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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

COURT BELOW:

COURT OF CHANCERY OF THE STATE OF DELAWARE,
C.A. No. 2021-0127-MTZ

APPELLEES' ANSWERING BRIEF

Of Counsel:

WACHTELL, LIPTON,
ROSEN & KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1000

POTTER ANDERSON & CORROON LLP
Kevin R. Shannon (No. 3137)
Christopher N. Kelly (No. 5717)
Daniel M. Rusk, IV (No. 6323)
1313 N. Market Street
Hercules Plaza, 6th Floor
Wilmington, Delaware 19801
(302) 984-6000

Attorneys for Defendants Dyal Capital Partners III (A) LP, Dyal Capital Partners III (B) LP, NB Dyal Associates III LP, NB Dyal GP Holdings LLC, and Dyal III SLP LP

Of Counsel:

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Manhattan West
New York, New York 10001
(212) 735-3000

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Robert S. Saunders (No. 3027)
Sarah Runnells Martin (No. 5230)
Jacob J. Fedechko (No. 6502)
One Rodney Square
P.O. Box 636
Wilmington, Delaware 19899-0636
(302) 651-3000

Attorneys for Defendants Neuberger Berman Group LLC, Neuberger Berman AA LLC, NB Alternatives GP Holdings LLC and NB Alternatives Advisers LLC

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NATURE OF PROCEEDINGS

Sixth Street seeks to block a $12 billion transaction between Neuberger Berman and Owl Rock Capital. Sixth Street asserts this block right on the ground that Dyal III, Neuberger's corporate great-grandnephew, made a passive equity investment in Sixth Street four years ago. Sixth Street says the garden-variety transfer restriction in the agreement governing that investment gives it a veto over the proposed deal and any similar transaction by anyone in the Dyal or Neuberger corporate family.

In support of this claim, Sixth Street and a common-interest partner launched expedited litigation in the Court of Chancery and in New York's commercial court. After substantial expedited discovery and two full-blown injunction hearings, both courts rejected Sixth Street's claims.

As set out in the Court of Chancery's careful ruling:

Sixth Street has no likelihood of success because its interpretation "elides the *subject* of the operative sentence" in the transfer restriction, drastically expanding its scope, in derogation of this Court's teaching in *Borealis.* That interpretation not only collides with *Borealis* and the sound interpretive principle it enshrines, but would subject separate entities anywhere in Dyal's corporate family to Dyal III's contractual obligations, violating "Delaware's well-settled respect for and adherence to principles of corporate separateness." Sixth Street's

interpretation would also transform a targeted transfer restriction into a broad change-in-control provision handcuffing parties far removed from the contract—an outcome unsupported by the text of the agreement and, in the words of the New York judge, "wildly implausible" in commercial context. The interpretation Sixth Street sponsors has accordingly never been adopted in Delaware or elsewhere.

As to the other elements necessary for injunctive relief, the trial court examined the record and concluded that Sixth Street had demonstrated no risk of imminent irreparable harm absent an injunction. After balancing the evidence, the court also found that Sixth Street pursued litigation to induce an opportunistic buyback and so determined that the equities tilted against relief. Accordingly, the court denied the motion for a preliminary injunction.

Rather than seek leave to take an interlocutory appeal, Sixth Street elected to abandon any attempt to pursue further discovery or present its claims at trial, and asked the court to enter final judgment against it.

SUMMARY OF ARGUMENT

1. **Denied.** Under Section 7.1(b) of the Investment Agreement, "no Subscriber may Transfer its Interests in any [Sixth Street] Issuer without the prior written consent of the Manager." Op. 7; A245. This provision restricts a Transfer only that is (1) by a "Subscriber," and (2) of "its Interests" in Sixth Street. The trial court correctly concluded that "the Subscriber, Dyal III, is transferring nothing in the Transaction, so the Transfer Restriction is not triggered." Op. 18.

This result was supported by this Court's *Borealis* decision, which refused to extend a similar transfer restriction beyond the "*subject* of the operative sentence … of which the verb phrase 'may only Transfer' serves as the predicate." 233 A.3d 1, 10 (Del. 2020). Because the subject of the operative transfer restriction here, Dyal III, is "transferring nothing," Op. 10, it was "therefore unnecessary" to additionally "parse the definition of 'Transfer' to determine the scope of" that restriction.

Sixth Street seeks to do what *Borealis* forbids, and have the verb enlarge its subject. According to Sixth Street, the definition of "Transfer" smuggled in a sweeping prohibition on *any* upstream transfers by non-parties—running all the way to the top of Neuberger's global operations—through the backdoor of a targeted limitation on transfers by one of five funds managed by one of Neuberger's many business divisions in an agreement memorializing an

investment that represents *one-tenth of one percent* of Neuberger's total assets under management. That is not what the contract says. And nothing in the extensive discovery record suggests that the parties intended that commercially improbable result.

Sixth Street's various attempts to avoid *Borealis* are without merit:

Sixth Street charges the trial court with "fixating solely" on the subject of the transfer restriction. Br. 3-4, 24. Untrue. The court gave effect to *each* component of the transfer restriction, and, just as in *Borealis*, rejected Sixth Street's attempt to "elide" one of those components—its subject.

Sixth Street asserts that the court's decision violates the "pick your partner" principle. Br. 25. Whatever the import of that "principle," it is not violated here. Sixth Street picked Dyal III as its partner, and Dyal III will continue as its partner after the Transaction. As the trial court found: "[t]he legal and economic relationships between Sixth Street and Dyal III … will not change." Op. 10.

Complaining that "ultimate ownership and decision-making" over Dyal III's passive investment "will transfer to Blue Owl" (Br. 13), Sixth Street proposes to convert a targeted transfer restriction into a change-of-control provision binding the entire Neuberger family. This exorbitant interpretation finds no support in the contract, or the context of the Investment Agreement, or the commercial expectations of the contracting parties.

Finally, Sixth Street seeks to rewrite the agreement, pretending that "Affiliates" is actually part of the definition of "Subscribers." Br. 28. This maneuver violates basic rules of contract interpretation. It also ignores Delaware's well-settled respect for principles of corporate separateness. And it is especially dangerous, given the far-reaching consequences of "enjoin[ing] transactions at any level of [a company's] corporate pyramid, regardless of whether that entity was explicitly bound." Op. 20.

Sixth Street's claim on the merits is also foreclosed by defendants' alternative arguments, which the court below did not address. They constitute independent grounds to deny relief.

The decision below is consistent with all relevant authority, including *Borealis*, the ruling in Sixth Street's New York companion case, other Court of Chancery decisions, and uniform precedent from around the country. It should be affirmed.

2. **Denied.** Sixth Street has not shown irreparable harm. As the trial court found: (a) "Sixth Street's concerns about misuse of its confidential information in the hands of a competitor are speculative at best," including because Owl Rock is "a minimal competitor" of Sixth Street and because "nothing in the record indicates Sixth Street ever actually became concerned about its confidential information" (Op. 22-24); and (b) "While Dyal III has some noneconomic rights,

the record undermines Sixth Street's litigation position that those rights are so significant that passing effective control over them to an Owl Rock co-owned entity will irreparably harm Sixth Street." Op. 24-25. These factual findings are entitled to deference and well-grounded in the evidence. The trial court correctly rejected Sixth Street's contention that the Investment Agreement requires a finding of irreparable harm notwithstanding contrary evidence, and also correctly ruled that the Investment Agreement could not bind the parties to the Transaction, against whom an injunction would operate, because they are not parties to the Investment Agreement.

3. **Denied.** The equities weigh decisively against injunctive relief. The trial court found that "[t]he record indicates that this litigation and the parallel action in New York were part and parcel of a calculated effort to 'muck up' the Transaction to force a buyback" of Dyal III's investment in Sixth Street. Op. 26. The court further found that Sixth Street's conduct "threatens the interests of a panoply of parties interested in the $12.5 billion Transaction, including Neuberger and Owl Rock investors who are in no way implicated in Sixth Street's relationship with Dyal III." *Id.* These findings are entitled to deference, are well-grounded in the evidence, and independently support affirmance.

STATEMENT OF FACTS

A. Dyal's business

Dyal Capital Partners ("Dyal") is a division of Neuberger Berman Group ("Neuberger"), an investment company with over $400 billion under management. Op. 2. Dyal sponsors funds ("Dyal Funds") that acquire passive minority equity stakes in other investment firms, referred to as "partner managers." *Id.* The Dyal Funds raise money primarily from outside investors, including pension funds, insurance companies, and foundations. Dyal's five funds, Dyal I through V, have invested in 50 partner managers. *Id.*

The Dyal Funds are limited partnerships. Op. 3. Dyal's investors, its "LPs," hold economic ownership of the Dyal Funds. *Id*. The Dyal Funds are managed by general partner entities ("Dyal GPs"). The Dyal GPs are appointed by the LPs, and themselves have no economic rights or interests in the Dyal Funds. *Id*. The Dyal GPs are owned by legally-distinct upstream Neuberger entities. *Id*.

B. Sixth Street negotiates for a passive investment from Dyal III

Sixth Street is one of Dyal III's 10 partner managers. Op. 4. It specializes in "special situations" investments and manages over $50 billion in assets. Op. 4.

The Investment Agreement between Dyal III and Sixth Street was executed in June 2017. Op. 4-5. On the Dyal side, the contract was entered into solely by Dyal III, defined in the contract as the "Subscribers." Op. 7. Dyal III did not

believe itself capable of binding upstream entities, and Sixth Street never asked that any entity other than Dyal III be made a party to the Investment Agreement. Op. 8; A3294.

In exchange for a $417 million investment, Dyal III acquired the right to certain "Interests" in Sixth Street. Interests are defined in the Investment Agreement as equity interests in Sixth Street and attendant cash flows. Op. 5; A187-91 § 2.1; B680.

Dyal III's investment is passive. Sixth Street's CEO, Alan Waxman, explained to his senior team that "we continue to run the business as we currently run it; Dyal has very few rights as a minority holder." B994-95. Dyal III's limited non-economic rights are designed only to ensure that Dyal III is treated *pro rata* with Sixth Street's other equity holders. Op. 5; A233-34 § 6.5(i)-(vii).

Dyal III also acquired the right to receive limited information necessary to monitor and value its investment. Op. 6. Sixth Street admits that none of the information Dyal receives is "competitively sensitive … in any real sense." Op. 6 (citing B999; A2787; A3372).

The transfer restriction on Dyal III. Section 7.1(b) of the Investment Agreement provides that "no Subscriber may Transfer its Interests in [Sixth Street] without the prior written consent of the Manager, which consent may be given or withheld for any reason or no reason." A245. The provision thus restricts only a

"*Subscriber*" (defined as the Dyal III entities making the investment) from making a Transfer, and restricts the Subscriber only from Transferring "*its Interests*" (the Subscribers' equity stake in Sixth Street and related cash flows). Op. 7.

The Portfolio Sale exception. Section 7.2(a)(iv) permits Dyal III to undertake a "Subscriber Portfolio Sale," defined as either the Transfer of at least 75% of Dyal III's portfolio of investments or the sale of Dyal III itself. A245-46 § 7.2(a)(iv); A264 § 9.1.

Restrictions on Sixth Street. Section 6.1.1 restricts Sixth Street's owners from transferring their equity in Sixth Street. Unlike the transfer restrictions applicable to Dyal III, Section 6.1.1 expressly binds Sixth Street's *upstream* general partner ("Manager") and senior executives ("Founders"), who are signatories to the Agreement. Op. 8-9 & n.36; A220 § 6.1.1; A280-86.

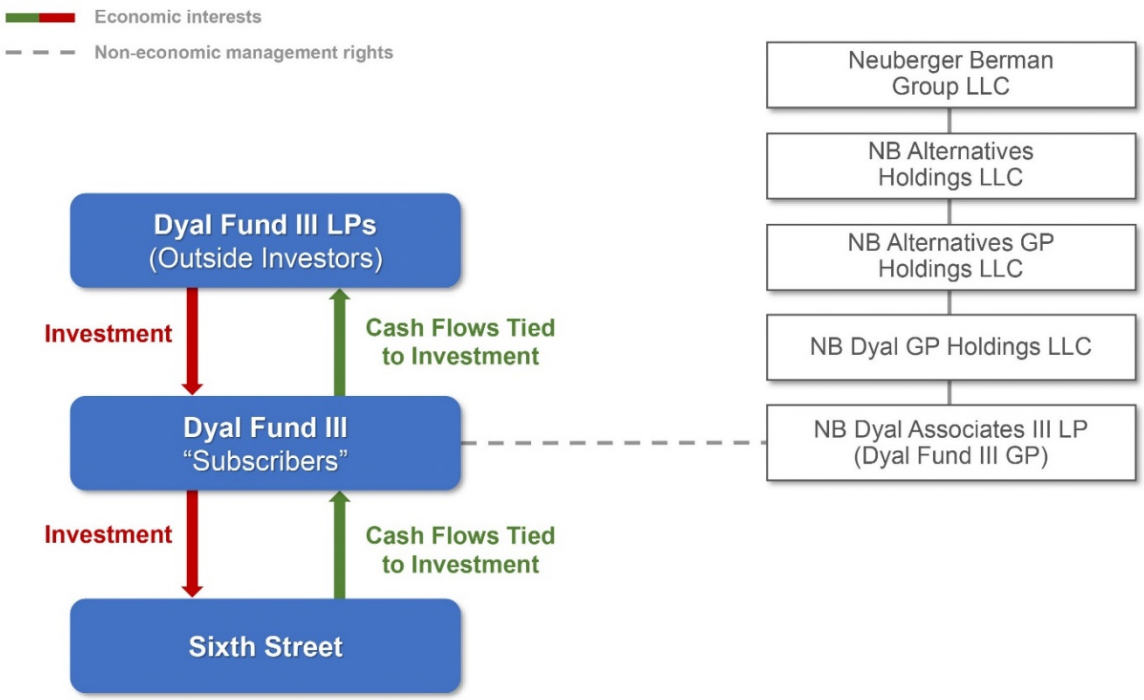
Provisions absent from the Investment Agreement. As the Court of Chancery observed, the Investment Agreement "does not contain any provision (1) addressing or restricting a change in control of Dyal; (2) preventing Neuberger or Dyal from competing against Sixth Street, acquiring or being sold to a competitor, or otherwise restricting their business activities in any way; or (3) supplying Sixth Street the right to buy back Dyal III's stake at fair value in the event of a Dyal III change in control, which several other Dyal partner managers did seek and obtain." Op. 8.

C. The Transaction

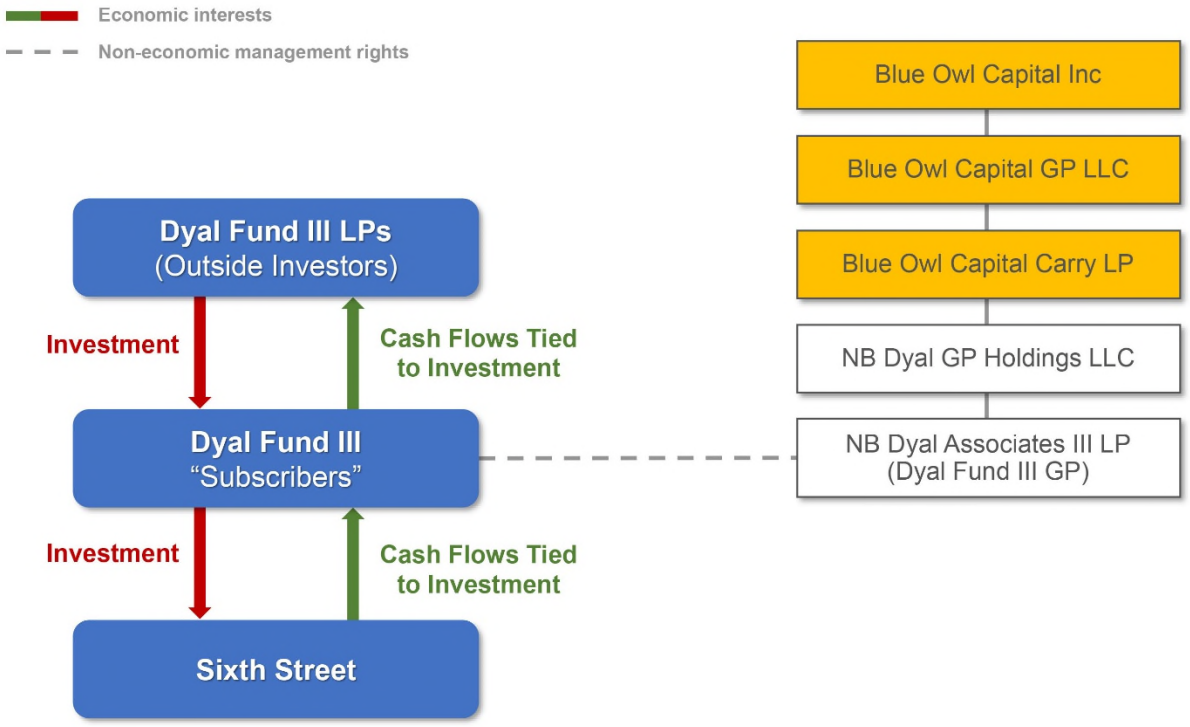
On December 23, 2020, Neuberger announced a business combination agreement ("BCA"), pursuant to which its Dyal division would merge with Owl Rock Capital Group ("Owl Rock") and Altimar Acquisition Corporation ("Transaction"). The resulting entity would be a publicly traded company called Blue Owl. Op. 9-10. The Transaction is expected to close on May 19, 2021.

Dyal III is not a party to the BCA and "is transferring nothing in the Transaction." Op. 10. The Transaction involves only Dyal III's "upstairs" entities. *Id.* The legal and economic relationships between Sixth Street and Dyal III, and between Dyal III and its investors, will not change. *Id.*

Sixth Street's relationship with Dyal III before the Transaction is illustrated below (B1163):



The unchanged relationship between Sixth Street and Dyal III after the Transaction is shown below (B977):



The personnel who manage the Dyal business now will continue to do so after the Transaction closes, with the same economic interests in Sixth Street's success. A2537-38; A2542. Sixth Street acknowledged that "it would be crazy" for Dyal to disfavor any partner manager, as the success of Dyal's business depends on the success of its partner managers. Op. 23-24; A2903-05. Sixth Street also admits that misuse of partner managers' confidential information "would kill [Dyal's] business." A2829-30; Op. 23-24.

D. Sixth Street assesses the Transaction and concludes it will have "zero impact" on its business

Sixth Street learned of the Transaction in early December 2020. Op. 11; A2684-85. Sixth Street's senior executives then told their investors that the Transaction would have "zero impact on our business" because Dyal was a "completely passive investor" run by "good folks." Op. 11 (quoting B999). They emphasized that Dyal "[does not] get competitively sensitive information from us in any real sense," and that "whatever information [Dyal] get[s] will be manag[ed]" with "informational firewalls." *Id.* (quoting A4484).

Sixth Street executives were "not particularly concerned about the theoretical possibility of [Owl Rock] … seeing [Sixth Street's] info." *Id.*; A2757-58. Sixth Street reiterated its lack of concern on multiple occasions, assuring investors that Dyal III was a "[p]assive 10% owner of Sixth Street" and that the Transaction was "nothing [to be] concerned about at all." Op. 11-12 (quoting

B1030). "[N]othing in the record indicates Sixth Street ever actually became concerned about its confidential information." Op. 23.

E. Sixth Street demands a buyback on grossly inadequate terms, then sues

Nevertheless, "Sixth Street saw opportunity in [the Transaction]," as the trial court found, Op. 26, and sought to leverage the Transaction to force a below-market buyout of Dyal III's stake. Op. 12.

So in mid-January, Sixth Street started a letter-writing campaign alleging concern about its confidential information. *Id.* This was a litigation contrivance. As the court found, top Sixth Street executives "d[id]n't care about the information [and] d[id]n't think Owl Rock is a competitor." Op. 23.

Then, on February 9, Sixth Street demanded to buy back Dyal III's investment for $417 million—the same price Dyal III paid years earlier (even though Sixth Street has nearly tripled in size since)—in installment payments over five years, without interest. Op. 12-13; B1070. That demand grossly undervalued Dyal III's interest. Op. 13; B941; B1063. Sixth Street's banker threatened that Sixth Street would "muck up" the Transaction if Dyal did not accept the take-it-or-leave-it buyback proposal. Op. 13; A3411-13; A3441-42; A2686-88.

At the same time, Sixth Street began secretly lobbying the DOJ to investigate the deal based on contrived antitrust concerns and bed-bugged the SEC regarding the "adequacy of [Dyal's] disclosures." Op. 13; B650-51; A2789-2793.

Sixth Street also lobbied other Dyal partner managers to oppose the deal; these efforts yielded only one additional dissenting partner manager, Golub Capital. Op. 13-14. Finally, after waiting to maximize leverage, Sixth Street filed this lawsuit on February 12—73 days after it first learned of the Transaction.

F. The same claims are rejected by a New York court

Two weeks later, Sixth Street's counsel filed a duplicative action in New York on behalf of Golub, Sixth Street's common-interest partner. Golub sought the same injunctive relief as Sixth Street, invoking a nearly-identical transfer restriction. Op. 15.

After a hearing on April 2, 2021, the New York court declined to enjoin the Transaction. The court found Golub's expansive interpretation of the transfer restriction "wildly implausible," and that its attempt to "escalat[e] this transfer restriction in 7.1 … into effectively a change of control provision is just not sustainable." B1638-39.

G. The Court of Chancery denies the preliminary injunction

In the court below, the parties engaged in extensive expedited discovery, including ten depositions and the production of 60,000 pages of documents. On April 20, the Court of Chancery denied Sixth Street's motion. The court held that Sixth Street failed to establish any of the elements required for injunctive relief.

As to the merits, the court held that "the Transfer Restriction is triggered only by the Subscriber's Transfer of its Interests in Sixth Street, which will not occur in the Transaction." Op. 19. The court rejected Sixth Street's tortious interference claim due to the absence of any breach. Op. 21.

The trial court further held that Sixth Street failed to show irreparable harm because "nothing in the record indicates that Sixth Street ever actually became concerned about its confidential information" and "the record undermines Sixth Street's litigation position that [Dyal III's noneconomic] rights are so significant that passing effective control over them to an Owl Rock co-owned entity will irreparably harm Sixth Street." Op. 23-25. The court also held that the equities favored defendants, because Sixth Street's "calculated effort to 'muck up' the Transaction to force a buyback … threatens the interests of a panoply of parties interested in the $12.5 billion Transaction." Op. 26.

H. This appeal

Rather than seek immediate interlocutory appeal, Sixth Street waited a week and then moved for entry of a final judgment. A135. On April 30, the court entered judgment dismissing Sixth Street's claims with prejudice. A5839. Sixth Street filed this appeal on May 1.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY RULED THAT SIXTH STREET HAD NO LIKELIHOOD OF SUCCESS ON THE MERITS.

A. Question Presented

Whether the Court of Chancery correctly found that Sixth Street's claim of breach of Section 7.1(b) of the Investment Agreement lacked a probability of success. Op. 16-21.

B. Scope of Review

This Court reviews the denial of a motion for preliminary injunction for abuse of discretion. *Kaiser Aluminum Corp*. v. *Matheson*, 681 A.2d 392, 394 (Del. 1996). "An abuse of discretion occurs when a court has 'exceeded the bounds of reason in view of the circumstances' or has 'ignored recognized rules of law or practice so as to produce injustice.'" *Heartland Payment Sys., LLC* v. *Inteam Assocs., LLC*, 171 A.3d 544, 570 (Del. 2017). "The trial court's findings of fact and inferences drawn from those facts are given deference unless clearly erroneous." *BlackRock Credit Allocation Income Tr*. v. *Saba Cap. Master Fund, Ltd.*, 224 A.3d 964, 975 (Del. 2020). Embedded legal conclusions are reviewed *de novo*. *Id.*

C. Merits of Argument

The Court of Chancery correctly held that the Transaction does not trigger Section 7.1(b). By its terms, Section 7.1(b) restricts only transfers by a

"Subscriber" of "its Interests" in Sixth Street. As the court found, "the Subscriber, Dyal III, is transferring nothing in the Transaction," and therefore "the Transfer Restriction is not triggered." Op. 18-19. That ruling accords with this Court's recent *Borealis* decision and case law around the country, longstanding principles of contract interpretation, and "Delaware's well-settled respect for and adherence to principles of corporate separateness and freedom of contract." Op. 19-20.

The Court of Chancery declined to reach two alternative grounds to reject Sixth Street's breach claim: (i) the Transaction does not involve any Transfer of Dyal III's "Interests," and (ii) even if it was such a Transfer, the Transaction would be a permitted Subscriber Portfolio Sale. *See infra* Points I.C.2-3. To establish a probability of success, Sixth Street must prevail on each of those independent grounds.

1. The Court of Chancery correctly ruled that the Transaction does not trigger Section 7.1(b).

a. The Transaction does not involve a transfer by a "Subscriber."

Section 7.1(b) provides: "no Subscriber may Transfer its Interests in [Sixth Street] without the prior written consent of [Sixth Street]." A245.

The transfer restriction thus has "three specific and defined components" and is triggered only when "the subject of the sentence (the Subscriber) … perform[s] a specific action (a Transfer) with the verb's direct object (the

Interests)." Op. 17-18. Giving meaning to each of those "specific and defined components," the Court of Chancery concluded that because "the Subscribers"—the Dyal III fund entities party to the Investment Agreement—are "not transferring any" of their "Interests," "the Transaction does not trigger the Transfer Restriction." Op. 18-19.

The court's interpretation faithfully applied this Court's decision in *Borealis*. Op. 18. The Court there considered a provision stating that "the Minority Member and its Permitted Transferees … shall not Transfer their LLC Units … unless such Selling Members have first complied with" a right of first refusal to purchase the LLC Units. *Borealis*, 233 A.3d at 6. When an entity that held an indirect interest in the Minority Member sought to sell its interest, the party with the right of first refusal argued—just like Sixth Street here—that the proposed sale would constitute an indirect transfer of LLC Units. *Id.* at 10.

This Court disagreed, holding that the plaintiffs' focus on the Transfer definition "elide[d] the *subject* of the operative sentence in [the contract] of which the verb phrase 'may only Transfer' serves as the predicate." *Id.* (emphasis in original). Because the right of first refusal applied only to a transfer *by the Minority Member*, it was "unnecessary" to additionally "parse the definition of 'Transfer.'" *Id.* The Court of Chancery correctly adopted the same interpretive approach here, concluding that "the Transfer Restriction is triggered only by *the*

Subscriber's Transfer of its Interests in Sixth Street, which will not occur in the Transaction." Op. 19.

On appeal, Sixth Street charges the trial court with "fixating solely" on the subject of the Transfer Restriction. Br. 3, 24. The Vice Chancellor did no such thing. The court recognized that to trigger Section 7.1(b), the Transaction "must satisfy" *each* of that section's "three specific and defined components." Op. 17. The reason that here, as in *Borealis*, "the subject of the Transfer Restriction—Subscriber—is dispositive" is that the Subscribers are not transferring anything, and so the first component of Section 7.1 is not satisfied. Op. 19-21.

The court thus interpreted the subject of the sentence—"Subscriber"—as the subject of the sentence. That is what *Borealis* instructs. So too does ordinary English grammar. The court properly rejected Sixth Street's attempt to "elide the subject" by focusing only on "the definition of 'Transfer.'" Op. 19; 233 A.3d at 10.

b. Sixth Street's attempts to avoid *Borealis* are meritless.

Sixth Street's various attempts to distinguish *Borealis* all lack merit.

(i) Sixth Street observes that the transferring stockholder in *Borealis* "owned only a 1% interest in the contracting party," while "Neuberger possesses 'complete control of the management'" of Dyal III through its ultimate ownership of the Dyal GPs. Br. 24; Op. 3. Sixth Street ignores that the 1% sale in *Borealis*

constituted a change in control, as it gave the transferee majority control of the company holding the investment. 233 A.3d at 10. More important, the Court's holding in *Borealis* did not rest on the size of the transferor's investment, but rather on how to read a contract: a provision restricting action binds only those "subject" to the restriction, however broadly the "verb" defines the restricted action. *Id.* at 8.

(ii) Invoking what it calls the "pick-your-partner" rule, Sixth Street says this case is different than *Borealis* because it involves an LP rather than an LLC. Br. 25. Sixth Street did not brief this argument or cite these authorities below; the argument is waived. It is also wrong. The principles of contract interpretation underlying *Borealis* were not limited to LLCs. Nor was *Borealis*'s invocation of "settled corporate-law principles." Moreover, Sixth Street's newly-raised "pick-your-partner" principle overlooks the trial court's finding that the "[t]he legal and economic relationships between Sixth Street and Dyal III"—the *only* entity that is a limited partner of Sixth Street—"*will not change*." Op. 10. "Only the ownership of [the] Dyal GP will change." *Id.* So Sixth Street will keep the partner it picked.

Sixth Street laments that "absent an injunction, ultimate ownership and decision-making" over Dyal III "will transfer to Blue Owl." Br. 13. But Sixth Street claims no "pick-your-partner's-*owner*" principle. And if Sixth Street wanted protection from a "change of control" of Dyal III, it should have bargained for it in the Investment Agreement. But it never even sought such protection. Op. 8.

(iii) Sixth Street asserts that the trial court's interpretation would "deny meaning and force to any transfer restriction in any agreement with a partnership." Br. 5. This hyperbolic claim is obviously false. Transfer restrictions remain enforceable as written. If Dyal III—Sixth Street's partner—sought to transfer "its Interests" in Sixth Street, that would implicate the transfer restriction. Section 7.1(b) is inapplicable not because Dyal III is a limited partnership—but rather because it "is not transferring" any of its Interests in the Transaction. Op. 19.

(iv) Sixth Street finally observes that the Transfer definition recites that a transfer may include a "transaction involving any Affiliate," language that did not appear in the "Transfer" definition in *Borealis*. That is not a basis to distinguish *Borealis*—which held that it was "unnecessary" and "inappropriate" "to parse the definition of 'Transfer' to determine the scope" of the restriction. *Borealis*, 233 A.3d at 9-10 ("[I]t does not matter whether the Hunt sale constitutes a 'transfer.'"). Nor is there any basis in the contract's words to permit Section 7.1's verb—"Transfer"—to enlarge the subject—"Subscribers." As in *Borealis*, the "subject of the operative sentence, sets the initial scope of the Transfer Restriction." Op. 20.

c. Sixth Street's additional contract arguments are meritless.

Sixth Street advances a variety of further contract contentions. All fail:

(i) According to Sixth Street, the trial court's interpretation renders the reference to "Affiliates" in the Transfer definition "surplusage." Br. 28-29.

Contract language is "surplusage" only where it is "meaningless" in the context of "a contract as a whole." *Osborn* v. *Kemp*, 991 A.2d 1153, 1159 (Del. 2010). That is not the case here. The term "Transfer" is not just used in Section 7.1(b) but throughout the Investment Agreement (75 times in 11 sections). It is thus defined to apply coherently in many contexts. *See, e.g.*, A202 § 3.3, A213 § 4.1 (representations and warranties); A237-38 § 6.9 (tax).

Even within Section 7.1(b), the phrase "whether by merger or sale or any other similar transaction involving any Affiliate" adds meaning: it identifies *which* "Transfer[s]" *by Dyal III* are subject to the restriction, and ensures that such a Transfer by Dyal III—even one "involving any Affiliate"—*would* presumptively require Sixth Street's consent. It also resolves any legal uncertainty regarding whether a Transfer includes a transfer that occurs by operation of law (as well as by a traditional sale). *Cf. Star Cellular Tel. Co.* v. *Baton Rouge CGSA, Inc.*, 1993 WL 294847, at *5-7 (Del. Ch. Aug. 2, 1993), *aff'd*, 647 A.2d 382 (Del. 1994). Sixth Street's claim that "under the court's reading … the reference to 'Affiliates' in the definition of 'Transfer' serves no purpose" (Br. 28) is therefore inaccurate.

(ii) Sixth Street argues (citing nothing) that the verb "Transfer" should "modif[y] the subject" of Section 7.1(b), so it would also "appl[y] to Transfers *by Affiliates*." Br. 28. By "modify," Sixth Street means—change the meaning of. Sixth Street does not explain why the verb in Section 7.1(b) should change the

meaning of the subject, or how it could under *Borealis*. And even setting aside Sixth Street's linguistic gymnastics, the Transfer definition does not even mention transfers "by Affiliates." A265 § 9.1.

(iii) Sixth Street's insistence that contractual restrictions binding a contracting party should extend to that party's affiliates (Br. 30) violates "the ordinary rule … that only the formal parties to a contract are bound by its terms." *Alliance Data Sys. Corp.* v. *Blackstone Cap. Partners V L.P.*, 963 A.2d 746, 754, 760, 769 (Del. Ch. 2009), *aff'd*, 976 A.2d 170 (Del. 2009). Delaware's "law of contracts recognizes the separate nature of entities and the choice of the contracting parties." *Murphy Marine Servs. of Del., Inc.* v. *GT USA Wilmington, LLC*, 2019 WL 3731661, at *2 (Del. Ch. Aug. 8, 2019) (parent not bound to subsidiary's contracts). To apply Section 7.1(b) to "transaction[s] at any level of Dyal's corporate pyramid"—without regard to the restriction's "subject"—is not only grammatically unsustainable, but "runs afoul of Delaware's well-settled respect for and adherence to principles of corporate separateness and freedom of contract." Op. 20.

Sixth Street observes that *other* provisions in the Investment Agreement purported to "benefit and bind [Dyal's] Affiliates." Br. 31. But that only confirms that the parties did not have the same intent regarding Section 7.1(b). Op. 20; *Veloric* v. *J.G. Wentworth, Inc.*, 2014 WL 4639217, at *13 (Del. Ch. Sept. 18, 2014)

("The reference to [the company's] subsidiaries in Paragraph 3(x) shows that, when the parties to the [agreement] intended to include subsidiaries, they did so expressly."). It cannot justify Sixth Street's request to undermine "the traditional respect accorded to the corporate form by Delaware law." *Shearin* v. *E.F. Hutton Grp., Inc.*, 652 A.2d 578, 590 n.13 (Del. Ch. 1994).

(iv) Sixth Street argues that, even if Section 7.1(b) restricts only transfers by Dyal III, that restriction is triggered because Dyal III's LPs are "consenting" to the sale of Dyal III's GP and the assignment of its investment-advisory agreement. Br. 33. The argument fails on multiple grounds.

First, Sixth Street never made this argument below; it is waived. Second, Section 7.1(b) restricts Dyal III from Transferring its Interests; it does not restrict Dyal III from consenting to transfers by others. Third, Dyal III is not consenting to any transfer of "its Interests" in Sixth Street—the only "object" of the transfer restriction, which the trial court found "will not occur." Op. 19.

Notably, Dyal III's LP agreement requires LP consent for transfers of 50% or more of the equity interests in Dyal III's GP. A1024 § 6.02(a)(ii). This kind of change-of-control provision is conspicuously absent from Sixth Street's agreement.

(v) None of Sixth Street's various cases supports its arguments. Citing *In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, 213 A.3d 39 (Del. 2019), Sixth Street says that "contracts *may* impose obligations on affiliates." Br. 30

(emphasis added). Whether affiliates *may* be bound is not the question—the question is whether they *are* restricted by Section 7.1(b). In fact, *Shorenstein* only undermines Sixth Street's position, as the restriction there (unlike here) expressly applied to the defendant's "Affiliates," which were defined as parties to the agreement. *Id.* at 51, 57. The parties here could have written an agreement like that one, but did not.

Sixth Street's reliance on *In re Asian Yard Partners*, 1995 WL 1781675 (Bankr. D. Del. Sept. 18, 1995), is likewise unavailing. The transfer provision there expressly included the upstream transferring entity—unlike here—and that entity, again unlike here, was a signatory to the contract. *Id*. at *3, *5. The parties there thus manifested their intent to bind the upstream entity with contract language that is missing here.

Sixth Street also invokes *Eureka VIII LLC* v. *Niagara Falls Holdings LLC*, 899 A.2d 95 (Del. Ch. 2006). But that agreement also expressly bound affiliates: it required that an individual maintain control of the contracting party, and contained an "unusual" provision that "expressly stipulated" that that individual's death constituted a breach. *Id.* at 100, 113. No surprise, then, when that individual

transferred a third of his interest to creditors; then pledged the remainder as security for another loan; and then died—the court found a breach.[1]

d. The trial court's decision applying *Borealis* is consistent with uniform case law.

The decision below is consistent with all the relevant decided cases, beginning with the closest precedent—Sixth Street's companion case in New York. There, a Commercial Division judge (applying Delaware law) ruled that a substantively identical transfer restriction was no bar to this Transaction. Noting "[i]n particular … the importance of respecting distinctions among corporate entities," B1634, the court concluded that this Court's *Borealis* decision "strongly supports Dyal's argument." B1640. Settled law, ruled the court, prohibited the attempt made there (just as here) to read the transfer restriction as a broad change-in-control prohibition—an interpretation the court found "implausible." B1638.

To the same effect is *Sheehan* v. *AssuredPartners, Inc*. There, the Court of Chancery concluded that a tag-along right was not triggered because, like in

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[1] The collection of cases Sixth Street stuffs into its footnote 6 are all likewise inapposite. The contract in *H-B-S* had an express "change in control" provision. 114 P.3d 306, 309 (N.M. Ct. App. 2005). The contract in *EIG* restricted transfers generally, without limitation to a particular subject. 2012 WL 5990113, at *3 (C.D. Cal. Nov. 30, 2012). *Horsehead* involved a fraudulent alter-ego. 239 A.D.2d 171, 172 (1st Dep't 1997). *Oregon RSA* similarly turned on "blatant subterfuge" and breach of the implied covenant of good faith and fair dealing. 840 F. Supp. 770, 775 (D. Or. 1993). None remotely authorize a court to expand the subject of a transfer restriction by bootstrapping the verb.

Borealis, the "*subject* of Section 4.2—Apax Limited Partner—… did not sell its Class A-1 Units in the [Transaction]." 2020 WL 2838575, at *13 (Del. Ch. May 29, 2020). Sixth Street says in a footnote that *Sheehan* is "distinguishable," but fails to explain how. Br. 26 n.1.

These decisions, like *Borealis* itself, are consistent with cases around the country limiting the scope of transfer restrictions to transfers by the subject of the restriction. The federal court in *White Wave, Inc.* v. *Dean Foods Co.* thus held that a provision stating that "No Shareholder shall transfer or pledge any interest in such Shareholder Shares" could not apply to a merger by the Shareholder's parent, even though "transfer" was defined to include "direct or indirect" transfers. 2001 WL 1833980, at *1, *3 (D. Colo. Dec. 5, 2001). Held the court: "[c]hanging the ownership of [the Shareholder] does not change its ownership of assets." *Id.* at *3. The interpretation pressed by the plaintiff (like Sixth Street's here) improperly "disregard[ed] [the entities'] corporate separateness" and so could not be sustained, even though the transfer would give the objecting party's "competitor … effective control of [its] business." *Id.* at *2-3.

Maryville Hotel Assocs. I, LLC v. *IHC/Maryville Hotel Corp.* is to identical effect. There, the contract provided that, "No Member shall have the right to sell or otherwise dispose of its Company Interest, or any part thereof, directly or indirectly," except pursuant to a right of first refusal by the other Member. 2006

WL 1237264, at *2 (E.D. Mo. May 5, 2006). When the corporate grandparent of one Member entered into a merger, the other Member invoked that right. *Id.* at *3. But the court held that it wasn't triggered—because the Member itself (like Dyal III) was retaining the interest. *Id.* at *4. The New Hampshire Supreme Court deployed identical reasoning in *Foundation for Seacoast Health* v. *HCA Health Services of New Hampshire, Inc.*, 953 A.2d 420, 423, 425 (N.H. 2008) (only the actions of the subject of a ROFR trigger that right).

This uniform case law is a specific application of a controlling principle of contract and corporate law. Courts do not interpret transfer restrictions as change-in-control provisions binding non-party corporate relatives. To do so would undermine the principle of corporate separateness and rewrite contractual bargains. The pernicious effect of doing so would be that "routine anti-assignment clauses would impede liquidity in the market for corporate control." *VDF FutureCeuticals, Inc.* v. *Stiefel Labs., Inc.*, 792 F.3d 842, 846 (7th Cir. 2015) (Posner, J). For that reason, courts routinely refuse to "transform [an] anti-transfer provision into a change of control clause … that would require consent based on an upstream change of control." *MassMutual Asset Fin. LLC* v. *ACBL River Operations, LLC*, 220 F. Supp. 3d 450, 456 (S.D.N.Y. 2016). Sixth Street identifies no cause for this Court to depart from these well-settled principles.

e. The structure of the contract confirms that the transfer restriction binds only Subscribers.

Notwithstanding Sixth Street's unfair charge to the contrary (Br. 4), the trial court specifically undertook to "read [the] contract as a whole," Op. 17, and did. The court compared Section 7.1(b)—where the parties "did *not*" "expressly [bind] Dyal III's upstairs entities"—with Section 6.1.1—where the parties *did* impose "restrictions on *Sixth Street*'s Manager and Founders with respect to equity transfers" in Sixth Street itself. Op. 20-21 & n.102. To enforce the parties' intent, Sixth Street's upstream entities and principals were made signatories—again, in stark contrast to Neuberger, Dyal and other entities upstream from Dyal III. A220 § 6.1.1; *supra* p. 9. Had the same parties intended to achieve the same result in Section 7.1(b), they "would have clearly set forth that understanding." *Equity Tr. Co.* v. *Interactive Brokers LLC*, 2018 WL 1216082, at *5 (Del. Super. Ct. Mar. 6, 2018), *aff'd*, 196 A.3d 885; Op. 20-21.

Sixth Street is left to insist that the court's interpretation of Section 7.1(b) conflicts with two provisions of Section 7.2, which identifies certain "permitted transfers" not subject to Article VII's restrictions. Br. 29. There is no conflict.

Section 7.2(a)(i) addresses a "Subscriber IPO," defined in Section 1.4 as "an initial public offering of any Subscriber (or any Affiliate or successor thereto)." A185 § 1.4(a). That reference to "any Affiliate" is not superfluous, as Section 7.2(a)(iii) expressly permits the Subscriber to transfer its Interests to a controlled

Affiliate, including before a Subscriber IPO. Moreover, a Subscriber IPO has contractual consequences beyond Section 7.1(b), including accelerated payments of capital contributions. A185 § 1.4.

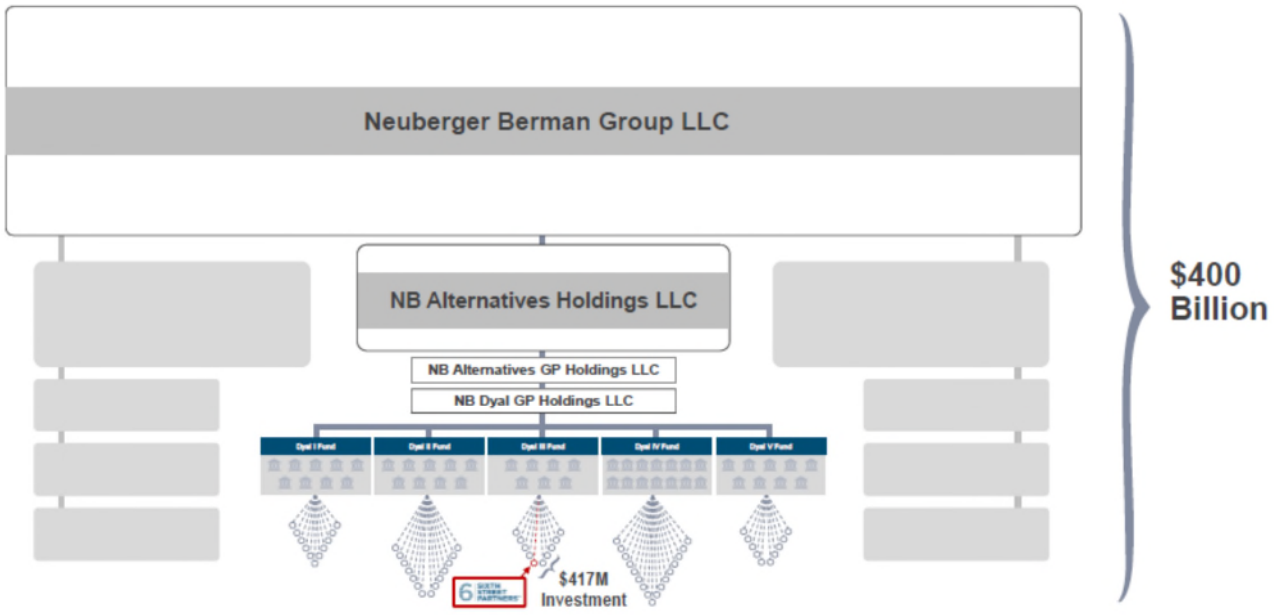
Sixth Street also points to Section 7.2(a)(ii), which addresses ordinary-course transfers of Dyal Funds limited partnership interests. Here again, there is no superfluity: Nothing in Section 7.2 says that each of the "Transfers" specified in that section are otherwise restricted by Section 7.1(b); and the provision addresses all potential transfers of LP interests—including by the Subscriber.

The "language [in these provisions] is not superfluous to the extent that it provides [the parties] with additional comfort" regarding permitted transactions. *iBio, Inc.* v. *Fraunhofer USA, Inc.*, 2016 WL 4059257, at *11 (Del. Ch. July 29, 2016). And these provisions, both specifically directed at the potential secondary market for Dyal III's interests in Sixth Street's cash flows, cannot alter the plain meaning of Section 7.1(b). *See* 11 Williston on Contracts § 32:10 (4th ed.) ("[T]he meaning which arises from a particular, even more specific clause cannot control the contract when that meaning defeats the agreement's overall scheme or purpose.").

f. Sixth Street's interpretation is commercially unreasonable.

Sixth Street's interpretation of Section 7.1(b) makes no sense in commercial context. Dyal is a small part of Neuberger, Dyal III is just one of Dyal's five

funds, and Sixth Street is just one of 10 Dyal III partner managers. Sixth Street's reading of Section 7.1(b), however, would give it a right to veto *any* transfer of any interest of any entity that has any direct or indirect interest in Dyal III's general partner. Br. 14-15. The extreme breadth of the claimed veto right is illustrated below:



As this graphic shows, under Sixth Street's interpretation, Dyal III's passive $400 million investment—the tiny red dot at the bottom—provided Sixth Street with unfettered discretion to block Neuberger—a $400 billion asset manager and a nonparty to the Investment Agreement—from selling itself to another firm or engaging in *any* value-maximizing transactions that result in *any* change of ownership above the Dyal III GP level. Sixth Street's reading would also prevent Neuberger's equity owners—none of whom are parties to the Investment

Agreement—from transferring their equity interests without Sixth Street's consent, as those too would be (in Sixth Street's view) a Transfer of an "interest" in the Dyal GP.

Sixth Street's interpretation thus transforms a narrow restriction on Dyal III's ability to transfer its defined Interests in Sixth Street into a sweeping change-of-control provision over much larger economic entities who were legal strangers to the Investment Agreement. That reading is irreconcilable with the "basic business relationship between [the] parties," *Chi. Bridge & Iron Co. N.V.* v. *Westinghouse Elec. Co. LLC*, 166 A.3d 912, 927 (Del. 2017), and imposes the kind of restraints on alienation of ownership interests that courts have long disfavored, *see, e.g.*, *Mitchell Assocs., Inc.* v. *Mitchell*, 1980 WL 268106, at *2 (Del. Ch. Dec. 5, 1980).[2]

Given the "prevalence of common contractual models" for creating a change-of-control right, "a court should be chary about reading a provision … that, on its face, has nothing to do with a change of corporate control as one that embodies hidden meanings burdening stockholders." *BASF Corp.* v. *POSM II*

[2] As the court below observed, several other Dyal partner managers negotiated for a buyback option in the event of a change in control above Dyal III. Op. 8; B1642-43. Sixth Street did not, further confirming that its claim to nevertheless enjoy the far more sweeping right to veto every change-in-control transaction in the entire Dyal pyramid blinks commercial reality.

Props. P'Ship, L.P., 2009 WL 522721, at *5 & n.35 (Del. Ch. Mar. 3, 2009). The Court should not "read[] into this unambiguous agreement an unwritten, material" right that Sixth Street did not negotiate for and would never have received. *Chi. Bridge*, 166 A.3d at 933. As the New York court observed in denying Golub's injunction application (B1638-39):

> [I]t seems wildly implausible, based on the language used here, that the Neuberger entities all the way up to the top agreed to bargain away their ability to enter into corporate-wide transactions just in light of a single investment made … in connection with a single fund.… [E]scalating this transfer restriction in 7.1 … into effectively a change of control provision is just not sustainable.

For the same reasons, as the Court of Chancery held, Sixth Street's expansive interpretation reached every "level of Dyal's corporate pyramid," without regard to distinct corporate forms, and therefore violated Delaware's "well-settled respect for and adherence to principles of corporate separateness and freedom of contract." Op. 20. Had these "sophisticated parties" intended to bind Dyal III's upstairs affiliates in Section 7.1(b), they would have said so "expressly." Op. 20-21 & n.102. The New York court made the same observation (B1641-44):

> Golub's reading of Section 7.1 would give it, effectively, a right to veto any transfer of any interest of any entity that has a direct or indirect interest in Dyal IV's general partner…. If that was what the parties intended to do, they could have added clear language doing just that.… I would not have to dig in between various lines.… It would be plain and simple right out front, and it plainly is not.

Sixth Street points to no contract language to support its exorbitant claim. Nor does Sixth Street point to any extrinsic evidence, notwithstanding the extensive program of expedited discovery that it told the trial court would validate its position. Instead, it blurts out that the ruling below will "wreak havoc on the expectations of countless Delaware partnerships … to conduct trillions of dollars of business." Br. 5-6. Sixth Street cites nothing to support this frantic hand-waving. The truth is to the contrary. Transaction planners rely every day on the separateness of corporate entities, and the faithful reading of transfer provisions. Under Sixth Street's view, every company whose subsidiaries are signatory to retail leases, or credit agreements, or any kind of commercial contract that includes transfer restrictions, will be newly subject to countless hold-ups when they try to do a deal. Sixth Street supplies neither authority nor logic for this extreme departure.

2. The Transaction involves no transfer of Dyal III's "Interests."

Sixth Street has no likelihood of success for the further reason that Section 7.1(b) applies only to Transfers by Dyal III of "its Interests." "Interests" are defined to include only Dyal III's economic interests in Sixth Street. Op. 7; A183, A187-97 § 2.1; B680. Those Interests are not being transferred in the Transaction. They will continue to be held by Dyal III, as they are today. Op. 10; A733 § 2.1(a), A756-57 § 3.8; A483 § 1.1(c), A487 § 2.1.

That fact was an independent basis to deny the motion and is an independent basis to affirm. Resorting to misleading ellipses, Sixth Street says the trial court found that the Transaction would result in a "transfer … of Dyal III's Interests" in Sixth Street. Br. 3, 27 (citing Op. 10-11). What the court actually found is that a Neuberger entity will transfer its "*control over Dyal III GP and therefore Dyal III's* Interests" to Blue Owl. Op. 10 (emphasis added). Because the trial court found that no Subscriber was Transferring anything, it did not address whether any Interests were being Transferred.

They were not. The narrowly-defined Interests are claims on Dyal III's share of Sixth Street's cash flows. They are not moving legally or economically or in any way. Below, Sixth Street insisted that Dyal III's limited minority protections, including information rights (Section 2.8) and consent rights (Section 6.5) were being transferred in the Transaction. A421-22. That is both inaccurate and irrelevant. Inaccurate, because those rights belong to Dyal III today and will belong to Dyal III after the Transaction. A3401. Irrelevant, because those non-economic contractual rights are not "Interests" under the contract. B680.

3. Even if the Transaction implicates Section 7.1(b), it would be a permitted Subscriber Portfolio Sale.

Even if the Transaction were found to involve a restricted "Transfer" of Dyal III's "Interests," the Transaction would still be permissible as a Subscriber

Portfolio Sale under Section 7.2(a)(iv). Although the trial court had no reason to reach this issue, Op. 7 n.29, it remains another independent basis to affirm.

"Subscriber Portfolio Sale" is defined as:

> (i) a Transfer to one or more Persons that are not Affiliates of the Subscribers of at least seventy five percent (75%) of the Subscribers' and their Affiliates' direct or indirect portfolio of investments, based on the fair market value of such portfolio as reported in the previous quarterly report of the Dyal Funds or (ii) the sale of the Subscribers themselves and/or of holding companies thereof.

A264. Any Portfolio Sale is exempt from the transfer restrictions of Section 7.1(b). A245-46 § 7.2(a).

If, as Sixth Street contends, the Transaction is a Transfer by Dyal III, then it would necessarily satisfy either branch of the Portfolio Sale exclusion:

Romanette (i) is satisfied. According to Sixth Street, 100% of Dyal III's portfolio of investments is being "Transferred" to Blue Owl by virtue of a change of control of Dyal III's GP. Br. 16-18. That is more than the 75% threshold needed to satisfy the Portfolio Sale definition in romanette (i).

Below, Sixth Street argued that a Portfolio Sale must involve the Transfer of at least 75% of *Neuberger's* entire $400 billion portfolio, because Neuberger is an "Affiliate" of Dyal III. A414. That reading makes no sense. First, it would make the Portfolio Sale provision impossible to satisfy, and the provision nonsensical, because the sale of all of Dyal III's investments would be a tiny fraction of Neuberger's entire portfolio. B1012. The sale of *every* Dyal portfolio in its

entirety would still not be a Portfolio Sale, because that amount would constitute only about 7% of Neuberger's value. Under Sixth Street's interpretation, no portfolio sale could ever trigger the 75% threshold. That is a "commercially unreasonable" interpretation. *Wilmington Firefighters Ass'n, Local 1590* v. *Wilmington*, 2002 WL 418032, at *2 (Del. Ch. Mar. 12, 2002).

The words of the contract supply the reasonable construction. Instructing the parties how to calculate whether the 75% threshold is met, Section 7.2(a)(iv) points to "the fair market value of such portfolio as reported in the previous quarterly report" of Dyal III. A264. The quarterly reports include *only* the holdings of Dyal III, not the entirety of Neuberger's portfolio, rendering Sixth Street's construction internally incoherent. B984-92; A3304-05; A3389.

Romanette (ii) is satisfied. Similarly, if the sale of Dyal in the Transaction were a Transfer, it must also be a "sale of the Subscribers" themselves and the "holding companies thereof," under romanette (ii) of the Portfolio Sale definition. Indeed, it is Sixth Street's position that all of Dyal is being sold in the Transaction, including the Subscribers and the relevant holding companies. Br. 16-18.

At the injunction hearing, Sixth Street's counsel had no answer for how the Transaction could trigger Section 7.1(b) but not also constitute a Subscriber Portfolio Sale. A5545-53. There is none.

4. Sixth Street's tortious interference claim was properly dismissed.

Sixth Street asserts that the trial court erred in rejecting its tortious interference claim against Neuberger—the only defendant that is a party to the BCA—for failure to show an underlying breach of contract. For the reasons discussed above, the court correctly found no breach. Sixth Street adds that it "has also met the remaining elements" of tortious interference. Br. 35. While the trial court did not consider the other elements, Sixth Street does not argue, and there is no evidence, that Neuberger acted "maliciously or in bad faith to injure plaintiff," as required in the corporate affiliate context. *Bhole, Inc.* v. *Shore Invs., Inc.*, 67 A.3d 444, 453 (Del. 2013). That is an independent basis to reject the claim.

II. SIXTH STREET HAS NOT SHOWN IRREPARABLE HARM.

A. Question Presented

Whether the Court of Chancery correctly denied injunctive relief on the ground that Sixth Street failed to establish imminent irreparable harm. Op. 21-25.

B. Scope of Review

This Court reviews the denial of a motion for preliminary injunction for abuse of discretion and defers to the "trial court's findings of fact and inferences drawn from those facts … unless clearly erroneous." *See supra* p. 16.

C. Merits of Argument

To obtain injunctive relief, Sixth Street must prove irreparable injury that is "imminent and genuine, as opposed to speculative." *CBS Corp.* v. *Nat'l Amusements, Inc.*, 2018 WL 2263385, at *4 (Del. Ch. May 17, 2018). But as the trial court found, "the record undermines" Sixth Street's assertions of harm. Op. 23-25. These findings are entitled to deference, are well-grounded in the evidence, and should be affirmed.

(1) Sixth Street asserts that "deprivation of a consent right" constitutes irreparable harm "as a matter of law." Br. 38. No Delaware precedent announces such a rule, and the Court of Chancery has at least twice decided, to the contrary, that a breach of a consent right could be remedied by damages. *See, e.g.*, *Lehman Bros. Holdings Inc.* v. *Spanish Broad. Sys., Inc.*, 2014 WL 718430, at *8 (Del. Ch.

Feb. 25, 2014), *aff'd*, 105 A.3d 989 (Del. 2014); *Fletcher Int'l, Ltd.* v. *ION Geophysical Corp.*, 2013 WL 6327997, at *18 (Del. Ch. Dec. 4, 2013).

Sixth Street cites a few cases where courts have entered injunctions in connection with claimed consent-right violations. Br. 38. Those cases show only that courts *sometimes* find actual, enjoinable harm in consent-rights cases; not that courts must *always* do so. None of Sixth Street's authorities even purport to strip the trial court of discretion to decide whether deprivation of consent rights cause actual harm. And none held that violation of a consent right cannot be remedied by damages measured "by the expected outcome of a hypothetical [buyback] negotiation." *Fletcher*, 2013 WL 6327997, at *18. That remedy is particularly apposite here, as the evidence shows that Sixth Street's litigation objective was to force a buyback negotiation not contemplated by the contract.

(2) Sixth Street contends that the trial court erred by "declin[ing] to credit and enforce" a stipulation in Section 10.11 of the Investment Agreement. Br. 38. The court's holding rested on two independent grounds: (i) the parties to the Transaction that Sixth Street sought to enjoin were not parties to the Investment Agreement and thus not bound by the stipulation, and (ii) the stipulation could not override the court's contrary factual findings that harm was absent. Op. 25 n.117. Both grounds are correct.

None of the parties to the Transaction signed the Investment Agreement. Enjoining those parties on the basis of Section 10.11 would improperly "extend[] the rights and obligations of contracts to parties that did not execute them." *Id.* Section 10.11 does not bind nonsignatories—it states that "each party … shall be entitled to compel specific performance of the obligations of any other party under this Agreement." A276 § 10.11. Enjoining Neuberger from transferring its Dyal business is not compelling "specific performance" of any Dyal III obligation.

Sixth Street's only response is that Rule 65(d) allows courts to enjoin parties in "active concert or participation" with Dyal III. Br. 40. No authority says Rule 65(d) permits a court to extend an irreparable harm stipulation to strangers to the contract. *Concord Steel, Inc.* v. *Wilmington Steel Processing Co., Inc.* did not even address the issue. 2008 WL 902406, *1-2 (Del. Ch. Apr. 3, 2008). Similarly, *ZRii, LLC* v. *Wellness Acquisition Group, Inc.* did not rely on a contractual stipulation and does not even mention Rule 65(d). 2009 WL 2998169, at *12-13 (Del. Ch. Sept. 21, 2009).

Nor has this Court ever held that a contractual stipulation deprives the court of discretion to deny injunctive relief when no imminent harm exists. To the contrary (and as the trial court observed), a large body of case law confirms that a contractual stipulation "cannot limit [the court's] discretion to decline to order injunctive relief." *Quarum* v. *Mitchell Int'l, Inc.*, 2019 WL 158153, at *3 (Del.

Ch. Jan. 10, 2019) (finding irreparable harm stipulation insufficient to confer equity jurisdiction); *AM Gen. Hldgs. LLC* v. *Renco Gp., Inc.*, 2016 WL 787929, at *2 (Del. Ch. Feb. 19, 2016). Sixth Street relies on *Martin Marietta* v. *Vulcan*, but, in affirming that injunction, this Court specifically invoked the trial court's "finding of 'actual'—and irreparable—injury … supported by ample record evidence." 68 A.3d 1208, 1227 (Del 2012).

III. THE BALANCE OF EQUITIES WEIGHS AGAINST SIXTH STREET.

A. Question Presented

Whether the Court of Chancery correctly denied injunctive relief on the ground that the equities weighed against Sixth Street. Op. 25-27.

B. Scope of Review

This Court reviews a trial court's balancing of the equities for "abuse of discretion," *N. River Ins. Co.* v. *Mine Safety Appliances Co.*, 105 A.3d 369, 382 (Del. 2014), and defers to the trial court's factual findings and inferences drawn therefrom unless "clearly erroneous," *supra* p. 16.

C. Merits of Argument

1. The trial court's balancing of the equities rests on factual findings that are supported by the record.

To obtain injunctive relief, Sixth Street must demonstrate "that [its] harm without an injunction outweighs the harm to the defendants that will result from the injunction." *C & J Energy Servs., Inc.* v. *City of Miami Gen. Emps.' and Sanitation Emps.' Ret. Tr.*, 107 A.3d 1049, 1066 (Del. 2014). The court found that Sixth Street's objections to the Transaction rang "hollow," because "the record indicates that this litigation and the parallel action in New York were part and parcel of a calculated effort to 'muck up' the Transaction to force a buyback." Op. 25; A3411-13; A3441-42; A2686-88; B1070. The court found that Sixth Street's own documents showed it was not concerned about the Transaction, and that Sixth

Street pursued injunctive relief only when it "saw opportunity" to "secure a lowball buyback of Dyal III's investment." Op. 26.

On the other side of the balance, the court found that Sixth Street's actions "threaten[] the interests of a panoply of parties interested in the $12.5 billion Transaction, including Neuberger and Owl Rock investors who are in no way implicated in Sixth Street's relationship with Dyal III." Op. 26; A3418.

Sixth Street identifies no legal error in these conclusions. Instead, it attacks the court's "consideration of the record." Br. 41. But Sixth Street does not challenge the trial court's factual findings as a point of error, let alone satisfy the demanding standard of review necessary to sustain such a challenge. Moreover, by stipulating to a final judgment, Sixth Street cannot relitigate those findings. Its attack on the facts as found is thus procedurally and substantively unavailing.

At any rate, there is overwhelming evidentiary support for the trial court's findings. Sixth Street's own testimony demonstrates that Owl Rock is a "minimal competitor" of Sixth Street, Op. 22, and that any confidential information Sixth Street provides to Dyal III would not create a risk of competitive harm, Op. 4, 6; A4574; A2787, A2799-2801, A2810-11. The evidence likewise proved that Sixth Street believed the Transaction would have "zero impact" on Sixth Street's business. Op. 11 (quoting B999). Sixth Street says these admissions were made before Sixth Street knew enough about the Transaction to speak intelligently. Br.

41-42. The court below reasonably rejected that flimsy excuse. Sixth Street witnesses admitted that, by early December 2020, they knew all the key facts about the Transaction. A2744, A2762, A2784. Also undisputed: Sixth Street's senior executives told their own investors that there was "nothing [to be] concerned about at all" because Dyal III was a "passive 10% owner of Sixth Street" and would "remain passive"—confident, unequivocal pronouncements that suggested no lack of information needed to reassure investors. B1030; A2777.

The decision below included extensive additional fact-finding, supported by record evidence, showing how Sixth Street used the threat of litigation "to leverage the Transaction to force a buyback." Op. 12-14. Among other things, the court noted that the $417 million price that Sixth Street offered (in installments over five years, without interest) was the exact same amount Dyal III invested in 2017—without a dollar of appreciation—even though Sixth Street documents showed that the value was hundreds of millions more. Op. 12-13; B1070; B941. The court also noted Sixth Street's acknowledgment that any confidentiality concerns would "be manag[ed] with informational firewalls," and Sixth Street's refusal to engage in developing appropriate information protections. Op. 11-12.

The fact findings, firmly rooted in the record, amply support the court's determination that Sixth Street proved no irreparable injury and that the balance of harms tilts against relief.

2. Sixth Street's proposed injunction would cause substantial harm and is procedurally improper.

Sixth Street argues that the trial court erred in finding that an injunction would harm the "panoply of parties interested in the $12.5 billion Transaction" (Op. 26) because Sixth Street is no longer seeking to enjoin that transaction in full. Br. 44. As the trial court observed, Sixth Street's requests for relief have been a moving target. Sixth Street first asked to enjoin the Transaction; in briefing, it claimed to narrow that request to an injunction against "the transfer of the Dyal Funds' interests in Sixth Street"; then, in a post-argument letter, Sixth Street asked for an injunction against various ill-defined actions all designed to impede the Transaction. Op. 14-15. On appeal, Sixth Street changes course again, vaguely asking the Court to remand for entry of an "appropriate injunction." Br. 45.

Whatever injunction Sixth Street now wants, its risks far outweigh the nonexistent harm the trial court found Sixth Street faces. Sixth Street seeks to create the illusion that the trial court could enter an injunction without jeopardizing the Transaction. Sixth Street tried that below as well. But at oral argument, the Vice Chancellor pressed Sixth Street's counsel to explain how the relief sought—that "the deal can go through, but just don't transfer Sixth Street's interest"—"squares with the instruction from *C&J Energy* … that we are not to blue-pencil mergers to detriment of the third party." A5595. Sixth Street's counsel had no answer—and was forced to admit that it was "not for [the court] to rewrite the

BCA." A5598-99. Sixth Street's request to hive off part of Dyal III from the Transaction thus violates this Court's teaching that "[t]o blue-pencil a contract … is not an appropriate exercise of equitable authority in a preliminary injunction order." *C & J Energy*, 107 A.3d at 1054. Compounding the imbalance of equities, Sixth Street has indicated (A464-65) that it would not post the billion-dollar-plus bond that would be necessary to protect defendants and third parties from the risk of an improper injunction.

CONCLUSION

The judgment should be affirmed.

POTTER ANDERSON & CORROON LLP

By: */s/ Kevin R. Shannon*
Kevin R. Shannon (No. 3137)
Christopher N. Kelly (No. 5717)
Daniel M. Rusk, IV (No. 6323)
1313 N. Market Street
Hercules Plaza, 6th Floor
Wilmington, Delaware 19801
(302) 984-6000

Attorneys for Defendants Dyal Capital Partners III (A) LP, Dyal Capital Partners III (B) LP, NB Dyal Associates III LP, NB Dyal GP Holdings LLC, and Dyal III SLP LP

Of Counsel:

WACHTELL, LIPTON,
ROSEN & KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1000

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP

By: */s/ Robert S. Saunders*
Robert S. Saunders (No. 3027)
Sarah Runnells Martin (No. 5230)
Jacob J. Fedechko (No. 6502)
One Rodney Square
P.O. Box 636
Wilmington, Delaware 19899-0636
(302) 651-3000

Attorneys for Defendants Neuberger Berman Group LLC, Neuberger Berman AA LLC, NB Alternatives GP Holdings LLC and NB Alternatives Advisers LLC

Of Counsel:

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Manhattan West
New York, New York 10001
(212) 735-3000

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