphasis added). Further, the trial court found that "there is 'evidence establishing that [Heartland] has long been aware that inTEAM developed and sold software with the functions [Heartland] now alleges are wrongfully competitive.'" *Id.* at *26.

The Court of Chancery's factual conclusions in this respect were correct and fully supported by the factual record at trial. As this Court noted, at the time Heartland closed its acquisition of School-Link's assets, inTEAM had developed and was marketing Phase I of its Decision Support Toolkit ("DST") software product. Supr. Ct. Op., 171 A.3d at 553. After closing, inTEAM developed DST Phase II and created the "Menu Compliance Tool+" module by incorporating the

USDA's newly enacted "simplified nutrient assessment" criteria into the existing DST functions. *Id.* at 553-54. The Menu Compliance Tool+ module "assisted customers with ensuring compliance with the USDA's regulations that had been finalized in 2012" by analyzing nutrients such as calories, saturated fat, sodium and carbohydrates. *Id.* at 554. Menu Compliance Tool+ "was the first USDA-approved menu planning tool for Six Cent Certification," having obtained USDA approval in August 2012. *Id.*

While it was developing DST Phase II and Menu Compliance Tool+, inTEAM was attempting unsuccessfully to engage Heartland in jointly promoting and cross-marketing the parties' products. As part of this effort, Mr. Goodman and others at inTEAM repeatedly communicated the Menu Compliance Tool+ functions to Mr. Roberts, the former Chief Operating Officer of inTEAM who became the head of Heartland's school services division following Heartland's acquisition of School-Link's assets. For example, while suggesting that he and Mr. Roberts discuss "how Heartland and inTEAM are adapting to help schools with the 'new rules'" adopted by the USDA under the Healthy, Hunger-Free Kids Act ("HHFKA"), Mr. Goodman identified to Mr. Roberts the following points for consideration: "Menu Plan Compliance as a DST Statewide Module," "Technical Collaboration and [revenue] share on Nutrient Analysis," and "DST Cloud Hosted District Opportunity." A1539. Mr. Roberts never disputed inTEAM's right to

pursue these opportunities, and there is no evidence that he believed they violated inTEAM's non-competition covenant.

Mr. Roberts also did not challenge inTEAM's development of menu compliance software when Mr. Ramp, Mr. Roberts' successor as inTEAM's Chief Operating Officer, described it to him explicitly. On June 5, 2012, Mr. Ramp asked Mr. Roberts to schedule a call to "talk through the Menu Planning Compliance Tool." A1542. On June 8, 2012, after having that call with Mr. Roberts, Mr. Ramp reported to Mr. Goodman:

> Terry said that as long as we aren't trying to get into the district menu planning game, ***he's fine with what we're developing***. I explored the option of partnering at which point he mentioned that State level products were not really Heartland's interest as they don't really try to sell anything to States.

A1544 (emphasis added).

As a follow up to the call, Mr. Ramp sent the following e-mail to Mr. Roberts:

> Terry -
>
> I want to make sure I was clear about what we're doing with Menu Compliance. We are building a menu compliance tool for use under Option #2 to certify menus submitted under the new regulations. We are not building full nutrient analysis software like what you have in the POS. But I think I stated that it would be a State-only product.States are our target, but there's a chance we would want to sell it to districts, but only for the purposes of submitting menus for certification and as an add-on to DST. Let me know if that makes sense.
>
> Talk to you soon.
> Erik

A1543.[3] Mr. Roberts never responded to Mr. Ramp's e-mail or questioned whether inTEAM's activities ran afoul of the non-compete covenants.

Shortly thereafter, in August 2012, Mr. Ramp disclosed to Heartland that the Menu Compliance Tool+ module was "nearly USDA approved." A1424-A1425. *See also* A530 at 75:12-22 (by Summer 2012, Mr. Roberts was aware that inTEAM had applied to the USDA for menu planning tool approval). At that time, pursuant to new regulations promulgated in 2012 under the HHFKA, the USDA reviewed and approved software categorized as "menu planning tools" for use in school meal programs.[4] The USDA criteria were posted publicly (*see* A1462-A1463) and would

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[3] As the Court will recall, "Option #2" refers to one of the three options by which schools may obtain Six Cent Certification from the USDA. *See* Supr. Ct. Op., 171 A.3d at 548. Under Option #2, "schools submit one week of menus and a USDA menu worksheet, but submit a simplified nutrient assessment instead of the in-depth nutrient analysis." *Id.* *See also* A1464-A1520, A1521-A1531 (USDA publications explaining Six Cent Certification options).

[4] Specifically, any software with the following functions requires USDA approval as a "menu planning tool" to be used for Six Cent Certification:

> 1. Provides food-based meal pattern functionality beyond simple identification of meal pattern components, such as user-identified fruits, vegetables, grains, meats/meat alternatives, and milk.
>
> 2. Tallies or sums the meal pattern components for a menu.

have been well-known to anyone working for a company developing and selling Six Cent Certification software.

Having been notified by Mr. Ramp that inTEAM had applied for USDA approval of Menu Compliance Tool+ as a "menu planning tool," Mr. Roberts and his management team at Heartland unquestionably knew that inTEAM's product included the relevant functions. Mr. Roberts and his management team also knew the functions of a Six Cent Certification "menu planning tool" because they attended a meeting at which the USDA explained to software developers the required functionality and the new approval process. A1065 at 428:15-429:20. Moreover, since Heartland subsequently applied for and obtained USDA approval of its Nutrikids software as a "menu planning tool" (*see* A1427; A1319 at 1146:17-1148:23, A1328-A1329 at 1183:21-1185:9), there can be no question that Mr.

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3. Compares the meal pattern totals to the standard or requirement.

4. Implies quantification or evaluation of the meal pattern requirements.

5. Provides similar functionality to the FNS certification worksheets.

6. Provides a Simplified Nutrition Assessment (SNA) tool that does not require data entry of all menu items or the use of a nutrient database.

A1462-A1463.

Roberts and others at Heartland were fully aware of the functions performed by software – such as inTEAM's Menu Compliance Tool+ – approved for that purpose.

This was further confirmed on August 7, 2012, when Mr. Roberts wrote to a Heartland colleague about inTEAM's Menu Compliance Tool+. A1425. In that e-mail, Mr. Roberts not only discussed his knowledge that inTEAM was in the process of obtaining USDA Six Cent Certification approval for the Menu Compliance Tool+, but also described his understanding of the Menu Compliance Tool+ functions, going so far as to suggest that Heartland should purchase rights to inTEAM's product and "rebrand" it as "Mosaic $.06":

> inTEAM- I talked with Erik Ramp last night who is the COO of inTEAM. These guys have a web version of $0.06 that is nearly USDA approved. They don't know how they are going to auto pull in data –think data extractor like DST, but it will take the data and output it into the spreadsheet format. We could offer this, or possibly resell it. As you both know, this would probably get complicated with Chip (what I'd like to do is add up what we think this would take in development time and just buy the rights….). Clients can also manually enter the data and have it output in the format needed. I asked Erik if we could get a demo that doesn't involve Chip or Mary Jo and he said he could do that for us. Maybe we could even rebrand it Mosaic $.06

Id.

On August 15, 2012, Mr. Ramp notified Mr. Roberts that inTEAM's Menu Compliance Tool+ had been approved by the USDA as a "menu planning tool" for Six Cent Certification. *See* A1426. A few days later, Mr. Roberts knew enough about Menu Compliance Tool+ to comment to a colleague that Heartland's Nutrikids product would "kill inTEAM's business model" for state-level sales when Nutrikids received its own USDA approval as a "menu planning tool." A1427.

On August 31, 2012, Mr. Ramp included Mr. Roberts on an e-mail sent to representatives of Indiana's Department of Education to follow up on that state's interest in inTEAM's USDA-approved Menu Compliance Tool+. *See* A1428-A1429. In that e-mail, Mr. Ramp described how Menu Compliance Tool+ users could input menus directly, as an alternative to importing menu information from Nutrikids. *See id.* The e-mail also disclosed to Mr. Roberts inTEAM's proposal that Indiana "select one or two pilot districts that are willing to build their menus in our Menu Compliance Tool+. inTEAM consultants will then work directly with these SFAs, either in-person or through virtual webinar, to plan and submit menus to the state for 6 cent certification." *Id.*

Mr. Ramp also forwarded to Mr. Roberts on October 18, 2012, a final report that inTEAM submitted to the New Mexico Public Education Department – a project in which Mr. Roberts himself had participated during his employment with School-Link. *See* A1430-A1454. Among the components of work inTEAM proposed to New Mexico in that report was the "web based software for menu compliance," or DST Phase 2, "updated to account for new legislation." A1433. The report detailed the functions of inTEAM's Menu Compliance Tool+ and its application at the state level. A1442-A1443. In his forwarding e-mail, Mr. Ramp informed Mr. Roberts that New Mexico "decided to purchase our Menu Compliance Tool+ which once finalized, will mean we have at least two State agency customers with the tool."

A1430. On November 1, 2012, when Heartland learned that Nutrikids earned its own USDA approval as a "menu planning tool," Mr. Roberts acknowledged in an e-mail to Michael Lawler that inTEAM was "the only other certified vendor" for software with such USDA-approved functions. A1455-A1456.

Mr. Roberts was not the only Heartland employee who was aware of inTEAM's Menu Compliance Tool+ and its functions. In the days following Nutrikids' approval by the USDA as a "menu planning tool," Heartland contacted a public relations consultant to discuss a press release. A1457-A1461. In an e-mail exchange with the consultant, Heartland employee Rosemary Orliss described inTEAM as a "competitor" who "offers a 6-cent solution" – albeit one that Heartland was not "concerned about":

> No. The other company that offers a 6-cent solution is inTEAM Associates, which used to be a division of School-Link Technologies until the HPS acquisition. HPS wasn't interested in that part of the business, so it spun off as its own company. Mary Jo Tuckwell is a senior consultant with them, and was on the IOM panel that made the initial recommendations.
>
> In all candidness, although they are technically a competitor in that they are the only other offering currently certified, none of us are concerned about them. They don't have a significant software footprint already in the market; most of their business is focused on the execution of consulting and other project work for the state of New Mexico at this time. On the flipside, more than 8,000 schools and nearly all state education departments in the US use NUTRIKIDS for menu planning. Our marketplace exposure is significantly higher in this area, so this certification will be able to have a more measurable impact for our clients.

A1459.

The record is thus replete with evidence demonstrating that Heartland knew for years that inTEAM openly developed and sold software with the exact functions this Court found to breach inTEAM's and Mr. Goodman's non-competition obligations. *See also* A3439-A3452 (Exhibit A to Answering Remand Brief,

showing how Mr. Roberts was involved with inTEAM's menu-centric, state-based business plan and citing the many instances after closing when Mr. Roberts and other Heartland representatives were made aware that inTEAM developed and marketed DST with competing functions). On remand, the Court of Chancery (1) should not have concluded that this Court's Opinion reversed the trial court's finding based on this factual record that "Heartland had knowledge of Goodman's and inTEAM's actions," and (2) should have determined that this evidence equitably bars Heartland's claims for relief based on the multiple separate affirmative defenses presented.

2. *Laches.*

Laches "is generally defined as an unreasonable delay by the plaintiff in bringing suit after the plaintiff learned of an infringement of his rights, thereby resulting in material prejudice to the defendant." *Reid v. Spazio*, 970 A.2d 176, 182 (Del. 2009). An affirmative defense of laches requires proof of: (1) knowledge by the claimant; (2) unreasonable delay; and (3) resulting prejudice to the defendant. *Id.* at 182-83.

Here, the Court of Chancery expressly found (in a ruling affirmed by this Court) that Heartland knew no later than June 2012 that inTEAM was developing Menu Compliance Tool+ with the precise functions that this Court held to be competitive. However, it was not until more than three years later, in July 2015, that

Heartland first accused inTEAM and Mr. Goodman of having breached their non-competition covenants. *See* A1545-A1547. The prejudice resulting from this unreasonable delay was real and substantial, as inTEAM and Mr. Goodman continued over at least three years to invest money and time into developing DST and Menu Compliance Tool+, reasonably relying to their detriment upon Heartland's inaction. This expenditure of resources easily establishes the prejudice required for laches. *See Whittington v. Dragon Group L.L.C.,* 2008 WL 4419075, at *7 (Del. Ch. Sept. 30, 2008) ("For purposes of laches, prejudice may occur in different ways … such as where a party suffers a financial detriment by relying on the plaintiffs' failure to seek relief in a timely manner."); *Gen. Video Corp. v. Kertesz*, 2008 WL 5247120, at *30 (Del. Ch. Dec. 17, 2008) (holding that two-year delay in asserting claims was prejudicial and established laches because it "undoubtedly led to a change in position by [defendants] who have invested money and time … reasonably believing that they would reap the rewards of their endeavor if it should prove successful").

Indeed, laches would still bar recovery if Heartland ***should have known*** of the facts giving rise to its claim. *See All Pro Maids, Inc. v. Layton*, 2004 WL 1878784, at *8 (Del. Ch. Aug. 9, 2004) ("Laches will bar a claim if the claimant had actual or constructive knowledge of the claim …."), *aff'd*, 880 A.2d 1047 (Del. 2005); *Kerns v. Dukes*, 2004 WL 766529, at *4 n.31 (Del. Ch. Apr. 2, 2004) ("Constructive

knowledge is sufficient to prove that … the doctrine of laches is applicable.”). Thus, Heartland cannot rely upon Mr. Roberts’ feigned ignorance to avoid laches when he “could have informed himself of the relevant facts through the exercise of reasonable diligence.” Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 11.06[b][1] (Matthew Bender & Co., 2018).

There can be no dispute that Heartland, at a minimum, had constructive knowledge of the Menu Compliance Tool+’s functionality. Heartland has offered no evidence suggesting that it could not have learned about the competitive functions of Menu Compliance Tool+ by even minimally monitoring the USDA regulatory activity in the market that both Heartland and inTEAM occupy. Even if Heartland could have demonstrated that it lacked actual knowledge of these functions – which, as the record shows, it did not – its constructive knowledge is fatal. At the very least, Heartland knew or should have known about the competitive functions of inTEAM’s products being openly and publicly certified by the USDA, not to mention inTEAM’s open promotion of those functions to Heartland’s and inTEAM’s common customers. Indeed, after trial the Court of Chancery found that this was true. *See* Post-Trial Op., 2016 WL 5660282, at *17 (“Heartland should be familiar with this concept [USDA software classification], as WebSMARTT unsuccessfully attempted to obtain USDA approval as a Menu Planning Tool, and another Heartland

program, Mosaic Menu Planning, is an approved Menu Planning Tool and Nutrient Analysis Software."). Heartland cannot legitimately contend that it did not know (or could not have known) about this public information relating to the regulations governing Heartland's own business.

Similarly, Heartland's contractual claims are time-barred under the applicable three-year statute of limitations. *See* 10 *Del. C.* § 8106; *Whittington v. Dragon Grp., L.L.C.*, 991 A.2d 1, 9 (Del. 2009) ("[A] party's failure to file within the analogous period of limitations will be given great weight in deciding whether the claims are barred by laches."). As the trial court correctly found, and as the evidentiary record makes clear, Heartland was well aware that inTEAM was developing Menu Compliance Tool+ and applying for USDA certification by July 2012, the time at which Heartland has argued the competitive activities commenced. While the Remand Order adopted the July 2012 "start date" to award Heartland damages equal to 27 months of fees paid to Mr. Goodman under his Consulting Agreement (*i.e.*, from July 27 to September 2014, *see* Remand Order ¶ 15) – this is more than three years before Heartland filed its counterclaims on October 5, 2015. *See* A304. The trial court, however, failed to properly apply the statute of limitations to bar Heartland's claim against Mr. Goodman.

3. *Acquiescence.*

The defense of acquiescence will bar a claim when the complaining party "has full knowledge of his rights and the material facts and (1) remains inactive for a considerable time; or (2) freely does what amounts to recognition of the complained of act; or (3) acts in a manner inconsistent with the subsequent repudiation, which leads the other party to believe the act has been approved." *Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1047 (Del. 2014). "[C]onscious intent to approve the act is not required, nor is a change of position or resulting prejudice." *Id.* (footnotes omitted).

Here, the facts as determined by the trial court (and affirmed by this Court) demonstrate that Heartland acquiesced to the conduct this Court found to be competitive by remaining silent for at least three years while inTEAM and Mr. Goodman openly pursued those activities. All the while, inTEAM continued to develop, promote and sell the Menu Compliance Tool+, at a cost of millions of dollars, in reliance upon Heartland's silence. Had the trial court not misinterpreted this Court's mandate, but rather had adopted its prior finding that inTEAM and Mr. Goodman were "transparent," Heartland's acquiescence would completely bar any relief for Heartland's counterclaims.

4. *Waiver And Estoppel.*

As this Court has long held, "[w]aiver is the voluntary relinquishment of a known right or conduct such as to warrant an inference to that effect." *Klein v. Am. Luggage Works, Inc.,* 158 A.2d 814, 818 (Del. 1960). *See also Amirsaleh v. Bd. of Trade of City of New York, Inc.,* 27 A.3d 522, 529-30 (Del. 2011) ("It is well settled in Delaware that a party may waive contractual requirements or conditions."). A successful waiver defense requires proof of three elements: "(1) that there is a requirement or condition capable of being waived, (2) that the waiving party knows of that requirement or condition, and (3) that the waiving party intends to waive that requirement or condition." *Id.* Again, the facts as adjudicated by the trial court prove that Heartland, if in fact it believed the Menu Compliance Tool+ was a competing product, waived the non-competition covenants by declining to enforce them against inTEAM or Mr. Goodman as the software's functions were repeatedly disclosed to Heartland.

The same facts also establish equitable estoppel, which applies "when a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change position to his detriment." *Wilson v. Am. Ins. Co.,* 209 A.2d 902, 903-04 (Del. 1965). A party claiming estoppel must show that it lacked knowledge or the means to obtain knowledge of the truth of the facts in question, relied on the conduct of the party against whom estoppel is claimed, and suffered a prejudicial

change of position as a result of his reliance. *Id.* Neither inTEAM nor Mr. Goodman had any reason to believe that Heartland considered their actions to be potentially unlawful until July 2015, and for at least three years prior to that time inTEAM expended resources to further develop and market Menu Compliance Tool+ while Heartland silently sat on its purported rights.

5. *Unclean Hands.*

While finding that inTEAM's and Mr. Goodman's unclean hands defenses were valid and barred equitable relief to Heartland, the Court of Chancery declined to apply Mr. Goodman's unclean hands defense to Heartland's claim for monetary damages, reasoning that the unclean hands doctrine does not apply to legal remedies. *See* Remand Order ¶ 16. However, the Court of Chancery has not ruled consistently on this issue, *see Phillips v. Hove*, 2011 WL 4404034, at *25 (Del. Ch. Sept. 22, 2011) (declining to award damages to plaintiff based on application of unclean hands), and research has not revealed any controlling precedent from this Court for this legal conclusion. Nonetheless, the Court has long viewed the unclean hands doctrine as a broad equitable concept that empowers Chancery to deny ***any*** relief to a party who has acted in bad faith:

> When one files a bill of complaint seeking to set the judicial machinery in operation and to obtain some remedy has violated conscience or good faith or other equitable principles in his conduct, then the doors of the court of equity should be shut against him. The court should refuse

> to interfere on his behalf to acknowledge his right or to award him a remedy.

Bodley v. Jones, 59 A.2d 463, 469 (Del. 1947). Accordingly, the Court of Chancery's conclusion that Mr. Goodman is ordered to pay $399,997.08 in monetary damages should be reversed for this separate and independent reason.

CONCLUSION

For the reasons stated herein, inTEAM and Mr. Goodman respectfully request that this Court: (1) reverse the Remand Order's vacation of the injunction against Heartland, reinstate the injunction, and remand with instructions to consider entry of a new injunction against Heartland and consider any evidence of Heartland's prior contempt that will be relevant to determining the duration of such injunction; and (2) reverse the Remand Order's holding that Mr. Goodman's affirmative defenses do not bar Heartland's recovery and vacate the award of monetary damages against Mr. Goodman. The Remand Order of the Court of Chancery is based on a misapplication and misinterpretation of this Court's Opinion, and should be corrected by this Court.

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Dated: August 10, 2018

CERTIFICATE OF SERVICE

I, Andrea S. Brooks, hereby certify that on this 24th day of August, 2018, I caused true copies of the **PUBLIC VERSION OF APPELLANTS' OPENING BRIEF** to be served upon the following via File & Serve*Xpress*:

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