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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

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SUMMARY OF ARGUMENT

So long as the terms of the Investment Agreement control, these partnership interests in Sixth Street cannot be transferred without its consent. Sixth Street and Dyal III expressly agreed to prohibit any transfer of the governance rights at issue, whether direct *or indirect*, absent Sixth Street's consent. They specified that indirect transfers would include those "involving *any Affiliate*" of Dyal III, as defined by control, "whether by merger or sale or any other similar transaction." And they based core provisions upon that expansive language, including provisions protecting Sixth Street's rights in *perpetuity*, particularly against transfers to a competitor such as Blue Owl. These provisions would be drained of meaning and force if only a transfer by Dyal III (which has always been a limited partnership controlled by general partners above) were covered. Indeed, Defendants' interpretation vitiates the Agreement's protections for Sixth Street. Under venerable canons of construction and this Court's precedents for ascertaining parties' intent, Defendants cannot prevail on the question of breach.

Unable to account for key contractual terms, Defendants dismiss them as inconsequential relative to their grand designs. In their view, Sixth Street overreaches by standing upon its consent rights in the face of a larger deal. But their indignation is misplaced. Defendants can honor Sixth Street's consent rights, or they can carve Sixth Street's interests out of their deal (just as they have done with various

components of their business), or they can answer to an injunction. The transfer of Sixth Street's partnership interests and the consent rights protecting against that transfer may seem piddling to Defendants as they eye their $12.5 billion deal, but they are precious to Sixth Street—just as they are to countless partnerships that count on Delaware law and courts to safeguard their rights and interests against those who would trample them.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN RULING THAT SIXTH STREET WILL NOT PREVAIL ON THE MERITS

Defendants' arguments in defense of the trial court's reading of the Agreement do not withstand scrutiny.

A. The Transfer Restriction Is Implicated By The Proposed Transfer

A plain reading of the Transfer Restriction and surrounding provisions shows that transfers by Affiliates are designedly covered.

1. Defendants' reading disregards the text. Once the definition of Transfer is factored into text (as highlighted below by the additions in bold), the Transfer Restriction explicitly applies to the proposed transfer, effectuated through merger of an Affiliate of the Subscriber: "[N]o Subscriber may **[directly or indirectly in any manner (whether by merger or sale … involving any Affiliate)] 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); A661.)

This language—which merely incorporates relevant portions of the "Transfer" definition into text—unambiguously encompasses transactions by Dyal III's Affiliates. And no such language was present in *Borealis* or any other case cited by Defendants. In fact, Defendants have not identified a single case—

anywhere—in which a transfer restriction *expressly referencing* transactions involving "Affiliates" was found *inapplicable* to affiliate transfers.

In *Borealis*, the Court observed that the definition of "Transfer" operated only as a verb, without clarifying the restriction's subject. *Borealis Power Holdings Inc. v. Hunt Strategic Utility Investment Inv. L.L.C.*, 233 A.3d 1, 9-10 (Del. 2020). The right of first refusal there did not attach to the transaction involving a sale by an indirect 1% shareholder, and the definition failed to supply the missing link. *Id.* Here, there is no such disconnect. The definition of Transfer expressly connects the dots, including by clarifying both the subject and object of the Transfer Restriction to link to this deal—providing that "any … transaction involving any Affiliate" is covered (addressing the subject of the restriction) and that "any interest (pecuniary or otherwise)" in an Interest is likewise covered (addressing the object). (A661.)

Defendants are wrong to maintain (Answering Brief ("AB") 21) there is no "basis in the contract's words to permit Section 7.1's verb—'Transfer'—to enlarge the subject—'Subscribers.'" The definition is unambiguous that "Affiliates" are to be included when determining whether an "indirect" Transfer is occurring relative to the "Subscriber." Because a "defined term simply serves as a convenient substitute for the definition," *Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at *48 n.525 (Del. Ch. Oct. 1, 2018), the definition must be incorporated in the construction. *See In re FAH Liquidation Corp.*, 581 B.R. 98, 107 (Bankr. D. Del.

2017). By defining "Transfer" to include "indirect[]" transfers "involving any Affiliate," the parties made clear that a direct transfer by Dyal III's Affiliate would be deemed an *indirect* transfer by Dyal III itself. (A661.) This comports with the well-understood realities that Dyal III, as a limited partner downstairs in Neuberger's chain, was a mere proxy for its upstairs Affiliates, and that the non-pecuniary governance rights that matter most to Sixth Street would always be controlled and exercised upstairs.

Defendants note (AB 22) that the term "Transfer" is used throughout the Agreement, suggesting the reference to Affiliates may find better purchase elsewhere. But Defendants lack any explanation why the "transaction involving any Affiliate" clause better fits any of the provisions they cite as compared to the Transfer Restriction. Defendants also suggest (*id.*) that the parties included the "transaction involving any Affiliate" clause to confirm that transfers *by Dyal III* are covered, but that betrays desperation. Only Sixth Street's interpretation affords substantive meaning to the plain English that expressly encompasses "transaction[s] involving any Affiliate." (A661).

Defendants concede that, where the parties so intend, non-signatory Affiliates "may be bound." AB 25 (italics removed). This is such a case, as the parties clearly intended to restrict transfers by Dyal III's Affiliates.

2. Defendants' reading would gut the Agreement's transfer provisions. Article VII reflects a carefully-negotiated scheme that (i) broadly restricts transfers but (ii) provides specific carve-outs and exceptions. The broad restrictions guarantee that, subject to the exceptions, no unconsented-to transfer of rights in Sixth Street would occur for ten years, and no transfer to a competitor would *ever* occur. (A641 §§7.1(b)-(c).) Under Defendants' view, however, this entire scheme is illusory—Defendants could always bypass *all* of the restrictions just by having Dyal III's general partner (which signed the Agreement on Dyal III's behalf), or its general partner, transfer away Dyal III's interests in Sixth Street, indirectly, to Sixth Street's most-feared competitor.

This interpretation renders the restrictions of Section 7.1 nugatory and the exceptions in Section 7.2 superfluous. It thus eviscerates Article VII as a whole, contrary to multiple canons of construction.

First, Defendants' view denies any meaning and value to Sixth Street's core protections. In Section 7.1(b), Sixth Street bargained for the right to restrict all transfers of its interests for ten years. In Section 7.1(c), Sixth Street obtained a perpetual right to restrict transfers to competitors. These robust restrictions become valueless under Defendants' reading. While Dyal III could *never* sell its interests in Sixth Street to a competitor, Dyal III's controlling general partner could do precisely

the same thing right after the Agreement was signed. That makes a mockery of Article VII's broad transfer protections.

Tellingly, Defendants have no contrary argument. Caselaw rules out any contractual interpretation, like theirs, that so renders protections illusory. *See Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1182-83 (Del. 1992) (rejecting interpretation on such basis); *Coughlan v. NXP B.V.*, 2011 WL 5299491, at *9 (Del. Ch. Nov. 4, 2011) (rejecting interpretation that permitted party to "circumvent" contract obligations by using affiliate to effectuate transfer).

Second, Defendants' view renders superfluous the exceptions in Section 7.2(a). Section 7.2(a)(i) specifically permits transfers in connection with a "Subscriber IPO," which is defined as an IPO by either the Subscriber *or its Affiliates*—thus allowing *those* transfers by Dyal III Affiliates. (A581; A641 §7.2(a)(i).) Similarly, Section 7.2(a)(ii) permits transfers by Dyal III's limited-partner investors, thus again allowing *those* transfers by Dyal III Affiliates. (A641 §7.2(a)(ii).) If, as Defendants claim, *no* transfer by Dyal III Affiliates were ever restricted, these discrete exceptions would not read as they do. Like the reference to Affiliate transactions in the definition of "Transfer," these carefully-negotiated exceptions do no real work under Defendants' view—permitting transfers that were already permitted. This too shows the fallaciousness of Defendants' position. *See Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) ("'We will read a

contract … so as not to render any part of the contract mere surplusage.'") (citation omitted); *Elliott Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843, 851 (Del. 1998) ("Avatex' proposed reading … would render the word consolidation mere surplusage, and is problematic for that reason.").

Defendants' response is incoherent. As to Section 7.2(a)(i), they appear to argue (AB 29-30) that an Affiliate IPO is a permitted transfer only if the Subscriber *first* transfers its interests *to* an Affiliate under a different exception—Section 7.2(a)(iii). But Defendants cite no contract language supporting this limitation on Section 7.2(a)(i), and there is none. As to Section 7.2(a)(ii), Defendants say (AB 30) only that "[n]othing in Section 7.2 says" that the Affiliate transfer permitted here (by Dyal III's limited partners) is "otherwise restricted by Section 7.1(b)." But they overlook the Agreement's text, which expressly states that Section 7.2(a) enumerates "*except[ions]*" that are permitted "*[n]otwithstanding*" the Transfer Restriction in Section 7.1(b). (A641 §§7.1(b), 7.2(a) (italics added).) Finally, Defendants suggest these exceptions were included merely to provide "additional comfort" that such Affiliate transfers would be allowed. AB 30 (quotation omitted). Yet that is the very definition of surplusage. It is not plausible to posit that these detailed exceptions were pointedly negotiated and cabined for no real purpose, or that the drafters were *clarifying* the absence of *any* restriction as to Affiliates when they carved out such discrete, detailed exceptions only for *certain* Affiliates in *limited*

circumstances. *See, e.g*, *In re Loral Space & Commc'ns Inc.*, 2008 WL 4293781, at *36 (Del. Ch. Sept. 19, 2008) (argument that covenant was included as "'belts and suspenders language' … doesn't make sense").[1]

Last, Defendants also fail to account for Section 7.2(a)(iii), which likewise make no sense under Defendants' reading. That section provides that Dyal III can transfer its rights in Sixth Street *only to an Affiliate in the Dyal family*. (A641 §7.2(a)(iii).) Yet under Defendants' view, Defendants have an unfettered right to transfer the rights to a third party, and even a competitor, so long as the transfer is made indirectly by Dyal III's controlling general partner, or its general partner. This contradicts the Agreement's drawing of lines around the Dyal family, once again violating this Court's rules of construction. *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 387 (Del. 2012) (rejecting interpretation that rendered limited rights afforded by contractual exceptions "superfluous" by granting broader rights).

In sum, Defendants would render the restrictions in Section 7.1 illusory and the exceptions in Section 7.2 superfluous. An interpretation that does this much violence is unsustainable.

[1] *iBio, Inc. v. Fraunhofer USA, Inc.*, 2016 WL 4059257 (Del. Ch. July 29, 2016), on which Defendants rely (AB 30), is inapposite. There, the disputed provision would have been superfluous under *either* party's reading. *Id.* at *11. Here, only Defendants' reading poses this problem.

3. In contrast, Sixth Street's interpretation gives meaning and effect to all relevant provisions, without depriving either side of bargained-for protections. Defendants cite no contract language rendered superfluous or illusory by Sixth Street's reading. Instead, they argue—counter-factually—that Neuberger would never agree to bind itself for such a negligible $417 million investment. But the plain terms *told* Neuberger's principals that the valuable governance rights and economic stake they were obtaining in Sixth Street could not thereafter be transferred without Sixth Street's consent, unless an agreed exception was met.

First, Defendants fail to identify any contractual provision that undermines Sixth Street's position. They cite Section 6.1.1, but fail to respond in any way to Sixth Street's showing that this provision created transfer restrictions for individual founders because they might not otherwise be bound as Affiliates. (*See* Opening Brief ("OB") 30 n.4.) Defendants identify no other provision of the Agreement that purportedly conflicts with Sixth Street's reading.

Second, Defendants misplace reliance on *Borealis*. Even setting aside key linguistic differences between the definitions of "Transfer," the analysis here critically differs. Defendants do not dispute that, in *Borealis,* the transferor had *no* control over the contract signatory (as this Court emphasized, 233 A.3d at 10), whereas Defendants have *complete* control over Dyal III. Defendants claim (AB 19-20) the transferee *obtained* control through the transfer in *Borealis*, but fail to explain

how that is pertinent. The relevant relationship is that between the contracting party and *transferor*—which either is or is not restricted—not the *transferee*.

Defendants also elide the different attributes of the *partnerships* at play here. They claim waiver (AB 20) even though this same argument (purely legal) *was* raised below. (A4503; A5416-18; A5523; A5583-86.) And Defendants blankly assert that the "settled corporate-law principles" that this Court invoked in *Borealis*—including the principle that "management of a limited liability company" vests in its controlling members, 233 A.3d at 10 & n.27—apply here. They do not, however, both because Defendants are all under common control, and because the "pick your partner" principle that is codified into the Delaware Code matters. *See* OB 25. This case involves a transfer of non-pecuniary interests controlled by Dyal III's general partner and its general partner—partnerships that have always sat under Defendants' common control, as the parties well understood and accounted for when contracting. Far from offending principles of "corporate separateness," Sixth Street here is simply preserving age-old principles of agency and partnership law.

Third, Defendants' parade of horribles (AB 31) rings hollow. Although Defendants paint Sixth Street as claiming "unfettered discretion to block Neuberger … 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," the Agreement builds in exceptions for liquidity events that are always

available to Dyal III and its Affiliates. (A641 §7.2(a).) Even setting those aside, the *only* thing Sixth Street would block Neuberger or any other Defendant from doing is *transferring the interests in Sixth Street* and thereby putting Sixth Street's governance and proprietary information at risk. Defendants are welcome to carve out Sixth Street's interests and leave them where they are. What Defendants cannot do is "maximize value" to themselves by blowing past Sixth Street's rights.

Defendants are therefore wrong to fault Sixth Street for not obtaining a "Change of Control" provision. Sixth Street neither needed nor wanted such a provision, which if phrased broadly *could* prohibit transactions having nothing to do with Sixth Street's business. Sixth Street has no interest in preventing a change of control by Dyal III's Affiliates in the abstract. It is interested only in preventing a transfer *of the rights in Sixth Street*—and it bargained for contract terms that do exactly that, while also regulating treatment of the relevant information and rights *post*-transfer by any authorized "Transferee." (A641-42 §§7.1(c), 7.2(a).) These provisions are sufficient, and appropriately tailored, to safeguard Sixth Street's rights.

The authorities do not support Defendants' claim that a change of control provision is somehow *de rigueur* for present purposes. Defendants cite cases in which the parties either did not define the scope of the transfer restriction or, at most, restricted "direct or indirect" transfers *without* including language reaching

transactions by upstream entities. *See, e.g.*, *MassMutual Asset Fin. LLC v. ACBL River Operations, LLC*, 220 F. Supp. 3d 450, 455-56 (S.D.N.Y. 2016) (contract "did not use any language that would require consent based on an upstream change of control"); *Found. for Seacoast Health v. HCA Health Servs. of N.H., Inc.*, 157 N.H. 487, 492-96 (2008) (contract "language does not demonstrate an intent that actions … by a parent or other upstream entity" would trigger right of first refusal); *Maryville Hotel Assocs. I, LLC v. IHC/Maryville Hotel Corp.*, 2006 WL 1237264, at *5 (E.D. Mo. May 5, 2006) (declining to enforce transfer restriction absent "clear intent to restrict [the] corporate transaction that occurred"); *White Wave, Inc. v. Dean Foods Co.*, 2001 WL 1833980, at *3 (D. Colo. Dec. 5, 2001) (similar); *see also VDF FutureCeuticals, Inc. v. Stiefel Labs., Inc.*, 792 F.3d 842, 844-47 (7th Cir. 2015) (sale of licensee did not violate license agreement that merely restricted assignment).

Here, by contrast, the parties *did* include language reflecting an intent broadly to reach transfers involving upstream affiliates. This case is therefore more akin to *H-B-S Partnership v. Aircoa Hospitality Services*, 137 N.M. 626 (2005), which—as Defendants' authorities recognize—"stands for the principle that a [transfer restriction] *can* be triggered by stock transactions of entities far up the corporate chain from the parties to the [transfer restriction]." *Seacoast Health*, 157 N.H. at

494 (italics added); *see Maryville Hotel*, 2006 WL 1237264, at *5 (similar).[2] By agreeing to restrict transfers performed "directly or indirectly in any manner," including those accomplished "by merger or sale or any other similar transaction involving an affiliate," the parties evidenced their intent to maximize the reach of Section 7.1.

4. In any event, Dyal III is violating the Transfer Restriction in its own right. (OB 34.) Defendants do not dispute that Dyal III must provide its consent for the transfer to occur, but argue (at 24) that is not prohibited. Yet that is *exactly* what is prohibited: Dyal III is *itself* taking affirmative measures—the only measures that a limited partnership ever could—to transfer to Blue Owl the interests in Sixth Street. The breach is glaring.

B. Defendants' Fallback "Interests" Argument Fails

In the alternative, Defendants claim that no restricted Transfer of "Interests" will occur. This, according to Defendants (AB 35), is because (i) Dyal III will retain nominal (though not *actual*) control over its rights in Sixth Street, and (ii) a transfer of *non-economic* rights supposedly is not restricted at all. Defendants ran this

[2] While the contract in *H-B-S* referenced stock transfers, "[o]ther courts have construed anti-transfer provisions similarly even when those provisions do not explicitly define 'transfer' to include changes in control …." *EIC Glob. Energy Partners, LLC v. TCW Asset Mgmt. Co.*, 2012 WL 5990113, at *7 (C.D. Cal. Nov. 30, 2012) (citing *Oregon RSA No. 6, Inc. v. Castle Rock Cellular of Oregon Ltd. P'ship*, 840 F. Supp. 770, 773-75 (D. Or. 1993)).

argument extensively below, only for the Court of Chancery to recognize that control over "Dyal III's Interests and noneconomic rights under the Investment Agreement" will transfer to Blue Owl. (Op. 10.) That was clearly correct.

Defendants' first point about the indirect route merely restates their erroneous Affiliates argument. Far from excepting indirect transfers, the Transfer Restriction expressly encompasses them. (A641 §7.1(b); A661).

Defendants' second point is equally misconceived. Non-economic rights are core to the Agreement. (*E.g.*, A595-97 §2.8; A619-24 §6.1.3; A629-30 §6.5; A639 §6.10(b); A643 §7.3(a).) And Sixth Street agreed to provide these rights to its *partner*, while taking care to prevent them from falling into the hands of its *competitor*. Lest there be any doubt, the Transfer Restriction specifies that no transfer of the Interests "*or any interest (pecuniary or otherwise) therein or rights thereto*" is permitted absent Sixth Street's consent. (A641 §7.1(b); A661 (italics added).) That language expressly restricts transfers of any interests *in* the Interests—including non-pecuniary interests. Defendants have no explanation for what this could reference *other than* the non-economic rights being transferred to Blue Owl. (A661.) Nor do Defendants explain why Sixth Street would supposedly limit transfers of pecuniary interests while ignoring the non-pecuniary rights that are of paramount concern. Moreover, here as well Defendants would render core protections illusory: "confidentiality protections" and "information rights" that are

among the *express concerns* of the transfer exceptions in Section 7.2 and tightly regulated post-transfer (A642) would, by Defendants' reading, be altogether omitted from the Transfer Restriction. That makes no sense.

Defendants claim (AB 34) that the Interests are defined to exclude non-economic rights, but the text of the Agreement says otherwise. Dyal III received the Interests "*together with all benefits, rights and obligations attached thereto*." (A580 §1.1 (emphasis added).) Among these "Interests" are "limited partnership interest[s]" in Sixth Street (A579), which provide extensive information and other non-economic rights. (AR453; AR456-58; AR461-63.) As the Court of Chancery grasped (Op. 10), Defendants cannot deny that "Dyal III's Interests and non-economic rights" will transfer to Blue Owl.

C. Defendants' Subscriber Portfolio Sale Argument Also Fails

Nor is there any merit to Defendants' invocation of the "Subscriber Portfolio Sale" exception under Section 7.2(a)(iv). This exception allows Dyal III's general partner to sell all (or substantially all) of Dyal III's investments, or to arrange for the coordinated sale of Dyal III's limited partners' equity interests. (A641 §7.2(a)(iv); A660.) Like other Section 7.2(a) exceptions, this exception enables Dyal III to generate "liquidity" for its "investors." (A3495; *see also* A641-42 §§7.2(a)(i) (permitting "Subscriber IPO" liquidity event), 7.2(a)(ii) (permitting "one-off

transfers" of limited partner interests by investors), 7.2(a)(v) (permitting "financing of all or substantially all of the Subscribers' portfolio").)

No such liquidity event is occurring here. Defendants are not transferring the value or ownership of Dyal III's "portfolio of investments," which belongs to Dyal III's limited partners—who will remain its limited partners following the transaction. (A569; A3490; A3498-99.) Nor are Defendants arranging for Dyal III's liquidation. (A569; A706; A3490; A3498-99.) Dyal III and its limited partners *are "not receiving anything"* of value in the transaction. (A2559 (italics added).)

In these circumstances, the exception is manifestly inapplicable. Romanette (i) is inapt because the Blue Owl transaction does not transfer substantially all economic "fair market value" even of *Dyal III's* "portfolio of investments," let alone the value of "*their Affiliates'* direct or indirect portfolio of investments." (A660 (italics added); *see also* A3305-07.) And romanette (ii) does not apply because the Blue Owl transaction does not involve the sale of Dyal III or any holding company owned by Dyal III. (A660; A3307.)

Defendants have never contended otherwise. Instead, they assert (AB 36-37) "*it is Sixth Street's position*" that Dyal III and the value of its investments are being transferred to Blue Owl. But that is *not* our position. While Dyal III's *non-economic interests* are being transferred, the Subscriber Portfolio Sale exception focuses on the *economic "value"* of Dyal III's portfolio—which is not being transferred. (AB

7 (conceding that Dyal III's general partner has "no economic rights or interests in [Dyal III]"); A660.)

D. Sixth Street's Tortious Interference Claim Is Meritorious

On tortious interference, Defendants' lone response is that Neuberger did not act "maliciously" as "required in the corporate affiliate context." AB 38 (quotation omitted). But the relevant "affiliate privilege" does not apply where a parent pursues interests separate from its subsidiary's. *NAMA Holdings, LLC v. Related WMC LLC*, 2014 WL 6436647, at *29-*30 (Del. Ch. Nov. 17, 2014); *see* OB 36 (citing authorities). Here, Neuberger's interests are the only ones served; while Neuberger will receive more than $5 billion from the deal, Dyal III will receive nothing. (A2558, A3469.) Tortious interference follows once the contract is read correctly.

II. THE COURT OF CHANCERY'S RULING THAT SIXTH STREET IS NOT ENTITLED TO EQUITABLE RELIEF WAS IMPROPER

If they lose on the contract, Defendants have no good argument against an injunction. Although Defendants urge "deference" (AB 39), "this Court reviews … a preliminary injunction [decision] without deference to the embedded legal conclusions of the trial court." *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996). And the lower court's legal construction of the contract is the fulcrum on which all else turns. Upon correcting that construction, this Court may decide the remaining elements—including irreparable harm and balance of equities—based on the appellate record. *See, e.g.*, *Levco Alt. Fund, Ltd. v. Reader's Digest Ass'n*, 803 A.2d 428 (Del. 2002) (reversing denial of preliminary injunction and remanding with instructions to enter injunction).

Nor does entry of final judgment (for the express purpose of enabling appellate review) somehow insulate any findings. The plaintiff-appellant in *Delaware Manufactured Home Owners Association v. Investors Realty, Inc.*, 186 A.3d 1240 (Del. 2018), took the same approach as Sixth Street here, and obtained review under the ordinary standard. *Id.* Defendants identify no reason to deviate.

A. The Court Of Chancery Unjustifiably Failed To Enforce The Parties' Contractual Stipulation Of Irreparable Harm

Defendants suggest that Sixth Street faces no harm even assuming its consent rights are violated (AB 39-40), yet they fail to distinguish the many authorities to

the contrary. OB 38 (collecting cases). According to Defendants, "[t]hose cases show only that courts *sometimes* find actual, enjoinable harm in consent-rights cases." AB 40. In truth, these cases underscore why "consent rights cases are better dealt with by injunctive relief"—as Defendants' authority recognizes. *Fletcher Int'l, Ltd. v. Ion Geophysical Corp.*, 2013 WL 6327997, at *19 (Del. Ch. Dec. 4, 2013) (*see* AB 40).

As for the stipulation of irreparable harm in Section 10.11, Defendants identify no good reason to ignore it. They say (AB 41) it does not "limit the court's discretion," but the right question is whether a breaching party can renege on its own written promise to answer in equity for such breach. Defendants cite no authority suggesting a court *should* disregard such a contractual stipulation.[3]

Last, Defendants claim (AB 40-41) the non-signatory Defendants are not subject to this contractual commitment. But Affiliates *can* be bound by a contract, as discussed above, and in any event Court of Chancery Rule 65(d) encompasses all parties acting in "active concert or participation" with Dyal III. Del. Ct. Ch. R. 65(d). Defendants do not deny that they are *together* participating in conduct which, if Sixth

[3] *Quarum v. Mitchell Int'l, Inc.*, 2019 WL 158153 (Del. Ch. Jan. 10, 2019), addressed only the irrelevant question of whether a stipulation conferred jurisdiction, and *AM Gen. Hldgs. LLC v. Renco Grp., Inc.*, 2016 WL 787929 (Del. Ch. Feb. 19, 2016), merely deemed a contractual stipulation inadequate to award "affirmative relief" that was "mandatory in nature." *Id.* at *2.

Street's construction is right, is a breach. That makes this case no different from *Concord Steel, Inc. v. Wilmington Steel Processing Co., Inc.*, 2008 WL 902406 (Del. Ch. Apr. 3, 2008), where the court enjoined a corporate contractual signatory, individual officers, "and those persons in active concert or participation with them" in light of a contractual stipulation by the corporation. *Id.* at *11; AR695.

Dyal III made a fundamental representation that it "ha[d] the legal capacity, power and authority to enter into this Agreement" without need for "any further consent of any third party." (A611-12 §4.6.) Senior Neuberger employees negotiated and signed the Agreement. The Defendants are all under common control. They have no basis for evading a remedy in equity while orchestrating a breach.

B. The Court's Incorrect Contract Ruling Affected Its Consideration Of The Record

Defendants rely heavily (AB 44-45) on the lower court's statements criticizing Sixth Street, but those criticisms were obviously colored by that court's total rejection of Sixth Street's contractual position—to the point that it blew past piles of contrary evidence. And assuming *arguendo* that any finding could stand separate and apart from the lower court's premise that Sixth Street's claims were meritless, this Court should "review the entire record and draw its own conclusions with respect to the facts if the findings below are clearly wrong and justice requires us to do so," because the denial of "a preliminary injunction was based entirely on a

paper record." *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1340–41 (Del. 1987); *see Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1385 (Del. 1995) (findings must be "sufficiently supported by the record").

First, Defendants quote (AB 44) the court's description of Owl Rock as only a "minimal competitor" of Sixth Street. If taken as fact (rather than mere gloss), that would be clearly wrong. Overwhelming evidence confirms that Sixth Street competes with Owl Rock. Sixth Street was listed as Owl Rock's peer when the transaction was announced. (A1213; A5368.) Both firms describe themselves identically in their securities filings as "specialty finance compan[ies] focused on lending to middle-market companies" and "on occasion" smaller companies. (A5368; AR4; AR260.) Defendants *admit* that Blue Owl is "*expected to compete (through the historic Owl Rock business*) with certain … partner managers"—like Sixth Street—"that have a significant credit investing business." (A3471-72 (emphasis added).) Sixth Street has competed with Owl Rock for business opportunities in the past. (A1908-11.) And Owl Rock's current president (and Blue Owl's future co-president) made clear how he feels about the rivalry with Sixth Street in a profane text message. *See* OB 18. Direct, intense competition jumps out from the record.

Likewise, Defendants' notion (AB 44) that "any confidential information Sixth Street provides to Dyal III would not create a risk of competitive harm" cannot

be squared with the record. Defendants do not—and cannot—deny they have obtained *streams* of sensitive confidential information from Sixth Street. Indeed, it is undisputed that Sixth Street principals met regularly with Dyal personnel to discuss business opportunities and future plans. (AR643-84.) A log produced by Defendants shows 63 interactions with Sixth Street in 2020 alone, reflecting discussions about sensitive business and regulatory issues, investment allocations, and growth strategies. (AR643-84; A2895-96; A4584-85.)

To obscure this hard evidence, Defendants trumpet (AB 44) an email from early December 2020 in which Sixth Street principals sought to allay concerns when the potential deal was a nascent rumor, expressing a mistaken belief that any information shared with Dyal was not all that sensitive. After examining the facts, they realized how wrong they were. (A1992-93; A2002-03.) And only two weeks later they made clear that Sixth Street would not provide more sensitive, confidential information to Defendants. (A5249.) Mere utterance of a mistaken belief does not trump a mountain of indisputable record evidence.

Defendants similarly point to a statement from the same timeframe that any deal would have "zero impact" on Sixth Street (AB 44), another mistaken early belief based on misinformation from Defendants. (A1997-98; A2013-15; A2754-55; A2830) As the true nature of the transaction began to emerge, its perils became clear: Blue Owl will control the governance rights relative to Sixth Street, including

rights to receive sensitive information about Sixth Street's business (A595-96 §2.8.); consent rights over transactions (A629-30 §6.5); rights to enforce restrictive covenants, including non-compete restrictions (A639 §6.10(b)); and other rights. While Dyal may have been a passive partner in the past, in the hands of a new "partner" who is a competitor, these rights can be weaponized—precisely the harm that the Agreement is designed to avoid.

C. The Court Failed To Properly Balance The Harms

Like the irreparable harm analysis, any balancing of equities is dictated largely by the underlying consent-right determination. And here, the lower court's balancing of the equities was profoundly skewed by its erroneous view of the contract. For instance, an effort to enforce a *valid* consent right could not fairly be deemed an attempt to "muck up" the transaction. AB 43.

To be clear, Sixth Street is not seeking to enjoin a $12 billion merger. Rather, it seeks only to protect its bargained-for consent right. Before turning to litigation, Sixth Street urged Defendants simply to leave Sixth Street's interests out of the deal. (A4675-77.) They refused, but requested a repurchase proposal from Sixth Street. (A2701; A4675; A5427; AR636-37.) That Sixth Street responded with a buyback offer pegged to the value that *Defendants themselves* had marked on their books (A5428; AR691; AR693) can hardly be held against Sixth Street.

With the contract properly construed, any balancing of the equities decidedly favors Sixth Street. Defendants can protect their deal by carving Sixth Street's protected interests out of it—just as Sixth Street requested pre-suit, and just as Defendants have done in slicing and dicing other portions of their holdings. Indeed, as part of the transaction, Dyal must split off its general-partner and limited-partner interests to render the former "separately transferrable." (A553.) Because the BCA allows for a closing any time before September 23, 2021 (A851), Defendants have plenty of time to "have the negotiation or work around the consent rights." *Fletcher*, 2013 WL 6327997, at *19. What Defendants cannot do is steamroll Sixth Street's consent rights altogether.

An injunction is warranted. And while Appellees suggest need for a "billion-dollar-plus bond" (Opp. at 47), the parties expressly agreed to waive any bond (A672), and such waivers are enforceable. *See, e.g.*, *Concord Steel*, 2008 WL 902406, at *12. Moreover, the relief that Sixth Street seeks is narrowly tailored to rectify the contractual violation without blocking the larger transaction. (A5703.)[4]

[4] Oddly, Defendants fault Sixth Street for seeking on appeal only the narrowest form of relief sought below. *See* AB 46. Of course, appellants routinely cull issues for appeal. The modesty of Sixth Street's current request—which Sixth Street preserved below (A170-72; A289-90; A5703)—in no way undercuts it.

CONCLUSION

For the foregoing reasons, Sixth Street respectfully requests that this Court reverse the judgment and remand for entry of an injunction.

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