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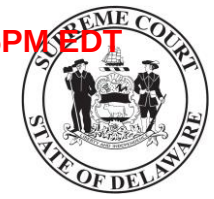

IN THE SUPREME COURT OF THE STATE OF DELAWARE

INTEAM ASSOCIATES, LLC. and LAWRENCE GOODMAN, III, Appellants, v. HEARTLAND PAYMENT SYSTEMS, LLC, Appellee.	PUBLIC VERSION FILED: September 24, 2018 C.A. No. 330,2018 Case Below Court of Chancery of the State of Delaware C.A. No. 11523-VCMR

APPELLEE'S ANSWERING BRIEF ON APPEAL

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NATURE OF PROCEEDINGS

This is the second appeal in litigation that has been ongoing since 2015. In the first appeal, this Court reversed the trial court's opinion and held that Appellants inTEAM Associates, LLC ("inTEAM") and Lawrence "Chip" Goodman, III ("Goodman") breached their contractual obligations to Appellee Heartland Payment Systems, LLC by secretly developing competing menu planning and nutrient analysis software designed to directly compete with the business Heartland acquired from Goodman for $17 million. *Heartland Payment Sys., LLC v. Inteam Assocs., LLC*, 171 A.3d 544, 547 (Del. 2017) ("Supreme Court Opinion"). In remanding this case, this Court instructed the trial court:

> We remand to the Court of Chancery for further proceedings consistent with this opinion. Because of the passage of time, we leave it to the Court of Chancery to fashion a remedy adequate to compensate Heartland for Goodman's breach of the APA and Consulting Agreement, and inTEAM's breach of the CMA.

Id. at 572.

On remand, the trial court faithfully followed this Court's guidance. Specifically, the trial court fashioned two independent remedies based on the record before it. ***First***, consistent with black-letter law, it vacated the injunction against Heartland. ***Second***, it awarded monetary damages against Goodman for his

breach of the Consulting Agreement.[1]

Unhappy with the remedy fashioned by the trial court, Goodman and inTEAM appealed. Through this appeal, they ask this Court to completely absolve them of their misconduct and, contrary to this Court's prior instruction, deny Heartland any remedy for their breaches.

For its part, inTEAM requests that this Court reinstate the injunction previously entered by the trial court against Heartland.[2] With no citation to any authority, inTEAM claims that it should receive the benefit of an injunction against Heartland where inTEAM is the party to have first breached the very provision it seeks to enforce. No Delaware case has been found to support this result. Rather, in fashioning its remedy, the trial court correctly recognized—consistent with settled equitable principles—that inTEAM should not be permitted to maintain an injunction when this Court found that inTEAM had breached the provision it sought to enforce. There is no error in such a commonsense result.

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[1] Capitalized but undefined terms have the same meaning ascribed to them in the prior Supreme Court Opinion.

[2] As explained by Heartland on remand, this Court's holding demonstrates that no injunction should have been issued. Nonetheless, for almost a year, Heartland voluntarily complied with an injunction that never should have issued. For that reason, Heartland sought expedited treatment of its request to vacate the injunction on remand. B1 ("Heartland respectfully requests a status conference with the Court to address . . . how quickly the Court can hear an expedited motion to vacate the current injunction entered against Heartland based on Court of Chancery Rule 60(b) and the Delaware Supreme Court's Opinion.").

Goodman's arguments are equally unfounded. Rather than simply accept responsibility for his conduct and pay the judgment entered against him, Goodman asks this Court to absolve him of his contractual breaches by raising a laundry list of purported "mistakes" made by the trial court on remand. As explained below, however, the trial court made no error. It properly considered—and rejected—each of Goodman's affirmative defenses and awarded relief consistent with the parties' contractual agreements and Delaware law.

This litigation has reached its natural end, and Appellants' efforts to use their agreements with Heartland "as an instrument of litigation" (B17) have failed. In granting Heartland an appropriate remedy under Delaware law, the trial court carefully considered the record, this Court's prior opinion, and the various arguments raised by the parties on remand. The trial court's decision should be affirmed.

HEARTLAND'S ANSWER TO INTEAM'S SUMMARY OF ARGUMENTS ON APPEAL

1. **Denied**. The trial court followed the explicit directions of this Court and crafted "a remedy sufficient to compensate Heartland for Goodman's and inTEAM's breaches of the transaction agreements." Supreme Court Opinion at 547.

a. **Denied**. inTEAM has cited no authority to support an assertion that it could obtain an injunction after breaching the same contractual provision that it seeks to enforce. Rather, the trial court's decision to vacate the injunction entered against Heartland is consistent with this Court's holding on remand and is supported by Delaware law. Separately, although not addressed by the trial court, Court of Chancery Rule 60(b) provides a separate, independent basis for affirming the decision on appeal.

b. **Denied**. inTEAM and Goodman have failed to cite a single authority demonstrating that the trial court erred by vacating the injunction as part of its remedy on remand. In fact, this Court's reversal of the trial court's holding regarding inTEAM's breach allowed the trial court to consider previously unresolved arguments that it was not initially required to reach. A reversal necessarily reverses all grounds on which a trial court's opinion was previously based. Accepting inTEAM and Goodman's position would have required

Heartland to appeal rulings never previously made by the trial court and would create a scenario in which Heartland is forced to comply with an injunction that should never have issued.

c. **Denied**. In the Supreme Court Opinion, this Court reversed the trial court's erroneous holding that Goodman and inTEAM had not breached their contractual obligations. This Court's reversal—and the scope of the remand—necessarily permitted the trial court to reexamine any findings on which its reversed prior opinion was based. Contrary to Goodman and inTEAM's arguments, law of the case and collateral estoppel do not require adherence to findings that were admittedly based upon a now-reversed holding.

2. **Denied**. The trial court's rejection of Goodman's affirmative defenses for the first time on remand is consistent with this Court's opinion, the record, and Delaware law. Goodman and inTEAM have failed to demonstrate that the trial court's conclusion on remand that Heartland lacked knowledge of Goodman's surreptitious contractual breaches was clearly erroneous, or that the trial court's rejection of Goodman's unclean hands defense misinterpreted Delaware law.

STATEMENT OF FACTS

Many of the pertinent facts justifying affirmance are set forth in the prior Supreme Court Opinion and the trial court's well-reasoned order on remand. What follows is an overview of the conduct by inTEAM and Goodman that warranted the remedies awarded on remand.

I. HEARTLAND ACQUIRES GOODMAN'S BUSINESS AND NEGOTIATES PROTECTIONS FOR ITS NEW INVESTMENT.

In 2011, Goodman sold his menu planning and nutrient analysis business, School Link Technologies, Inc. ("SL–Tech"), to Heartland for $17 million. Supreme Court Opinion at 547. To protect its investment, Heartland negotiated non-compete provisions in three transactional documents[3] to prohibit Goodman and inTEAM from "developing a software product that competed head to head with WebSMARTT, a product Heartland paid . . . $17 million to acquire." *Id*.

II. APPELLANTS CREATE A NEW COMPETING BUSINESS.

Notwithstanding the bargained-for contractual protections, Goodman sought to compete with Heartland almost immediately after the acquisition. Specifically, Goodman and inTEAM began development of a new Menu Compliance Tool+ module that this Court found to be directly competitive with Heartland's

[3] These transactional documents include the Asset Purchase Agreement ("APA") between Goodman and Heartland, the Co-Marketing Agreement ("CMA") between inTEAM and Heartland, and the Consulting Agreement between Heartland and Goodman. *See id.* at 551-53.

WebSMARTT software. *Id*. at 546, 554. This Court recognized that "[u]nlike the modeling and forecasting functions contemplated" by the parties, inTEAM's Menu Compliance Tool+ had "overlapping capabilities with WebSMARTT—specifically, nutrient analysis and menu planning." *Id*.

In sum, "inTEAM created an entirely different product from that envisioned [in the transaction documents] knowing that it was 'invading WebSMARTT territory.'" *Id*. at 568. "inTEAM's employees questioned inTEAM's decision to create the new module." *Id*. at 554. In fact, inTEAM's former Vice President of Operations, Erik Ramp ("Ramp"), wrote to Geri Hughes of inTEAM: "'you know [we're] basically developing a competing product with [Heartland] now. Chip doesn't think so . . . but I don't think an outsider will see it that way.'" *Id*. (quoting B12).

III. APPELLANTS CONCEAL THEIR MISCONDUCT.

Recognizing that inTEAM's development efforts placed it in direct competition with Heartland, Goodman and inTEAM concealed the true functionality of the Menu Compliance Tool+ from Heartland. In July 2012, Heartland's Terry Roberts ("Roberts") received an email from Ramp, wherein Ramp assured Roberts that inTEAM was ***not*** trying to develop competitive software. A1543. Ramp wrote:

> 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*** . . .

Id.; *see also* A1321 (explaining Ramp's assurances).[4]

Consistent with the organized "cover-up," Goodman expressed a need to hide certain functionality from Heartland "after a review of our documents and agreements with [Heartland]." B33. Goodman's comments were not isolated. In connection with inTEAM's development of something called the "Recipe Calculator," inTEAM's Janet Luc Griffin ("Griffin"), a nutritionist and Director of Business Development at inTEAM, wrote: "[Goodman] just called me. [H]e says he loves the idea. We just need to be careful how we name it because of his contract with WebSMARTT." B46. Then, days later, Griffin advised a colleague that inTEAM needed to be careful with naming its products because "menu planning . . . would be invading WebSMARTT territory." B49.

As explained by Roberts, inTEAM's concealment worked. *See, e.g*., A1334-35; *see also* A1067; B49; B46 (demonstrating inTEAM's attempts to conceal its efforts to develop a menu planning alternative to WebSMARTT). The

[4] Record evidence demonstrates that the "POS" referred to in Ramp's email was, in fact, Heartland's WebSMARTT software. A1395 (§ 1.1.2); A1114; A1120; A1192; *see also* Supreme Court Opinion at 553-54.

trial court's conclusion following trial that inTEAM and Goodman had not developed competitive software (which was eventually reversed on appeal), further demonstrates the success of inTEAM's efforts to conceal the true competitive nature of its conduct.

IV. APPELLANTS' "BIG REVEAL" EXPOSES THE EXTENT OF THEIR CONTRACTUAL BREACHES.

Goodman and inTEAM ultimately combined all of their various competing software products into one, unified platform. Supreme Court Opinion at 555. "Goodman presented inTEAM's 'Big Reveal' of its new software" to the marketplace in July 2015, proclaiming: "Things Change as of TODAY!" *See id*.; B57. It was not until the "Big Reveal" that Heartland learned the true nature of Goodman and inTEAM's competitive activities. A1322.

V. AFTER TRANSFORMING INTEAM INTO A COMPETING BUSINESS, GOODMAN USES THE CONTRACTUAL AGREEMENTS AS "INSTRUMENT[S] OF LITIGATION" AGAINST HEARTLAND.

Having fulfilled his quest to recreate the business he had sold to Heartland five years earlier, Goodman turned his attention to attacking his newfound competitor, Heartland. On September 21, 2015, inTEAM filed suit against Heartland in the Court of Chancery accusing Heartland of breaching the CMA A103. Such strategy was consistent with Goodman's prior threats to use the CMA

as an "instrument of litigation." B17. Heartland filed counterclaims against inTEAM for breach of the CMA and against Goodman for his breaches of the APA and his Consulting Agreement. A328-51.

Thereafter, a four-day trial ensued, and the trial court issued its final opinion on September 30, 2016. *inTEAM Assocs., LLC v. Heartland Payment Sys., Inc.*, 2016 WL 5660282 (Del. Ch. Sept. 30, 2016), *aff'd in part, rev'd in part sub nom. Heartland Payment Sys., LLC v. inTEAM Assocs., LLC*, 171 A.3d 544 (Del. 2017) ("Trial Opinion"). In the Trial Opinion, the trial court erroneously concluded that inTEAM and Goodman did not breach their non-compete obligations. *Id*. at *14-15; *22-24. The trial court also issued an injunction against Heartland finding that Heartland had indirectly breached the CMA. *Id*. at *27. Because the trial court found no breach by inTEAM or Goodman, it did not consider certain of Heartland's affirmative defenses.[5] *Id*. at *23.

VI. THE FIRST APPEAL.

Heartland subsequently appealed to the Delaware Supreme Court, and inTEAM cross-appealed. A1937, A1998. After full briefing and oral argument, the Delaware Supreme Court issued its Opinion on August 17, 2017. A2996. In

[5] While not at issue on the current appeal, the trial court found that Goodman had breached the non-solicitation provision of his Consulting Agreement and awarded approximately $50,000 to Heartland as damages. Trial Opinion at *28.

its Opinion, the Delaware Supreme Court held that inTEAM and Goodman breached their non-competition obligations and reversed the trial court's holding of no breach by inTEAM and Goodman. Supreme Court Opinion at 547. The action was remanded to the Court of Chancery "to fashion a remedy adequate to compensate Heartland for Goodman's breach of the APA and Consulting Agreement, and inTEAM's breach of the CMA." *Id*. at 572. This Court also found that Goodman and inTEAM should be permitted to raise certain affirmative defenses, but only "to the extent that inTEAM and Goodman properly raised and briefed affirmative defenses at trial addressed to the alleged violation of the non-compete and the Court of Chancery did not reach them because it found no violation[.]" *Id*.

VII. THE REMAND.

Faced with the prospect that they could soon be subject to severe consequences as a result of their breaches, Appellants made immediate efforts to expand the scope of the remand and impose undue burden and expense on Heartland. Despite an order prohibiting Goodman and inTEAM from taking post-trial discovery, they served discovery without leave of court. *See, e.g.*, A3078; A3080; *see also* A2986. When Goodman and inTEAM were reminded of the prior

order, they filed a request to reopen the trial record. A3090. Their request was denied.[6] A3356.

Following the initial procedural skirmishes about the scope of the remand, Heartland filed its brief on remand. A3362. In that brief, Heartland sought three primary remedies—each consistent with this Court's finding of Appellants' breach: (1) dissolution of the injunction previously entered by the trial court based on this Court's reversal and/or Court of Chancery Rule 60(b); (2) money damages from Goodman for his breaches of the APA and Consulting Agreement; and, (3) injunctive relief against both Goodman and inTEAM. A3388. While briefing was ongoing regarding Heartland's request for relief, inTEAM filed yet another motion for rule to show cause.[7] A3650.

Notwithstanding Goodman and inTEAM's efforts to bully Heartland with additional discovery and yet another motion for rule to show cause, the trial court

[6] Appellants have not appealed the trial court's decision to deny post-trial discovery or refusal to re-open the record. A3887-87 (Notice of Appeal).

[7] Although inTEAM discusses the contents of that motion in its Opening Brief on Appeal (Trans. ID 62334616 at 17, cited herein as "OB"), the motion was never briefed because inTEAM itself recognized that the trial court should first address Heartland's earlier-filed request to vacate the injunction. A3656. Heartland denies that it violated any aspect of the trial court's injunction—an injunction that never should have issued—and, of course, the trial court already rejected inTEAM's prior accusations that Heartland had somehow violated the injunction. A2986. Furthermore, because inTEAM's second motion for rule to show cause was never briefed, it is not subject to this appeal, and this Court should simply ignore inTEAM's allegations stemming from that motion.

agreed with Heartland, in large part, in crafting an appropriate remedy on remand. ***First***, the trial court vacated the injunction previously issued against Heartland and held—consistent with applicable Delaware law—that a party found to have breached the provision it seeks to enforce cannot obtain injunctive relief.[8] OB Ex. A at 6, 9 (the "Remand Order"). ***Second***, the trial court fashioned a monetary award against Goodman based on his ill-gotten gains under the Consulting Agreement. *Id*. at 11-12. In fashioning such remedy, the trial court rejected Goodman's affirmative defenses based on the record evidence before it. *Id*. at 12-15.

Following issuance of the trial court's order on remand, Appellants moved for reargument and raised largely the same arguments they unsuccessfully argued in the initial round of briefing. A3801. When the trial court rejected these recycled arguments a second time, Goodman and inTEAM filed the instant appeal to essentially ask this Court to absolve them of their misconduct and reject the remedy fashioned by the trial court for their breaches. Even worse, Goodman and inTEAM seek to reinstate an injunction that never should have issued under

[8] Because the trial court addressed the injunction as part of its instruction to fashion a remedy for Heartland, it did not specifically consider Heartland's request to vacate the injunction pursuant to Rule 60(b). As explained below, Court of Chancery Rule 60(b) provides an alternate ground for affirming the decision of the Court of Chancery. *Infra* Section I.C.4.

applicable Delaware law and that would have expired by its original terms months ago.[9] No legal or equitable principles support the effort by Goodman or inTEAM to obtain such injunctive relief and to get a free pass for their own breaches of their contractual obligations to Heartland.

[9] inTEAM and Goodman did not seek to expedite this appeal or file any type of motion below to stay the trial court's order vacating the injunction. Without any such application, Heartland has been free to compete with inTEAM since the trial court vacated the injunction. Re-imposing any injunction now, after such delay, is not only inequitable, but also unsupported by the record and applicable authority.

ARGUMENT

I. THE TRIAL COURT PROPERLY VACATED THE INJUNCTION AGAINST HEARTLAND IN LIGHT OF THIS COURT'S FINDING OF INTEAM'S BREACH

A. Question Presented

Did the trial court properly adhere to this Court's instructions by crafting a remedy that included vacating the previously entered injunction when this Court: (1) held in the first appeal that inTEAM had committed a prior breach of the provision it sought to enforce; and (2) reversed the trial court's prior determination of no breach by inTEAM? *See* A3376-80; A3471-76.

B. Scope of Review

The trial court's issuance of a remedy following a Supreme Court mandate is subject to *de novo* review. *SIGA Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1139-40, n.9 (Del. 2015), *as corrected* (Dec. 28, 2015); *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 36, 38-29 (Del. 2005).

C. Merits of Argument

1. Vacation of the Injunction is Consistent with the Holding and Mandate of this Court.

In its mandate to the trial court, this Court left open the possibility that Heartland could seek vacation of the injunction as a "remedy" on remand. *See* Supreme Court Opinion at 547 ("[W]e leave it to the Court of Chancery to fashion ***a remedy*** adequate to compensate Heartland for Goodman's breach of the APA

and Consulting Agreement, and inTEAM's breach of the CMA.") (emphasis added). The plain meaning of the word "remedy" is "something that corrects or counteracts" or "the legal means to recover a right or to prevent or obtain redress for a wrong." Merriam Webster's Online https://www.merriam-webster.com/dictionary/remedy. The Court of Chancery's lifting of an improperly issued injunction qualifies as a remedy under the basic dictionary definition. *See Lorillard Tobacco Co. v. American Legacy Found.*, 903 A.2d 728, 738 (Del. 2006) ("Under well-settled case claw, Delaware courts look to dictionaries for assistance in determining the plain meaning of terms . . .").

2. Vacation of the Injunction is Supported by Delaware Law.

The trial court's decision to vacate the injunction in light of inTEAM's prior breach of the CMA and unclean hands is consistent with Delaware law, which prohibits a party who has acted inequitably from obtaining injunctive relief. As the trial court explained in its Remand Order, any litigant who seeks an award of equitable relief must "come[] into equity . . . with clean hands." Remand Order at 6 (quoting *In re Silver Leaf, L.L.C.*, 2005 WL 2045641, at *11 (Del. Ch. Aug. 18, 2005). "When one [who] 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." *Id*. at 7 (alteration in original) (quoting *Bodley v. Jones*, 59 A.2d 463, 469 (Del. 1947)).

"[T]he unclean hands doctrine is aimed at providing courts of equity with a shield from the potentially entangling misdeeds of the litigants in any given case." *Id.* (alteration in original) (quoting *Merck & Co. v. SmithKline Beecham Pharms. Co.*, 1999 WL 669354, at *45 (Del. Ch. Aug. 5, 1999)); *Nakahara v. NS 1991 Am. Tr.*, 718 A.2d 518, 522–23 (Del. Ch. 1998). Accordingly, trial courts have "broad discretion" to apply the doctrine of unclean hands when a party's inequitable conduct has an "immediate and necessary relation to the claims under which relief is sought." *SmithKline Beecham Pharm. Co. v. Merck & Co.*, 766 A.2d 442, 448 (Del. 2000); *Nakahara*, 718 A.2d at 522–23.

As Heartland additionally raised on remand, the injunction is also properly vacated under the doctrine of prior material breach. A3377-79; A3474-76; *see also C & J Energy Servs., Inc. v. City of Miami General Employees'*, 107 A.3d 1049, 1073 n.119 (Del. 2014) ("It is a general principle of contract law that a party's prior material breach can discharge the other party's obligation to perform, or at least allow the other party to recover damages for the breach") (citing 14

SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 43.5 (4th ed. 2003)).[10]

Here, as established by this Court's prior opinion, inTEAM indisputably violated the same provision it seeks to enforce. Under settled equitable principles, the trial court found that further equitable relief was inappropriate and vacated the injunction. There is no error.

3. Law of the Case and Collateral Estoppel Do Not Bar Vacating the Injunction Because This Court Reversed the Court of Chancery's Holding on Appeal

Contrary to available authorities, inTEAM argues that despite this Court's prior ***reversal*** of the trial court's holding that there had been no prior breach by inTEAM, the injunction against Heartland should be reinstated. According to inTEAM, it is somehow "law of the case" that the injunction should survive because this Court found Heartland liable for breaching its non-compete obligations almost two years after inTEAM began breaching the same non-compete clause. This argument makes no sense in light of this Court's prior holding and is wholly unsupported.

[10] Even inTEAM's misguided argument that the Court of Chancery must adhere to its rejection of Heartland's unclean hands defense in its reversed Trial Opinion does not extend to Heartland's material breach defense, which has never actually been considered by any court in light of the trial court's erroneous finding of no breach by inTEAM. Trial Opinion at *23.

First, inTEAM identifies no authorities where a court (anywhere) entered an injunction in favor of a party that breached the very same provision it was seeking to enforce. This failure to identify any precedent is unsurprising, as the relief sought is contrary to the principles of equity the court below enforces on a daily basis. *Nakahara v. NS 1991 Am. Tr.*, 739 A.2d 770, 791 (Del. Ch. 1998); *Sherwood, Inc. v. Cottman Transmission Sys., Inc.*, 1982 WL 17882, at *2 (Del. Ch. Apr. 15, 1982) (denying injunctive relief to plaintiff because of his unclean hands due to breach of contract).

Second, inTEAM's argument that this Court's holding on appeal "***affirmed*** the Court of Chancery's post-trial entry of the injunction" (OB at 15) mischaracterizes what actually happened in the first appeal. Contrary to inTEAM's arguments, this Court's prior opinion must be read as a whole—particularly since this Court expressly "reverse[d] the Court of Chancery's finding that Goodman and inTEAM did not breach their non-compete obligations under the various agreements," but affirmed the Court of Chancery's finding that "Heartland breached its contractual obligations by collaborating with an inTEAM competitor" and then remanded the case to the Court of Chancery to craft a remedy for Heartland. Supreme Court Opinion at 547. Nowhere did this Court hold that Heartland must comply with the previously-issued injunction following remand.

Rather, this Court remanded to the trial court to make such determination in light of its opinion ***reversing*** parts of the trial court's earlier holding. *Id.*[11]

Third, inTEAM's contention that the trial court was not entitled to lift the injunction on remand because Heartland "did not argue that the injunction was barred *in toto* by any of Heartland's affirmative defenses" (OB at 16) is without merit. There is no dispute that Heartland properly appealed the finding of no breach by inTEAM. And, just as inTEAM failed to do on remand, it has again failed to cite a single authority suggesting that Heartland's appeal of the trial court's holding—and this Court's subsequent reversal—was somehow an insufficient basis for the trial court to evaluate Heartland's defenses and issue appropriate relief on remand—particularly where, as here, this Court expressly instructed the trial court to consider the appropriate remedy Heartland should receive. Supreme Court Opinion at 547. Vacating the previously issued injunction is plainly an appropriate remedy "to compensate Heartland for Goodman's and

[11] In reality, and contrary to inTEAM's arguments, a close review of this Court's earlier opinion confirms that this Court merely affirmed the trial court's calculation of the duration of the injunction in the context of Heartland's separate appeal of the length of the injunction (Supreme Court Opinion at 570-71) as well as the Court of Chancery's holding that Heartland indirectly breached the CMA through its collaboration with Colyar. *Id*. at 568-69. Nothing in this Court's decision suggests that the Court of Chancery was not permitted to lift the injunction on remand.

inTEAM's breaches" (*id*.), especially when the holding on which the injunction was based was reversed on appeal.

Fourth, inTEAM's argument that the trial court's decision to vacate the injunction against Heartland is inconsistent with the principles of law of the case or collateral estoppel is unsupported by Delaware law. The law of the case doctrine "is founded on the principles of efficiency, finality, stability and respect for the judicial system." *Cede*, 884 A.2d at 39 (citing *Gannett Co. v. Kanaga*, 750 A.2d 1174, 1181 (Del. 2000)). Where this Court remands a case 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***." *Id*. at 38 (emphasis added). Similarly, the doctrine of collateral estoppel precludes a party from relitigating a fact issue that has previously been decided in a prior action when the question of fact was: "(1) a question of fact essential to the judgment, (2) . . . litigated and (3) determined (4) by a ***valid and final judgment***." *Taylor v. State*, 402 A.2d 373, 375 (Del. 1979) (citing *Tyndall v. Tyndall*, 238 A.2d 343, 346 (Del. 1968)).

Based on these well-established principles, neither the law of the case doctrine nor collateral estoppel required the trial court to leave the injunction in place against Heartland when this Court's opinion ***reversed*** the holding on which

entry of the injunction was based.[12] *See, e.g.*, *SIGA Techs., Inc.*, 132 A.3d at 1128-29 (when the Delaware Supreme Court remanded the case to the Court of Chancery to reconsider damages, that included permitting the Court of Chancery to reconsider its prior rejection of expectation damages as such damages were now possible as a result of the appeal). Consistent with this Court's reversal, the trial court was free to "make any order or direction in further progress of the case so long as it is not inconsistent with the decision of the appellate court, as to any question not settled by the decision." *Cede*, 884 A.2d at 39.

Moreover, as Appellants expressly acknowledge in their Opening Brief on Appeal, the law of the case doctrine does not apply "to a prior decision that is clearly wrong, produces an unjust result or should be revisited because of changed circumstances." OB at 15 (citing *Cede*, 884 A.2d at 39). This is precisely the scenario here. This Court's reversal of the trial court's finding of no breach by inTEAM constitutes "changed circumstances" that renders entry of injunction against Heartland improper under Delaware law.

Under the same basis, collateral estoppel cannot apply where the trial court's opinion was reversed on appeal. Simply put, Heartland cannot be "estopped" from

[12] As explained above, to enter the injunction, the trial court needed to find no breach by inTEAM. *Nakahara*, 718 A.2d at 522–23. Because the holding was reversed, neither the law of the case doctrine, nor collateral estoppel apply. *Cede*, 884 A.2d at 38.

"re-litigating" factual issues that were not actually "determined . . . by a valid and final judgment." *Taylor*, 402 A.2d at 375. Due to this Court's reversal of the Trial Opinion, the elements of collateral estoppel are not met.

This same logic defeats inTEAM's assertion that the trial court's prior rejection of Heartland's unclean hands defense prevented it from lifting the injunction on remand. The trial court expressly acknowledged in the Remand Order that to the extent the Trial Opinion stated that inTEAM did not have unclean hands, "that ruling relied heavily on my finding that inTEAM did not breach its non-compete obligations"—a finding explicitly ***reversed*** on appeal. Remand Order at 9 n.2. inTEAM's desire to prevent the trial court from reexamining determinations based on its reversed holding would render the Supreme Court's reversal superfluous and contradict this Court's remand for further proceedings "consistent with [its] opinion." Supreme Court Order at 572.

4. In the Alternative, the Court of Chancery was Authorized to Vacate the Injunction Under Court of Chancery Rule 60(b).

Leaving aside inTEAM's arguments, this Court has an additional basis to affirm the trial court's decision to vacate the injunction. As explained by Heartland on remand, Court of Chancery Rule 60(b) provides the trial court with the authority to "relieve a party . . . from a final judgment . . . [when] (5) the

judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment." Ct. Ch. R. 60(b). Rule 60(b) can also be applied at any time after final judgment is entered. *Scureman v. Judge*, 1998 WL 409153, at *3 (Del. Ch. June 26, 1998). Here, Rule 60(b) provided the Court of Chancery with an independent basis to vacate the injunction where the prior judgment upon which the injunction was based (i.e. no breach by inTEAM and Goodman) "has been reversed" by this Court such that it is "no longer equitable" that an injunction be enforced against Heartland in light of the finding of inTEAM and Goodman's development of competitive software.

Heartland raised the trial court's authority to vacate the injunction on Rule 60(b) grounds in its briefing on remand. A3376-77; A3472. Yet, inTEAM failed to respond to Heartland's Rule 60(b) argument, not even citing to Rule 60(b) anywhere in its briefing. A3435-37 (no mention of Rule 60).

Consistent with prior authorities, Rule 60(b) provides an alternate ground upon which to affirm the trial court's decision to vacate the injunction. *See Cent. Laborers Pension Fund v. News Corp.*, 45 A.3d 139, 141 (Del. 2012) ("[T]his Court may rest its appellate decision on any issue that was fairly presented to the

Court of Chancery, even if that issue was not addressed by that court. Accordingly, this Court may affirm the judgment of the Court of Chancery on the basis of a different rationale."); *see also* infra n.13. Heartland preserved the argument on remand, and inTEAM never responded thereby waiving its ability to present argument on Rule 60 now or in the future. *See Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993) ("The failure to raise a legal issue in the text of the opening brief generally constitutes a waiver of that claim on appeal."). Accordingly, this Court need not remand again should it determine that Rule 60(b) authorizes the relief provided in the Remand Order.[13]

[13] *See, e.g.*, *Butler v. State*, 2009 WL 1387640, at *2 n.2 (Del. May 19, 2009) ("'We also recognize that this Court may rule on an issue fairly presented to the trial court, even if it was not addressed by the trial court.'"); *Telxon Corp. v. Meyerson*, 802 A.2d 257, 263 (Del. 2002) ("As we have previously recognized, this Court may rule on an issue fairly presented to the trial court, even if it was not addressed by that court below."); *Cannelongo v. Fid. Am. Small Bus. Inv. Co.*, 540 A.2d 435, 440 n.5 (Del. 1988) ("Fidelity argued the waiver issue but the Superior Court declined to consider the point. The issue is nonetheless before us for review by reason of its having been 'fairly presented' at the trial level.").

II. THE COURT OF CHANCERY PROPERLY REJECTED GOODMAN'S AFFIRMATIVE DEFENSES AND AWARDED HEARTLAND MONETARY DAMAGES FOR GOODMAN'S BREACHES OF THE CONSULTING AGREEMENT

A. Question Presented

Was the Court of Chancery's determination on remand that Heartland did not have knowledge of Goodman and inTEAM's breach consistent with this Court's reversal of the finding of no breach by Goodman and inTEAM and supported by the record? A3477-82; A3489-98.

B. Scope of Review

In the context of affirmative defense determinations, issues that the trial court resolved as a matter of law are reviewed *de novo*. *See Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) (citing *Gilbert v. El Paso Co.*, 575 A.2d 1131, 1142 (Del. 1990) (the Delaware Supreme Court considers a "claim involving the formulation and application of legal principles *de novo*."). In contrast, factual determinations are overturned only if they are determined to be clearly erroneous. *CDX Holdings, Inc. v. Fox*, 141 A.3d 1037, 1041 (Del. 2016) ("After 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."). Additionally, "[u]nder 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)).

C. Merits of Argument

1. An Award of Damages for Goodman's Breach of the Consulting Agreement Is Consistent With this Court's Mandate and the Record.

The monetary damages awarded to Heartland for Goodman's breach of the Consulting Agreement is consistent with both the language of the agreement and the trial court's methodology for calculating damages under the agreement (which was affirmed by this Court). *See* B6 (explaining that Goodman was to be paid at a rate of $16,667.67 per month); *see also* Remand Order at 11 ("the Court of Chancery held, and the Supreme Court affirmed, that Goodman must return consulting fees earned from his initial breach of the Consulting Agreement through the end of the Consulting Agreement."). In its Remand Order, the Court of Chancery pointed to this Court's determination that "Goodman began breaching his non-compete obligations under the Consulting Agreement in 2012" (Remand Order at 11-12 (citing Supreme Court Opinion at 572)) and used July 2012 as the starting date for Goodman's breach. *Id*. at 12.

Accounting for the twenty-seven months of consulting fees that Goodman owes to Heartland, less the amount Goodman has already been ordered to pay for his violation of the non-solicitation agreement, the Court of Chancery awarded Heartland an additional $399,997.08 (plus interest) for Goodman's breach of the Consulting Agreement. *Id*. The only argument Appellants put forth on appeal of these damages is that the trial court incorrectly rejected Goodman's affirmative defenses on appeal. But, as detailed below, the trial court considered each of these affirmative defenses and its rejection of the defenses is supported by this Court's opinion, the record in this case, and Delaware law.[14]

2. The Court of Chancery Properly Rejected Goodman's Affirmative Defenses.

In its Trial Opinion, the trial court expressly ***did not analyze*** Goodman's affirmative defenses (including that of unclean hands) because it did not determine that Goodman had breached his non-compete obligations. Trial Opinion at *26. Accordingly, the Supreme Court Opinion permitted Goodman to "reassert" those affirmative defenses on remand in the event that "inTEAM and Goodman properly

[14] Goodman is not a party to the CMA, the contract that Heartland was found to have breached. A1390. And, of course, there is no record evidence that Heartland violated any obligation owed ***to Goodman*** or otherwise treated Goodman inequitably.

raised and briefed" them at trial, and the trial court "did not reach" them because "it found no violation . . . ." Supreme Court Opinion at 572.

Accordingly, while primarily ignored by Appellants in their briefing, the trial court did not consider Goodman's affirmative defenses until remand. And, on remand, the trial court properly and thoughtfully considered and rejected Goodman's affirmative defenses of unclean hands, laches, waiver, acquiescence and equitable estoppel, holding that these defenses should not bar an award of monetary damages to Heartland for Goodman's breach of the Consulting Agreement. Remand Order at 12-15. That conclusion should not be disturbed on appeal where, as here, Goodman has failed to establish that the trial court's rejection of Goodman's unclean hands defense was incorrect as a matter of law, or that the rejection of the remaining defenses based on a factual finding that Heartland did not have knowledge of Goodman's breach was clearly erroneous.

a. The Court of Chancery is not bound by prior factual determinations that are inconsistent with this Court's decision on appeal

When assessing Goodman's affirmative defenses, the trial court held that the defenses of laches, waiver, acquiescence and equitable estoppel[15] all fail because

[15] As detailed below, the Court of Chancery further rejected Goodman's unclean hands defense on different grounds as a matter of law. *Infra* Section II.C.2.e.

Heartland lacked knowledge of Goodman's breaching behavior. Remand Order at 15. On remand, the Court of Chancery is "'free to make'" such an "'order or direction in further progress of the case'" where, as here, it is "'*not inconsistent* with the decision of the appellate court not settled by the decision.'" *Motorola Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 860 (Del. 2008) (emphasis added) (quoting *Ins. Corp. of America v. Barker*, 628 A.2d 38, 41 (Del. 1993)).

In support of its determination, the trial court pointed to this Court's opinion on appeal, which reversed the finding of no breach by inTEAM and Goodman, instead concluding that "Goodman's behavior constituted breach of his non-compete obligations and that Goodman and inTEAM took evasive steps to conceal their behavior from Heartland." Remand Order at 14 (citing Supreme Court Opinion at 544, 555, 568 n.90). Commenting on allegations of concealment from both sides, the trial court noted in the Remand Order that "the parties each took steps to conceal their respective violations from each other." *Id*. at 8 ("For instance, in an email from November 11, 2012, an inTEAM nutritional consultant stated that 'we can't be straight up . . . because that would be invading [Heartland's] territory!'") (citing Supreme Court Opinion at 568 n.90)). In further support of this determination, the trial court pointed to an email from Ramp to Hughes, where he stated: "'you know [we're] basically developing a competing product with

[Heartland] now[.]' . . ." *Id*. (citing Supreme Court Opinion at 554). The trial court described Ramp's statement as "a view that inTEAM never shared with Heartland." *Id*.

But Goodman now claims that the trial court was not entitled to reject any of his affirmative defenses based upon conclusions set out in the reversed Trial Opinion. OB at 29-30. In support of this contention, he specifically points to the trial court's prior statement that "Heartland fail[ed] to prove that inTEAM was not being transparent" with its development activities. *Id*. (citing Trial Opinion at *23). This Court, however, disagreed with that determination, holding instead that inTEAM's "development activities" actually included developing software designed to compete with Heartland. Supreme Court Opinion at 547.

Unsurprisingly, Appellants offer no support for their argument that the trial court is bound by factual findings that are inconsistent with this Court's Opinion on Appeal. In reality, this Court's reversal of the trial court's underlying holding that "Goodman and inTEAM did not breach their non-compete obligations" necessarily called into question any ancillary findings that were inconsistent with the Supreme Court's ruling. *See Insurance Corp. of America v. Barker*, 628 A.2d 38, 40 (Del. 1993) ("[On remand] [t]he trial court is required '[to] implement both the letter and the spirit of the [appellate court's] mandate, *taking into account the*

appellate court's opinion and the circumstances it embraces.'") (emphasis added) (quoting *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 949 (3d Cir. 1985)). Accordingly, this Court's reversal of the trial court's prior holding required the trial court to remedy previous inconsistent determinations that inTEAM and Goodman were transparent about their conduct. *Id*. ("While the mandate does not control a trial court as to matters not addressed on appeal, the trial court is bound to strictly comply with the appellate court's determination of any issues expressly or impliedly disposed of in its decision.").

Consistent with its responsibility on remand, the trial court recognized the need to reevaluate any findings that were inconsistent with this Court's opinion on appeal. In a footnote in the Remand Order, the trial court noted that while this Court's opinion on appeal "does not explicitly overrule" its Trial Opinion finding that Heartland had "knowledge of Goodman and inTEAM's actions" (citing Trial Opinion at *23), "the only logical conclusion is that [this Court] agreed with Heartland that Ramp's email, along with other evidence presented by Heartland, reflect concealment rather than disclosure." Remand Order at 14 n.4. The trial court reached this conclusion by determining that "the same logic that led to the Supreme Court's finding that Heartland would not enter into a $17 million contract only to immediately allow inTEAM to breach, dictates a finding that Heartland

would not allow for an immediate waiver of that breach." *Id*. (citing Supreme Court Opinion at 564). Accordingly, the trial court read this 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." *Id*. at 14. Appellants have failed to establish that this conclusion by the trial court was erroneous.

b. Heartland's legal remedies against Goodman are not barred by laches and Appellants waived their statute of limitations argument

Goodman's argument that Heartland's damages are barred by laches additionally fails because it is unsupported by Delaware law. In contrast to equitable claims, legal claims for monetary damages brought in the Court of Chancery, like those asserted against Goodman, are subject to the statute of limitations, not laches. *See Laventhol, Krekstein, Horwath & Horwath v. Tuckman*, 372 A.2d 168, 169-70 (Del. 1976) ("[A]n action in the Court of Chancery for damages or other relief which is legal in nature is subject to the statute of limitations rather than the equitable doctrine of laches."); *Kraft v. WisdomTree Investments, Inc.*, 145 A.3d 969, 983 (Del. Ch. 2016) ("If a plaintiff brings a legal claim seeking legal relief in the Court of Chancery, the statute of limitations (and its tolling doctrines) logically should apply strictly and laches

should not apply."); *see also Lehman Bros. Hldgs. v. Spanish Broad. Sys., Inc.*, 2014 WL 718430, at *8 (Del. Ch. Feb. 25, 2014) ("Because I find . . . that the relief requested by the Plaintiffs is legal in nature, the doctrine of laches is not applicable."). As explained by the Court of Chancery in *Kraft*, "[o]therwise, one may be able to circumvent the statutory time-bar that would have applied to the same claim if it had been brought in a court of law." *Kraft*, 145 A.3d at 983.

Additionally, Goodman is precluded from arguing that Heartland's contractual claims against Goodman are time-barred under the statute of limitations because he made no such argument to the Court of Chancery in his remand briefing.[16] In fact, Goodman said the opposite and acknowledged that Heartland's counterclaims "were filed before the applicable statute of limitations expired" in his answering brief on remand. A3414 ("Heartland's counterclaims do

[16] As Heartland has already raised on remand (A3477-78, n.7), Goodman cannot point to a single reference in his remand answering brief where he suggested that the statute of limitations would bar Heartland's claims against him. Instead, Goodman's argument was limited to the assertion that a shorter time-period than Delaware's three-year statute of limitations should apply to Heartland's breach of contract claims (as inTEAM acknowledged that Heartland had filed its counterclaims within the governing statute of limitations time-period). A3414. Yet, in complete contrast to its prior position, for the first time in its sur-reply brief Appellants argued that the statute of limitations precludes Heartland's claims against Goodman. A3520. Of course, Goodman's failure to raise this argument until his sur-reply brief constitutes improper sandbagging. Consistent with precedent from both this Court and the Court of Chancery, the argument is waived. *See Murphy*, 632 A.2d at 1152; *Emerald P'rs*, 726 A.2d at 1224.

not survive simply because they were filed ***before*** the applicable statute of limitations expired."). Because Goodman failed to present his statute of limitations argument to the trial court on remand, Supreme Court Rule 8 and this Court's precedents preclude consideration of the argument now. Del. Supr. Ct. R. 8; *Scion Breckenridge Managing Member, LLC*, 68 A.3d at 678.

If the Court excuses Goodman's failure to preserve this argument for appeal and rejects Goodman's prior admission on this point (it should not), it may nonetheless affirm the Court of Chancery's rejection of Goodman's laches or statute of limitations defense on other grounds. *See Cent. Laborers Pension Fund*, 45 A.3d at 141; *see also* supra n.13 (compiling cases where this Court considered information fairly presented to the trial court, even if not addressed in the trial court's opinion). As Heartland pointed out in its briefing on remand, a number of tolling exceptions apply to extend the statute of limitations period (and defeat any laches argument). A3489-93. Specifically, Goodman agreed to a tolling provision in his Consulting Agreement that operates to preclude a laches defense. A3493. The tolling provision provides that the five-year term of the contract "shall not include any period(s) of violation or period(s) of time required for litigation to enforce the covenants set forth herein." B8, Section f. Therefore, even if the Court accepted inTEAM's laches argument, the contractual language in the Consulting

Agreement forecloses the defense with respect to Goodman's violation of his Consulting Agreement because the non-compete was "tolled" for the time in which Goodman was in violation. *See* A3385; A3493. inTEAM and Goodman failed to rebut these arguments on remand. *See* A3493 at n.10 ("Although Heartland raised the tolling provision in its Opening Brief to support its claim for injunctive relief against Goodman for his violations of the Consulting Agreement ([A3385]), inTEAM failed to respond to this argument."). Goodman has therefore waived his right to respond to these issues. *Emerald P'rs*, 726 A.2d at 1224 ("Issues not briefed are deemed waived."); *Murphy*, 632 A.2d at 1152.[17]

c. Heartland's legal remedies against Goodman are not barred by acquiescence

As admitted by Goodman, acquiescence requires that the claimant had "full knowledge of his rights and the material facts" and acted in a manner "which leads the other party to believe the act has been approved . . . ." *Dirienzo v. Steel Partners Holdings L.P.*, 2009 WL 4652944, at *7 (Del. Ch. Dec. 8, 2009). Only

[17] Heartland further argued in its remand briefing that even if the tolling exceptions do not apply, the statute of limitations would only operate to limit Heartland's claim for monetary relief (as opposed to preclude it entirely). A3373; A3478-79; A3489-91. The Court of Chancery never reached this argument, but it offers yet another explanation to support the award of damages against Goodman. *See Cent. Laborers Pension Fund*, 45 A.3d at 141.

when these elements are met will a plaintiff be estopped from seeking protection of those rights. *Id.*

Here, Heartland did not have "full knowledge of . . . all material facts" necessary to establish acquiescence or estoppel. A1321; A1322 (explaining lack of knowledge). inTEAM and Goodman concealed from Heartland (and the trial court) exactly how the inTEAM software competed with Heartland, and this Court's opinion reflects this reality. Supreme Court Opinion at 554, 555, 568 n.90. Numerous emails and other documents also demonstrate inTEAM and Goodman's concerted campaign of concealment (*see, e.g.*, B46; B49; B50).

Moreover, the record reflects that it was reasonable for Heartland not to suspect inTEAM and Goodman of breaching their contractual obligations. ***First***, inTEAM employees repeatedly told Heartland that inTEAM was ***not*** engaging in competitive activity and concocted a scheme to deceive Heartland. *See* A1543; B49. ***Second***, Roberts testified that anytime inTEAM referenced "menu planning" it was in connection with DST, so Heartland assumed that the Menu Compliance Tool Plus+ module was simply analyzing menu planning data for analytics purposes, consistent with DST's intended use. A1321-22. ***Third***, Goodman consistently asserted that he wanted access to Heartland's products so he could market his DST product that was supposed to be complementary to Heartland's

products. B13. ***Fourth***, until this Court held that inTEAM's development of the Menu Compliance Tool+ violated its contractual obligations, not even inTEAM employees knew whether the Menu Compliance Tool+ was competitive with Heartland's software. *See, e.g.*, B12 ("[Y]ou know [we're] basically developing a competing product with [Heartland] now. Chip doesn't think so . . . but I don't think an outsider will see it that way.").

The trial court's determination on remand that Heartland did not have knowledge of Goodman's breach (Remand Order at 15) is thus supported by the record and not clearly erroneous.

d. Heartland's legal remedies against Goodman are not barred by Waiver and Estoppel

On remand, Goodman similarly failed to meet the elements required for his affirmative defenses of waiver and estoppel. *See Bantum v. New Castle Cty. Vo-Tech Educ. Ass'n*, 21 A.3d 44, 51 (Del. 2011) (describing elements of waiver and estoppel). Waiver and estoppel are also equitable defenses with common elements to acquiescence. *See Pharm-Eco Labs., Inc. v. Immtech Int'l, Inc.*, 2001 WL 220698, at *8 n.20 (Del. Ch. Feb. 26, 2001) ("the doctrines of estoppel, waiver, and acquiescence each require a failure to object to an invasion on one's rights."). Here, Heartland's claims against Goodman are not barred because Heartland's conduct does not indicate any waiver of its rights under the Consulting Agreement.

As detailed above, it is not reasonable for Goodman to contend that Heartland must have realized as fact what was debated internally at inTEAM before litigation and hotly disputed by the parties both at the trial court level and on appeal. In fact, the Court of Chancery's reversed holding is evidence in itself of Goodman's success at concealing the true competitive nature of his software. Accordingly, there is no support for the assertion that Heartland waived any relief for Goodman's breaches.

e. Heartland's legal remedies against Goodman are not barred by unclean hands

In rejecting Goodman's unclean hands defense, the trial court recognized that "[m]oney damages are legal in nature, and the 'unclean hands' doctrine bars equitable, but not legal, relief." Remand Order at 12 (citing *Lehman Bros. Hldgs. v. Spanish Broad. Sys., Inc.*, 2014 WL 718430, at *7 n.47 (Del. Ch. Feb. 25, 2014), *aff'd*, 105 A.3d 989 (Del. 2014) (internal quotations omitted); *In re Estate of Tinley*, 2007 WL 2304831, at *1 (Del. Ch. July 19, 2007)). Accordingly, the trial court "decline[d] to apply the equitable defense of unclean hands to bar the legal remedy of money damages expressly mandated by the contractual terms of the Consulting Agreement." *Id*. at 13.

Unlike the other affirmative defenses that the trial court rejected because Heartland did not have knowledge of Goodman's breach, the trial court rejected Goodman's unclean hands defense as a matter of law. *Id*. at 12-13. This

determination is supported by the case law raised by Heartland in its briefing on remand (A3482) and ultimately cited in the Remand order. *See* Remand Order at 12 (citing *Lehman Bros. Hldgs.*, 2014 WL 718430, at *7 n.47; *In re Estate of Tinley*, 2007 WL 2304831, at *1). Therefore, Appellants' appeal of the Court of Chancery's rejection of Goodman's unclean hands defense fails for several reasons.

First, Goodman is precluded from rebutting Heartland's well-established authorities on appeal when he made no effort to rebut such authorities on remand. Del. Supr. Ct. R. 8; *Scion Breckenridge Managing Member, LLC*, 68 A.3d at 678. ***Second***, *Phillips v. Hove*, cited by Goodman, is inapposite. OB at 44 (citing *Phillips v. Hove*, 2011 WL 4404034, at *25 (Del. Ch. Sept. 22, 2011)). There, the Court of Chancery denied the plaintiff's request for attorneys' fees and costs based on the defendant's alleged "bad faith and disloyal[ty]" in filing a bankruptcy petition because the plaintiff also acted in bad faith, "needlessly complicat[ing] the bankruptcy proceeding, and dr[iving] up the costs of that litigation." *Phillips*, 2011 WL 4404034, at *25. This does not translate to authority that an unclean hands defense bars legal damages for Goodman's breach of contract. These arguments provide no basis to overturn the trial court's legal determination on appeal.

Furthermore, this Court may affirm the Court of Chancery's rejection of Goodman's unclean hands defense because Goodman has no basis to accuse Heartland of unclean hands when ***Goodman*** is the only party who has been found to violate the Consulting Agreement. *See Cent. Laborers Pension Fund*, 45 A.3d at 141 (affirming trial court's judgment on the basis of different rationale). Unsurprisingly, Goodman has not cited to any authority suggesting that the Court of Chancery's finding of Heartland's conduct towards inTEAM somehow entitles a separate third party (Goodman) to an unclean hands defense. Simply put, the trial court correctly determined that Heartland's breach of the CMA—an agreement between inTEAM and Heartland—does not constitute an "unclean hands" defense that would bar Goodman from paying monetary damages for his breach of the Consulting Agreement—an entirely separate agreement which Heartland indisputably did not breach.

In conclusion, the trial court's rejection of Goodman's affirmative defenses is consistent with this Court's opinion, the record, and Delaware law. Appellants have failed to demonstrate that the Court of Chancery's finding on remand that "Heartland lacked knowledge of Goodman's breaching behavior" (Remand Order at 15) was clearly erroneous, or that the Court of Chancery's rejection of Goodman's unclean hands defense (*id*. at 12-13) misinterpreted Delaware law.

Therefore, this Court should affirm the damages awarded to Heartland for Goodman's breach.

CONCLUSION

For the reasons set forth above, this Court should affirm the Court of Chancery's Order on Remand.

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Dated: September 7, 2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 24, 2018, a copy of the foregoing was served on the following in the manner indicated:

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