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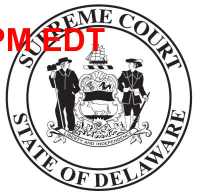

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CANTOR FITZGERALD, L.P., a Delaware limited partnership, Defendant Below, Appellant v. BRAD AINSLIE, JASON BOYER, CHRISTOPHE CORNAIRE, JOHN KIRLEY, ANGELINA KWAN and REMY SERVANT, Plaintiffs Below, Appellees.	)	No. 162,2023 Court Below: Court of Chancery Consol. C.A. No. 9436-VCZ

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NATURE OF PROCEEDINGS

This case concerns one of the most fundamental issues of Delaware law and policy: a party's right to have its contract applied according to its terms. Plaintiffs-below/Appellees Brad Ainslie, Jason Boyer, Christophe Cornaire, Angelina Kwan, John Kirley, and Rémy Servant (collectively, "Plaintiffs") are former limited partners of Defendant-below/Appellant Cantor Fitzgerald, L.P. ("Defendant," "CFLP," or the "Partnership") pursuant to the CFLP Partnership Agreement (the "Partnership Agreement"). Plaintiffs previously worked for Cantor Fitzgerald (Hong Kong) Capital Markets Ltd. ("Cantor HK"), an affiliate of CFLP, as brokers in the financial services industry. In addition to earning compensation through their employment with Cantor HK, Plaintiffs were partners in CFLP, the ultimate parent company for the Cantor Fitzgerald global enterprise. This afforded them supplemental benefits including profit distributions. After enjoying these benefits for years, Plaintiffs voluntarily resigned from Cantor HK and withdrew from the Partnership in coordinated fashion. They immediately began competing at two different wholesale institutional brokerages. By joining direct competitors, Plaintiffs rendered themselves ineligible to receive certain additional payments (the "Additional Payments") for the redemption of their partnership units that were expressly conditioned on, *inter alia*, Plaintiffs refraining from competing with the Partnership (the "Competition Conditions").

Despite indisputably failing to meet the Competition Conditions, Plaintiffs sued to obtain the benefit of the very bargain they failed to honor, and which they now claim was illegal. Disregarding Delaware precedent to the contrary, the Court of Chancery (the "Court") refused to enforce the plain language of the Partnership Agreement. Rather, in resolving the parties' simultaneous summary judgment motions by awarding summary judgment to Plaintiffs, the Court erroneously held that the Partnership should have compensated its former partners with Additional Payments while those partners actively competed against the Partnership.

The Court treated this case as if it involved a proposed injunction on employees' competitive activities, rather than a condition to payment in a Delaware limited partnership agreement. In so doing, it applied a reasonableness requirement that has never been applied to Delaware partnership-related payment conditions. The Court also provided no rationale for striking the provisions in their entirety, even though Plaintiffs' voluntary departure from the Partnership for immediate work with direct competitors meant that they would have forfeited the Additional Payments even if the scope of the conditions had been significantly narrowed. By declining to enforce the conditions agreed upon by sophisticated parties, the decision places Delaware in the minority of states and threatens to undermine the legitimate expectations of the businesses that depend on predictable Delaware law and policy. While the Court reasoned that the decision would promote competition, the ruling is

likely to have the opposite effect: it will discourage companies from organizing in Delaware and hinder existing Delaware partnerships' ability to compete against entities organized in states where such provisions are respected.

In short, the Court's conclusions were unsupported by Delaware law, policy, and the factual record. Its decision should be reversed and summary judgment entered for Defendant.

SUMMARY OF ARGUMENT

CFLP appeals the Court's denial of CFLP's summary judgment motion combined with its award of summary judgment to Plaintiffs. The Supreme Court should reverse the Court's error of law—by granting summary judgment to CFLP and reversing the grant of summary judgment to Plaintiffs—for several independent reasons.

1. The Court failed to follow and apply principles of Delaware law codified in the Delaware Revised Uniform Limited Partnership Act ("DRULPA"). Delaware encourages entities to organize here and structure their relationships under contracts governed by Delaware law, with the express expectation that they will be strictly and predictably enforced. This protection is nowhere stronger than in DRULPA, where Delaware has enshrined the principles of freedom of contract. The Court's departure from this longstanding principle warrants reversal. This is particularly so because the public policy the Court elevated over DRULPA—Appellee's right to earn a living—is not implicated by this case, in which each Appellee pursued highly remunerative work at a competitor immediately after their voluntary departure from Cantor HK.

2. The Court's application of a reasonableness analysis to the Competition Conditions in the Partnership Agreement is inconsistent with conclusions reached by Delaware courts considering analogous payment conditions. While the Court

noted that “Delaware law is not clear” on this issue, even this statement overstated the case: No court applying Delaware law has ever subjected a condition for post-departure payments in a partnership agreement to this level of scrutiny. The few opinions on which the Court relied were of limited (if any) precedential value. And even if the law was unclear, as the Court suggested, Delaware policy favors enforcing agreements according to their agreed terms instead of court-drafted equities. The weight of authority makes clear that provisions like these are not subject to a reasonableness analysis, and the Court’s decision should be reversed.

3. Even if the Court was correct in holding the conditions to payment were overbroad, it erred in failing to consider that they could be partially enforced. The Court, without offering any reasoning, refused to enforce the Competition Conditions to the extent reasonable despite noting the presence of a severability clause which required narrowing of objectionable provisions. The Court made a legal error when it failed to follow DRULPA and Delaware law which required the Court to enforce the parties’ severability provision. To the extent the option to blue pencil was discretionary, the Court’s refusal to do so, without analyzing whether the facts and equities warrant wholesale rejection of the entire contract, constituted an abuse of discretion. If the Court had enforced any of the provisions in question even in part, summary judgment to CFLP would have been warranted.

4. Even assuming a reasonableness analysis applied to the Competition Conditions, the Court misapplied such scrutiny by misconstruing the relationship between the parties. There was no genuine factual dispute that each Appellee had competed against CFLP or an affiliate—thereby failing to satisfy the Competition Conditions. But the Court erroneously assessed the reasonableness of the conditions based on the scope and reach of Plaintiffs' employer, nonparty Cantor HK. This analysis was wrong because CFLP was not any Appellee's employer, but rather a partnership that pays its current and recently-departed limited partners through revenues derived from various businesses worldwide. If the Court had properly considered the interests of a global partnership, it would have found that the Competition Conditions were reasonable to ensure that CFLP's partners were not paying their competition to damage CFLP's business. As such, summary judgment should have been granted to CFLP.

For each of these reasons, the Court's resolution of the parties' dueling summary judgment motions constituted reversible error. CFLP thus respectfully requests that the Supreme Court rectify this mistake of law by fully reversing the Court and granting summary judgment to CFLP on all of Plaintiffs' counts.

STATEMENT OF FACTS

I. THE PARTIES EXECUTE THE PARTNERSHIP AGREEMENT

CFLP is a Delaware limited partnership. (A0067 § 20.07.) Formed in 1945, CFLP is Wall Street's oldest private partnership. In the mid 2000s, each Appellee voluntarily signed the Partnership Agreement to become limited partners in CFLP. (Op. at 6−7.) During their partnership, each Appellee received or purchased limited partnership interests in the form of CFLP partnership units, which entitled them to receive benefits such as the receipt of quarterly distributions (*i.e.* profits) that the Partnership derived from the businesses of its affiliates worldwide. (Op. at 10.)

Article XI of the Partnership Agreement provides for the possibility that a limited partner may receive payments in respect of the redemption of their partnership units after they leave the partnership ("Terminated Partners"), but only if they meet certain conditions. These payments (the "Conditioned Payments") may include "Additional Amounts" under Section 11.04, "Post-Termination Payments" under Section 11.08, the Partner's "Grant Tax Payment Account" under Section 11.09, and "Matching Post Termination Payments" under Section 11.10. Each of the Conditioned Payments, which are paid out in one-quarter installments over approximately four years following departure, is conditioned on refraining from "Competitive Activity" prior to the date of such payments. (*See* A0001-A0082 §§

11.04(a), 11.08(b), 11.09(b), 11.10(b).)[1] Thus, a Terminated Partner who is otherwise compliant with the Partnership Agreement, but engages in Competitive Activity, may keep any installments of Conditioned Payments already received, but is not entitled to receive future installments.

A Partner engages in "Competitive Activity" if he or she:

> (A). . . solicits, induces, or influences, or attempts to solicit, induce or influence, any other partner, employee or consultant of the Partnership or any Affiliated Entity to terminate their employment or other business arrangements with the Partnership or any Affiliated Entity, or to engage in any Competing Business (as hereinafter defined) or hires, employs, engages (including as a consultant or partner) or otherwise enters into a Competing Business with any such Person,
>
> (B) solicits any of the customers of the Partnership or any Affiliated Entity (or any of their employees), induces such customers or their employees to reduce their volume of business with, terminate their relationship with or otherwise adversely affect their relationship with, the Partnership or any Affiliated Entity,
>
> (C) does business with any person who was a customer of the Partnership or any Affiliated Entity during the 12-month period prior to the Partner becoming a Terminated or Bankrupt Partner if such business would constitute a Competing Business,
>
> (D) directly or indirectly engages in, represents in any way, or is connected with, any Competing Business,

[1] These provisions, and the definition of "Competitive Activity" in Section 11.04(c) incorporated therein, are hereinafter referred to as the "Contingent Payment Provisions."

> directly competing with the business of the Partnership or of any Affiliated Entity, whether such engagement shall be as an officer, director, owner, employee, partner, consultant, affiliate, or other participant in any Competing Business, or
>
> (E) assists others in engaging in any Competing Business in the manner described in the foregoing clause (D)." (A0047-48.)

Section 11.04(c) defines a "Competing Business" as one which:

> (i) involves the conduct of the wholesale or institutional brokerage business, (ii) consists of marketing, manipulating or distributing financial price information of a type supplied by the Partnership or any Affiliated Entity to information distribution services or (iii) competes with any other business conducted by the Partnership or any Affiliated Entity if such business was engaged in by the Partnership or an Affiliated Entity or the Partnership or such Affiliated Entity took substantial steps in anticipation of commencing such business prior to the date on which such Partner ceases to be a Partner. (*Id.*)

Notably, in Section 11.02(c), the limited partners of CFLP agreed that these conditions are not affirmative restraints:

> Each Partner acknowledges that this Article XI is intended solely to reflect the economic agreement between the Partners with respect to amounts payable upon a Partner's Bankruptcy or Termination. Nothing in this Article XI shall be considered or interpreted as restricting the ability of a former Partner in any way from engaging in Competitive Activity, or in other employment of any nature whatsoever, subject in either case to the restrictions elsewhere in this Agreement (including without limitation in Sections 3.05 and 8.06). The provisions of Article XI shall be in addition to, and not in substitution for, any other

> provision of this Agreement or any agreement to which the Partner is subject pursuant to the terms of any other agreement with the Partnership or any Affiliated Entity and shall not abrogate any provisions contained in this or any other such agreement. (*Id.*)

Additionally, the Partnership Agreement defines the "Partner Obligations" under Section 3.05. These obligations include refraining from soliciting or doing business with customers of CFLP or engaging in or assisting others in engaging in a Competing Business during the one-year period after a limited partner's termination. (A0025-A0026 § 3.05(a)(iii).) Section 3.05(a)(vi) provides that "[t]he determination of whether a Limited Partner has breached its Partner Obligations will be made in good faith by the Managing General Partner in its sole and absolute discretion, which determination will be final and binding." A Terminated Partner who breaches any Partner Obligation becomes ineligible to receive any future payments of "Additional Amounts" under Section 11.04 or any other payments to which they might otherwise be entitled. (A001-A0082 §§ 3.05(b), 11.04(a).)[2]

By engaging in a Competitive Activity or breaching a Partner Obligation, Plaintiffs became ineligible for payments under Sections 11.04, 11.08, 11.09, and 11.10.

[2] The Court referred to these conditions—providing for forfeiture of the right to future payments in the event of breach of a Partner Obligation—as the "No Breach Condition." (Op. at 12.)

Section 20.11 of the Partnership Agreement states that "[i]n the event that any provision of this Agreement is ultimately determined to be unenforceable in accordance with its terms, such provision shall be modified to the minimum extent necessary to cause it to be enforceable, and the remaining provisions of this Agreement shall nevertheless remain in full force and effect." (A0068.)

II. PLAINTIFFS VOLUNTARILY DEPART CFLP, BREACH THE COMPETITION CONDITIONS, AND FILE SUIT

Between September 2020 and November 2011, each Appellee departed the Partnership voluntarily. Each Appellee then immediately commenced providing services to competing institutional brokerages that offered the same services, to the same client base as CFLP's affiliates. (Op. at 51 n.156). For example, Boyer, Ainslie, and Kwan each began work at Reorient, a global financial services group that all three admitted provided institutional brokerage services. (A0359-A0435 at 85:23-86:14, 89:22-25; A0606-A0672 at 92:25-93:13; A0436-A0506 at 68:3-10, 70:12-71:6.) Boyer and Ainslie conceded that Reorient was a competitor to Cantor. (A0436-A0506 at 67:2-16, A0606-A0672 at 94:12-16.) Similarly, Cornaire, Servant, and Kirley joined ICAP, which they conceded is a global interdealer brokerage that offers many of the same services as the CFLP affiliates with whom ICAP competes. (A0699-A0777 at 32:9-17, 34:9-35:2, 59:14-20; A0511-A0605 at 66:8-68:9; A0778-A0817 at 44:7-21.)

Plaintiffs' choice to work for direct competitors rendered them ineligible for additional payments from CFLP. Accordingly, CFLP did not make any Conditioned Payments to Plaintiffs. There is no evidence anywhere in the record below that the Agreement's Competition Conditions affected any Appellee's ability to find work after they chose to leave Cantor HK.

On October 4, 2016, five years after their departures from Cantor HK, Plaintiffs filed a consolidated Complaint against CFLP seeking money damages and declaratory judgments that the Competition Conditions are unenforceable.

On March 31, 2022, CFLP moved for summary judgment against Plaintiffs' claims because the undisputed record showed Plaintiffs had engaged in "Competitive Activity" and therefore did not meet the preconditions for payment under Article XI. (A0912-963.) CFLP further argued that Plaintiffs breached at least one Partner Obligation under Section 3.05 by working for competitors within a one-year period after their departure or by soliciting clients and employees of Cantor HK on behalf of those competitors. CFLP similarly sought summary judgment on Plaintiffs' claims for declaratory relief.[3]

[3] CFLP sought summary judgment on Appellee Ainslie's claim that he was entitled to his Base Amount under Section 11.03 of the Partnership Agreement on the grounds that Ainslie had failed to sign the release that was a precondition to payment. The Court granted summary judgment to CFLP on this issue. CFLP does not appeal that ruling.

On May 10, 2022, Plaintiffs moved for summary judgment on their claims, arguing in part that the relevant provisions of Article III and Article XI of the Partnership Agreement were unenforceable. Plaintiffs also admitted that they worked for competitors of CFLP, but nonetheless argued that they did not fail to satisfy the Competition Conditions because their violations of the Conditions were not "material." (*See* A0964-A1033 at43-44 (arguing that the conduct of the Plaintiffs who joined Reorient "was a technical but not material violation"), 52 (conceding that ICAP "was a competitor of a separate Cantor affiliate called BGC" but arguing that those who joined ICAP "did not compete with Cantor Fitzgerald Hong Kong in any material way").)

III. THE COURT GRANTS SUMMARY JUDGMENT TO PLAINTIFFS

In its January 4, 2023 memorandum opinion on the parties' motions (as corrected on January 17, 2023, the "Opinion"),[4] the Court granted partial summary judgment to Plaintiffs on both their breach of contract counts. The Court found in favor of Plaintiffs solely because it concluded that both the Contingent Payment Provisions and the No Breach Condition were not enforceable, even in part.[5] The

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[4] The citations herein are to the corrected Opinion, dated January 17, 2023 (attached hereto as Ex. A, referred herein as "Op.").

[5] Because the enforceability question was case-dispositive, the Court did not reach a ruling on Appellees' argument that there was a genuine issue of material fact as to whether they engaged in Competitive Activity, or on Ainslie and Boyer's argument that CFLP was precluded from arguing that they engaged in Competitive Activity in

Court began by correctly rejecting two arguments advanced by Plaintiffs: (1) that the provisions could not be enforced because they were penalties, reasoning that Delaware law permits penalties for breaches of a partnership agreement (Op. at 39-40); and (2) that CFLP was required to show that any violation of the Contingent Payment Provisions or Partner Obligations was "material," reasoning that the Contingent Payment Provisions explicitly conditioned CFLP's duties to remit payment on Plaintiffs refraining from certain conduct. Therefore, "[t]o require that the condition be material would undermine the very purpose of including such conditions in our contracts . . ." (Op. at 40-41.)

Despite properly rejecting these arguments, the Court failed to enforce the plain language of the Partnership Agreement. First, it concluded that the Competition Conditions were subject to a non-compete reasonableness analysis (ordinarily applicable to injunctive relief applications), despite the apparent lack of any cases from Delaware courts holding as much. Instead, the Court relied on a 35-year-old Third Circuit opinion, *Pollard v. Autotote, Ltd.*, 852 F.2d 67 (3d Cir. 1988), which, relying on a Massachusetts case, "predicted" that Delaware law might apply a reasonableness test to a forfeiture-for-competition provision in an employment setting—a situation not before the court.

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light of prior litigation between them and CFLP affiliates in Hong Kong. (Op. at 20 n.61.)

The Court first held that the Partnership Agreement's restrictive covenants under Section 3.05 (which include a two-year obligation not to solicit employees or customers of the Partnership or its affiliates, as well as a one-year obligation to refrain from working for a Competing Business) were not enforceable. The Court concluded that these provisions did not pass the reasonableness test of (1) being reasonable in geographic scope and temporal duration, (2) advancing a legitimate economic interest of the enforcing party, and (3) being equitable on balance. (Op. at 43.) The Court applied hypotheticals that bore no resemblance to the record in this case to criticize the worldwide geographic scope of the covenants, as well as the covenants' protection of the Partnership's affiliates under the non-competition and non-solicitation obligations. (Op. at 45-49.) The Court also faulted Section 3.05 for committing the determination of a Terminated Partner's breach of these covenants to the good-faith discretion of CFLP's Managing General Partner, even though the Court's assumption that these breaches had in fact occurred should have rendered this issue moot. (Op. at 49-50.)

Lastly, the Court concluded that enforcement of the restrictive covenants under Section 3.05 would be inequitable. On one hand, the Court acknowledged that Plaintiffs "knowingly entered into a contractual arrangement bringing them into the Partnership." The Court also noted that five of the Plaintiffs "invested additional funds to acquire [Partnership] Units notwithstanding these provisions" with

knowledge of the conditions attached to them. And the Court also noted that Plaintiffs "as partners profited . . . from the enforcement of these provisions against other departing partners" and that denying enforcement "would deny [CFLP] and its other partners the benefit of their bargain." (Op. at 51.)

Nonetheless, the Court determined that the balance of equities tilted in favor of Plaintiffs due to the amount of money that would not be paid to them, as well as the breadth of the restrictions. The Court did not contrast those sums of money with the financial benefits Plaintiffs had received from their years in the Partnership. Nor did the Court discount the harm to Plaintiffs based on its earlier conclusion that Plaintiffs' rights to these sums were contingent. (Op. at 52.) The Court instead determined that because Section 3.05's restrictive covenants did not meet the reasonableness scrutiny applied to actions for injunctive relief, Plaintiffs' breach of those conditions could not extinguish CFLP's duty to make the Conditioned Payments. (Op. at 52-53.) The Court so held despite the fact that this case does not involve injunctive relief or any affirmative restraint.

The Court also determined that Article XI's Contingent Payment Provisions were unenforceable. First, despite stating that Delaware law was "not clear" on whether forfeiture-for-competition provisions "are restraints of trade that should be evaluated for reasonableness," the Court reasoned that Delaware should "join[] the ranks of jurisdictions" that apply reasonableness tests to such provisions. (Op. at 53,

65.) In particular, the Court disagreed with CFLP's argument that, under the considerations governing the "employee choice" doctrine adopted by many other jurisdictions, such provisions are not subject to reasonableness review in the cases of individuals (such as all six Plaintiffs) who voluntarily departed the company withholding payment. (Op. at 55-64.) The Court instead analogized the Contingent Payment Provisions to a provision requiring the payment of liquidated damages to the employer (despite previously determining they were not liquidated damages provisions). In reasoning that Delaware law views liquidated damages provisions of this sort to be potentially unreasonable restraints on competition, the Court relied primarily on a Superior Court opinion in which the court partially enforced such a provision. (Op. at 59-62 (citing *Faw, Casson & Co., L.L.P. v. Halpen*, 2001 WL 985104 (Del. Super. Aug. 7, 2001)).)[6]

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[6] The case the Court relied upon was premised on the principle that "[e]mployment restrictions are governed by a rule of reason," *Faw, Casson & Co.*, 2001 WL 985104 at *2, and the Court did not acknowledge that such case (or the other authorities it relied upon) did not involve a limited partnership agreement governed by DRULPA, which expressly approves of these types of provisions. "A partnership agreement may provide that (1) a general partner who fails to perform in accordance with, or to comply with the terms and conditions of, the partnership agreement shall be subject to specified penalties or specified consequences; and (2) at the time or upon the happening of events specified in the partnership agreement, a limited partner shall be subject to specified penalties or specified consequences." 6 *Del. C.* 6, § 17-306. The Court's decision, if upheld, would effectively delete Section 17-306 from DRULPA.

The Court then reasoned that the appropriate reasonableness test was "the more lenient or employer-friendly review Delaware affords restrictive covenants in the sale of a business as compared to an employment agreement." (Op. at 65-66.) The Court cited no authority, however, to support its application of this standard, which applies to the enforcement of noncompete provisions through injunctive relief. Even under this standard, the Court held that the Contingent Payment Provisions were unenforceable. The Court relied on reasons it already offered "for concluding the Restrictive Covenants [under Section 3.05] are unreasonable" without providing any distinction for the more lenient standard it purportedly applied. (Op. at 66.) The Court conceded that the Contingent Payment Provisions were "more reasonable" than the No Breach Condition because "the scope of prohibited activity is narrower" and the determination of competition was not delegated to the discretion of the Managing General Partner. (Op. at 66-67.) However, the Court took issue with the application of the Contingent Payment Provisions over a four-year period (a longer period than the one to two-year period for the restrictive covenants under Section 3.05), reasoning that "any legitimate interest . . . is stale by years three and four." (Op. at 67.) Despite suggesting that the Partnership's interests remained "legitimate" for at least two years, the Court offered no explanation for declining to blue-pencil the provisions to a two-year

period, as the Court had suggested, which would have resulted in a grant of summary judgment to CFLP.

Having found the conditions overbroad under its newly fashioned standard, the Court did not then analyze what the consequences of that overbreadth should be. Instead, it held that Plaintiffs were entitled to receive their Contingent Payments, thereby imposing a new legal standard on a partnership operating under Delaware law for decades and saddling CFLP and its limited partners with the obligation to pay Plaintiffs to compete against them.

ARGUMENT

I. THE COURT ERRED WHEN IT DISREGARDED DRULPA

A. QUESTION PRESENTED

Whether the Court erred when it declined to enforce the conditions to payment in the Partnership Agreement despite Section 17-306 of DRULPA authorizing such conditions and the considerable body of Delaware law favoring the enforcement of partnership agreements according to their terms. (A0912-A0963 at 21-23.)

B. SCOPE OF REVIEW

This Court reviews *de novo* the "trial court's formulation and application of legal principles." *Reddy v. MBKS Co., Ltd*., 945 A.2d 1080, 1085 (Del. 2008) (citing *Emerald Partners v. Berlin*, 726 A.2d 1215, 1219 (Del. 1999)).

C. MERITS OF ARGUMENT

Any analysis of the enforceability of a limited partnership agreement should begin with the statutory text and case law relating to DRULPA. The Court, however, ignored DRULPA and related law, misconstrued the Partnership Agreement's payment conditions and applied the reasonableness analysis generally reserved for a restrictive covenant in an employment agreement. (Op. at 42-43.) The Court articulated no basis for disregarding Delaware's strong preference for enforcing partnership agreements according to their terms. The Court's ruling should be reversed.

1. The Court's Decision Is Inconsistent with DRULPA

Delaware law strongly protects parties' contract rights and accordingly favors enforcing private parties' contracts as written. *See Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) ("Parties have a right to enter into good and bad contracts, [and] the law enforces both.").

This principle is nowhere stronger than in the context of limited partnership agreements, where Delaware has codified the principles of freedom of contract. "[B]y statute, the parties to a Delaware limited partnership have the power and discretion to form and operate a limited partnership in an environment of private ordering according to the provisions in the limited partnership agreement." *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 170 (Del. 2002) (internal quotations omitted). That law, DRULPA, embodies the policy of "freedom of contract and [] the enforceability of partnership agreements." *Ryan v. Buckeye Partners, L.P.*, 2022 WL 389827, at *9 (Del. Ch. Feb. 9, 2022); *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 360 (Del. 2013) (quoting 6 *Del. C.* § 17-1101(c)) (internal quotation marks omitted (DRULPA gives "maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements"). Delaware courts accordingly hold that limited partnership agreements must be interpreted and enforced "in accordance with their literal terms." *In re K-Sea Transp. Partners L.P. Unitholders Litig.*, 2011 WL 2410395, at *8 (Del. Ch.

June 10, 2011) (citing *In re Nantucket Island Assocs. P'ship Unitholders Litig.*, 810 A.2d 351, 361 (Del. Ch. 2002)).

This principle should have guided the Court's analysis of the Partnership Agreement. "When a particular limited partnership has plainly opted out of the statutory default scheme, judicial review . . . must look to the limited partnership's distinct doctrinal foundation in contract theory. There is no reason . . . to depart from that source to further some highly generalized interest of equity." *Sonet v. Timber Co., L.P.*, 722 A.2d 319, 323–24 (Del. Ch. 1998) (footnote omitted); *see also In re Cencom Cable Income Partners*, 1997 WL 666970, at *4 (Del. Ch. Oct. 15, 1997) ("Plaintiffs have failed to show why the written terms of the sale process should be subject to some court-approved, after-the-fact, moralistic 'entirely fair' standard, when the parties defined the desired process in the Partnership Agreement and could have, but did not, require the General Partner to include the specific provisions that Garber testified would be desirable in a purchase agreement negotiated at arms-length.").

Partnership agreements—unlike consumer contracts or typical employment relationships—reflect complex business relationships among sophisticated parties who own equity in the business. "Where equity holders in such entities have provided for such a custom menu of rights and duties by unambiguous contract language, that language must control judicial review of entity transactions." *Emps.*

Ret. Sys. of City of St. Louis v. TC Pipelines GP, Inc., 2016 WL 2859790, at *1 (Del. Ch. May 11, 2016), *aff'd sub nom. Emps. Ret. Sys. of the City of St. Louis v. TC Pipelines GP, Inc*., 152 A.3d 1248 (Del. 2016).

The Court acknowledged that Delaware's proclivity toward enforcing alternative entity agreements permits terms "that would be unavailable in a standard commercial contract, most notably penalties and forfeitures." (Op. at 35 (citing *XRI Inv. Hldgs. LLC v. Holifield*, 283 A.3d 581, 661–62 (Del. Ch. 2022) (citations omitted).) Accordingly, Delaware courts recognize that DRULPA tolerates deviations from default rules and court-fashioned equities. "Delaware alternative entity law is explicitly contractual; it allows parties to eschew a corporate-style suite of fiduciary duties and rights, and instead to provide for modified versions of such duties and rights—or none at all—by contract.'" *Emps. Ret. Sys. of City of St. Louis v. TC Pipelines GP, Inc*., 2016 WL 2859790, at *1 (Del. Ch. May 11, 2016), *aff'd sub nom. El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248 (Del. 2016)).

Indeed, this court has recently again confirmed that "Delaware courts respect the terms of a partnership's governing agreements to preserve the 'maximum flexibility' of contract'" and that it takes a "strict approach to contract interpretation . . . regarding the primacy of partnership agreements." *Boardwalk Pipeline Partners, LP v. Bandera Master Fund LP*, 288 A.3d 1083, 1108 (Del. 2022). Enforcing the terms of the Partnership Agreement against Plaintiffs' overreach is entirely

consistent with Delaware law and policy, which does not forgive sophisticated individuals who seek to avoid the enforcement of contracts they sign. *Miller v. Am. Real Estate P'rs, L.P.*, 2001 WL 1045643, at *8 (Del. Ch. Sept. 6, 2001) ("This court . . . will not [be] tempted by the piteous pleas of limited partners who are seeking to escape the consequences of their own decisions . . . . [I]nvestors should be careful to read partnership agreements before buying units."). Accordingly, the Court's decision should be reversed because it failed to follow and apply the principles of DRULPA.

2. <u>The Court's Decision Is Inconsistent with Delaware Public Policy</u>

Effectively brushing aside DRULPA, the Court held that enforcement of the Partnership Agreement's payment conditions would contravene public policy. This was error. Delaware law rarely supports the invalidation of contract terms based on notions of public policy that are not enshrined in legislative enactments. *See Sycamore Partners Mgmt., L.P. v. Endurance Am. Ins. Co.*, 2021 WL 761639, *11 (Del Super. Feb. 26, 2021) ("As the Supreme Court has cautioned, public policy is the General Assembly's domain, and judges should avoid the temptation to legislate from the bench. Following these instructions, this Court has declined invitations to apply judicially-fashioned policy limitations."). Furthermore, it is error to do so in the face of codified policy to enforce such terms. "When parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to

respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract." *New Enter. Assoc. 14, L.P. v. Rich*, 2023 WL 3195927, at *33 (Del. Ch. May 2, 2023) (citing *Libeau v. Fox*, 880 A.2d 1049, 1056 (Del. Ch. 2005), *aff'd in part, rev'd in part on other grounds*, 892 A.2d 1068 (Del. 2006).

The axiomatic public policy of Delaware is that where competent parties have voluntarily and knowingly entered into a contract under Delaware law, those terms should be enforced. *Id.*; *See W.R. Berkley Corp. v. Hall*, 2005 WL 406348, at *4 (Del. Super. Feb. 16, 2005) (enforcing clawback against employee due to post-departure competition and stating that "the Court cannot end this opinion without at least questioning whatever happened to the business world of a person being bound by his word and accepting the consequences of his personal decision."). "Such public policy interests are not to be lightly found, as the wealth-creating and peace-inducing effects of civil contracts are undercut if citizens cannot rely on the law to enforce their voluntary-undertaken mutual obligations." *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 903 (Del. 2021) (emphasis added) (internal quotation marks omitted).

No Delaware statute sets forth any public policy against enforcement of conditions on payments to terminated limited partners in a limited partnership

agreement. To the contrary, through DRULPA, the legislature has expressly articulated a policy in favor of *enforcing* such terms. *Sonet*, 722 A.2d at 323. Consistent with DRULPA's command to "give[] "maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements," (*Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 360 (Del. 2013) (quoting 6 *Del. C.* § 17-1101(c))), Delaware courts will enforce provisions in limited partnership agreements "that would be unavailable in a standard commercial contract," *XRI Inv. Hldgs. LLC*, 283 A.3d at 662 (discussing identical provisions of Delaware's LLC Act). Among these are clauses which "concentrate power in the general partner, [] limit liabilities, and [] waive fiduciary duties." *Boardwalk Pipeline Partners, LP*, 288 A.3d at 1108; *see also Norton*, 67 A.3d at 360 ("Parties may expand, restrict, or eliminate any fiduciary duties that a partner or other person might otherwise owe . . . .").

DRULPA likewise expressly authorizes conditions precedent to payment. Most notably: "A partnership agreement may provide that (1) a general partner who fails to perform in accordance with, or to comply with the terms and conditions of, the partnership agreement shall be subject to specified penalties or specified consequences; and (2) at the time or upon the happening of events specified in the partnership agreement, a limited partner shall be subject to specified penalties or specified consequences." 6 *Del. C.* § 17-306; *see also id.* § 17-101(14)(a) (providing

that a limited partnership agreement can impose "conditions for becoming a limited partner or assignee as set forth in the partnership agreement or any other writing"); *id.* § 17-502(b)(2) (providing that "conditional obligation of a partner to make a contribution or return money or other property to a limited partnership may not be enforced unless the conditions to the obligation have been satisfied or waived as to or by such partner.").

Time and again, Delaware has confirmed that enforcement of such conditions is fundamental to the parties' ability to construct and arrange their affairs. *See Dieckman v. Regency GP LP*, 155 A.3d 358, 361 (Del. 2017) ("But where, as here, the express terms of the partnership agreement naturally imply certain corresponding conditions, unitholders are entitled to have those terms enforced according to the reasonable expectations of the parties to the agreement."); *Manti Holdings, LLC v. Authentix Acquisition Co.*, 261 A.3d 1199, 1246 n.79 (Del. 2021) ("Once partners exercise their contractual freedom in their partnership agreement, the partners have a great deal of certainty that their partnership agreement will be enforced in accordance with its terms" (*citing Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 291 (Del. 1999)).). The parties here reasonably expected maximum enforcement, as evidenced by the Partnership Agreement's severability provision providing that the remainder of the agreement survives even if a court finds some provision unenforceable. (Op. at 15.)

By contrast, there is no countervailing public policy in Delaware against conditions on post-termination payments to a limited partner who has voluntarily withdrawn and immediately competed. The Delaware legislature has not enacted any such policy. Nor has this Court ever invalidated any provision of a limited partnership agreement on such grounds.

Indeed, the theoretical public policy the Court chose to elevate above the clear dictates of the Legislature – an employee's right to earn a living – is not implicated by the facts of this case in any way. Each of the Appellee's knowingly and voluntarily entered into the Agreement and received the fruits of that bargain during their time as partners. When they desired to leave the partnership, the disputed provisions of the Agreement did not limit Plaintiffs' ability to work. To the contrary, each Appellee left Cantor HK and immediately began employment at a rival firm before suing for cash payments from the partnership five years later. Delaware has no policy interest in Appellee's desire for a windfall, let alone an interest strong enough to supplant its longstanding protection of partnerships.

The Court's failure to enforce the Partnership Agreement's conditions against Plaintiffs, as written, controverted Delaware's strong public policy favoring the strict enforcement of such agreements. The Supreme Court should remedy that error by reversing the Court and granting summary judgment to CFLP due to Plaintiffs having failed to satisfy the conditions for post-departure payments.

II. THE COURT ERRED WHEN IT CONCLUDED COMPETITION CONDITIONS IN A PARTNERSHIP AGREEMENT MUST BE "REASONABLE"

A. QUESTION PRESENTED

Whether the Court erroneously applied injunctive reasonableness scrutiny to the conditions to payment in a partnership agreement governed by DRULPA. (A0950-52, A1048-A1054.)

B. SCOPE OF REVIEW

Same as above.

C. MERITS OF ARGUMENT

First, the cases cited by the Court do not support the result here. Most importantly, the Court could identify *no case* declining to enforce a comparable condition in a limited partnership agreement.

To begin, the only case even suggesting a reasonableness analysis, *Pollard v. Autotote, Ltd.*, 852 F.2d 67, 70–71 (3d Cir. 1988), does not apply for several reasons. (*See* Op. at 53 n. 162.) First, the *Pollard* court acknowledged that it was not describing Delaware law, but merely "predicting" it. The reasons the court considered applying a reasonableness analysis in *Pollard* demonstrate the case's inapplicability. For one, the provision at issue in *Pollard* arose under an employer-employee relationship, not under a limited partnership agreement governed under DRULPA. The plaintiff, Pollard, was a general manager making $55,000 annually—not a sophisticated and highly compensated financial professional like

the Plaintiffs who knowingly signed onto the Partnership Agreement to reap enormous benefits from their participation as limited partners in the global enterprise. As such, neither the express terms of, nor the policy undergirding, DRULPA's mandate to enforce these types of conditions was at issue in *Pollard*.

Further, Pollard was an employee who was terminated *without cause*, a point critical to the Third Circuit's analysis. *See Pollard*, 852 F.2d at 70-71 (noting "Delaware courts have not addressed the enforceability of a forfeiture provision against an employee who was involuntarily terminated without fault"). Here, there is no dispute that each Appellee voluntarily left the partnership. Further, there was no finding that Pollard had enjoyed any financial benefit from enforcement of these competition conditions against others. By contrast, Plaintiffs received substantial distributions that were augmented, in part, from CFLP enforcing these provisions against other Terminated Partners.[7] Thirty-five years after *Pollard*, there is no basis in Delaware law for declining to apply explicitly bargained-for and agreed-to provisions among sophisticated limited partners who benefitted from those same provisions throughout the time they were in the Partnership.

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[7] As CFLP noted in its briefing, Appellee Cornaire once received more than $213,000 in distributions in a single year, and Appellee Boyer once received more than $74,000 in distributions in a single quarter. (A0118-A0125, A0139-A0150.)

Neither Plaintiffs nor the Court identified a single case under Delaware law that invalidated a provision conditioning payment of financial benefits on refraining from competition against the entity that provided the benefits. There is no such case.[8] Indeed, the Court identified only two Delaware law cases in which the court conducted a reasonableness analysis for a company's imposition of a monetary consequence on an employee who competed after departure. Those cases—*Faw, Casson & Co. v. Halpen*, 2001 WL 985104 (Del. Super. Aug. 7, 2001), and *Lyons Ins. Agency, Inc. v. Wark*, 2020 WL 429114, at *1 (Del. Ch. Jan. 28, 2020)—both involved liquidated damages provisions. (Op. at 59-61.) Based on these cases, the

[8] Of the states that have considered similar provisions, a majority would decline to review a condition of this nature as a covenant not to compete on the grounds that this provision is distinguishable. *See S. Farm Bureau Life Ins. Co. v. Mitchell*, 435 So. 2d 745 (Ala. Civ. App. 1983); *Collister v. Bd. of Trustees of McGee Co. Profit Sharing Plan*, 531 P.2d 989 (Colo. App. 1975); *Barr v. Sun Life Assur. Co. of Canada*, 200 So. 240 (Fla. 1941); *Stannard v. Allegis Grp., Inc.*, 2009 WL 1309751 (N.D. Ga. Apr. 27, 2009); *Barfield v. GuideOne Mut. Ins. Co.*, 2020 WL 13526604 (N.D. Ga. Mar. 24, 2020) (Slip Op.); *Trumble v. Farm Bureau Mut. Ins. Co. of Idaho*, 456 P.3d 201 (Idaho 2019); *Tatom v. Ameritech Corp.*, 305 F.3d 737 (7th Cir. 2002); *Allegis Grp., Inc. v. Jordan*, 951 F.3d 203 (4th Cir. 2020); *Alldredge v. City Nat'l Bank & Tr. Co. of Kansas City*, 468 S.W.2d 1, 4 (Mo. 1971); *Grebing v. First Nat. Bank of Cape Girardeau*, 613 S.W.2d 872 (Mo. Ct. App. 1981); *Kristt v. Whelan*, 164 N.Y.S.2d 239 (App. Div. 1957), *aff'd*, 155 N.E.2d 116 (N.Y. 1958); *J.W. Hunt & Co. v. Davis*, 437 S.E.2d 557 (S.C. Ct. App. 1993); *Exxon Mobil Corp. v. Drennen*, 452 S.W.3d 319 (Tex. 2014); *Rochester Corp. v. Rochester*, 450 F.2d 118 (4th Cir. 1971); *Freeze v. Am. Home Products Corp.*, 839 F.2d 415 (8th Cir. 1988); *Miller v. Foulston, Siefkin, Powers & Eberhardt*, 790 P.2d 404 (Kan. 1990); *Swift v. Shop Rite Food Stores, Inc.*, 489 P.2d 881, 883 (N.M. 1971); *E. Carolina Internal Med., P.A. v. Faidas*, 564 S.E.2d 53 (N.C. Ct. App.), *aff'd*, 572 S.E.2d 780 (N.C. 2002); *Ekman v. United Film Serv., Inc.*, 335 P.2d 813 (Wash. 1959).

Court reasoned that Delaware has a "distaste for liquidated damages provisions that restrain trade by requiring employees to pay former employers if they compete" and that "it is only a small step to move from a liquidated damages provision . . . to a forfeiture-for-competition provision excusing the employer from paying amounts if the employee competes." (Op. at 62, 65.)[9]

However, the Court largely disregarded subsequent decisions that have gutted any precedential value of *Faw, Casson, & Co.* or *Wark* on this point. In both *Hall*—a Superior Court case from 2005—and *Dunai*—a District of Delaware case from 2021—the courts enforced clawback-for-competition provisions in employee stock option agreements and specifically rejected any comparison of these provisions to liquidated damages clauses. *See W. R. Berkley Corp. v. Dunai*, 2021 WL 1751347, at *2 (D. Del. May 4, 2021) (upholding clawback of proceeds of option exercise; "This is not a $200,000 penalty for working for a competitor; it is returning a supplemental benefit for breaching the terms of a bargain. That is not a liquidated-damages provision."); *Hall*, 2005 WL 406348, at *4 ("the Court is unpersuaded by the Defendant's liquidated damage argument"). Those courts recognized that they must enforce the parties' agreed-upon bargain, even though, in those cases, the result was the clawback of prior payments to employees who competed after departure,

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[9] As discussed *infra* at 37-38, this "small step" requires specious logic.

rather than a mere non-payment of additional monies to a limited partner. These cases, not the aged speculation in *Pollard* or the analysis applied by a few courts to inapposite liquidated damages clauses, reflect the state of Delaware law. *See e.g., Smythe v. Raycom Media, Inc*., 2013 WL 4401811, at *3 (E.D. Mo. Aug. 15, 2013) (holding that, upon consideration of *Pollard* and *Hall*, regardless of whether the forfeiture provision in employee's stock option plan defined a duration or territory, it was enforceable under Delaware law).

1. Delaware's Public Policy Does Not Support Application of a Reasonableness Analysis

In the absence of supportive case law, the Court identified two public policy considerations to support a reasonableness review for forfeiture-for-competition provisions—neither of which is present in this case. The first is Delaware's "skepticism" of liquidated damages provisions enforcing restrictive covenants. (Op. at 59.) Second, the Court considered whether the condition to payment offends Delaware's public policy interest in protecting employees from restraints of trade that affect their ability to earn a livelihood. (Op. at 62-63.) These considerations are not persuasive.

First, as explained above, the Court's analogy of forfeiture-for-competition provisions to liquidated damages provisions is inconsistent with the Court's prior determination that the Competition Conditions are conditions, not liquidated damages provisions. (Op. at 37.) Even if they had been liquidated damages

provisions, they would be expressly permitted by DRULPA's enablement of forfeitures and penalties. In all events, the analogy to liquidated damages provisions has been rejected by the Delaware courts confronting this argument. Consequently, the Court's argument was devoid of, and directly refuted by, applicable legal authority. Furthermore, a liquidated damages provision requires a party to come out of pocket, potentially jeopardizing their finances. By contrast, the applicable conditions in the Partnership Agreement merely state that a former partner will not receive cash payments of Additional Amounts that have not been earned for which she does not satisfy the conditions precedent. The limited partners keep all distributions of profits previously paid to them.

Second, the Court's implication that the Partnership Agreement's conditions jeopardized Plaintiffs' ability to "earn a living" and "meaningfully deter[red]" them from "seeking other employment" was devoid of any support in the record. For example, rather than acknowledging the windfall sought by Plaintiffs, the Court assumed evidence not in the record (which would be error in a bench trial, much less on a summary judgment motion) when it concluded without any factual foundation that the Plaintiffs were forfeiting "earned compensation." (Op. at 64.) These payments constitute a supplemental benefit comprised of conditional payments. Plaintiffs lost out on that extra benefit due to their free choice and were not put out of work or restrained from working anywhere else. On the contrary, the record

shows they went to work directly for competitors. They were not, by any stretch, unable to earn a living. Instead, they demanded subsidies from their former partners with whom they directly competed and whose business they were damaging.

Third, the Court erred when it relied on hypotheticals as opposed to the undisputed facts of the case to find the condition to payment unenforceable. (*See* Op. at 48 (discussing a hypothetical "former Cantor Fitzgerald partner who worked as a broker in the Hong Kong office could withdraw from the Partnership, move to Europe, and switch professions by taking a position as an accountant for a large international accounting firm").) But even those hypotheticals failed to establish any sort of harm to the public interest that would override Delaware's keen interest in ensuring that parties to limited partnership agreements can reliably enforce them.

Fourth, the Court handicapped the ability of Delaware limited partnerships to compete against peers formed under the laws of other states. Many jurisdictions, including New York, recognize the employee choice doctrine and are consistent with Delaware's contractrarian approach to enforcement of business contracts. The employee choice doctrine is based on the rationale that employees can make rational, informed choices for themselves when signing agreements, and that those choices do not implicate public policy concerns where the employee's livelihood is not at risk. "[W]here an employee has the choice between not competing—thus retaining her benefits—or competing and losing them, the court will enforce the covenant

without regard to its reasonableness." *Morris v. Schroder Cap. Mgmt. Int'l*, 2005 WL 167608, at *5 (S.D.N.Y. Jan. 25, 2005), *aff'd*, 481 F.3d 86 (2d Cir. 2007)). "This 'employee choice doctrine' assumes that an employee who elects to leave a company makes an informed choice between forfeiting a certain benefit or retaining the benefit by avoiding competitive employment." *Lucente v. International Bus. Machines Corp*., 310 F.3d 243, 254 (2d Cir. 2002). "It is no unreasonable restriction of the liberty of a man to earn his living if he may be relieved of the restriction by forfeiting a contract right or by adhering to the provisions of his contract." *Kristt v. Whelan*, 4 A.D.2d 195, 199 (N.Y. App. Div. 1957).

Upholding the ruling below would require Delaware limited partnerships with similar agreements to effectively subsidize their competition. While Delaware entities would be required to pay a former limited partner who is actively assisting a competitor (exacerbating any business difficulties caused by the partner's departure), partnerships in many other states would not face such a burden. Therefore, the Court's ruling risks making foreign entities more competitive, Delaware entities less competitive, and the enforcement of Delaware limited partnership agreements less certain, thereby diminishing the incentive for businesses to organize within this state. That outcome undermines the longstanding pro-business tradition for which Delaware is widely known and which has led entities headquartered all over the nation to organize under the laws of Delaware.

III. THE COURT ERRED IN DECLINING TO SEVER OR BLUE-PENCIL THE PARTNERSHIP AGREEMENT

A. QUESTION PRESENTED

Whether the Court erred in failing to narrow provisions of the Partnership Agreement as specified in the severability clause instead of declaring it entirely unenforceable. (A1058-60, A2008.)

B. SCOPE OF REVIEW

Same. Alternatively, when asked to review a discretionary ruling of the trial court, this Court's scope of review is to determine whether the trial court committed an abuse of discretion. *See Berger v. Pubco Corporation*, 976 A.2d 132, 139 (Del. 2009).

C. MERITS OF ARGUMENT

First, the Partnership Agreement's severability clause should have ameliorated the Court's concerns by narrowing or eliminating certain provisions and enforcing the remainder of the contract. Second, any overbreadth should have been addressed through narrowing, rather than full-scale rejection, of the conditions.

1. <u>The Court erred by failing to apply the severability clause.</u>

DRULPA mandates that courts give "*maximum* effect to the principle of freedom of contract and to the enforceability of partnership agreements." 6 *Del. C.* § 17–1101(c) (emphasis added); *see also Norton*, 67 A.3d at 360. The Partnership Agreement contains a severability clause stating the parties' intent that any

unenforceable provision be "modified to the minimum extent necessary to cause it to be enforceable." (A0068 § 20.11.) The Court erred by failing to enforce this provision.

Delaware courts have "give[n] great weight to the [s]everability [c]lause" in partnership agreements, which are viewed as "safeguards that allow the otherwise untainted portions of . . . partnership agreement[s] to go into effect." *R.S.M. Inc. v. All. Cap. Mgmt. Holdings L.P.*, 790 A.2d 478, 496 (Del. Ch. 2001) (Strine, J.) (declining to invalidate entire amended partnership agreement based on invalidity of amendment to one provision). This is consistent with black-letter Delaware law, which is clear that "[a]n invalid term of an otherwise valid contract, if severable, will not defeat the contract." *Hildreth v. Castle Dental Centers, Inc.*, 939 A.2d 1281, 1283–84 (Del. 2007).

The Court acknowledged the severability provision but declined to enforce it without any explanation. (Op. at 15) This was error. The Court implied that the conditions could be enforceable if modified, but still ignored DRULPA and Delaware caselaw and struck the provisions in their entirety. For example, the Court acknowledged that Article XI's conditioned payment provisions have a narrower scope of prohibited activity than the Partner Obligations under Section 3.05, and, unlike those separate provisions, do not delegate any determination of "Competitive Activity" to the discretion of the Managing General Partner. Nonetheless, the Court

concluded that the Article XI conditions were wholesale unenforceable because the Partnership's "legitimate interest . . . in years one and two" in enforcing the conditions "is stale by years three and four." (Op. at 67.) Had the Court narrowed the time period to one or two years, the ruling would have been summary judgement in CFLP's favor.

Similarly, the Court failed to sever the portion of Section 3.05 it found unenforceable. (Op. at 42-44, 48 (considering a "hypothetical" in which "Cantor Fitzgerald could seek injunctive relief and withhold payment of all Conditioned Amounts").) This was particularly problematic because Section 3.05 was not squarely at issue. The Court's qualm with the Competition Conditions was their overlap with Section 3.05, an entirely separate provision of the Partnership Agreement that allowed for the possibility of injunctive relief. This analysis was inappropriate because the record is crystal clear that CFLP had never sought an injunction to enforce any part of the Partnership Agreement.

The Court's rejection of the parties' intent under the Partnership Agreement and Delaware law thus constitutes reversible error.

2. The Court should have blue-penciled the Partnership Agreement instead <u>of calling it wholesale unenforceable.</u>

The Court's concerns with overbreadth should have been addressed through narrowing, rather than full-scale rejection, of the Competition Conditions. As the Court acknowledged, the decision to apply a reasonableness analysis to a payment

condition in a partnership agreement was novel. This decision affected the rights of hundreds of CFLP partners, and countless other partnerships in Delaware who had the longstanding expectation their partnership agreements would be enforced according to their terms.

But instead of enforcing the Partnership Agreement as required by DRULPA and the Agreement's own terms, the Court eviscerated it and subjected it to a new, much higher level of scrutiny. The Court could have—and should have—accounted for its brand-new standard by blue-penciling the Competition Conditions to a reasonable level. The Court articulated no analysis of the facts and equities to explain why it declined to blue-pencil the Article XI conditions to the "legitimate" one to two years and allow them to survive.

The Court's abuse of discretion is evident in its election, on summary judgment, not to enforce any part of the conditions. Had the Court done so, it would have awarded summary judgment in favor of CFLP. Even under a narrowed interpretation, Plaintiffs' near-immediate competition left no doubt that they still would not have qualified to receive any additional payments in respect of their partnership interests. The inequitable effect of the Court's ruling is to punish CFLP and its limited partners by doing little more than granting Plaintiffs a windfall in the face of a contractual commitment to the contrary.

IV. THE COURT ERRED IN ITS CONSIDERATION OF THE PARTNERSHIP AGREEMENT BY MISCONSTRUING THE RELATIONSHIP BETWEEN THE PARTIES

A. QUESTION PRESENTED

Whether the Court's granting summary judgment to Plaintiffs was based on a misapprehension of the factual record. (A0941-46.)

B. SCOPE OF REVIEW

When asked to review a discretionary ruling of the trial court, this Court's scope of review is to determine whether the trial court committed an abuse of discretion. *See Berger v. Pubco Corporation*, 976 A.2d 132, 139 (Del. 2009).

C. MERITS OF ARGUMENT

Even if it had been correct for the Court of Chancery to apply a reasonableness standard to the Competition Conditions (it was not), the Court of Chancery misapplied that standard, by misapprehending the nature of CFLP's business and its relationship to Plaintiffs. The Court relied on cases that consider the interests of an employer, not a global partnership parent company. (Op. at 43.). The Court faulted the Partnership Agreement for "includ[ing] prohibited actions taken not just against Cantor Fitzgerald, but also 'any Affiliated Entity,'" and concluded that the scope was not necessary to protect considerations particular to Plaintiffs' employer, such as "Cantor Fitzgerald's good will and customer relationships." (Op. at 47-48.) These observations fundamentally misunderstand the nature of the relationship

between the parties as reflected in the record: CFLP was not Plaintiffs' employer, and Plaintiffs' obligations to their employer, Cantor HK, are governed by separate agreements which are not at issue and do not address their entitlement to the Conditioned Payments from CFLP. (Op. at 6 n.3.)

The bargain the parties made here was that, *in addition* to being compensated as employees of Cantor HK, Plaintiffs were permitted to become partners in CFLP, the ultimate parent company. As a result, while they were partners, Plaintiffs enjoyed (on top of benefits from their employer) distributions of profits derived from a portfolio of companies that spanned numerous lines of business across the globe—several of which did not involve Plaintiffs. These profit distributions to Plaintiffs totaled millions of dollars and reflected, among other things, the benefits of the protections of the Partnership encompassed in the Partnership Agreement. In return, Plaintiffs agreed that, to receive post-departure payments in respect of their Partnership interests, they would need to meet the Competition Conditions that ensured a former partner would not simultaneously benefit from the Partnership while competing against it.

Thus, there is a legitimate reason for the scope of the condition: the Partnership is not obligated to pay its competition. Likewise, even in the context of a sale of a business (from which the Court borrowed its reasonableness analysis), courts have long recognized a business's interest in preventing sellers from

competing in the geographic scope in which the buyer operates. *See, e.g., FP UC Holdings*, *LLC v. Hamilton*, 2020 WL 1492783, at *6 (Del. Ch. Mar. 27, 2020) (observing that, in the sale-of-business context, a buyer has a legitimate interest in "clear[ing] the seller from the competitive space"). Here, the Partnership operated—and paid as a supplemental benefit to Plaintiffs the profits derived from its operations—on a global scale.

The Court's failure to appreciate the parties' relationship of a partnership and its former equity holders puts the Court's decision out of touch with the law. Even states like California, which traditionally disfavor such conditions, recognize that departing partners can be bound not to compete with the business of the partnership they are leaving. *See* Cal. Bus. & Prof. Code § 16602 (noting that partners dissociating from partnership may agree not to "carry on a similar business within a specified geographic area where the partnership business has been transacted" while the partnership carries on there). This is another reason why the Court's concern about the scope of the conditions under Article XI is misplaced. As the record showed, the scope was appropriate given Plaintiffs' status as departing partners of a global business. Honoring the conditions for Additional Payments by declining to compete with the partnership they just left reflects the very obligations Plaintiffs benefited from while they were partners.

Had the Court correctly analyzed the factual record, the only supportable conclusion would have been that the conditions are reasonable in light of the nature of the partnership and Plaintiffs' undisputed actions that directly harmed CFLP.

CONCLUSION

For the foregoing reasons, the Court's decision should be reversed and summary judgment entered in favor of Appellant CFLP.

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CERTIFICATE OF SERVICE

I, Skyler A. C. Speed, Esquire, do hereby certify that on June 27, 2023, I caused a copy of the foregoing document to be served on the following counsel in the manner indicated below.

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