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IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRADLEY BAKOTIC and JOSEPH HACKEL, Plaintiffs-below/ Appellees, v. BAKO PATHOLOGY LP, BPA HOLDING CORP., and BAKO PATHOLOGY ASSOCIATES, LLC, Defendants-below/ Appellants.	No. 382, 2021 On Appeal from the Superior Court of the State of Delaware C.A. No. N17C-12-337 WCC

APPELLANTS' REPLY BRIEF AND CROSS-APPELLEES' ANSWERING BRIEF

YOUNG CONAWAY STARGATT & TAYLOR, LLP

Mary F. Dugan (No. 4704)
Lauren E.M. Russell (No. 5366)
1000 North King Street
Wilmington, Delaware 19801
Telephone: 302-576-3255
Facsimile: 302-576-3750
Email: mdugan @ycst.com;
lrussell@ycst.com

Attorneys for Appellants Bako Pathology, LP, BPA Holding Corp., and Bako Pathology Associates, LLC

OF COUNSEL:

JACKSON LEWIS P.C.
Robert W. Capobianco
Adriana R. Midence
Kelli N. Church
171 17th Street NW, Suite 1200
Atlanta, GA 30363

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INTRODUCTION

Since their Bako separations, Plaintiffs have mistakenly believed a court would never find they breached their Agreements. Plaintiffs were so confident they initiated this action to void their covenants while investing hundreds of thousands of dollars in equipment for a competing laboratory and attacking Bako's customer relationships via their Rhett entities. Plaintiffs attempted to disguise such activities under the cloak of a "charitable foundation."

However, the Superior Court correctly held that Plaintiffs' Agreements were enforceable, Plaintiffs had breached their Employment and Partnership Agreements, and such breaches directly caused significant damages to Bako. In fact, the Superior Court's only errors in this regard were the: (1) amount of damages awarded to Bako; and (2) failure to award attorneys' fees. These errors are the narrow focus of Bako's appeal.

By contrast, Plaintiffs have adopted a kitchen-sink approach, appealing almost every significant ruling. To do this, Plaintiffs must frequently misinterpret the Superior Court's Opinion, cite incorrect legal standards of review, or ignore Delaware law and the factual record. When Plaintiffs' arguments are analyzed through the proper legal framework and the record, they fall woefully short of justifying a reversal.

APPELLANTS' REPLY

I. The Superior Court Abused its Discretion[1] by Applying an Arbitrary Growth Rate to Determine Damages, Failing to Explain Its Calculation, and Erroneously Awarding Only $1,740,254.00 in Damages.

Plaintiffs agree the Superior Court abused its discretion with respect to its applied growth rate, but argue there is nothing for this Court to remand because: (1) the Superior Court rejected Hosfield's analysis and (2) Bako's evidence did not support any growth rate. While the record easily rebuts both arguments, Plaintiffs fail to respond to Bako's arguments in its Opening Brief, namely that the Superior Court misapplied Hosfield's analysis through its incorrect calculations. Similarly, Plaintiffs fail to respond to Bako's only argument in its Opening Brief concerning lost business value—despite the Superior Court's conclusion that *some* of the lost business value was attributable to Plaintiffs' misconduct, it declined to award *any* lost business value to Bako. Instead, Plaintiffs assert an argument concerning irrelevant revenue. This Court should reverse and remand.

[1] While Plaintiffs are correct that factual findings are reviewed for clear error, and the amount of damages is generally a fact question, damages awards are reviewed for an abuse of discretion. *SIGA Techs., Inc. v. Pharmathene, Inc.*, 132 A.3d 1108, 1130 (Del. 2015). When awarding damages, a court abuses its discretion if it: (1) makes factual findings lacking record support; and/or (2) fails to explain its reasoning, depriving the parties of a record basis to challenge the decision. *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 868 (Del. 2015); *Golden v. Telecom, Inc. v. Global GT LP*, 11 A.3d 214, 219 (Del. 2010). Under either standard, this Court should reverse and remand with instructions to apply a growth rate supported by the record and properly calculate damages using it.

A. The Superior Court Did Not Reject Hosfield's Analysis

Plaintiffs argue the Superior Court rejected Hosfield's analysis; thus, there is nothing to remand. (Appellees' Answering Brief on Appeal (Dkt. 18, hereinafter cited as "AB") at 19.) This argument is incorrect and based on a misinterpretation of the Opinion. Rather, the Superior Court clearly adopted Hosfield's "but for" damages analysis, but misapplied the analysis to an arbitrarily-selected growth rate, resulting in incorrectly calculated damages. (Op. at 46-47, 49.[2]) Thus, Plaintiffs' first argument fails.

B. Actual Growth Rates and Revenue Are Irrelevant

Plaintiffs' second argument is because Bako did not provide actual growth rates for 2018 and 2019,[3] there is no record support for any growth rate, including a 1.5% growth rate.[4] (AB at 18-19.) Like the Superior Court, however, Plaintiffs fail to recognize that Bako's *actual* 2018 and 2019 growth rates are irrelevant when

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[2] The Superior Court's Decision After Bench Trial (hereinafter cited as "Op. at __") was attached as Exhibit A to Appellants' Opening Brief.

[3] While the actual growth rates are irrelevant to Bako's damages calculation, they are in the record as they are discernable from Bako's actual 2018/2019 sales data, which were in Hosfield's report and tendered into evidence *by Plaintiffs*. (A768 at 150:20-151:4; A346-A490.) This data shows Plaintiffs' misconduct impacted Bako's growth as the year-over-year growth rate in 2018 was -3.56% and -0.31% for January-February 2019. *Id.*

[4] Even Plaintiffs' rebuttal expert referred to a 3% growth rate. (A795 at 37:2-15.)

calculating lost profits because, by 2018 and 2019, Plaintiffs had already caused harm; thus, the actual growth rates for 2018 and 2019 were impacted by Plaintiffs' misconduct. (A747 at 64:21-65:20.) Rather, the proper inquiry is what the growth rate *should have been* in the absence of Plaintiffs' misconduct. (A747 at 64:21-65:20; A840 at 38:16-39:14.)

Similarly flawed is Plaintiffs' argument that Bako's 2015-2017 revenue is relevant. (AB at 18-19.) Bako's revenue is based on reimbursement rates, set per test by insurance companies. (A746 at 62:8-21.) So, if reimbursement rates are higher in a given year, then revenue can appear higher even though actual unit sales are lower than past years. (A746 at 61:21-63:19; A748 at 68:4-69:9.) Conversely, if reimbursement rates are lower, then revenue can appear lower even though actual sales units are higher. (A772 at 166:20-23.) As reimbursement rates are controlled by insurance companies, they are an inaccurate reflection of damages. (A746 at 61:21-63:19; A748 at 68:4-69:9.) Rather, as the Superior Court recognized, Bako's *actual unit sales* had diminished during the relevant time period. (Op. at 48.) That diminishment is where damages lie: Plaintiffs' misconduct caused Bako to sell fewer units than it would have otherwise. (A746 at 61:21-63:19; A748 at 68:4-69:9.)[5] Thus, Hosfield applied the growth rate to *actual units*, not revenue, to determine how

[5] Between 2015-2016, Bako's unit sales increased while Plaintiffs claim its revenue decreased, thus demonstrating the flaw in Plaintiffs' argument. (A377.)

many units Bako should have sold absent Plaintiffs' misconduct. (A748 at 69:10-70:5.)[6]

Therefore, Plaintiffs' arguments fail and, as Bako's arguments from its Opening Brief are unrebutted, this Court should reverse and remand with instructions to apply a growth rate supported by the record.

C. The Superior Court Abused its Discretion When it Failed to Award Lost Business Value

Lost business value is recoverable in this case. Plaintiffs' citation to *Crowell Corp. v. Himont USA, Inc.*, 1994 WL 762663 (Del. Super. Dec. 8, 1994), contradicts their argument as it states that future lost profits are not recoverable *beyond the termination date of the contract sued upon*. *Crowell*, at *3 ("In instances when a profit history is established, recovery for lost profits is limited to those profits which might have been made pursuant to the performance of the particular contract sued on, during the period for which the contract was to run. . . . [as opposed to] a period beyond the termination date of the contract . . . ."); *see also Tanner v. Exxon Corp.* 1981 WL 191389, at *3 (Del. Super. July 23, 1981) ("recovery for lost profits is limited to those profits which might have been made pursuant to the performance of the particular contract sued on and during the period for which it was to run"). As

[6] Bako notes that there is a typo on line 69:23 in the trial transcript—Hosfield applied an 8.9% growth rate, not 0.9%.

Plaintiffs are still Limited Partners under the Partnership Agreement, which has not terminated, lost business value is an appropriate remedy.

Plaintiffs fail to address Bako's argument that, despite the Superior Court's conclusion that *some* of the lost business value was attributable to Plaintiffs' misconduct, it declined to award *any* lost business value to Bako.[7] (Op. at 49-50.) After making the factual determination that some of Bako's lost business value was attributable to Plaintiffs, it was an abuse of discretion not to award Bako at least some measure of its lost business value. *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 351-52 (Del. 2013) (remanding for a determination of expectation damages consistent with its factual findings); *Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1265 (Del. 1989) (reversing decision where legal conclusions were inconsistent with factual findings).

Rather than responding to Bako's argument, Plaintiffs point to "actual revenue" in 2016 and 2017 to argue that, because Hosfield's lost profit analysis was flawed, his lost business value analysis is also flawed. (AB at 21-22.) Plaintiffs ignore that the Superior Court accepted Hosfield's lost profit analysis. (Op. at 49.)

[7] Plaintiffs mischaracterize the Superior Court's findings by claiming it did not find any causation. (AB at 22.) This assertion is directly contradicted by the Superior Court's finding that Plaintiffs caused *some* lost business value. (Op. at 49-50.)

Accordingly, because the Superior Court's decision not to award lost business value is inconsistent with its factual findings, this Court should reverse and remand with instructions to calculate Bako's lost business value.

D. The Superior Court Abused its Discretion and Erroneously Applied Delaware Law by Not Awarding Attorneys' Fees to Bako.

1. Plaintiffs Incorrectly Cite the Standard of Review

The Superior Court's denial of attorneys' fees was based on its findings that: (1) Bako was not the "prevailing party" under the applicable Agreements; and (2) even if it were the "prevailing party," Bako's alleged failure to "exercise good business judgment" precludes an award of attorneys' fees. (Op. at 50-53.) While the parties agree that the Superior Court's decision not to award attorneys' fees is reviewed for an abuse of discretion, Plaintiffs ignore that the Superior Court's interpretation of the Agreements' "prevailing party" language is reviewed *de novo*. *SIGA Techs., Inc.,* 67 A. 3d at 341 ("We review the Vice Chancellor's interpretation of a contractual fee-shifting provision *de novo*, but we review his decision to award attorneys' fees and costs for an abuse of discretion.").

2. Bako Was the "Prevailing Party" at Trial

Applying an "all-or-nothing approach," the Superior Court found Bako was not the prevailing party because it did not win all claims presented at trial, which

included contract and tort claims.[8] (Op. at 53.) As stated in Bako's Opening Brief, this interpretation of "prevailing party" is not supported by Delaware law. Rather, Delaware law limits the inquiry to claims brought pursuant to the agreements with the fee-shifting provisions. A party, like Bako, that prevails on all or most of the claims under such agreements is the prevailing party and entitled to its reasonable attorneys' fees. *Vianix Delaware LLC v. Nuance Commc'ns, Inc.*, 2010 WL 3221898, at *28 (Del. Ch. Aug. 13, 2010) ("[A] party who is deemed a prevailing party under an attorneys' fees provision such as the one at issue here typically is entitled to recover all of its attorneys' fees, even if it does not win every disputed claim."); *see also Sternberg v. Nanticoke Mem. Hosp., Inc.*, 62 A.3d 1212, 1220-21 (Del. 2013) (affirming grant of all attorneys' fees where defendant *only prevailed on one of two claims* where contract provided that if claimant initiates suit and does not prevail, it pays attorneys' fees); *AFH Holding & Advisory, LLC v. Emmaus Life Scis., Inc.*, 2014 WL 1760935, at *3 (Del. Super. Apr. 16, 2014) (finding defendant "predominated in the litigation regarding [the] breach of contract issues" because the defendant won partial summary judgment on its contractual declaratory judgment claim).

[8] Notably, these tort claims were unrelated to the contractual fee-shifting provisions. (Op. at 39, 41.) Rather, these claims related to tortious interference with third-party contracts. (*Id.*)

After incorrectly relying on the abuse of discretion standard, Plaintiffs defend the Superior Court by taking a more extreme position—a party must win every claim asserted in its initial pleadings to qualify as the "prevailing party." (AB at 25-26.) Plaintiffs cannot cite any legal authority for this expansive interpretation of "prevailing party" because it is not the law in Delaware. *See, e.g., Mrs. Fields Brand, Inc. v. Interbake Foods LLC*, 2018 WL 300454, at *3-4 (Del. Ch. Jan. 5, 2018) (ignoring claims abandoned earlier in case which were brought under the agreement with the fee-shifting provision); *AFH Holding & Advisory*, 2014 WL 1760935, at *3 ("The Court finds that a voluntary dismissal of the fraud claims by [the defendant], or a dismissal by the Court, would not alter [the defendant's] status as the prevailing party."). More importantly, however, this was not the interpretation of "prevailing party" applied by the Superior Court. Thus, Plaintiffs' arguments in this regard are irrelevant.

3. Applying a "Good Business Judgment" Standard Was an Abuse of Discretion

The Superior Court applied a "good business judgment" standard to Bako's request for attorneys' fees, (Op. at 50-51), a standard unsupported by Delaware law. The Superior Court neither explained what constitutes "good business judgment" nor how Bako could demonstrate "good business judgment" beyond successfully litigating its breach of contract claims. Holding Bako to this undefined "good business judgment" standard was a clear abuse of discretion. *Pitts v. White,* 109

A.2d 786, 788 (Del. 1954) (abuse of discretion occurs when court "ignored recognized rules of law or practice, so as to produce injustice."). Plaintiffs do not even attempt to defend the Superior Court's ruling in this regard. Thus, because Bako was the prevailing party, it is entitled to its reasonable attorneys' fees, and the Superior Court's denial based on an arbitrary and capricious "good business judgment" standard was error.

4. Bako May Still Present Evidence of Attorneys' Fees

Plaintiffs' contention that Bako "failed to provide any evidence of amount or reasonableness of their attorneys' fees" is perplexing given this issue was squarely addressed at trial. Indeed, the parties introduced evidence regarding the amount of their respective attorneys' fees.[9] When Plaintiffs sought to introduce invoices, the Superior Court noted it was unclear whether "when you put your number in, you put in any supporting documentation," but "if I award fees, if I have any concerns about it, I'll address it at that time." (A838-A839.) Thus, the Superior Court accepted testimony regarding the amount of attorneys' fees and reserved its reasonableness review for later.

[9] Bako introduced testimony that it had incurred approximately $2.3 million in attorneys' fees through December 2020, the month before trial. (A701 at 148:8-20.)

Plaintiffs do not cite to any legal requirement that Bako must submit invoices or evidence of reasonableness *at trial*, especially when the Superior Court instructed that such an exercise would occur later. Indeed, the more common practice is to submit evidence of attorneys' fees after a liability finding. *See*, *e.g.*, *Mrs. Fields Brand, Inc.*, 2018 WL 300454, at *1-2 (application for attorneys' fees was filed three months after court issued an opinion following trial).

For all these reasons, as well as those in Bako's Opening Brief, this Court should reverse the Superior Court's denial of attorneys' fees and remand for evidentiary submissions and an award of Bako's reasonable attorneys' fees.

RESPONSE TO PLAINTIFFS' SUMMARY OF ARGUMENTS ON CROSS-APPEAL

1. Denied. The Superior Court correctly found 6 *Del. C.* § 2707 ("Section 2707") not applicable to the Parties' Agreements. Further, the Superior Court did not conflate "between" and "among." Section 2707 is not applicable to Plaintiffs' Agreements for multiple reasons.

2. Denied. All Defendants had standing to bring claims pursuant to the Partnership Agreement. Bakotic Pathology Associates, LLC and BPA Holding Corp., subsidiaries of Bako Pathology LP, were third-party beneficiaries under the Partnership Agreement. Additionally, Bako Pathology LP suffered an injury in fact.

3. Denied. The Superior Court properly found Plaintiffs' breaches caused Bako's damages.

4. Denied. The Superior Court properly found Plaintiffs' misconduct breached the Employment and Partnership Agreements.

5. Denied. The Superior Court did not reform the Partnership Agreement's non-competition provision. Such provision is not void and the Superior Court did not rely on the parties' intent.

ARGUMENT

I. The Superior Court Correctly Found Section 2707 Is Inapplicable.

A. Question Presented

Did the Superior Court correctly find Section 2707 inapplicable to the Agreements?

B. Scope of Review

Statutory interpretation and application are legal questions reviewed *de novo*. *Salzberg v. Sciabacucchi*, 227 A.3d 102, 112 (Del. 2020); *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 866 A.2d 1, 15 (Del. 2005).

C. Merits of Argument

Section 2707 states:

> Any covenant not to compete provision of an employment, partnership or corporate agreement between and/or among physicians which restricts the right of a physician to practice medicine in a particular locale and/or for a defined period of time, upon the termination of the principal agreement of which the said provision is a part, shall be void; except that all other provisions of such an agreement shall be enforceable at law, including provisions which require the payment of damages in an amount that is reasonably related to the injury suffered by reason of termination of the principal agreement. Provisions which require the payment of damages upon termination of the principal agreement may include, but not be limited to, damages related to competition.

6 *Del. C.* § 2707.

Plaintiffs argue the Superior Court ignored the word "among" when considering Section 2707 and, thus, frustrated the statute's purpose. That is incorrect. Moreover, Plaintiffs ignore the numerous other reasons why Section 2707 is inapplicable to the Agreements, all of which demonstrate that the Superior Court did not frustrate the statute's purpose. For these reasons, this Court should affirm the Superior Court's decision that Section 2707 is inapplicable.

1. The Superior Court did not Ignore "Among"

Plaintiffs' argument that the Superior Court ignored "among" is based on their extraction of six words from the Court's Order stating it must determine whether "the disputed agreements are between physicians." (AB at 34-35; A500.) Plaintiffs then advance a convoluted and inaccurate argument as to the different meanings of "between" and "among." (AB at 34-37.)

Plaintiffs' premise is false. The Superior Court specifically wrote:

> It is evident that the Employment Agreement, Merger Agreement, and Partnership Agreement are executed by Bakotic and Hackel on the one hand, arguably in their capacity as physicians. However, the other parties that executed the documents are largely corporate entities, unrelated to the practice of medicine. Accordingly, the Court finds that Section 2707 is inapplicable because the agreements at issue cannot be considered "**between and/or among physicians**."

(A503) (emphasis added).

The Superior Court did not ignore "among"; rather, it rejected Plaintiffs' argument regarding the meaning of "among." Specifically, when a word is not statutorily defined, that word is interpreted in accordance with its ordinary, contemporary, and common meaning. *Alixpartners, LLC v. Benichou*, 250 A.3d 775, 789 (Del. Ch. 2019). The ordinary, contemporary, and common meaning of "between and/or among physicians" is "between" means two physicians and "among" means more than two physicians; indeed, the case law upon which Plaintiffs rely states as much. *See B.F. Goodrich Co. v. Aircraft Braking Sys. Corp.*, 1994 WL 16019986, at *8 (D. Del. Nov. 10, 1994) ("In its definition of 'among,' the same dictionary states: 'Precise users of English use AMONG when more than two…things are involved…and use BETWEEN when only two…things are involved.").

None of the Agreements are "between and/or among physicians." Rather, as the Superior Court observed, the parties to the Agreements are Plaintiffs, various non-physician individuals, and various corporate entities. (A502-A503.) Thus, the Agreements are neither "between" nor "among" physicians and the Superior Court correctly held Section 2707 inapplicable.

2. Section 2707 is Inapplicable for Additional Reasons

a. Plaintiffs Are Not Delaware Physicians and Do Not Treat Patients

The "practice of medicine" as described in Section 2707 refers to a physician's provision of medical services to patients **in Delaware**. *Dunn v. FastMed Urgent Care P.C.*, 2019 WL 4131010, at *14 (Del. Ch. Aug. 30, 2019). A person may not practice medicine in Delaware without a certificate issued by the Delaware Board of Medical Licensure and Discipline. 24 *Del. C.* § 1720(a); *see also* 24 *Del. C.* § 1702(10) and (11). Plaintiffs are not licensed to practice medicine in Delaware. (C63 at 17:4-6; C44 at 7:13-15.) They are not Delaware physicians and Section 2707 is inapplicable to them. *See Dunn*, 2019 WL 4131010, at *14-15 (holding that Delaware did not intend to regulate the practice of medicine in other states and Section 2707 inapplicable to a physician who lived in Arizona).

Additionally, Section 2707 is inapplicable to Plaintiffs because they did not treat patients. The purpose of Section 2707 is to further "the importance of maintaining the continuity of care by protecting the physician-patient relationship." *Total Care Physicians, P.A. v. O'Hara*, 2002 WL 31667901, at *6 (Del. Super. Oct. 29, 2002). At Bako, a patient's clinician forwarded a skin or nail sample to Bako with a diagnosis or clinical impression, and Bako's dermatopathologist analyzed the specimen under a microscope and confirmed the patient's clinician's initial belief or

"might suggest other things" for the clinician to consider. (C24 at 76:2-7.) Thus, Plaintiffs did not treat patients; they interacted with clinicians. (C24 at 74:22-74:25.) Indeed, Plaintiff Bakotic cannot recall a single patient when he worked for Bako. (C96 at 149:24-150:10.) Likewise, Plaintiff Hackel does not recall the name of a single patient he saw in person. (C28 at 91:25-92:3.) Accordingly, Section 2707 is inapplicable because Plaintiffs (1) are not licensed to practice medicine in Delaware and (2) did not see patients.

b. The Agreements Have Not Terminated

Significantly, Section 2707 will only void a non-competition provision "upon the termination of the principal agreement of which the said provision is a part." Yet, none of Plaintiffs' Agreements had terminated. Plaintiffs' Employment Agreements were in effect and had not terminated at the time of Plaintiffs' breaches. (A93-A100; A101-A107.) The restrictive covenants in the Merger Agreement specifically survive its closing and, thus, had not terminated. (A108, §§ 5.11 and 8.1.) Finally, the Partnership Agreement still has not terminated and Plaintiffs remain Limited Partners. (Op. at 9.) Section 2707 is inapplicable to the Agreements for this additional reason.

c. Plaintiffs' Interpretation of Section 2707 Yields an Absurd Result

If any question remains as to the inapplicability of Section 2707, this Court need look no further than legislative intent, which is grounded in the "sanctity of the physician-patient relationship." *See Total Care Physicians, P.A.*, 2002 WL 31667901, at *7. Indeed, the General Assembly recognized that Delaware "patients should not be deprived of the services of the physician of their choice because of an economic contract entered into between two physicians." *Id.* at *6. Thus, the statute is clearly designed to protect the Delaware patient's relationship with the physician—not the physician's right to compete. Not surprisingly, cases interpreting Section 2707 generally involve agreements between physicians who physically see Delaware patients.[10]

Accepting Plaintiffs' interpretation of Section 2707[11] means any agreement governed by Delaware law in which a physician admitted to practice medicine

[10] *See Total Care Physicians, P.A.*, 2002 WL 31667901, at *1 (determining whether treating physician who formed his own competing practice had "solicited" patients to join him); *Palekar v. Batra*, 2010 WL 2501517 (Del. Super. May 18, 2010) (determining enforceability of liquidated damages provision when physician opened a competing practice and took patients with him; *Dickinson Med Group, P.A. v. Foote, C.A.*, 1984 WL 8208 (Del. Ch. May 10, 1984) (entering temporary restraining order against oncologist who solicited patients to join new practice.)

[11] To support their convoluted and unorthodox meaning of "among," Plaintiffs cite to a centuries old case interpreting the commerce clause and ignore Delaware law. (AB at 35); *Gibbons v. Ogden*, 22 U.S. 1, 189 (1824). Plaintiffs also cite to Black's Law Dictionary for the definition of "among," but its definition refers to *Gibbons*.

somewhere (even if not in Delaware) is a party cannot contain a non-compete provision if it even arguably restricts the practice of medicine. This would upend Delaware law. Indeed, no buyer of a business could include a non-compete provision for any seller of a business who is a physician and all past agreements—including asset purchase agreements, merger agreements, etc.—which include such provisions would have voidable non-compete provisions. Neither Section 2707 nor any Delaware case law interpreting it supports such an outcome. *Total Care Physicians, P.A.*, 2002 WL 31667901 at *6 (holding purpose of Section 2707 is to further "the importance of maintaining the continuity of care by protecting the physician-patient relationship."); *FP UC Holdings, LLC v. Hamilton*, 2020 WL 1492783, at *7-8 (Del. Ch. Mar. 27, 2020) (approving use of nationwide non-

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Black's Law Dictionary cites another case which states "[w]here property is directed by will to be distributed *among several persons*, [e.g., more than one], it cannot be all given to one." In *Gibbons*, the Supreme Court interpreted "among the several States" in the commerce clause. The Court stated "'among' means intermingled with. A thing which is among others, is intermingled with them." *Id.* at 194. The Court then interpreted "among the several States" to mean that Congress can regulate commerce which occurs among more than one State and not solely internal to a State. *Id*. Therefore, *Gibbons* reflects that "among" means more than two, *e.g.*, among the numerous States. Specifically, the Court stated, "[c]omprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns *more States than one*. The phrase is not one which would have been selected to indicate the completely interior traffic of a State…" *Id.* (emphasis added). Thus, Plaintiffs' extrapolation is incorrect as the Supreme Court did not ignore the words following "among" in the commerce clause (*e.g.*, the States) to distort the meaning of "among" to "States with countries and other non-States intermingled therewith."

compete upon the sale of a business). For all these reasons, this Court should affirm the Superior Court's finding that Section 2707 is inapplicable.

II. Defendants Have Standing Under the Partnership Agreement.

A. Question Presented

Did the Superior Court correctly find that Defendants have standing to assert a claim under the Partnership Agreement?

B. Scope of Review

Decisions as to standing are reviewed *de novo*. *Brookfield Asset Mgmt. v. Rosson*, 261 A.3d 1251, 1262 (Del. 2021).

C. Merits of Argument

Plaintiffs make two arguments regarding standing under the Partnership Agreement[12]: (1) Bakotic Pathology Associates, LLC and BPA Holding Corp. do

[12] On appeal, Plaintiffs argue no Defendant has standing to assert claims under the Partnership Agreement. (AB at 39.) In their Motion for Summary Judgment, Plaintiffs argued that Bako Pathology LP and BPA Holding Corp. lacked standing to assert counterclaims under all three Agreements. (B156-B159.) Plaintiffs did not raise any standing argument as to Bakotic Pathology Associates, LLC in their Motion for Summary Judgment. (B128-B176.) Therefore, this issue is waived on appeal. Del. Supr. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review…"); *In re Infinity Broad. Corp. S'holders Litig.*, 802 A.2d 285, 289 (Del. 2002) (where standing argument not raised in Chancery Court, this Court did not consider on appeal). Instead, after initiating this litigation against Bako Pathology LP and BPA Holding Corp. and litigating for nearly two years, Plaintiffs argued for the first time in their Motion for Summary Judgment that Bako Pathology LP and BPA Holding Corp. did not have standing under the Partnership Agreement because allegedly only Bakotic Pathology Associates, LLC, who was not a party at the time, suffered damages. (B156-B159.) At oral argument, after questioning Plaintiffs' counsel regarding this argument, the Superior Court instructed the parties to add Bakotic Pathology Associates, LLC as a party and that Bako's counsel need not address the argument during oral argument. (C136-C137 at 31:8-36:20; C144-C145 at 65:15-66:10.) The parties then stipulated to the addition of Bakotic Pathology Associates, LLC. (C151-C153.) Bako Pathology

not have standing under the Partnership Agreement because neither were signatories nor third-party beneficiaries and (2) Bako Pathology LP does not have standing under the Partnership Agreement because it did not suffer an injury-in-fact because the injury was to its subsidiary, Bakotic Pathology Associates, LLC.

1. Bakotic Pathology Associates, LLC and BPA Holding Corp. Have Standing as Third-Party Beneficiaries

Plaintiffs argue that, as subsidiaries and non-parties to the Partnership Agreement, Bakotic Pathology Associates, LLC and BPA Holding Corp. do not have standing to assert claims under the Partnership Agreement.[13] (AB at 41.) To demonstrate they have standing under the Partnership Agreement as third-party beneficiaries, Bakotic Pathology Associates, LLC and BPA Holding Corp. must show (1) they were intended beneficiaries, (2) the benefit was intended as a gift or in satisfaction of a pre-existing obligation to the beneficiaries, and (3) the conferral of the benefit was a material part of the Partnership Agreement's purpose. *Comrie v. Enterasys Networks, Inc.*, 2004 WL 293337, at *3 (Del. Ch. Feb. 17, 2004).

Associates, LLC's standing was not addressed in the Superior Court's Order on summary judgment (or otherwise). (A491-A504.)

[13] Plaintiffs have referred to Bakotic Pathology Associates, LLC and BPA Holding Corp. as Bako Pathology LP's subsidiaries throughout this litigation. (*See, e.g.,* B136-B137, B157.)

First, Bakotic Pathology Associates, LLC and BPA Holding Corp. were intended third-party beneficiaries of the Partnership Agreement as evident from the Partnership Agreement's plain language: both the non-compete provision (Section 6.5) and the confidentiality provision (Section 6.8) apply to subsidiaries. (B89-B90; B93.) Thus, the Partnership Agreement specifically prevents Plaintiffs from competing against the Partnership's subsidiaries and using confidential information, which includes subsidiaries' information. (B89-B90; B93.) *Comrie*, 2004 WL 293337, at *3, ("When a promised performance is rendered directly to the beneficiary, 'it is presumed that the contract was for the beneficiary's benefit.'").

Second, the benefits of restricting Plaintiffs in the Partnership Agreement were in satisfaction of and consistent with Plaintiffs' pre-existing legal obligations to Bakotic Pathology Associates, LLC and BPA Holding Corp., *i.e.,* their obligations under their Employment Agreements. (A93-A107); *United Health Alliance, LLC v. United Med., LLC*, 2014 WL 6488659, at *3-4 (Del. Ch. Nov. 20, 2014) (pre-existing contract between plaintiffs and third-party beneficiary was pre-existing legal obligation the contract between plaintiffs and defendants reaffirmed and satisfied).

Lastly, the Partnership Agreement's plain language demonstrates that part of its purpose was to confer protection and a benefit to the Partnership and its subsidiaries. *Comrie*, 2004 WL 293337, at *2. As such, as subsidiaries, Bakotic

Pathology Associates, LLC and BPA Holding Corp. are third-party beneficiaries of the Partnership Agreement and have standing to bring claims pursuant to it. *Comrie*, 2004 WL 293337; *see also CTF Dev., Inc. v. BML Props.*, 2022 WL 42041, at *8-9 (Del. Ch. Jan. 5, 2022) (affiliate had standing as third-party beneficiary under agreement); *Carder v. Carl M. Freeman Cmtys., LLC*, 2009 WL 10651, at *7-8 (Del. Ch. Jan. 5, 2009).

2. Bako Pathology LP Has Standing

Plaintiffs argue that Bako Pathology LP did not suffer an injury in fact because Bakotic Pathology Associates, LLC is the only Defendant that could have suffered an injury. (AB at 42.) Plaintiffs' factual premise is incorrect, and the record contains evidence to the contrary. For example, Hosfield presented evidence that all three Defendants experienced damages because of Plaintiffs' misconduct. (A346-A490.) Hosfield's testimony demonstrates that all three entities suffered direct damages from Plaintiffs' conduct, but even if Bako Pathology LP and BPA Holding Corp.'s damages are characterized as indirect damages, Delaware law is clear that those entities still have standing to bring direct claims. *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 176 (Del. 2015) ("a promisee-plaintiff may bring a direct suit against the promisor for damages suffered by the plaintiff resulting from the promisor's breach, notwithstanding that (1) the third-party beneficiary of the contract is a corporation in which the promisee-plaintiff owns stock; and (2) the

plaintiff-promisee's loss derives indirectly from the loss suffered by the third-party beneficiary corporation.").[14]

In addition to Plaintiffs' incorrect factual premise, Plaintiffs' legal analysis is also incorrect. For example, Plaintiffs rely heavily on *Acrisure Holdings, Inc. v. Frey*, 2019 WL 1324943 (D. Del. Mar. 25, 2019). Notably, the issue in *Acrisure* was whether the plaintiffs had Article III standing in Delaware federal court based on a stock purchase agreement. Obviously, Defendants are not required to meet Article III standing requirements to bring counterclaims in Delaware state court. Furthermore, the court in *Acrisure* was concerned that one of the plaintiffs was not a party to or third-party beneficiary of the contract it sought to enforce, a nonexistent concern here given the presence of Bakotic Pathology Associates, LLC.

Plaintiffs also rely on *Case Financial, Inc. v. Alden*, which actually supports the conclusion that Bako Pathology LP has standing.[15] 2009 WL 2581873, at *6-8 (Del. Ch. Aug. 21, 2009). Plaintiffs cite a passage stating that injury to a subsidiary

[14] Moreover, the Court of Chancery found Bako Pathology LP and BPA Holding Corp. suffered irreparable harm due to Plaintiffs' misconduct and entered a Status Quo Order preventing further harm. (C1-C4.)

[15] The remaining cases cited by Plaintiffs are from other jurisdictions and not applicable. *See In re Beck Industries, LLC*, 479 F.2d 410 (2d. Cir. 1973) (determining jurisdiction of bankruptcy court to enjoin proceedings in another state); *CRC Health Grp., Inc. v. Town of Warren*, 2014 WL 2444435 (D. Me. Apr. 1, 2014); *Tullett Prebon, PLC v. BCG Partners, Inc.*, 2010 WL 2545178 (D.N.J. June 18, 2010).

does not create a claim as to a parent corporation. (AB at 41.) What Plaintiffs have cited, however, is an excerpt from a California case, which the *Alden* court immediately disregarded. *Id.* at *7 ("I need not rely upon California law . . ."). Instead, the court focused on the nature of the relationship between Alden and the plaintiffs; specifically, the fact that Alden was an officer and director of the parent plaintiff. Thus, because of Alden's relationship to the parent, the court concluded:

> . . . [the parent company's] ability to pursue a suit against Alden directly would not depend, in this sense, on whether the entirety of the damage was sustained directly by [the parent company] or derivatively through [the subsidiary]. To the contrary, if Alden was substantially certain his conduct would injure [the parent company] unjustifiably, regardless of how far down the causal chain the injury would occur, Alden should have refrained from the conduct . . . [.] . . . Accordingly, I find that [the parent company] has standing to assert direct claims for breach of fiduciary duty against Alden.

Id. This is analogous to the instant case where Plaintiffs are parties to their Employment Agreements with BPA Holding Corp., parties to the Merger Agreement with Bako Pathology LP, and remain Limited Partners in the Partnership Agreement. (A93, A101, A114, B61.) Because of Plaintiffs' direct relationship with Bako Pathology LP, it can bring claims for damages. *Id.; see also NAF Holdings, LLC*, 118 A.3d at 176. For these reasons, this Court should affirm the Superior Court's finding that Defendants have standing under the Partnership Agreement.

III. The Superior Court Properly Found that Plaintiffs' Breaches Caused Bako's Damages.

A. Question Presented

Did the Superior Court properly find that Plaintiffs' breaches caused damage to Bako?

B. Scope of Review

Factual findings of causation are reviewed for clear error. *SIGA Techs., Inc.*, 132 A.3d at 1130. A damages award is reviewed for abuse of discretion. *Id.*

C. Merits of Argument

The Superior Court explicitly found that Plaintiffs' contractual breaches harmed Bako by causing lost profits. (Op. at 46) ("The Court has no doubt that Plaintiffs' violation of their contractual Non-Competition restrictions caused Bako to lose business."). Despite this explicit finding, Plaintiffs appeal what they describe as a "tacit" finding by the Superior Court—that is, a purported finding that Plaintiffs' "non-actionable conduct" caused Bako's damages. Plaintiffs' argument is based on a mischaracterization of the Superior Court's Opinion and evidence.

1. The Superior Court Awarded Damages for Losses Caused by Plaintiffs' Breaches

As noted above, the Superior Court explicitly found that Plaintiffs' misconduct proximately caused Bako's damages. First, the Superior Court found that Plaintiffs breached the non-compete provision of their Employment Agreements by performing the same or similar duties that they performed for Bako for the benefit

of Bako's customers in the 24-month period following the termination of their employment. (Op. at 21.) These duties specifically included lecturing at and sponsoring podiatric events, which Plaintiffs performed on behalf of the Rhett Foundation. (*Id.* at 22-24.) Next, the Superior Court found that Plaintiffs breached the Partnership Agreement, which prohibits them from having any business interests or engaging in any business activities other than those for the Partnership. (*Id.* at 33-34, 36.) The Superior Court specifically found that the "activities performed by Drs. Bakotic and Hackel in the name of the Rhett entities" constituted a breach of the Partnership Agreement. (*Id*. at 36.) The activities carried out "in the name of the Rhett entities" included: (1) lectures at podiatric events; (2) sponsorships of podiatric events; (3) publishing articles related to podiatric care; and (4) the dissemination of the Tarr Petition and their activities related to this litigation. (*Id.* at 11-13, 15-16.)

Having found breaches of the Employment and Partnership Agreements, the Superior Court turned to the issue of causation and concluded there was "no doubt" Plaintiffs' breaches caused Bako damages. (*Id.* at 46.) Specifically, the Superior Court focused on those customers who ceased or reduced their business with Bako because of their belief that Bako mistreated Plaintiff Bakotic as alleged by Plaintiff Bakotic in his unlawful lectures and/or in response to this litigation after the Rhett Foundation contacted them regarding the Tarr Petition and/or to execute an affidavit

for this litigation. (*Id.* at 46-47.) Relying on Hosfield's testimony, the Superior Court calculated the damages related to these specific customers. (*Id.* at 46-47.) Thus, the Superior Court explicitly found that Plaintiffs' contractual breaches caused Bako's damages.

2. Bako Presented Sufficient Evidence to Prove Causation

To reverse the Superior Court's causation findings, Plaintiffs must demonstrate that such findings were "clearly erroneous." *SIGA Techs.*, 132 A.3d at 1130. "Where there is more than one permissible determination to be drawn from the evidence, and the trial court chooses one, its findings cannot be clearly erroneous." *Id.* Plaintiffs claim the Superior Court erred when it found causation because: (1) they never opened a competing laboratory or engaged in "commercial competition"; and (2) their alleged breaching activities were "non-actionable" and the subject of Bako's previously dismissed slander and tortious interference claims. (AB at 44-48.) Plaintiffs are wrong on both counts.

First, neither the Employment Agreement nor Partnership Agreement contains language limiting a breach to a competing laboratory or "commercial competition." (A93-A107, B57-B127.) Indeed, the Employment Agreement prohibits Plaintiffs from performing the same or similar duties that they performed for Bako for the benefit of Bako's clients, while the Partnership Agreement prohibits Plaintiffs from

engaging in "business activities" other than those for the Partnership.[16] (A93, A101, B89-B90.) That Plaintiffs did not open a laboratory is—and has always been—a red herring. The record is replete with evidence that Plaintiffs' misconduct (*e.g.,* their lectures, the Tarr Petition circulated in the name of the Rhett Foundation, their efforts to collect affidavits in the name of the Rhett Foundation) caused certain customers to stop or decrease their business with Bako. For example:

- Drs. Kauthon, Cairns, McEnberg, Green, Concho, and Lin stopped using Bako because of something read or heard in Plaintiff Bakotic's Rhett Foundation publications or lectures (A650-651 at 87:20-89:2; A653-654 at 99:19-101:23; A678 at 56:23-58:7; A683 at 78:9-16; A683 at 79:2-13; A683-684 at 79:20-80:8);
- Drs. Zaborowski, Donela, and Bhatia stopped using Bako at the same time they signed the Tarr Petition and/or specifically referenced the Tarr Petition as the reason they left Bako (A642 at 54:1-55:23; A643-644 at 59:22-60:4; A658 at 118:7-119:12); and
- Drs. Willinski and LeBow stopped ordering GMS or PCR tests as a result of what they read in the Rhett's Perspectives, which was written

[16] The Partnership Agreement is broader than the Employment Agreements. Plaintiffs completely ignore the Partnership Agreement and the Superior Court's findings regarding their breach of same, and the resulting damages. (AB at 44-50.)

using Bako's confidential information (A678 at 58:8-23; A684 at 80:22-81:15).

Hearing this evidence, the Superior Court determined that Plaintiffs' misconduct caused Bako's damages, which is consistent with the facts and law and not clearly erroneous. *SIGA Techs.*, 132 A.3d at 1130.

Second, Plaintiffs incorrectly argue that the misconduct upon which the Superior Court relied to determine causation was all the subject of Bako's previously dismissed slander and tortious interference claims. (AB at 45.) Again, Plaintiffs are wrong. Plaintiffs' misconduct as it relates to the Tarr Petition and affidavits all occurred *after* the Superior Court dismissed Bako's unrelated claims. Moreover, that Plaintiffs' misconduct constituted both a breach of contract *and* a separate tort claim is irrelevant. The Superior Court dismissed Bako's separate slander claim without prejudice on jurisdictional grounds, while Bako's tortious interference claim as to Plaintiff Hackel was dismissed because the Court found it was preempted by the breach of contract claim. (A294-296, A297-300.) Thus, despite Plaintiffs' suggestion to the contrary, the Superior Court has not ruled that Plaintiffs did not engage in the misconduct which forms the basis of the Superior Court's findings of breach and causation.

3. Evidence of the "Benefit" to Bako's Customers is Irrelevant

Plaintiffs contend that Bako failed to introduce evidence that its customers financially benefitted from Plaintiffs' lecturing and sponsoring; thus, Bako failed to demonstrate how such activities caused its damages. (AB at 48-50.) Plaintiffs are conflating evidence of breach with evidence of causation.

To prove Plaintiffs breached their Employment Agreements,[17] in relevant part, Bako needed to prove they engaged in the same or similar duties that they performed for Bako "on behalf of or for the benefit of . . . any customer or client of Bako[.]" (A93, A101.) Thus, when examining whether Plaintiffs' misconduct constituted a breach of the Employment Agreement, the Superior Court found that, on behalf of the Rhett entities, Plaintiffs provided lectures "which were attended by and for the benefit of Bako's client base." (Op. at 24.) This finding is well supported by the evidence. Indeed, the purpose of the Rhett Foundation was to provide Plaintiffs with a vehicle to lecture and sponsor various educational events and institutions for the educational benefit of Bako's customers as they had done at Bako. (Op. at 11; A526 at 76:1-3; A530 at 95:18-21; A590 at 50:19-51:1.) Importantly, the podiatrists who attended these events are the primary customer base of Bako.

[17] The inquiry of whether Plaintiffs' conduct benefitted Bako's customers is completely irrelevant to the Partnership Agreement, which is an entirely separate basis on which the Superior Court found breach and causation. (Op. at 33-36.)

(A526 at 76:10-20.) Thus, there is no question that Plaintiffs' sponsorships and lectures benefitted Bako's customers.

That Bako's customers may not have ***financially*** benefitted is irrelevant to the finding that Plaintiffs breached their Employment Agreements because these Agreements do not require a financial benefit. (A93, A101.) More importantly, however, any benefit conferred on Bako's customers is completely irrelevant to the issue of causation, which focuses on the harm caused to Bako. As it relates to the Employment Agreements, the Superior Court's logic in this regard is clear: (1) Plaintiffs were prohibited from giving lectures for the benefit of Bako's clients; (2) Plaintiffs breached their Employment Agreements by giving such lectures; and (3) in such lectures, Plaintiffs made statements which caused Bako's customers to stop or decrease their business with Bako, resulting in lost profits. (Op. at 21-26, 46-47.)

4. The Superior Court Properly Focused on Profits Lost as a Result of Plaintiffs' Breaches

Finally, Plaintiffs take issue with the Superior Court's calculation of damages by arguing the Superior Court did not limit damages to customers who left because of Plaintiffs' breaches, identifying Metroplex as one such customer. (AB at 51-52.) Plaintiffs misinterpret the Superior Court's causation findings. The Superior Court did identify damages caused by Plaintiffs' breaching misconduct and limited its damages award to such customers. (Op. at 46-47.) Indeed, the sole example cited

by Plaintiffs to support this argument (Metroplex) was actually excluded by Hosfield's analysis.[18]

For these reasons, this Court should affirm the Superior Court's finding that Plaintiffs' breaching misconduct caused Bako's damages.

[18] Metroplex left Bako in October 2017. (A719 at 222:3-8.) Hosfield calculated damages to Bako from January 2018-February 2019. (A745 at 58:2-59:11; A752 at 85:12-18; A752-A753 at 87:14-88:15.) To determine Bako's expected unit sales for 2018 and January/February 2019, Hosfield applied an expected growth rate to Bako's 2017 and January/February 2018 unit sales, respectively. (A748 at 69:10-70:5.) Because Metroplex was included in Bako's 2017-unit sales, Hosfield provided an alternative damages calculation removing Metroplex from his calculation. (A844-A845 at 54:21-57:19.)

IV. The Superior Court Properly Found that Plaintiffs' Sponsoring and Lecturing Breached the Employment and Partnership Agreements.[19]

A. Question Presented

Did the Superior Court properly find that Plaintiffs breached the Employment Agreements?

B. Scope of Review

The Superior Court's interpretation of the Employment Agreements is reviewed *de novo*. *Glaxo Grp. Ltd. v. Drit LP*, 248 A.3d 911, 918 (Del. 2021). The Superior Court's factual findings based on this interpretation are reviewed for clear error. *Parke Bancorp Inc. v. 659 Chestnut LLC*, 217 A. 3d 701, 709-10 (Del. 2019).[20] After a bench trial, the Superior Court's findings are not disturbed unless they are clearly wrong such that justice would require overturning them. *City of Lewes v. Raymond*, 1990 WL 17786, *1 (Del. 1990).

[19] Although Plaintiffs' heading and question presented mention the Employment and Partnership Agreements, their arguments focus only on the Employment Agreements. (AB at 53-60.)

[20] Plaintiffs' citation to *Hudak* for an abuse of discretion standard is misplaced. *Hudak* analyzed the rebuttal of a legal presumption and did not apply an abuse of discretion standard. *Hudak v. Procek*, 806 A.2d 140, 149-50 (Del. 2002).

C. Merits of Argument

Plaintiffs appeal the Superior Court's finding that their sponsoring and lecturing breached the Employment Agreements on three grounds: (1) their sponsoring and lecturing were not a competing business; (2) the Superior Court improperly relied on the parties' subjective intent; and (3) their sponsoring and lecturing did not financially benefit Bako's customers. Plaintiffs are wrong on all counts.

1. "Business" Does Not Appear in the Employment Agreements' Covenant

Plaintiffs argue they did not breach their Employment Agreements because their sponsoring and lecturing was not a competing "business." (AB at 54-56.) In doing so, however, Plaintiffs completely ignore the plain language of their Employment Agreements. As the Superior Court noted, Plaintiffs' Employment Agreements prohibit them from performing the "same or similar duties" they performed at Bako "on behalf of or for the benefit of . . . any customer or client of [Bako] for whom [Bako] provided services within two years prior to [their] termination from [Bako]." (Op. at 21.) Noticeably absent from this covenant is the word "business." Thus, the Superior Court was not required to define and/or

interpret the word "business"[21] vis-à-vis this covenant and its literal interpretation of the covenant as written withstands *de novo* review.[22]

Plaintiffs' remaining arguments are red herrings. For example, Plaintiffs contend Plaintiff Bakotic had an "educational carveout" which allowed him to use his lecture materials at educational events following his termination. (AB at 55.) In interpreting this language, however, the Superior Court again relied on the Employment Agreement's plain language when it held that this carve out was an exception to the Employment Agreement's proprietary information provisions, but "falls short of providing an exception to the non-competition restrictions[.]" (Op. at 25.) Plaintiffs do not even attempt to argue why this construction is incorrect. Similarly, without explanation, Plaintiffs summarily claim that Delaware law does not allow an employer to prohibit lecturing and/or sponsoring. (AB at 56.) This argument has no legal support. The case relied upon by Plaintiffs for this far-

[21] The cases cited by Plaintiffs are inapposite on this point because, unlike here, the contracts at issue included terms like "business" and "services." *See, e.g, Kan–Di-Ki, LLC v. Suer*, 2015 WL 4503210, at *7 (Del. Ch. July 22, 2015); *Cincinnati SMSA Ltd. Pshp. v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 991 (Del. 1998).

[22] Plaintiffs do not deny they sponsored and lectured on behalf of Bako; rather, they attempt to downplay these duties by describing them as "ancillary." (AB at 54.) Pretermitting the fact that the Employment Agreements do not distinguish between ancillary and non-ancillary duties, Plaintiffs' argument is also factually disingenuous. Plaintiff Bakotic admits his activities in this regard were so prolific, he was known as the "face" of Bako. (A527 at 82:8-9.)

reaching conclusion addresses the interpretation of a non-solicitation covenant and whether such a covenant can prohibit any contact with customers. *KPMG Peat Marwick LLP v. Fernandez,* 709 A.2d 1160, 1164 (Del. Ch. Jan. 6, 1998). Again, without any citation to evidence or legal authority, Plaintiffs claim prohibiting sponsorships or lectures goes far beyond what is necessary to protect Bako's legitimate business interests. (AB at 55.) This contention ignores the Superior Court's finding that Plaintiffs' promotion of the Rhett entities through sponsorships and lectures would "influence Bako's customers" and was intended to help Plaintiffs "replace Bako as the leader in the industry." (Op. at 23.) In other words, these were not simply educational endeavors. They were marketing activities designed to hurt Bako. (*Id.*) Finally, Plaintiffs allege the Superior Court found they had breached the Employment Agreements, but not the Merger Agreement. According to Plaintiffs, this somehow suggests that the Employment Agreements are overbroad. (AB at 56.) Again, Plaintiffs provide limited explanation for this argument, but this Court may summarily reject it on the grounds that the Employment Agreements and Merger Agreement contain two separate, differently worded covenants. (A93, A163.) Therefore, it is meaningless that Plaintiffs' misconduct constituted a breach of one but not the other.

2. The Superior Court Did Not Base Its Ruling on the Parties' Intent

Plaintiffs contend that the Superior Court improperly based its finding of breach on an opinion regarding their intent to harm Bako. (AB at 56-57.) To support this argument, Plaintiffs cite two lines of dicta from the Opinion in which the Superior Court muses whether the parties would have engaged in years of litigation had Plaintiffs simply lectured at podiatric events in a vacuum, as opposed to the full scale assault Plaintiffs launched against Bako in the months following their termination using their Rhett entities which included, but was not limited to, lecturing. (*Id.*) These musings, however, are not the basis of the Superior Court's finding of liability. Later in the Opinion, the Superior Court identifies Plaintiffs' specific misconduct upon which it based its finding of breach. (Op. at 23-24.) Thus, Plaintiffs are incorrect.

3. The Superior Court Correctly Interpreted the Word "Benefit"

Plaintiffs contend the Superior Court incorrectly interpreted "benefit" in the Employment Agreements and "benefit" means only "commercial" benefits. (AB at 57-60.) As an initial matter, "benefit" is not defined in the Employment Agreements and, thus, a plain language interpretation is appropriate. *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, 2020 WL 7024929, at *57, n.207 (Del. Ch. Nov. 30, 2020) (Delaware courts look to dictionaries for assistance in determining plain

meaning of undefined terms) (citing *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006)). Webster's Dictionary defines "benefit" as "something that produces good or helpful results or effects or that promotes well-being."[23] There is no requirement that a "benefit" under the Employment Agreements means only "commercial benefit." The Superior Court correctly interpreted the language in the Employment Agreements to include educational benefits.

Moreover, the evidence supports the Superior Court's findings that Plaintiffs conferred a benefit on Bako's customers. The evidence showed that the Rhett Foundation's purpose was to provide Plaintiffs with a vehicle to lecture throughout the country and sponsor various educational events and institutions for the benefit of Bako's customers as they had done at Bako. (Op. at 11; A526 at 76:1-3; A530 at 95:18-21; A590 at 50:19-51:1.) It is disingenuous for Plaintiffs to claim they are just a charitable organization helping the podiatric community, yet nobody benefits from their lectures. (AB at 57-60.) When announcing their Rhett Foundation, Plaintiff Bakotic promised that he and Plaintiff Hackel would continue to serve the podiatric community "as [they] always have" by sponsoring and lecturing at podiatric events because their hope was these "podiatric clinicians" would "***benefit***

[23] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/benefit (last visited March 21, 2022).

from our various initiatives in some way." (emphasis added) (A230.) Importantly, the podiatrists who attended the events sponsored by the Rhett Foundation are Bako's primary customer base. (A526 at 76:10-20.) Thus, there is sufficient evidence to support the Superior Court's finding that Plaintiffs' sponsoring and lecturing benefitted Bako's customers and, therefore, breached the Employment Agreements.[24]

[24] The Employment Agreements also prohibit Plaintiffs from performing the same or similar duties for the benefit of any laboratory which competes with Bako. (A93.) At trial, Plaintiff Bakotic testified that his lectures benefitted other pathology labs besides Bako. (A571 at 259:2-9.)

V. The Superior Court Correctly Found a Breach of the Partnership Agreement.

A. Question Presented

Did the Superior Court properly find a breach of the non-competition provision of the Partnership Agreement?

B. Scope of Review

Questions of contract interpretation are reviewed *de novo*. *Glaxo Grp. Ltd.*, 248 A.3d at 918. Factual findings are reviewed for clear error. *Parke Bancorp Inc.*, 217 A. 3d at 709-10. After a bench trial, the Superior Court's findings are not disturbed unless they are clearly wrong, and justice requires overturning them. *Raymond*, 1990 WL 17786, at *1.

C. Merits of Argument

1. The Partnership Agreement's Non-Competition Provision is Not Void

Plaintiffs argue that the Partnership Agreement's "unreformed" non-competition provision is void under Delaware law because it is unlimited in territory and the type of prohibited conduct. (AB at 62.) The non-competition provision in the Partnership Agreement,[25] however, is not reviewed with the same scrutiny as a

[25] The Partnership Agreement resulted from the sale of a business in which Plaintiffs received millions of dollars. (A108-A255; A315-A316 at ¶12; A528 at 84:21-85:6; A528 at 87:8-13; A529 at 88:7-12; A591 at 53:4-10.) The inquiry into the enforceability of the restrictive covenant in connection with the sale of a business for millions of dollars is far "less searching" than in the employment context. *See Revolution Retail Sys., LLC v. Sentinel Techs, Inc*., 2015 WL 6611601, *10 (Del.

non-compete provision in an employment agreement.[26] In *Insituform Technologies, Inc. v. Insitu, Inc.*, the Chancery Court evaluated a partnership agreement with a similar clause preventing partners from engaging in any act detrimental to the partnership. 1999 WL 240347, at *10 (Del. Ch. Apr. 16, 1999). The court held that, for so long as the defendant remained a partner, it was bound by the covenant prohibiting any acts detrimental to the partnership. *Id.* at *14. Likewise, for so long as Plaintiffs remain Limited Partners under the Partnership Agreement, they remain bound by the non-compete provision therein. (Op. at 36.) Accordingly, the provision is not void under Delaware law.[27]

Ch. Oct. 30, 2015). Additionally, Delaware recognizes the enforceability of a nationwide non-compete upon the sale of a business. *FP UC Holdings, LLC* , 2020 WL 1492783, at *7-8 .

[26] Plaintiffs' cited case law demonstrates the analysis is different. *Lyons Insurance* concerns a former employee's contract, not a partner or the sale of a business. *Lyons Ins. Agency, Inc. v. Wilson*, 2018 WL 4677606, at *1-3 (Del. Ch. Sept. 28, 2018). Further, the *Delaware Elevator* case presents the same situation as *Lyons*, but the non-compete agreement is governed by Maryland rather than Delaware law. *Del. Elevator, Inc. v. Williams*, 2011 WL 1005181, at *1 (Del. Ch. Mar. 16, 2011).

[27] Plaintiffs argue that because they cannot simply resign from the Partnership means, "[s]uch unilateral and perpetual discretion by Defendants is far outside the bound of what Delaware courts consider an enforceable non-compete provision." (AB at 63.) Setting aside that Plaintiffs provide no support for this proposition, which is contrary to Delaware partnership jurisprudence, they ignore their obligations as Limited Partners and that the provision's temporal scope is consistent with the provision in *Instiuform* (*e.g.*, for so long as a partner).

2. The Superior Court Did Not Reform the Partnership Agreement

Plaintiffs further assert that the Superior Court agreed that the Partnership Agreement's non-competition provision is void because it is unlimited in territory and prohibited conduct. (AB at 62.) However, the Superior Court explicitly stated, "[a]lthough Plaintiffs argue that the Non-Competition provision of the Partnership Agreement is unlimited in scope, territory, and duration, **the Court disagrees**." (emphasis added) (Op. at 36.)

Relying on their incorrect premise, Plaintiffs argue that the Superior Court reformed the Partnership Agreement. (AB at 62-63.) This is also incorrect. As an initial matter, the Superior Court could not have reformed the Partnership Agreement as reformation of a contract is a specific legal remedy (which the parties did not seek) only the Court of Chancery can provide. *In re Tibco Software Inc. Stockholders Litig.*, 2014 WL 6674444, *13-14 (Del. Ch. Nov. 25, 2014); *Catamaran Acquisition Corp. v. Spherion Corp.*, 2001 WL 755387, at *5 (Del. Super. May 31, 2001) ("In Delaware, reformation is available only in the Court of Chancery.").

Plaintiffs ignore these legal hurdles and argue the Superior Court "reformed" the Partnership Agreement by removing the term "business" and including "non-business activities like medical lectures and charitable sponsorships." (AB at 65.) The Superior Court, however, did not remove the word "business." Rather, the

Superior Court wrote, "the Court finds Drs. Bakotic and Hackel did engage in ***business*** activities and held ***business*** interests that competed with Bako's interest through the Rhett brand, and therefore they breached the Non-Competition provision of the Partnership Agreement." (emphasis added) (Op. at 36.) As such, there was no reformation of the Partnership Agreement and Plaintiffs' arguments fail.

Next, Plaintiffs argue that the Superior Court reformed the Partnership Agreement based on the parties' "intent" and this was error because there was no evidence of intent in the record. (AB at 62-63.) Plaintiffs' "intent" argument is premised on a few words of dicta in the following passage:

> If the Court was to accept Defendants' interpretation of this provision, it would prohibit Drs. Bakotic and Hackel from any business of any nature. To demonstrate the absurdity of that provision, if the doctors wanted to open a lemonade stand on their front lawn, Defendants would assert they have violated the Partnership Agreement as that lemonade business was "engaging in business activities" outside of the partnership. The Court simply cannot accept or condone a provision that in essence prohibits engaging in any activity regardless of how remote or unrelated to the partnership's business. The Court is equally convinced this was never the intent of those who were participants in the Partnership Agreement. There is no question that provision was intended to prevent Plaintiffs from engaging in similar and competitive activity that would be detrimental to the partnership. **However, the Court finds Drs. Bakotic and Hackel did engage in business activities and held business interests that competed with Bako's interest through the Rhett brand**…

(Op. at 35-36) (emphasis added).

Needless to say, this case did not involve the opening of a lemonade business, so the Court's hypothetical is *dicta*. The more accurate interpretation of the Superior Court's *dicta* is if the Plaintiffs had opened a lemonade stand, then the Superior Court would have blue penciled the provision. Plaintiffs, however, cannot acknowledge this interpretation because it would require an admission that any such blue penciling by the Superior Court would have narrowed the provision to their benefit. Instead, Plaintiffs rely on their failed argument concerning the inapplicable reformation doctrine.

For all of these reasons, the Superior Court correctly found a breach of the enforceable Partnership Agreement.

CONCLUSION

For the reasons set forth above, Appellants and Cross-Appellees Bako Pathology Associates, LLC, BPA Holding Corp. and Bako Pathology LP, respectfully request that the Court remand this matter to the Superior Court (1) to conduct an analysis of Appellants' damages in accordance with Delaware law, (2) to enter an award of attorneys' fees in their favor, and (3) uphold the Superior Court's decision in all other regards, denying all relief sought by Appellees and Cross-Appellants Bradley Bakotic and Joseph Hackle on appeal.

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Lauren E.M Russell

Mary F. Dugan (No. 4704)
Lauren E.M. Russell (No. 5366)
1000 North King Street
Wilmington, Delaware 19801
Telephone: 302-576-3255
Facsimile: 302-576-3750
Email: mdugan @ycst.com;
lrussell@ycst.com

Attorneys for Appellants Bako Pathology, LP, BPA Holding Corp., and Bako Pathology Associates, LLC

OF COUNSEL:

JACKSON LEWIS P.C.
Robert W. Capobianco
Adriana R. Midence
Kelli N. Church
171 17th Street NW, Suite 1200
Atlanta, GA 30363

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