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IN THE SUPREME COURT OF THE STATE OF DELAWARE

SIXTH STREET PARTNERS MANAGEMENT COMPANY, L.P., SIXTH STREET PARTNERS, L.P., and SPECIAL SITUATIONS GP, LLC, Plaintiffs-Below, Appellants, v. DYAL CAPITAL PARTNERS III (A) LP, DYAL CAPITAL PARTNERS III (B) LP, NB DYAL ASSOCIATES III LP, NB DYAL GP HOLDINGS LLC, DYAL III SLP LP, NB ALTERNATIVES GP HOLDINGS LLC, NB ALTERNATIVES ADVISERS LLC, NEUBERGER BERMAN AA LLC, and NEUBERGER BERMAN GROUP LLC, Defendants-Below, Appellees.	No. 133, 2021 Case Below: Court of Chancery of the State of Delaware C.A. No. 2021-0127-MTZ

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

This appeal concerns a contractual consent right limiting the transferability of partnership interests. Plaintiffs, Sixth Street Management Company, L.P., Sixth Street Partners, L.P., and Special Situations GP, LLC (together, "Sixth Street"), bargained for this consent right when forming a strategic partnership with the Defendants. But Defendants now are poised to violate this consent right by transferring partnership interests in Sixth Street to a competitor without Sixth Street's consent. Consistent with longstanding principles of law and partnerships, Sixth Street's submission on this appeal is simply that it should get to pick its partner, not have one—a competitor, no less—foisted upon it in plain violation of a contractual transfer limitation.

In 2017, Defendants—acting through Defendants Dyal Capital Partners III (A) LP and Dyal Capital Partners III (B) LP (together "Dyal III"), entities controlled by the remaining Defendants—acquired a minority partnership stake in Sixth Street pursuant to an Amended and Restated Equity Subscription and Investment Agreement (the "Agreement" or "IA"). As one would expect, Sixth Street took care in selecting who its partner would be. Subject to certain carefully negotiated exceptions that do not encompass this transaction, the Agreement grants Sixth Street the right to withhold consent "for any reason or no reason" to any transfer of any of Defendants' interests in Sixth Street, including "indirect[]" transfers and transfers

by "merger or sale or any other similar transaction involving any Affiliate" of Dyal. (A641, IA §7.1(b) (the "Transfer Restriction"); A661.) Sixth Street's right to withhold consent extends for ten years, and even then Sixth Street retains a perpetual right to withhold its consent for any transfer to a competitor.

On December 28, 2020, Defendant Neuberger Berman Group LLC ("Neuberger") announced that it had entered into a Business Combination Agreement ("BCA") with certain affiliates of Owl Rock Capital Partners ("Owl Rock")—a Sixth Street competitor—and a publicly-traded special-purpose acquisition company called Altimar Acquisition Corporation ("Altimar"), whereby Neuberger's entire "Dyal Capital Partners" division, including control over Dyal III, would be transferred to a merged entity called Blue Owl. Pursuant to this transaction, the general partner of Dyal III—and control over Dyal III's interests in Sixth Street—is set to be transferred to a Sixth Street competitor, ostensibly on May 19, 2021. To accomplish the transfer, Dyal III's controlling general partner, acting through its controlling general partner which is owned and controlled by Neuberger—all Affiliates of Dyal III—affirmatively agreed to the sale and assignment of these partnership interests to Sixth Street's competitor. Dyal III itself is directly participating in the transfer by agreeing to replace its investment advisor and seeking and obtaining the necessary consents of its limited partners to the transfer. All of these actions are being taken without Sixth Street's consent.

On February 12, 2021, Sixth Street filed a Verified Complaint in the Court of Chancery asserting claims for breach of contract and tortious interference and seeking specific performance of the Transfer Restriction and an injunction. Following expedited discovery and briefing, on April 20, 2021, the Court of Chancery (Zurn, V.C.) entered an Order Denying Plaintiffs' Motion For Preliminary Injunction (the "Opinion" or "Op.," attached as Exhibit A). The court recognized that the transaction would result in a "transfer … of Dyal III's Interests and noneconomic rights under the Investment Agreement" and "control of Dyal III's rights and obligations *vis-à-vis* Sixth Street." (Op. 10-11.) Despite finding a transfer, the court erroneously concluded that the Transfer Restriction "is not triggered" because the transfer would be made indirectly by Dyal III's affiliates, rather than directly by Dyal III. (Op. 18.)

In so ruling, the Court of Chancery relied heavily on this Court's decision in *Borealis Power Holdings Inc. v. Hunt Strategic Utility Investment, L.L.C.*, 233 A.3d 1 (Del. 2020). In the view of the Court of Chancery, *Borealis* compelled the court's conclusion by requiring that courts focus solely on the grammatical "subject" of a transfer restriction. In the Agreement, the "subject" of the Transfer Restriction is the "Subscriber," or Dyal III. (A641 §7.1(b).) For the court below, nothing else mattered. "[T]he Subscriber, Dyal III, is transferring nothing in the Transaction, so

the Transfer Restriction is not triggered." (Op. 18.) "[T]he subject of the Transfer Restriction—Subscriber—is dispositive." (Op. 21.)

Through this analysis, the court below erred as a matter of law and broke from this Court's consistent instruction that contracts must be construed "as a whole" to give "effect to all … provisions." *Fletcher v. Feutz*, 246 A.3d 540, 555 (Del. 2021). *Borealis* did not supplant the normal rules of contract interpretation. Rather, it applied long established rules to a particular set of facts—where a transfer was made by a third party that had no control over the contracting party, and where the contract language did not reflect an intent to bind the transferring party. The facts and contract here differ in critically important respects. The affiliate Defendants are in "complete control" of the contracting parties (Op. 3), and this Transfer Restriction expressly and broadly prohibits any transfer made (1) "directly or indirectly," (2) by "merger or sale," (3) involving "any Affiliate," (4) of "any interest (pecuniary or otherwise)" or (5) of "rights thereto." (A661.) Moreover, other provisions of the Agreement confirm the contracting parties' intent to benefit and bind their non-signatory "Affiliates," including as to the Transfer Restriction. The Court of Chancery ignored these telltale provisions because it read *Borealis* as confining its analysis to the grammatical "subject" alone. By doing so, the court disregarded the parties' manifest intent—reading out of the agreement entirely all transfer

restrictions save only for direct transfers *and* rendering numerous contractual provisions superfluous.

This Court should now restore primacy to larger principles of Delaware contract and partnership law and credit the intent of these contracting parties, as revealed by their agreement as a whole, to restrict the transfer at issue. Contract signatories may—and often do—bind their non-signatory Affiliates to contract obligations and unquestionably can agree to terms that make contractual compliance dependent on the actions of non-signatories. Dyal III did exactly that here, creating obligations and restrictions not just for itself but for its controlling general partner (and its general partner) as well.

Such obligations and restrictions are customary and expected, particularly when *partners* select and confide in one another, as Sixth Street did with Dyal III. Notably, Dyal III can act *only* by and through its controlling general partner, which signed the Agreement on Dyal III's behalf. To hold that Dyal III's general partner (and its controlling general partner) is not bound by the agreement would be to deny meaning and force to any transfer restriction in any agreement with a partnership as the contracting party. If allowed to stand, the Court of Chancery's ruling would upend long-settled principles of Delaware law governing contract interpretation and wreak havoc on the expectations of countless Delaware partnerships that have relied

on these principles to conduct trillions of dollars of business. This Court should reverse.

SUMMARY OF ARGUMENT

The Court of Chancery improperly denied Sixth Street's motion for an injunction.

1. Once the contract is properly read as a whole, Sixth Street should prevail on the merits. The contract expressly constrains "indirect[]" transfers and transfers by "merger or sale or any other similar transaction involving any Affiliate" of Dyal III, absent Sixth Street's consent. Confirming its reach, the contract expressly exempts from that broad constraint *certain* indirect transfers through Affiliates but *not* the transfer now contemplated. And the Court of Chancery recognized that Defendants are transferring "Dyal III's Interests and noneconomic rights under the Investment Agreement" and "control of Dyal III's rights and obligations *vis-à-vis* Sixth Street." In other words, the contractual violation here should be obvious.

Only for one reason would the Transfer Restriction nonetheless be inapplicable, according to the Court of Chancery: because the "Subscriber" itself "is transferring nothing." Finding this "dispositive" based on its reading of *Borealis*, the court deemed it "unnecessary and inappropriate" to examine the remainder of the contract. But *Borealis* neither overturns the rule that contracts must be interpreted as a whole, nor holds that contractual indicia of intent to restrict transfers

by affiliates should be disregarded. Under the Court of Chancery's incorrect interpretation, numerous contract provisions are rendered meaningless surplusage.

Additionally, the court wrongly ignored the fact that Dyal III *itself is taking action* to accomplish the transfer, contrary to the Transfer Restriction. Specifically, Dyal III must obtain the consent of its limited partners and agree to a new investment advisor (itself a Sixth Street competitor). These actions contradict the Court of Chancery's premise that "Dyal III[] is transferring nothing in the Transaction." For multiple reasons, therefore, Sixth Street is entitled to prevail under the governing contract.

2. The court's foundational error in interpreting the contract infects its remaining rulings. Under Delaware law, the denial of a contractual consent right constitutes irreparable harm. What is more, Defendants stipulated in the Investment Agreement that "there would be no adequate remedy at law if any party fails to perform any of its obligations." Critical facts highlight the harm Plaintiffs face absent an injunction: Sixth Street provided competitively-sensitive information to Defendants, which will be transferred to Blue Owl upon closing. And powerful non-economic governance rights wielded by Defendants could, once transferred to Sixth Street's competitor, be turned against Sixth Street's business.

As for any remaining equities, the court gave them short shrift after rejecting Sixth Street's contract claim. In particular, the court made no meaningful effort to

balance the harm to Sixth Street against any competing concerns or consider the alternative and narrower injunctive relief Sixth Street proposed. Defendants cannot claim any cognizable interest in exercising contractual rights relative to Sixth Street while doing so in violation of the attendant transfer restrictions and consent rights that were built in to protect Sixth Street.

STATEMENT OF FACTS

A. The Parties

Sixth Street is a private investment firm with over $50 billion in assets under management. (Op. 4.) Sixth Street raises funds from investors and then invests, including by making direct loans to middle-market companies. (*Id.*)

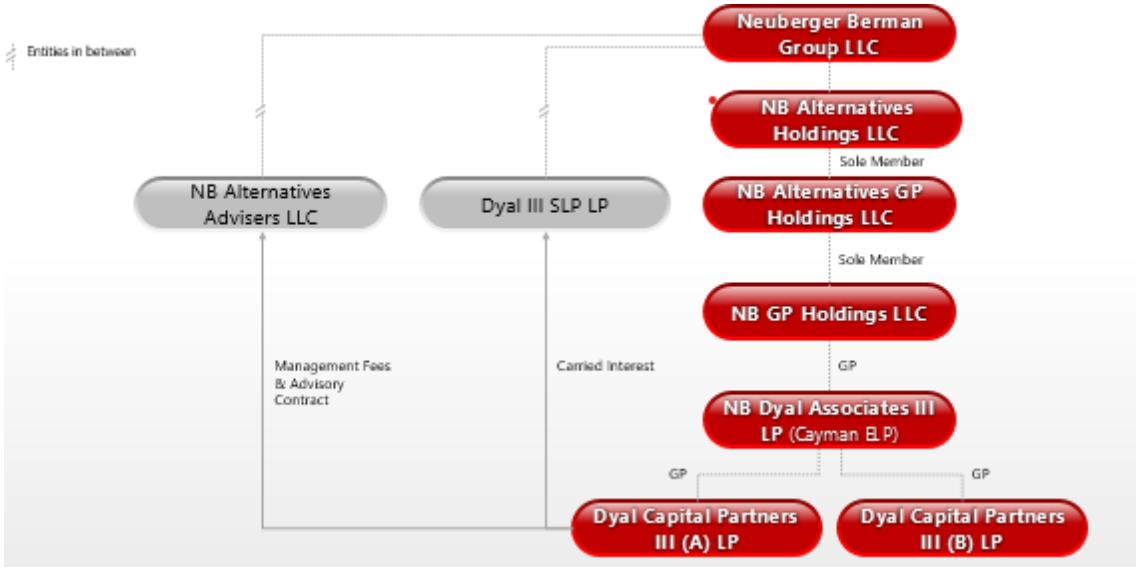
Neuberger is also a private investment firm that raises and invests funds on behalf of investors. (A901; A1824.) Among Neuberger's investment strategies is the Dyal Capital Partners division, which uses investor funds to purchase interests in the general partnerships of other investment firms. (Op. 2.)

Defendants Dyal Capital Partners III (A) LP and Dyal Capital Partners III (B) LP, which together comprise Dyal III, are Cayman exempted limited partnerships consisting of limited partners—*i.e.*, outside investors—and a general partner. (Op. 2-3; A579-80; A3857.) Dyal III is controlled by and exercises rights through its general partner, Defendant NB Dyal Associates III LP ("Dyal Associates"). *See* Cayman Island Exempted Limited Partnership Act (2018 Revision) §§14, 16.1, 22; *see also* A988; A990.

Dyal Associates is, itself, a Cayman exempted limited partnership that is controlled by and exercises rights through *its* general partner, Defendant NB Dyal GP Holdings LLC ("Dyal Holdings"). *See* Cayman Island Exempted Limited Partnership Act (2018 Revision) §§14, 16.1, 22; *see also* Op. 3-4; A965; A1045.

Dyal Holdings, a Delaware LLC, is wholly owned and controlled by its sole member, Defendant NB Alternatives GP Holdings LLC ("Alternatives GP Holdings"). (Op. 4.) Through its sole owner, NB Alternatives Holdings LLC (of which Neuberger is a 99.999% owner), Alternatives GP Holdings is ultimately owned and controlled by Neuberger. (Op. 2 n.2, 4.) Defendant Dyal III SLP LP ("Dyal III SLP") is the special limited partner of Dyal III and the recipient of carried interest generated by Dyal III—*i.e.*, a percentage of the profits Dyal III generates by investing the capital of its limited partners. (A545; A1018-19; A4486.) Defendant NB Alternatives Advisers LLC ("NBAA") is the registered investment advisor to Dyal III and the recipient of Dyal III's management fees—*i.e.*, a percentage of the total capital that Dyal III invests on behalf of its limited partners. (Op. 2 n.2; A545; A967; A1068.)

A diagram reflecting the relationship between these various entities is below:



Neuberger possesses "complete control of the management and conduct of the business of" Dyal III, including the power to "exercise all rights of the Partnership

with respect to [its] interest in any Person, firm, corporation or other entity." (Op. 3 (quotation marks and citations omitted).) All employees of the Dyal Capital Partners division are employed by "some Neuberger Berman entity." (A3095.)

B. The Investment Agreement

In 2016, Neuberger and Sixth Street began negotiating a minority investment in Sixth Street. (A1155.) Key to the negotiations, from Sixth Street's perspective, was Neuberger's offer of a long-term strategic partnership free of conflicts of interest. (A2822-23.) In return for Neuberger's investment, which was to be made through Dyal III, the "Subscribers"—Dyal III—receive pecuniary and non-pecuniary interests in Sixth Street. (A580 §1.1.) The pecuniary interests include a percentage of certain fees, including management fees earned by Sixth Street, and carried interest or other performance-based earnings generated by Sixth Street with respect to its investments. (A583-84 §2.1.) The non-pecuniary interests include rights as a limited partner of Sixth Street (*e.g.*, indemnification rights) (A587 §2.2); rights to receive certain information about Sixth Street's business periodically, including both financial information and the ability to question key Sixth Street personnel regarding the firm's strategy (A595-97 §2.8); the right to subscribe in new equity issuances by Sixth Street (A616-18 §6.1.2); rights to enforce restrictive covenants, including non-compete restrictions, against certain Sixth Street personnel (A639 §6.10(b)); rights to force a repurchase of the investment in the event of a key

person departure from Sixth Street (A643 §7.3(a)); tag-along and drag-along rights in connection with future equity transactions (A618-24 §6.1.3); and typical partnership consent rights over certain actions by Sixth Street, including certain distributions, equity issuances, changes to Sixth Street's capital structure, related-party transactions, business combinations, incurrences of debt, and amendments to Sixth Street's organizational documents (A629-30 §6.5).

Dyal Associates "controls and wields" Dyal III's non-pecuniary interests under the Investment Agreement. (Op. 6.) Dyal Associates' "decisions with respect to those rights are made by Dyal Holdings, and ultimately" Alternatives GP Holdings (*id.*), which is ultimately owned and controlled by Neuberger (Op. 4). Absent an injunction, ultimate ownership and decision-making will transfer to Blue Owl.

The Agreement also contains a broad restriction on transfers, subject to an enumerated list of discrete exceptions. Section 7.1(b) provides that, prior to the tenth anniversary of the investment or a qualified initial public offering of Sixth Street, unless otherwise specifically permitted in the Agreement, "no Subscriber may Transfer its Interests in [Sixth Street] without the prior written consent of [Sixth Street], which consent may be given or withheld for any reason or no reason." (A641 §7.1(b).) Section 7.1(c) adds that, even after this ten-year hold period expires, no "Transfer may be made without the prior written consent of [Sixth Street] if such

Transferee or any of its Affiliates … is, in the reasonable opinion of [Sixth Street], a Competitor" (A641 §7.1(c)(A)), which includes any entity "that materially competes, or that has a division or business line that materially competes, with one or more of [Sixth Street's] underlying businesses" (A651).

Recognizing that Defendants were investing through passive investment vehicles whose rights and obligations were managed by their general partner, Dyal Associates, and therefore by the other Defendants, the parties included a broad definition of the term "Transfer" in the Investment Agreement. A restricted "Transfer" includes any act that would "*directly or indirectly* in any manner (whether by *merger or sale* or any other similar transaction *involving an Affiliate*) transfer, sell, assign, exchange, hypothecate, pledge, or otherwise encumber or dispose of" an investment, right, or interest. (A661 (emphasis added).) Similarly, recognizing that Defendants' interests included both an economic component (in the form of an entitlement to fees and carried interest) and a noneconomic component (in the form of the "benefits, rights and obligations" that are "attached" to those payment streams (A580 §1.1)), the parties agreed that a transaction would constitute a "Transfer" if it involved an "equity interest or other security (or *any interest (pecuniary or otherwise) therein or rights thereto*)" (A661 (emphasis added)).

Together, these provisions ensured that Sixth Street's right to consent to the transfer of Defendants' investment would apply beyond "direct" sales by Dyal III of

its Interests in Sixth Street and encompass *any* transfer or grant of rights or interests in those Interests, including mergers or sales consummated by the upstream Affiliates that control Dyal III and its non-pecuniary rights.

Section 7.2(a) identifies five specific permitted "Transfers" that do not require Sixth Street's consent, none of which applies to the Blue Owl transaction. (A641-42 §7.2.) These exceptions include, among other things, a "Subscriber IPO," *i.e.*, an "initial public offering of any Subscriber (or any Affiliate or successor thereto)" (A581; A641 §7.2(a)(i)), and a transfer by a Dyal III limited partner of its partnership interest in Dyal III (A641 §7.2(a)(ii)).

The Investment Agreement also contains a stipulation by the parties that "there would be no adequate remedy at law if any party fails to perform any of its obligations" under the agreement, and "accordingly … each party … shall be entitled to compel specific performance of the obligations of any other party." (A672 §10.11.)

C. The Blue Owl Transaction

In early December 2020, Sixth Street received rumors through press inquiries that Neuberger was contemplating a go-public transaction involving Dyal III, although few reliable terms of the transaction were clear. (A1158; A1160; A1978-80.) Further rumors suggested that the transaction would involve the merger of

Neuberger's Dyal Capital Partners division with Owl Rock, an investment-management company that competes with Sixth Street.

When Sixth Street raised its concerns in early December about a possible combination with its competitor, Defendants misled Sixth Street, suggesting that the proposed merger and the resulting entity would be structured to avoid any conflict and that the transaction would not change the parties' relationship. (A2018-19.) Based upon Defendants' false assurances and an incomplete understanding, Sixth Street quickly sought to reassure its investors, including by sharing its initial mistaken belief that its confidential information and the management of its business would not be at risk. (A1980; A1993; A1997-98; A2018-19; A2764; A4484; A4626-27.) As the rumors continued and further details started to trickle in over the next two weeks, Sixth Street began to raise concerns and it began to hear concerns from various other "partner-manager" investment firms in which Defendants held general partnership stakes. (A5248; A5253.)

Neuberger's prior assurances were then belied by its public announcement of the merger on December 23, 2020, and the publication of the BCA on December 28. (A1161-1215.) According to the BCA, the proposed merger involved the transfer of the entire Dyal Capital Partners business to a new entity called "Blue Owl," which would be co-owned and co-controlled by the principals of Owl Rock and Dyal. (A695; A715.) Contrary to Neuberger's prior assurance that "nothing would

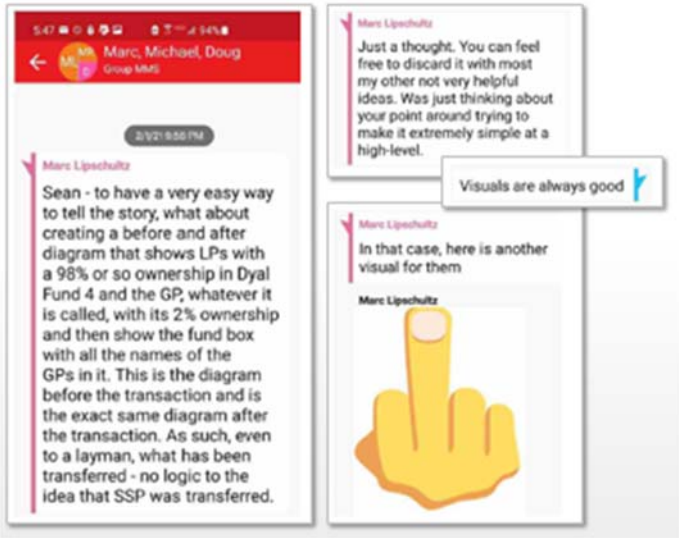
change" with respect to Dyal III's investment in Sixth Street, the BCA indicated that, following the merger, Blue Owl, a competitor to Sixth Street, would control Dyal III. (A733.)

Still unable to determine the precise details of the proposed transaction (which were described in a non-public letter between the BCA parties), Sixth Street sought clarification from Defendants, including by requesting a copy of the disclosure letter and asking Defendants to explain why the merger would not run afoul of the Transfer Restriction. (A875-76; A880; A889.) Defendants refused to provide the disclosure letter or any additional details regarding the transaction, and instead simply asserted that "[t]he proposed transaction does not violate Article VII or any other provision of the Investment Agreement" (A879-80; A892), even while conceding that the transaction involved the "indirect transfer of non-economic general partnership interests" in Dyal III (A892).

Documents produced in discovery, including the non-public letter, have revealed that, contrary to the assurances Defendants provided to Sixth Street in early December, the Blue Owl transaction will fundamentally alter the relationship between the parties. As part of the planned merger, the rights to and control over all of Dyal III's non-pecuniary interests in Sixth Street are to be transferred to Blue Owl through the sale of Dyal Holdings—the general partner of Dyal III's general partner. (A570.) Dyal Associates—Dyal III's general partner—will also be acquired by Blue

Owl. (A494.) As a result, "following the [transaction], [Blue Owl] shall control [Dyal III]" (A733), and "control over [Dyal Associates] and therefore Dyal III's Interests and noneconomic rights under the Investment Agreement" will transfer to Blue Owl" (Op. 10).

After closing, Blue Owl will be predominantly controlled by Owl Rock and managed by co-presidents Marc Lipschultz, who is currently the president of Owl Rock, and Rees, who is presently head of Neuberger's Dyal Capital Partners division, who will become employed by Blue Owl. (A1168-69.) Rees has admitted that his "economic alignment" will be with Blue Owl (A2537)—not Sixth Street—and Lipschultz made his adversarial stance towards Sixth Street all too clear in the below text message thread produced in discovery:



(A1870). Defendants have admitted that "Blue Owl and its affiliates are expected to compete (through the historic Owl Rock business) with certain … partner

managers" and "in particular, partner managers"—like Sixth Street—"that have a significant credit investing business." (A3471-72.)

Discovery has also revealed that Dyal III itself is necessarily participating in the Blue Owl transaction. The BCA provides that the consent of Dyal III and its limited partners is a required "condition to closing the Blue Owl Transaction." (A2561; A3120-21; A3558-59; *see also* A817, BCA §10.1(b) (listing the written consent of Dyal III's limited partners as a "requirement" that "shall have been satisfied prior to Closing," and noting that Dyal III "shall be deemed to have … consented" to the transaction once the required percentage of limited partners have provided consents).) By letter dated February 17, 2021, Neuberger requested the consent of Dyal III's limited partners to the transfer of "100% of the interests in the parent entity of [Dyal III's] non-economic general partner [*i.e.*, Dyal Holdings] to a Blue Owl controlled entity," as well as the assignment of Dyal III's investment advisor agreement from NBAA to a Blue Owl entity (A3450-51.) On May 3, 2021, Defendants announced that they had received these consents. (A5843.)

D. Procedural History

On February 12, 2021, Sixth Street filed a Verified Complaint in the Court of Chancery to enforce the Transfer Restriction. (A140.) Sixth Street also moved for a preliminary injunction against Defendants "and all those acting in active concert or participation, including any affiliates of Neuberger or Dyal." (A170-71.)

On February 24, 2021, Sixth Street filed a Verified Amended Complaint asserting breach of contract against all Defendants and tortious interference against all Defendants except Dyal III, and seeking preliminary and permanent injunctive relief as well as specific performance. (A291.)

The Court of Chancery heard argument on the preliminary injunction motion on March 24, 2021. On March 26, 2021, Sixth Street submitted a proposed order for the court to "enjoin[] [Dyal III] and [its] general partner from transferring [Dyal III's] interests in Sixth Street or, in the alternative and at a minimum, enjoin[] [Dyal III] and [its] general partner from exercising [Dyal III's] non-economic rights under the Investment Agreement pending resolution of Plaintiffs' claims." (A5702-03.)

On April 20, 2021, the Court of Chancery entered its Opinion denying Sixth Street's motion for a preliminary injunction, ruling, *e.g.*, that "[t]he Transfer Restriction's unambiguous language compels an outcome in Defendants' favor" as to both causes of action in Sixth Street's Amended Complaint. (Op. 17.)

On April 27, 2021, Sixth Street filed a motion requesting that the court enter a final judgment, expressly preserving its right to appeal. On April 30, 2021, the court entered final judgment in favor of Defendants, dismissing the action in its entirety "on the basis of the [Opinion]." (Ex. B at 2.) That same day, Sixth Street noticed this appeal and sought expedition, which the Court granted.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN RULING THAT SIXTH STREET IS NOT LIKELY TO PREVAIL ON THE MERITS OF ITS CONTRACT CLAIMS

A. Question Presented

Whether the Court of Chancery erred in ruling that Sixth Street is not likely to prevail on the merits on the basis that the Transfer Restriction does not apply. This question was raised below (A423-57), and considered by the Court of Chancery (Op. 16-21).

B. Scope Of Review

Although this Court "generally reviews the denial of a motion for a preliminary injunction under the abuse of discretion standard," the "Court of Chancery's legal conclusions are subject to *de novo* review." *Lawson v. Meconi*, 897 A.2d 740, 743 (Del. 2006); *see Del. Manufactured Home Owners Ass'n v. Inv'rs Realty, Inc.*, 2018 WL 2446805, at *2 (Del. May 31, 2018) (applying this standard on review of final judgment entered after preliminary injunction motion was denied). This Court "interpret[s] contracts *de novo*." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

C. Merits Of Argument

Despite recognizing that the Blue Owl transaction will cause "control of Dyal III's rights and obligations *vis-à-vis* Sixth Street" to transfer to a Sixth Street competitor, the Court of Chancery ruled that "[t]he Transfer Restriction's

unambiguous language compels an outcome in Defendants' favor." (Op. 10-11, 17.) The court based this conclusion on the "subject of the sentence" that sets forth the Transfer Restriction (Op. 17), believing that, under *Borealis,* "the subject of the Transfer Restriction—Subscriber—is dispositive." (Op. 21.) That was error. By focusing on the subject of the Transfer Restriction alone, the court nullified and rendered superfluous other contract terms that make clear the parties' intent. *Borealis* does not compel such an aberrant approach. Even if it did, however, record evidence establishes in this case that Dyal III—the subject of the Transfer Restriction—*is* effecting a transfer through its own affirmative acts. For these reasons, this Court should reverse the judgment below and rule that Sixth Street should succeed on the merits.

1. <u>The Court Of Chancery Erred In Its Contract Interpretation</u>

The rules of contract interpretation are well-established and consistently followed in Delaware. To determine meaning, Delaware courts examine "the specific provisions of the contract in light of the entire contract.'" *Chi. Bridge & Iron Co. v. Westinghouse Elec. Co., LLC*, 166 A.3d 912, 913–14 (Del. 2017). "This principle of construction, known as the whole-text canon, stems from the theory that context is the primary determinant of meaning." *HUMC Holdco, LLC v. MPT of Hoboken TRS, LLC*, 2020 WL 3620220, at *6 (Del. Ch. July 2, 2020). Delaware courts "read a contract as a whole" and "give each provision and term effect, so as

not to render any part of the contract mere surplusage." *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010).

Borealis does not deviate. In *Borealis*, this Court considered whether a stockholder's sale of its 1% stake in a Delaware corporation triggered rights related to the transfer of assets by that corporation's corporate grandchild. 233 A.3d at 2-3. Those rights would be triggered if the downstream entity, a Delaware LLC called "TTI," "intend[ed] to" transfer the relevant assets. *Id.* at 6, 9. Considering the contract as a whole, this Court concluded that the 1% stockholder's sale of its shares in the grandparent corporation "is simply not the same as TTI intending to Transfer its" assets. *Id.* at 9-10. "[A]s a minority shareholder of TTI's controller," the stockholder could not possibly "express the intent of TTI or unilaterally cause it to act," and the transfer restriction accordingly was not triggered by the stockholder's sale. *Id.* at 10. "To hold otherwise would be to impute the contractual intentions of a minority member of a company's controller to the company itself—a result that runs contrary to settled corporate-law principles," including the principle that "management of a limited liability company shall be vested" in its *majority* controlling members. *Id.* at 10 & n.27 (emphasis added; quoting 6 *Del. C.* §18-402).

On those facts, this Court ultimately concluded that the "*subject* of the operative sentence" in the agreement—which referred to TTI but not the 1% stockholder—controlled the outcome. *Id.* at 9-10 (emphasis in original). But that

was this Court's *conclusion*—not its *premise*. The Court did not begin and end its analysis by asking who was the subject of the transfer restriction. Nor did the Court announce a new rule that only the subject of a transfer restriction matters. The Court simply found that the subject of the transfer restriction was determinative on the facts and contract before it. Yet the Court of Chancery overread this ruling by fixating solely on the subject of the Transfer Restriction, to the exclusion of the remainder of the Agreement. *Borealis* does not call for such a stilted and incomplete analysis.

Moreover, the Court of Chancery failed to appreciate how drastically the facts of the cases differ. In *Borealis,* the transferring stockholder indirectly owned only a 1% interest in the contracting party (TTI), and thus had no ability to control TTI "or unilaterally cause it to act." *Id.* at 10. The entities were not under common control. Here, by contrast, Dyal III is under the "*complete control*" of the "upstairs" entities that Defendants claim would effectuate the transfer—as the Court of Chancery acknowledged. (Op. 3 (italics added).) In fact, as a matter of partnership law, Dyal III cannot act on its own; it can act *only* through the entities that would consummate the transfer. Cayman Exempted Limited Partnership Law (2018 Revision) §14; *Active Asset Recovery, Inc. v. Real Estate Asset Recovery Servs., Inc*, 1999 WL 743479, at *12 (Del. Ch. Sept. 10, 1999); *see also* A988; A990. This is the exact

opposite of the relationship in *Borealis*, where the transferring party had no control over the contracting party, and vice versa.

The form of the entities in each case is also materially different. In *Borealis*, this Court invoked "settled corporate-law principles" governing LLCs. 233 A.3d at 10. But this case involves limited partnerships, which operate under different principles. With partnerships, the Delaware Code confirms the default rule that non-economic rights cannot be transferred absent consent or agreement. 6 *Del. C.* § 17-702(a) ("Unless otherwise provided in the partnership agreement: … (2) An assignment of a partnership interest does not … entitle the assignee to become or to exercise any rights or powers of a partner."). This rule, known as the "pick your partner" principle, ensures that no partner will be forced into partnership with another person against its wishes. *See* Uniform Partnership Act, Section 503, Cmt. Yet it is *precisely* such non-economic rights that Defendants now would transfer to a Sixth Street competitor notwithstanding bargained-for terms designed to *reinforce* the default "pick your partner principle" that defines and protects partnerships.

Finally, the Court of Chancery also failed to recognize that the language of the contracts in the cases materially differ. In *Borealis*, the agreement restricted transfers by TTI but included no language restricting transfers by its Affiliates. Here, the Transfer Restriction expressly applies to a "sale" or "merger" involving the parties' "Affiliates"—and, as discussed further below, the text, structure, and context

of the Agreement all reveal the parties' intent to restrict Transfers not just by the contracting parties, but also by Affiliates. The Court of Chancery erred in overlooking such critical contractual language and context.[1]

2. Properly Interpreted, The Transfer Restriction Is Triggered

Consideration of the Agreement as a whole shows that the Transfer Restriction is triggered. A wealth of evidence reveals the parties' intent to restrict *all* transfers of the interests in Sixth Street, except as specified in exceptions that are not met here. The Court of Chancery's contrary view that all transfers of the interests in Sixth Street are *permitted*—provided they are made indirectly by an Affiliate rather than by Dyal III itself—disregards express language of the contract and would vitiate the transfer restriction altogether, rendering Sixth Street's consent right illusory. *See Osborn*, 991 A.2d at 1159. (Delaware courts "will not read a contract to render a provision or term 'meaningless or illusory'").[2]

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[1] The Court of Chancery cited below (Op. 18-19) another decision which applied *Borealis*—*Sheehan v. AssuredPartners, Inc.*, 2020 WL 2838575, at *12-13 (Del. Ch. May 29, 2020). *Sheehan* is likewise distinguishable, but to the extent it echoes the Court of Chancery's misconception that the "subject [i]s dispositive" under *Borealis*, it underscores the need for correction.

[2] Sixth Street believes the Transfer Restriction is clearly triggered. If this Court finds any ambiguity, however, a remand for consideration of extrinsic evidence (which was offered below but not considered) would be warranted. Defendants explicitly "acknowledge[d] and agree[d]" that a virtually identical transfer restriction in their investment agreement with another partner-manager like Sixth Street *did* apply to the Blue Owl transaction, and obtained that manager's consent to the transfer. (A3529; A5243.) This and other evidence introduced below confirms—as the text

The Transfer Restriction provides that, prior to the tenth anniversary of the investment or a qualified IPO, "no Subscriber may Transfer its Interests in [Sixth Street] without the prior written consent of [Sixth Street], which consent may be given or withheld for any reason or no reason." (A641 §7.1(b).) The Agreement then adds that, after this ten-year prohibition expires, no "Transfer may be made without the prior written consent of [Sixth Street] if such Transferee or any of its Affiliates … is, in the reasonable opinion of [Sixth Street], a Competitor"—language reflecting Sixth Street's longstanding concerns about transfers to competitors. (A641 §7.1(c)(A).) The Agreement sets forth limited exceptions to these general prohibitions in the next section. (A641-42 §7.2(a).)

As the Court of Chancery acknowledged, the Transfer Restriction contains three key terms: a subject (the "Subscribers," *i.e.*, Dyal III); a verb ("Transfer"); and an object (the "Interests"). (Op. 17.) The court correctly found that Dyal III's "Interests" are being transferred to Blue Owl because "Defendants intend to "transfer . . . control over Dyal III GP and therefore Dyal III's Interests and noneconomic rights under the Investment Agreement." (Op. 10.) But the court failed to consider the broad definition of "Transfer" in construing the scope of the Transfer Restriction as a whole, and whether it applies to Transfers by Affiliates.

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of the Agreement makes clear—that Dyal III's Affiliates are bound by the Transfer Restriction.

By its terms, that definition modifies the subject when used in connection with the verb Transfer. The Agreement defines "Transfer" to include any "merger or sale or any other similar transaction involving any Affiliate" of Dyal III. (A661.) This language (which was absent in *Borealis*) illuminates the meaning of the provision. Under this express definition, the Transfer Restriction applies not only to direct transfers by Dyal III, but also to "mergers" involving Dyal III's "Affiliates."[3]

Under the court's reading, however, the reference to "Affiliates" in the definition of "Transfer" serves no purpose. The word "Transfer" nearly always appears in the Agreement in a sentence with a named subject—*e.g.*, "Subscribers," "TSSP Personnel," or "TSSP Issuers." (A619 §6.1.3; A629-30 §6.5; A635 §6.9(e); A641 §7.1(b); A641 §7.1(c).) If the word "Affiliate" in the definition does not modify the subject, then it does *nothing*. Under the court's reading, Transfers involving "Affiliates" would *never* be restricted unless "Affiliates" are already expressly included in the subject of the restriction—in which case there would be no need for the definition of "Transfer" to specify that it includes actions by "Affiliates." The court's interpretation thus violates the cardinal rule that "each

[3] "Affiliates" means "with respect to a specified Person, any other Person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, such specified Person." (A650.) All Defendants are undisputedly Affiliates of Dyal III.

provision and term" must be given effect, and none shall be rendered "meaningless or illusory" or "mere surplusage." *Osborn*, 991 A.2d at 1159.

Nor can the court's reading be reconciled with Section 7.2, which sets forth specific "Permitted Transfers" that are excepted from the Transfer Restriction of Section 7.1. Two exceptions are notable. The first permits "a Transfer of *the limited partner interests* in [Dyal III] that is part of ordinary-course or one-off transfers of interests *by any investor*." (A641 §7.2(a)(ii) (emphasis added).) If Section 7.1 applies only to actions undertaken by Dyal III itself, as the court ruled below, then Section 7.2(a)(ii)—involving transfers by an *individual investor* in Dyal III, not Dyal III itself—would be unnecessary. Similarly, Section 7.2(a)(i) permits Transfers in connection with a "Subscriber IPO," defined as "an initial public offering of any Subscriber (*or any Affiliate* or successor thereto)." (A641 §7.2(a)(i); A581 §1.4(a) (emphasis added).) If the Transfer Restriction in Section 7.1 applied only to actions taken by Dyal III directly, there would be no need to exempt IPOs by Dyal III's Affiliates from the Transfer Restriction, as the parties specifically did.

These exceptions do not permit the transfer in this case. But their very existence refutes the lower court's cramped reading of the Transfer Restriction. The express exemption of *some* transactions by Affiliates of Dyal III (such as investor sales and Affiliate IPOs) reflects the parties' understanding that the Transfer Restriction applies, absent an explicit exception, to *any* transaction effecting a

transfer of Dyal III's interests in Sixth Street—whether that transfer is made by Dyal III itself or its Affiliates. These contract terms, like the definition of Transfer, are pivotal and telling. Yet the court below did not consider any of them—and interpreted the contract in a manner that renders them surplusage. On *de novo* review, this Court should hold that the Transfer Restriction reaches Affiliates as well as Dyal III itself.[4]

That conclusion comes all the more naturally considering that, under established Delaware law, "[c]ontracts may impose obligations on affiliates" who are not contract signatories. *In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, 213 A.3d 39, 57 (Del. 2019) (upstairs beneficial owners of contracting party held bound by party's non-competition agreement). Any other view would threaten to upend longstanding principles of agency and contract practices.[5] And

[4] The Court of Chancery did consider one portion of the Agreement other than the Transfer Restriction—Section 6.1.1—a transfer provision that the court deemed significant because it binds Sixth Street's founders and imposes duties on its general partner specifically. (Op. 8-9 & n.36.) But Sixth Street's founders cannot be assumed to be under its control and therefore may not be its contractual "Affiliates" at all relevant times. Moreover, contrary to the court's assumption, the cited provision does not impose any transfer restriction on Sixth Street's general partner, but merely imposes an obligation, not relevant here, to ensure compliance by other individuals. (A616 §6.1.1.)

[5] For example, releases in settlement agreements typically include releases of claims by non-signatory affiliates. *See, e.g.*, *Geier v. Mozido, LLC*, 2016 WL 5462437, at *6-7 (Del. Ch. Sept. 29, 2016) (a broad release binding "affiliates, subsidiaries, and parents" is part of a "classic model of a general release").

here Dyal III undertook to both benefit and bind its Affiliates *throughout* the Agreement, agreeing that its Affiliates would not issue certain public announcements (A672 §10.10(f)), obtaining indemnity rights (A645-46 §8.2(a)) and restrictive covenants "for the protection" of its Affiliates (A639 §6.10(c)), and so on. Indeed, the Agreement was signed by an Affiliate of Dyal III—its general partner—precisely because Dyal III can only act through its upstairs Affiliates. The Court of Chancery's statement that "Dyal III did not believe itself capable of binding upstream entities" (Op. 8) thus defies the text of the Agreement itself. In any event, it suffices for present purposes to note that the contractual terms expressly constrain transfers by Affiliates—and that Defendants cannot properly exercise contractual rights, post-closing, in violation of these transfer restrictions.

Where contractual language and principles of agency so warrant, courts find that a transfer restriction applies to a party's affiliates. For example, in *Eureka VIII LLC v. Niagara Falls Holdings, LLC*, 899 A.2d 95 (Del. Ch. 2006), an entity called "Holdings" contracted that it would not "Transfer" its interests in "Niagara Redevelopment" without the consent of its contractual counterparty. *Id*. at 100. As here, "Transfer" was defined to include "any direct or indirect transfer" of interests. *Id.* Also as here, the parties expressed their intent that "Transfers" would encompass transactions involving affiliates by defining "indirect transfer" as a "sale, pledge, hypothecation, encumbrance, conveyance, assignment, or other disposition of

interests in a Person holding an [interest in Niagara Redevelopment]." *Id.* After Holdings' parent, the Cogan Trust, sold 32% of its interests in Holdings, the Court of Chancery found "[t]here is no doubt that this proposed reorganization involved an indirect transfer" triggering the consent right. *Id.* at 108. Thus, although Holdings—the signatory to the agreement and the actor named in the transfer restriction—was not directly transferring anything (instead a non-signatory affiliate was transferring interests *in Holdings*), the Court of Chancery concluded that the transfer restriction was violated. *See id.* This Court affirmed. *Eureka*, 918 A.2d at 1171.

So too here. Construing the Agreement as a whole, the Transfer Restriction applies not just to direct transfers by Dyal III, but also to "transaction[s] involving [Dyal III's] Affiliate[s]." A661; *accord In re Asian Yard Partners*, 1995 WL 1781675, at *3, 5 (Bankr. D. Del. Sept. 18, 1995) (transfer restriction providing that "[n]o Partner may … transfer … directly or indirectly, or by operation of law or otherwise, any interest in the Partnership" prohibited the sale *of* Partner *by* its beneficial owner). Courts outside Delaware take the same view.[6]

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[6] *See, e.g.*, *EIG Glob. Energy Partners, LLC v. TCW Asset Mgmt. Co.*, 2012 WL 5990113, at *3, *8 (C.D. Cal. Nov. 30, 2012) (enjoining non-signatory upstream affiliates from consummating transfer); *H-B-S P'ship v. Aircoa Hosp. Servs., Inc.*, 114 P.3d 306, 308-09, 313 (N.M. Ct. App. 2005) (sale of equity in upstream affiliate of partner triggered right-of-first-refusal provision applicable to transfer of partner's interest); *Horsehead Indus. v. Metallgesellschaft AG*, 239 A.D.2d 171, 171-72 (N.Y.

3. Dyal III Is Violating The Transfer Restriction By Its Own Actions

Even if the Transfer Restriction applied only to actions undertaken by Dyal III itself, it is still triggered by the Blue Owl transaction. In concluding otherwise, the court below overlooked that Dyal III is taking affirmative actions—itself—to transfer its interests in Sixth Street. Specifically, Dyal III is accomplishing the transfer by consenting to at least two essential steps in the Blue Owl transaction: the transfer of Dyal III's general partner and its general-partner interest, and the assignment of Dyal III's investment-advisor agreement.

As part of the Blue Owl transaction, Neuberger will sell Dyal Associates (Dyal III's general partner) and Dyal Holdings (Dyal Associates' general partner) to Blue Owl. (A494-95; A570.) Under the Dyal III limited-partnership agreement, limited partners must consent to the sale of Dyal Associates, or to the direct or indirect transfer of Dyal III's general partner interest. (A1023-24.)

Additionally, as part of the transaction, Neuberger is transferring the right to receive management fees paid by Dyal III. (A569.) Currently those fees are paid to NBAA under investment advisory agreements with Dyal III; because NBAA is not being sold to Blue Owl, however, the transfer of the management fees requires Dyal

App. Div., 1st Dep't 1997) (similar); *Oregon RSA No. 6, Inc. v. Castle Rock Cellular of Oregon Ltd. P'ship*, 840 F. Supp. 770, 773, 775-76 (D. Or. 1993) (similar).

III to "assign" its investment advisory agreements from NBAA to a new entity controlled by Blue Owl. (A569.)

By letter dated February 17, 2021, Defendants sought Dyal III's consent to both (i) the transfer of "100% of the interests in" Dyal Holdings (which results in a transfer of the Dyal III general partner and its general partner interest) and (ii) "the assignment of the Fund's investment advisory agreements from [NBAA to] a Blue Owl controlled entity." (A3450-51.) On May 3, 2021, Defendants announced that these consents had been obtained. (A5843.) It is undisputed that these consents are a necessary condition to closing the Blue Owl Transaction. (A2561; A3120-21; A3558-59.)

In sum, Dyal III's consent to the transfer of its general partner and general partnership interest and to the assignment of its investment advisory agreements constitute affirmative actions by "Subscribers" to effectuate the transfer of their interests in Sixth Street as part of the Blue Owl transaction. *See EIG*, 2012 WL 5990113, at *4 n.2, *6 (plaintiff's argument that a transaction involving contracting party's upstairs affiliates would violate a transfer restriction because "consummation of the deal would presumably require various forms of action by [the contracting party], including obtaining consents, providing information, and the like" was "convincing"). The Court of Chancery's assumption that "Dyal III is transferring nothing in the Transaction" (Op. 18) was thus demonstrably wrong. Even if the

Transfer Restriction only applied to actions by Dyal III, it would still apply to the transfer of interests in Sixth Street.

4. Sixth Street Is Also Likely To Prevail On Its Claim For Tortious Interference

Having erroneously concluded that Sixth Street "failed to demonstrate … success on its breach of contract claim" (Op. 21), the Court of Chancery concluded that Sixth Street likewise failed to establish a likelihood of success on its tortious interference claim, which requires contractual breach. *Id*. Because Sixth Street has established a breach, as shown above, the rejection of its tortious-interference claim should be reversed.

Sixth Street has also met the remaining elements of its tortious interference with contract claim, namely: (1) the non-Dyal III Defendants' knowledge of the Investment Agreement; (2) their intentional act is a significant factor causing breach of the Investment Agreement; and (3) there is no valid justification. *See NAMA Holdings, LLC v. Related WMC LLC*, 2014 WL 6436647, at *25 (Del. Ch. Nov. 17, 2014). The record reflects that the non-Dyal III Defendants were aware of the Investment Agreement. Not only did Neuberger employees negotiate the Agreement (A3174-76; A3095), but Sixth Street sent multiple letters to, and had meetings with, Neuberger executives to discuss the Blue Owl transaction and its effect on the Agreement (A875-76; A880; A889-90; A892). Defendants do not dispute that, if the Transfer Restriction applies, their entrance into the BCA and consummation of

the Blue Owl transaction are "significant factors" causing the breach of the Investment Agreement; in fact, these actions would be the direct cause of the breach. Finally, to the extent Defendants' actions would "induce[]" Dyal III to breach the Investment Agreement and "render[] [Dyal III] unable to satisfy its contractual obligations," they are without justification. *NAMA Holdings*, 2014 WL 6436647, at *30; *see also PPL Corp. v. Riverstone Holdings LLC*, 2019 WL 5423306, at *13 (Del. Ch. Oct. 23, 2019); *eCommerce Indus., Inc. v. MWA Intelligence, Inc.*, 2013 WL 5621678, at *37 (Del. Ch. Sept. 30, 2013). Sixth Street's tortious-interference claim succeeds on its merits, and the court erred in finding otherwise.

II. THE COURT OF CHANCERY ERRED IN RULING, IN LIGHT OF ITS ERRONEOUS CONTRACT INTERPRETATION, THAT SIXTH STREET IS NOT ENTITLED TO EQUITABLE RELIEF

A. Question Presented

Whether the Court of Chancery erred in determining, in light of its ruling that Sixth Street's consent right is not triggered, that Sixth Street is not entitled to equitable relief. This question was raised below (A457-64), and considered by the Court of Chancery (Op. 21-27).

B. Scope Of Review

Although denial of a preliminary injunction is generally reviewed for abuse of discretion, any finding "premised upon a determination" that is legally erroneous is subject to *de novo* review. *Miller v. State Farm Mut. Auto. Ins. Co.*, 993 A.2d 1049, 1053 (Del. 2010). The "applicable standard of appellate review is *de novo*" when a motion for an injunction is denied based on conclusions of law. *Lawson*, 897 A.2d at 743 (reversing denial of preliminary injunction and remanding for entry of permanent injunction).

C. Merits Of Argument

To the extent that the Court of Chancery erred in its contract analysis, it also erred in its ensuing analysis of the equities, which was colored by its notion that Sixth Street's claims are meritless. This Court should reverse because an injunction is plainly warranted once Sixth Street's consent rights are considered.

1. The Court Erred In Finding No Irreparable Harm

Contrary to the Court of Chancery's suggestion, deprivation of a consent right has long been recognized to constitute irreparable harm under Delaware law. *See SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998) (affirming preliminary injunction enjoining general partner's implementation of a withdrawal and dissolution plan in violation of partners' consent rights); *Telcom-SNI Inv'rs, L.L.C. v. Sorrento Networks, Inc.*, 2001 WL 1117505, at *9 (Del. Ch. Sept. 7, 2001) (denial of stockholders' right to "consent" posed irreparable harm), *aff'd*, 790 A.2d 477 (Del. 2002); *see also Potter v. Cmty. Commc'ns Corp.*, 2004 WL 550747, at *3 (Del. Ch. Mar. 11, 2004) (loss of "control" over "intangible assets" constitutes irreparable harm); *Solar Cells, Inc. v. True N. Partners, LLC*, 2002 WL 749163, at *7 (Del. Ch. Apr. 25, 2002) (finding irreparable harm where merger would deny plaintiff "voting power" in management).[7] For the reasons noted above, Sixth Street has a valid consent right, violation of which would result in irreparable harm as a matter of law.

Nor can the Court of Chancery—assuming its reading of the contract is reversed—properly decline to credit and enforce the parties' express stipulation set forth in Section 10.11 of the Investment Agreement. The parties agreed there "would be no adequate remedy at law if any party fails to perform any of its obligations"

[7] Given the difficulty of quantifying monetary damages in this context, "consent rights cases are better dealt with by injunctive relief." *Fletcher Int'l., Ltd. v. Ion Geophysical Corp.*, 2013 WL 6327997, at *19 (Del. Ch. Dec. 4, 2013) (Strine, C.).

under the Investment Agreement, and that "accordingly … each party … shall be entitled to compel specific performance of the obligations of any other party." (A672 §10.11.) This stipulation "alone suffice[s] to establish [irreparable harm] for the purpose of issuing injunctive relief." *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 68 A.3d 1208, 1226 (Del. 2012).

The court nonetheless cited three unreported decisions for the proposition that the Court of Chancery can override a contractual stipulation of irreparable harm. (*See* Op. 25 n.117 (citing *AM Gen. Holdings LLC v. Renco Grp., Inc.*, 2016 WL 787929 (Del. Ch. Feb. 19, 2016); *AM Gen. Holdings LLC v. Renco Grp., Inc.*, 2012 WL 6681994 (Del. Ch. Dec. 21, 2012); *Del. Elevator, Inc. v. Williams*, 2011 WL 1005181 (Del. Ch. Mar. 16, 2011)).) But none of these cases would support disregarding the irreparable harm stipulation in Section 10.11. In two of them, the Court of Chancery *found* irreparable harm in light of contractual stipulations resembling Section 10.11. *See AM Gen. Holdings*, 2012 WL 6681994, at *4 n.49, *5 (holding contractual stipulation "waive[d] the requirement of irreparable harm on a motion for a preliminary injunction," and noting "a defendant cannot successfully argue that there is no irreparable harm" contrary to a stipulation, absent some "concern that the parties are attempting to improperly confer equitable jurisdiction upon this Court"); *Del. Elevator, Inc.*, 2011 WL 1005181, at *15 (treating as "binding" and "sufficient to support injunctive relief" a contractual stipulation that

"a violation by the Employee of the provisions of this Section could cause irreparable injury to the Corporation and there is no adequate remedy at law for such violation"). As for the third case, the Court of Chancery there declined to accept the contractual stipulation as a basis to award "*affirmative* relief" that was "*mandatory* in nature"—quite different from "relief to maintain the *status quo*," which suffices to satisfy Sixth Street here. *AM Gen. Holdings*, 2016 WL 787929, at *2 (emphasis added).

Nor was the Court of Chancery correct that "the parties to the Transaction are not bound" by Section 10.11. (Op. 25 n.117.) As noted above, Dyal III is an active and necessary participant in the Blue Owl transaction. Further, under Court of Chancery Rule 65, the trial court can enjoin not just Dyal III, but all entities in active concert or participation with Dyal III, including the remaining Defendants. Del. Ch. Ct. R. 65(d) ("[e]very order granting an injunction … shall be binding … upon the parties to the action … and upon those persons in active concert or participation with them"). Courts applying this rule have entered injunctions based on stipulations of irreparable harm, including against non-signatories. *See Concord Steel, Inc. v. Wilmington Steel Processing Co., Inc.*, 2008 WL 902406, at *11 (Del. Ch. Apr. 3, 2008); *ZRii, LLC v. Wellness Acquisition Grp., Inc.*, 2009 WL 2998169, at *16 (Del. Ch. Sept. 21, 2009). For all of these reasons, irreparable harm follows inexorably from a correct interpretation of the Agreement combined with settled Delaware law and procedure.

2. The Court's Erroneous Contract Ruling Affected Its Consideration Of The Record

The Court of Chancery's balancing of the equities was likewise colored by its total rejection of Sixth Street's reading of the contract. Just as it saw Sixth Street's contractual argument as meritless, the Court of Chancery took a jaundiced (and, we respectfully submit, unfair) view of how Sixth Street came to bring its argument to court. For the same reasons Sixth Street actually has rights that are being violated, however, its commitment to vindicating those rights should be irreproachable.

Indeed, any effort to impugn Sixth Street's conduct of the litigation does not withstand scrutiny. For example, the court cited a handful of internal Sixth Street e-mails that it characterized as reflecting an initial lack of concern at Sixth Street regarding the impact of the Blue Owl transaction on Sixth Street's business. (Op. 11-12.) But the Court neglected to note that those e-mails dated from *early December*, weeks before the BCA was published, while Sixth Street was relying entirely on Defendants' false assurances that the as-yet-undisclosed go-public transaction would not affect Sixth Street. (A2018-19.)[8] It was just one beat later, when Sixth Street started obtaining a clearer picture of this opaque transaction, that

[8] While Defendants represented below that, in initial calls with Sixth Street in early December, Mr. Rees "told them…everything…about the transaction" (A3500 (quoting Rees's deposition testimony)), that is irreconcilable with Rees's own sworn admission that, at the time of his deposition three months later, he was still "[a]bsolutely not" familiar with the transaction structure (A2523; A2706-07).

Sixth Street communicated to Defendants its concerns about the disclosure of confidential information relating to the management of its business to a direct competitor. (A5248-53.) That Sixth Street's concerns were well founded is confirmed by Defendants' contemporaneous internal e-mails acknowledging that *multiple other* asset managers had raised similar concerns as well. (A5248.)

The Court of Chancery's characterization of Owl Rock as a "minimal competitor" (Op. 22), is unexplained and at odds with the record, which shows that Sixth Street and Owl Rock directly and designedly compete, including as reflected in their respective 10-Ks. (A1916; A3471-72; A5368.) The record further reflects how Sixth Street, in choosing Dyal as a partner and memorializing the Investment Agreement, took care to foreclose any prospect that these valuable, potent rights would ever fall into such hands. (A2837; A4583; A4597-98.) Similarly, in doubting the validity of Sixth Street's confidentiality concerns (Op. 22-23), the court below failed to take any meaningful account of record evidence demonstrating that Sixth Street raised its concerns as soon as material details of the transaction emerged—and that those concerns were (i) backed by actual, incontestable transfers of confidential information that had occurred (precisely as contemplated by the Investment Agreement) and also (ii) corroborated by Defendants themselves. (A416-17; A460-61; A2895-96; A4531-34; A4584-85; A5317-18; A5370-72; A5375.)

Similarly unfounded is the court's suggestion that Sixth Street "set out to leverage the Transaction to force a buyback of Dyal III's interest," which the court based entirely on the fact that Sixth Street did not assert its contract right until January 11. In fact, the BCA had not been published until December 28, at which point Sixth Street sought advice of litigation counsel (as a party genuinely concerned about violation of its contractual rights would do) (A2767), and then promptly made a good-faith settlement offer (at Defendants' behest) by offering to repurchase Dyal III's investment at Defendants' own fair-market valuation (A4688-89). What the court saw as an effort to assert "leverage" was, when viewed through a different contractual lens, nothing more than an attempt by Sixth Street to protect and vindicate a valid contractual right, absent any other adequate recourse.[9] Sixth Street's goal has not been to buy back its stake: It has long made clear that it would

[9] So too are the acts cited by the Court of Chancery as evidencing Sixth Street's "attempt[] to derail the Transaction via regulatory channels" and by "lobb[ying]" other asset managers "to oppose the deal." (Op. 13-14.) Apart from this being a mischaracterization of the facts, any party facing imminent breach of its consent rights and dangerous transfer to a direct competitor would be well within its rights to discuss the transaction with regulators and others who may be similarly concerned. Nor is there any good reason to fault Sixth Street, as the Court of Chancery did, for a supposedly "a calculated effort to 'muck up' the Transaction" to force a buyback. (Op. 26.) That alleged out-of-court statement cannot possibly supplant the hard record evidence establishing that Sixth Street diligently (i) investigated the facts surrounding the transaction, (ii) raised concerns as soon as it identified a potential breach, and (iii) sought to protect its contractual rights through negotiations before turning to court once doing so proved necessary. *See supra* Stmt. Facts §C; A4533-34.

be equally content for Neuberger to keep its stake in Sixth Street, rather than contribute it to Blue Owl.

3. The Court Erred In Balancing The Harms

Finally, although the court recognized its obligation to "balance the Plaintiff's need for protection against the harm that can reasonably be expected to befall the Defendants if the injunction is granted," (Op. 25 (citing *CBS Corp.*, 2018 WL 2263385, at *5)), it erred in assessing both sides of that scale.

With respect to Sixth Street's need for protection, the Court simply reiterated its misinterpretation of the record through a lens hostile to Sixth Street's invocation of contractual rights. (Op. 26.) With respect to the impact on Defendants, the Court focused on the risk that an injunction might pose to "the interests of a panoply of parties interested in the $12.5 billion Transaction." (*Id.*) As the court itself had acknowledged (Op. 14), however, Sixth Street does not seek to enjoin the entire $12.5 billion Transaction; instead, Plaintiffs have narrowly tailored their requested relief so as simply to prevent the transfer, or at a minimum the exercise, of the interests and rights relative to Sixth Street that Dyal III and its general partner are prohibited from transferring (*id.*). Defendants remain otherwise free to proceed with their transaction with all of the $12.5 billion staked on it. To the extent that the Sixth Street partnership interests to be contributed in the deal are small potatoes by comparison, Defendants are welcome to leave them behind and should. But in no

event can Defendants claim legitimate interests in exercising, post-closing, the partnership rights in Sixth Street that are transferred in violation of Sixth Street's consent right.

Once the parties' respective interests are properly analyzed under a correct reading of the contract, the equities balance overwhelmingly in favor of Sixth Street, and vindication of its contractual rights. Upon reversing the Court of Chancery's contractual interpretation, therefore, this Court should remand for prompt entry of an appropriate injunction.

CONCLUSION

For the foregoing reasons, Sixth Street respectfully requests that this Court reverse the Court of Chancery's final judgment dismissing Sixth Street's claims and remand with orders to enter an injunction.

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