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Case Number 162,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEES' ANSWERING BRIEF

COOCH & TAYLOR P.A

Blake A. Bennett (#5133)
The Brandywine Building
1000 N. West Street, Suite 1500
Wilmington, DE 19801
(T): (302) 984-3800

Attorneys for Plaintiffs Below, Appellees Brad Ainslie, Jason Boyer, Christophe Cornaire, John Kirley, Angelina Kwan, and Remy Servant

Of Counsel:

Kyle W. Roche
KYLE ROCHE P.A.
260 Madison Avenue, 8th Fl.
New York, NY 10016
(T): (917) 909-8766

Velvel Freedman
Alex Potter
FREEDMAN NORMAND FRIEDLAND LLP
99 Park Avenue, Suite 1910
New York, NY 10016
(T): (646) 970-7509

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NATURE AND STAGE OF PROCEEDINGS

This case concerns Appellant Cantor Fitzgerald Limited Partnership's ("CFLP") decade-long effort to strip millions of dollars owed to former limited partners through the enforcement of unreasonably broad forfeiture provisions that are untethered to its legitimate economic interests. In a 72-page opinion that resolved the parties' simultaneous summary judgment motions (the "Opinion"), the Court of Chancery carefully considered the interlocking provisions contained in CFLP's limited partnership agreement (the "LP Agreement") that are designed to restrict competition from former partners. Finding that CFLP had "advanced no convincing rationale" to justify the forfeiture provisions at issue, the Court of Chancery correctly found these provisions facially overbroad and void against Delaware public policy.

Appellees Brad Ainslie, Jason Boyer, Christophe Cornaire, Angelina Kwan, John Kirley, and Rémy Servant (collectively, "Plaintiffs") are each former limited partners of CFLP and each were awarded or purchased partnership units in connection with their employment at a CFLP affiliate named Cantor Fitzgerald (Hong Kong) Capital Markets Ltd. ("Cantor HK"). Shortly after they left, CFLP invoked a series of provisions in the LP Agreement, referred to below as the "Conditioned Payment Device," to deny both payments owed in connection with

grants they were awarded and money they directly invested into the partnership as capital account contributions.

As detailed in the Opinion, the scope of this Conditioned Payment Device is incredible, as it:

- contains no geographic limitation;
- is four-years in duration;
- is interpreted and applied at the discretion of CFLP's managing general partner Howard Lutnick;
- covers dozens of industries and affiliated entities unrelated to a former partner's actual role; and
- is estimated by CFLP itself to strip 40% of former partners of their investments.

As the Court of Chancery recognized, the scope of these provisions is so remarkable that former partners violate these provisions unknowingly. CFLP's use of the Conditioned Payment Device against Plaintiff Cornaire is emblematic of its unreasonable scope. Cornaire was denied the compensation he was owed after he: (i) took a year sabbatical; (ii) was told by CFLP administrators prior to his departure that he was a "good leaver" and that he would be "paid in full"; and (iii) moved

across the world from Hong Kong to New York to work in a different industry and service entirely different clients.

In the face of these facts, CFLP confusingly complains that the Court of Chancery focused on "hypotheticals that bore no resemblance to the record." While the record *does* support the *in terrorem* concerns evoked in the Opinion below, the Court of Chancery correctly identified that the question before it was whether the Conditioned Payment Device was unenforceable *as written*. Following decades of Delaware case law that considered the same question, the Court of Chancery appropriately found that the forfeiture-for-competition provision was void as an unreasonable restraint of trade. The Opinion and the Order below should be affirmed.

SUMMARY OF ARGUMENT

CFLP's opening brief asks this Court to overturn the Court of Chancery's detailed scrutiny of certain provisions in its LP Agreement by fashioning an unprecedented rule that would insulate all forfeiture-for-competition provisions from reasonableness analysis. In advancing this request, CFLP ignores the Delaware General Assembly's express public policy interest in voiding unlawful restraints on trade and misinterprets two Delaware cases that do not support its proposed rule. CFLP seeks insulation from any review of the Conditioned Payment Device because it is "patently unreasonable" and cannot withstand *any* level of scrutiny.

1. Denied. The Court of Chancery correctly recognized that the central issue in this case concerned "the competing policy interests of enforcing private agreements on one hand, and disfavoring restraints of trade and allowing individuals to freely pursue their profession of choice, on the other." The Court did not ignore the Delaware Revised Uniform Limited Partnership Act ("DRULPA"); it rejected CFLP's "conclusory argument" that its allowance for penalties in a limited partnership shields such provisions from public policy concerns. The Delaware General Assembly has articulated a public policy against "every contract" that is "in restraint of trade or commerce" and this policy does not exempt limited partnerships. CFLP's arguments ignore this public policy.

2. Denied. The Court of Chancery properly analyzed the Conditioned Payment Device for reasonableness and scrutinized its scope against CFLP's legitimate interests. The distinction CFLP draws between partnership agreements and employment contracts is unsupported by the law. Delaware Courts have applied the reasonableness standard to non-compete clauses contained in partnership agreements. There is no Delaware case indicating that forfeiture-for-competition provisions are *per se* reasonable, and the Opinion is consistent with Delaware authority considering this issue.

3. Denied. CFLP's arguments concerning severability and blue penciling were not presented to the Court of Chancery and therefore should be rejected. These arguments also fail on their merits. The Court *did* enforce the severability provision; it considered each of the unlawful conditions in isolation and found them each to be unenforceable. It did not strike any other provisions of the LP Agreement. CFLP does not articulate which provisions should have been severed to reach a different result than the Court of Chancery. Each of the provisions at issue are global in their reach and each are applied to CFLP *and* all its affiliated entities. The relief CFLP seeks is more appropriately characterized as blue penciling because it is seeking to *alter* certain unenforceable provisions, not *sever* them. This request should also be denied. CFLP cites no authority in support of its request to blue pencil the LP

Agreement. Blue penciling is also inequitable because it would shift all risk away from CFLP for drafting unenforceable clauses and onto former limited partners, like Plaintiffs, who would be required to guess how a Court would later reshape provisions governing their economic rights.

4. Denied. The Court of Chancery did not misconstrue the nature of the relationships between the parties. It recognized that each Plaintiff was employed by a Cantor affiliate and that each Plaintiff also received limited partnership interests in CFLP in connection with that employment. Indeed, it was this distinction, in part, that led the Court of Chancery to apply "the more lenient" review afforded to restrictive covenants in the sale of a business.

COUNTERSTATEMENT OF FACTS

A. **The LP Agreement**

(1) The Partnership Units

Limited partnership interests in CFLP are governed by the LP Partnership Agreement. Op. 7. The LP Agreement contemplates different partnership interests in CFLP. Op. 10-11. Both "Grant Units" and "Matching Grant Units" represent "limited partnership interests in CFLP" and may be issued to Cantor employees at CFLP's "discretion." A0027 at §§ 5.01(d), (e). "High Distribution II Units" (or "HDII Units") likewise constitute partnership interests in CFLP but, in contrast to "Grant Units" and "Matching Grant Units," are *purchased* by Cantor employees. Op. 10-11; A0829 at 41:11-21.

Under the Partnership Agreement, CFLP is obligated to create a "Capital Account" for each holder of HDII Units. Op. 10-11. That Capital Account is "credited" with "the amount of any capital contributions made by such Partner to the Partnership" and "the amount of any Income allocated to such Partner" under Article VII of the Partnership Agreement. *Id.*; A0031 at § 6.02(b). It is "charged" with "the amount of any Loss allocated to such Partner pursuant to Article VII," "the amount of any distributions made to such Partner," and "the fair market value" of "any Partnership property distributed to such Partner." *Id*.

(2) The Restrictive Covenant Device

Section 3.05(a) of the LP Agreement, as CFLP concedes, is a noncompete provision. A0834 at 60:5-61:19. The Court of Chancery defined this provision as the "Restrictive Covenant Device." Op. 7. The Restrictive Covenant Device imposes certain "Partner Obligations" on current and former partners of CFLP. *Id*. Pursuant to those "Partner Obligations," a partner is prohibited from engaging in "Competitive Activity" within the "Restricted Period." *Id*. at 7-8.

The term "Competitive Activity" is defined to include a host of activities, which are broken down into five subsections. *Id.* at 7-8 (listing out subsections). The "Restricted Period" for conduct falling within subsection (A) covers "the two-year period immediately following the date" of their voluntary *or* involuntary departure, whereas the "Restricted Period" for conduct falling within the remaining four subsections ends one year earlier. *Id.*

The term "Competing Business," as referenced in the definition of "Competitive Activity," is defined to include any activity that:

> (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. at 8-9.

An "'Affiliated Entity' is defined as 'the limited and general partnerships, corporations or entities owned, controlled by or under common control with the Partnership,'" and includes entities both *related* and *unrelated* to Plaintiffs' employment. *Id.* at 9.

The scope of the Restrictive Covenant Device is incredible. There are no geographic limitations on *any* of the restrictions in the Restrictive Covenant Device. Op. 44. The determination of whether Plaintiffs or any other departing partner breached the Restrictive Covenant Device is determined by Lutnick, as the Managing General Partner, "in [his] sole and absolute discretion, which determination will be final and binding." *Id*.; A0025 at § 3.05(a)(vi). This authority expands the scope of prohibited employment from competing activities to employment that may not actually compete so long as Lutnick believes that the activity fell within the scope of Competitive Activity. Op. 50.

The term "Competitive Activities" prohibits actions not just competing against CFLP, but also "any Affiliated Entity." Op. 47. Prohibited solicitation is not limited to successfully convincing a CFLP partner to withdraw to work for a competitor; it also includes acting in concert with others to attempt to "solicit, induce

or influence" a consultant to terminate "other business arrangements" with CFLP or a CFLP affiliate, and inducing a customer or employee of a CFLP affiliate to "adversely affect their relationship" with the affiliate. *Id*. Other prohibited activities include assisting others in becoming "connected with any Competing Business" of an affiliate and taking "any action that results directly or indirectly in revenues or other benefits for that Limited Partner or any third party that is or ***could*** be considered to be engaged in such Competitive Activity." *Id.* (emphasis added).

As the Court of Chancery noted, under these standards, former limited partners are likely to unknowingly breach the Restrictive Covenant Device. *Id*. 47-48.

(3) The Conditioned Payment Device

Under Section 3.05(b) of the LP Agreement, if "a Limited Partner breaches his, her or its Partner Obligations, then in addition to any other rights or remedies the Managing General Partner may have," CFLP "shall redeem all of the Units held by such Partner for a redemption price equal to their Base Amount, and such Partner shall have no right to receive any further distributions," including "any Additional Amounts" or "other distributions" to which "such Partner otherwise might be entitled." A0025-26.

The upshot of Section 3.05(b) is that, as a remedy for a former partner's breach of a Partner Obligation, CFLP can buy that former partner's partnership interest for less than the value of the former partner's Capital Account, while retaining all of the former partner's Additional Amounts. Op. 11. CFLP concedes that, as a result of this provision, former partners that breach Section 3.05(a) typically do not receive the full amount that they paid for their limited partnership interests back from CFLP; instead, CFLP keeps that money. A0836-37. The Court of Chancery referred to this as the "No Breach Condition." Op. 12.

In addition to Section 3.05(b), Section 11.04(a) provides CFLP with a similar remedy. A0047. Under Sections 11.02(a)(i), 11.03(a), and 11.04(a), when a partner withdraws or is terminated from CFLP, CFLP redeems the former partner's partnership interest for the "Base Amount" and agrees to pay the former partner's "Additional Amounts" in four installment payments over the succeeding four years. A0045-47. Section 11.04(a), however, grants CFLP the remedy of retaining those "Additional Amounts" if the former partner breaches his or her Partner Obligations. A0047. Like the remedy described in Section 3.05(b), Section 11.04(a) thus permits CFLP to retain the difference between a former partner's Capital Account and that former partner's "Base Amount." A0047. The Court of Chancery referred to this as the "Competitive Activity Condition." Op. 12.

Accordingly, the Competitive Activity Condition and the No Breach Condition each can be triggered to deny payment to a former limited partner. *Id.* The Court of Chancery referred to these conditions collectively as the Conditioned Payment Device. *Id.* 10-13. The purpose of these provisions is undisputed: to provide an "incentive" for former partners "to not compete" with CFLP. *Id.* Or, as Lutnick put it: "So *we get extra money* if you act in a particular way." A0847 at 111:12-18 (emphasis added). Indeed, CFLP's internal documents show that CFLP uses the Conditioned Payment Device to refuse payment to an estimated 40% of former partners. B32.

B. CFLP Refuses to Pay Plaintiffs for Their Partnership Interests

(1) Plaintiffs are Former Employees at Cantor HK and Former Limited Partners at CFLP

Plaintiffs are former limited partners at CFLP and former employees at Cantor HK. Op. 6. They each worked at Cantor HK until 2010 or 2011. *Id*. at 15. While at Cantor HK, Plaintiffs Ainslie and Boyer were the Co-Heads of Asian Equities. A0616 at 37:4-17; A0444-45 at 29:23-30:25. Plaintiff Cornaire was a Managing Director in Equity Derivatives, and Plaintiffs Kirley and Servant were equity derivatives brokers. A0706 at 22:20-24, 31:13-20; A0782-83 at 13:16-15:1; A0517-18 at 20:4-23:9. Plaintiff Kwan served in administrative capacities, first in compliance and later as the COO of Cantor HK. A0365 at 19:20-20:10.

Plaintiffs each received Grant Units over the course of their employment, and Boyer and Cornaire both received Matching Grant Units contemporaneous with their purchases of HDII Units. B17-22. Each Plaintiff, except for Kirley, also purchased HDII Units. *Id*. Collectively, Plaintiffs paid CFLP millions of dollars to acquire their HDII Units. Op. 17.

(2) After Plaintiffs Left, Cantor HK Sued Them and Lost

Plaintiffs each left Cantor HK in 2010 and 2011. Op. 11. Boyer and Ainslie became employed by a Hong Kong-based startup called Mansion House, which became Reorient Financial Markets ("Reorient"). A0304. Cornaire, Servant, and Kirley relocated to the United States and became employed by ICAP, where Kirley focused on trading OTC options in the United States market and Servant focused on trading United States listed products. A0305. Kwan started her own consulting firm, Stratford Finance Limited, and served on the board of directors for Reorient. A0375 at 60:16-17.

In 2011, after Ainslie and Boyer announced that they would be leaving Cantor HK to join Reorient, Cantor HK sued them in Hong Kong court, alleging that they were in violation of non-compete provisions contained in their employment agreements. Op. 17. The Hong Kong court expressly found that Reorient was not a "competitor" of Cantor HK. B6-7, ¶¶ 58-73 ("It is difficult to see, by any stretch of

the imagination, how at its inception Mansion House could be regarded as a 'competitor' of a leading and long-established global enterprise such as the Cantor Fitzgerald group."). Based on these findings, the Hong Kong court found that neither Ainslie nor Boyer breached their fiduciary duties. *Id.* ¶ 74.

Plaintiffs Ainslie and Boyer argued below that the Hong Kong ruling precluded CFLP from asserting the Conditioned Payment Device against them. A1007-14. The Court of Chancery did not reach this issue because it found the Conditioned Payment Device facially unenforceable.

(3) CFLP Exercises the Conditioned Payment Device to Deny Payment to Plaintiffs

Within a year of their respective departures, Lutnick, in his capacity as CFLP's Managing General Partner, determined that each Plaintiff had breached a Partner Obligation by accepting employment or otherwise performing services on behalf of a Competing Business. Op. 15-16. Relying on Sections 3.05 and 11, CFLP refused to pay Plaintiffs their "Additional Amounts," as well as the amounts payable for their Grant Units and Matching Grant Units. Op. 15-17. The total amounts at issue for each Plaintiff ranged from under $100,000 to nearly $5.5 million. *Id*. at 17.

At the time, Plaintiffs Cornaire, Kirley, and Servant had moved halfway around the world, from Hong Kong to the New York City area. A0305. This did not matter to CFLP. Specifically, it asserted that Cornaire, Kirley, and Servant had each

breached their Partner Obligations by providing services for ICAP in New York City, notwithstanding that, at ICAP, they focused on trading products *in United States markets*, whereas, while at CFLP, they had focused on trading products *in Asian markets* for clients located outside of the United States. A0710 at 38:18-25; A0715 at 60:8-17; A0785 at 26:2-10; A0528 at 65:12-23.

The facts relating to CFLP's exercise of the Conditioned Payment Device against Cornaire are particularly egregious. Cornaire took a sabbatical in 2010. A0715 at 58:18-59:14. Before he left on sabbatical, he ensured that CFLP would treat him as a "good leaver" such that he would be entitled to payment for his partnership interests and a waiver of any forfeiture for engaging in Competitive Activity. A0756-57 at 224:2-225:14, 227:14-229:5. The evidence shows that CFLP acknowledged Christophe requested to be treated as "a good leaver in regard of his partnership" – and there is no indication in the record he was ever denied that request. B24. When Cornaire was informed that CFLP had determined him in breach of the Partnership Agreement's "non-compete obligations," he responded that he was "told prior to my departure that i [sic] will be paid in full." B25-28.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY WEIGHED DELAWARE'S COMPETING POLICY INTERESTS IN ENFORCING PRIVATE AGREEMENTS AND DISFAVORING RESTRAINTS OF TRADE.

A. Question Presented

Whether the Court of Chancery appropriately weighed the competing public policy interests Delaware has in enforcing private agreements on one hand and scrutinizing unreasonable restraints of trade on the other in finding the Conditioned Payment Device unenforceable. Plaintiffs raised these policy issues below (A0991-A1003) and the Court of Chancery considered them (Op. 42-67).

B. Scope of Review

The Supreme 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).

C. Merits of Argument

As set out by the Court of Chancery, the issues in this matter put "front and center . . . the competing policy interests of enforcing private agreements on one hand, and disfavoring restraints of trade and allowing individuals to freely pursue their profession of choice, on the other." Op. 57-58. CFLP's assertion (at 20) that the Court "ignored" DRUPLA simply fails to confront the Court of Chancery's

detailed analysis on this issue. There is no basis to assert that the General Assembly has insulated anticompetitive provisions in limited partnership agreements from scrutiny because 6 *Del. C.* § 2103 says the opposite. The Court of Chancery's ruling should be affirmed.

(1) The Court's Decision Is Consistent with Delaware Public Policy.

CFLP argues *for the first time* (at 25-26) that "[n]o Delaware statute sets forth any public policy against enforcement of conditions on payments to terminated limited partners in a limited partnership agreement."[1] CFLP is wrong. Title 6 of the Delaware Code – the same title governing limited partnerships – states "every contract . . . in restraint of trade or commerce of this State shall be unlawful." 6 *Del. C.* § 2103. The language of this statute, which is virtually identical to the opening provision of the Sherman Antitrust Act, evidences the "Delaware Legislature's intention to adopt not only the language but the judicial interpretation and application of the Sherman Act." *Hammermill Paper Co. v. Palese*, 1983 WL 19786, at *4 (Del. Ch. June 14, 1983) (citing 6 *Del. C.* § 2113).

[1] Notably, CFLP failed to argue below that there is no legislative policy against unreasonable conditions on post-termination payments. A1052-53 (arguing simply that DRUPLA authorizes a partnership agreement to include penalties – not that such provisions are insulated from any public policy scrutiny). Accordingly, neither Plaintiffs nor the Court of Chancery had the opportunity to point out the fatal flaw in the logic that CFLP now presents to this Court.

There is "little difference between [antitrust scrutiny of post-employment restraints] and the traditional criteria applied to covenants not to compete under Delaware law." *Id.* at *5. The General Assembly did not exempt limited partnership agreements from such scrutiny. *See* 6 *Del. C.* § 2104. CFLP's argument that "there is no countervailing public policy in Delaware against conditions on post-termination payments to a limited partner" is entirely without merit and contradicted by statute.

Thus, contrary to CFLP's assertion (at 24), the Court of Chancery did not "brush[] aside DRUPLA" in considering the enforceability of the Conditioned Payment Device. Rather, it found that the enforceability of the economic consequences of the Conditioned Payment Device turned on "the enforceability of the underlying promise that was breached." Op. 35; *see also Geronta Funding v. Brighthouse Life Ins. Co.*, 284 A.3d 47, 68 (Del. 2022) (citing RESTATEMENT (SECOND) OF CONTRACTS § 197 for the rule that "courts will not enforce an illegal contract"). In examining the enforceability of the promises underlying the Conditioned Payment Device, the Court of Chancery carefully weighed "the competing policy interests of enforcing private agreements" and Delaware's interest in refusing to enforce "restraints of trade" that are "designed to deter competition

and have a restraining influence." Op. 54. As set forth below (*see infra* Section II(c)(2)), the Court of Chancery correctly found the restraint at issue unreasonable.

(2) The Court's Decision Is Consistent With DRUPLA.

CFLP cites no case law – and Plaintiffs are aware of none – for the proposition that DRULPA exempts limited partnerships from scrutiny under the reasonableness standard. To the contrary, Delaware courts have applied the reasonableness standard to non-compete clauses contained in partnership agreements. Op. 23; *KPMG Peat Marwick LLP v. Fernandez*, 709 A.2d 1160, 1161 (Del. Ch. 1998) (noting Delaware law requires analyzing a former partner's agreement not to compete for whether its "purpose and reasonable operation is to protect the legitimate interests of the former employer"); *see also Deloitte & Touche USA LLP v. Lamela*, 2005 WL 2810719, at *11-12 (Del. Ch. Oct. 21, 2005) (applying Florida law and refusing to enforce a restrictive covenant in a partnership agreement against a former partner from offering services to partnership clients "for whom [he] did not provide professional services while he was a partner"); RESTATEMENT (SECOND) OF CONTRACTS 188(2)(c), Comment h. ("*Promise by partner.* A rule similar to that applicable to an employee or agent *applies to a partner* who makes a promise not to compete that is ancillary to the partnership agreement *or to an agreement by which he disposes of his partnership interest*.") (emphasis added).

Setting aside Delaware's enshrinement of the public policy against unreasonable restraints of trade (as set forth above), the Court also scrutinized CFLP's misinterpretation of DRUPLA. Specifically, the Court rejected CFLP's "conclusory argument" regarding DRUPLA, finding "Section 17-306's leniency [for penalty provisions] to stop short of consequences to conditions precedent." Op. 66 n. 199 (explaining that "even the most generous reading of the statute covers only consequences flowing from a limited partner's breaches and failures to 'comply' with a condition, i.e., a condition that imposes some obligation on that partner"). In other words, DRUPLA does not permit the enforcement of penalties that are conditioned on an otherwise unenforceable promise.

CFLP's strained reading of DRUPLA also fails because the provision they invoke does not speak to penalties impacting payments owed to *former* limited partners. At the time that CFLP invoked the Conditioned Payment Device, none of the Plaintiffs were limited partners. That's because under the LP Agreement, CFLP purchases the limited partnership interest "upon any Termination . . . of a Limited Partner," such that each Plaintiff ceased being limited partners the day they left the partnership. *See* A0045 § 11.02. DRUPLA is silent as to the permissibility of penalties on former limited partners. *See* §§ 17-306(1)-(2).

The law CFLP relies upon is inapposite. The cases CFLP cites for its argument that the Court disregarded DRUPLA mostly concern disputes arising from agreements that eliminate certain fiduciary duties. But DRUPLA provides that a partnership agreement can expand or restrict any fiduciary duties, except for the implied contractual covenant of good faith and fair dealing. 6 *Del. C.* § 17-1101. None of the cases that CFLP relies upon concern issues germane to free competition. *See Nemec v. Shrader*, 991 A.2d 1120 (Del. 2010) (limited partnership agreement "superseded and negated any distinct fiduciary duties"); *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160 (Del. 2002) (same); *Ryan v. Buckeye Partners, L.P.*, 2022 WL 389827, at *9 (Del. Ch. Feb. 9, 2022) (same); *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 361-62 (Del. 2013) (same); *In re K-Sea Transp. Partners L.P. Unitholders Litig.*, 2011 WL 2410395, at *8 (Del. Ch. June 10, 2011) (same); *Sonet v. Timber Co., L.P.*, 722 A.2d 319, 322-23 (Del. Ch. 1998) (same); *In re Cencom Cable Income Partners*, 1997 WL 666970, at *1 (Del. Ch. Oct. 15, 1997) (same); *Emps. Ret. Sys. of City of St. Louis v. TC Pipelines GP, Inc.*, 2016 WL 2859790, at *1 (Del. Ch. May 11, 2016) (same); *Miller v. Am. Real Estate P'rs, L.P.*, 2001 WL 1045643, at *1 (Del. Ch. Sept. 6, 2001) (same).

RSUI Indem. Co. v. Murdock, 248 A.3d 887 (Del. 2021) – one of the few cases CFLP cites outside of the fiduciary duty context – supports Plaintiffs' position.

There, the Supreme Court was confronted with the question of whether Delaware "ha[s] a public policy against the insurability of losses occasioned by fraud so strong as to vitiate the parties' freedom of contract." *Id.* at 903. In answering this question, this Court found that the General Assembly expressly authorized "corporations to afford their directors and officers broad indemnification and advancement rights," which was "the opposite of the policy the [appellant] asks us to adopt." *Id.* (citing 8 *Del. C*. § 145).

Here, Plaintiffs invoke the public policy enshrined by the General Assembly – not a "theoretical" one as CFLP suggests. AB 28. The Court of Chancery recognized Delaware's strong interest in "encouraging competition and ensuring that individuals are free to earn a living" and the role of the "reasonableness standard [in] permit[ting] employers to enforce restrictive covenants, but only where the circumstances show it is fair and reasonable to do so." Op. 58-59. It did not ignore DRUPLA; it simply rejected CFLP's "conclusory argument" that it insulates forfeiture-for-competition provisions from scrutiny.

II. THE COURT OF CHANCERY CORRECTLY FOUND THE CONDITIONED PAYMENT DEVICE IS PREDICATED ON AN UNENFORCEABLE PROMISE

A. Question Presented

Whether the Court of Chancery correctly found that the forfeiture-for-competition provision contained within the LP Agreement was an unenforceable condition. Plaintiffs argued below that Delaware law requires reasonableness review for provisions like the Conditioned Payment Device (A0991-A1003) and the Court of Chancery considered the authority Plaintiffs cited (Op. 42-67).

B. Scope of Review

See § I(B) above.

C. Merits of Argument

CFLP does not (and cannot) assert the provisions at issue are reasonable. Instead, it effectively argues that this Court should adopt a rule that would insulate "competition conditions in a partnership agreement" from reasonableness scrutiny. AB 29. There is no legal basis for such a rule. Indeed, the adoption of such a rule would allow partnerships and their affiliates who employ thousands (like CFLP and Cantor HK here) to evade reasonableness review all together leading to absurd incentives.

The Court of Chancery appropriately recognized that longstanding Delaware law rejects such a rule and requires that the scope of anticompetitive provisions like the ones in the LP Agreement be tethered to a legitimate business interest. Op. 61-63. CFLP's attempts to distinguish this authority requires it to cherry-pick language from these cases while ignoring their underlying reasoning.

(1) Forfeiture-For-Competition Provisions Must Be Reasonable

Delaware Courts should review forfeiture-for-competition provisions for reasonableness because they implicate the same set of public policy concerns – competition and the freedom to earn a living – that traditional restrictive covenants implicate. None of the Delaware authority cited by CFLP suggests otherwise.

The Third Circuit confronted the issue before this Court thirty-five years ago. *Pollard v. Autotote, Ltd*., 852 F.2d 67 (3d Cir.), amended, 872 F.2d 1131 (3d Cir. 1988). In *Pollard*, the court noted the absence of controlling state law and predicted Delaware courts would evaluate forfeiture-for-competition provisions for reasonableness. *Id.* at 70-72. The court relied upon "the similarity between the enforceability of a forfeiture-for-competition provision in a management incentive compensation plan and a covenant not to compete in an employment contract" in predicting that "Delaware courts would apply the same test of reasonableness in both contexts." *Id.* at 72.

CLFP's attempts to distinguish *Pollard* are unavailing. *First*, CFLP claims that the former employee in *Pollard* was a "general manager making $55,000 annually [and] not a sophisticated and highly compensated financial professional" like Plaintiffs. AB 29. While this distinction is hardly relevant to the underlying policy concerns of restrictive covenants, the distinction is also not accurate. The former employee in *Pollard* had worked at his employer for "sixteen years," the agreement at issue concerned "a 'Management Incentive Compensation Plan' for selected *key executives*," and the compensation at issue was earned in connection with his employment. 852 F.2d at 69 (emphasis added). Two of the Plaintiffs here, Kirley and Servant, were derivatives brokers – not high-ranking executives – and the amounts at issue for them are comparable to the $52,111.50 at issue in *Pollard*. *Compare id.* at 70 *with* Op. 16-17 (showing $96,651 at issue for Kirley and $201,179 at issue for Servant).

Next, CFLP distinguishes *Pollard* (at 30) on the basis that the former employee did not leave voluntarily. But the question of enforceability is whether the *covenant itself* is "facially invalid." *Delaware Elevator, Inc. v. Williams*, 2011 WL 1005181, at *10 (Del. Ch. Mar. 16, 2011); *see also EDIX Media Grp., Inc. v. Mahani*, 2006 WL 3742595, at *7 (Del. Ch. Dec. 12, 2006) (asking "[m]ay the covenant not to compete be enforced as written?"). For purposes of the Conditioned

Payment Device, the LP Agreement does not distinguish between partners who leave their employment voluntarily with those who are terminated. A0020 (defining "Terminated" to mean "the actual termination of the employment of a Partner, such that such Partner is no longer an employee of the Partnership or any Affiliated Entities, *for any reason whatsoever*, including, but in no way limited to, termination by the employer with or without cause, by the Partner or by reason of death") (emphasis added). CFLP cites no law for the proposition that the reasonableness of the Conditioned Payment Device should be reviewed *as applied*.

Since *Pollard*, Delaware Courts have applied this straightforward rationale to similar provisions that discourage competition. In *Faw, Casson & Co., L.L.P. v. Halpen*, the Superior Court was faced with a liquidated damages provision in an employment agreement that caused a departing employee to pay a sum of money if the employer's clients followed him. 2001 WL 985104, *2-3 (Del. Super. Aug. 7, 2001). In examining this provision, the Superior Court reasoned that "[a]s a general rule, the underlying noncompetition agreement must also pass the test of reasonableness" for the associated "damages provision to be enforceable." *Id.* at *2 n. 1 (citations omitted). Otherwise, if such clauses were to "be applied indiscriminately, then it would have an unlawful *in terrorem* purpose and effect." *Id.* at *3. Nearly twenty years after *Faw*, the Delaware Chancery Court adopted the

same "sound reasoning" to invalidate a similar liquidated damages provision that was "untethered to [the employer's] reasonable interests in preventing competition" by ex-employees. *Lyons Ins. Agency, Inc. v. Wark*, 2020 WL 429114, at *7 (Del. Ch. Jan. 28, 2020).

Applying the same reasoning set forth in *Halpen* and *Wark*, the Court of Chancery reasoned that it was only a "small step to move from" reviewing "a liquidated damages provision" for reasonableness to applying the same inquiry to a forfeiture-for-competition provision. Op. 59-62. In recognizing the potential benefits a forfeiture-for-competition clause may have in some instances compared to injunctive relief, the Court properly found that application of the "reasonableness standard to forfeiture-for-competition provisions can weed out abusive and harmful forfeiture provisions while still permitting employers to discourage competition insofar as their interests warrant it." Op. 62-63.

Forfeiture-for-competition provisions are often more effective restraints than noncompetes because the employer does not need to rush to court to enjoy its anticompetitive effect. The employer can simply withhold the amounts owed and force the former employee to incur the cost of litigation. In this way, forfeiture-for-competition, unlike noncompetes, can be self-enforcing. The self-enforcing nature

of the Conditioned Payment Device has allowed CFLP to deny Plaintiffs use of money they directly invested into the partnership for *more than a decade*.

CFLP confusingly claims (at 32) that the Court "disregarded subsequent decisions that have gutted any precedential value of [*Halpen*] or *Wark*." The two cases they cite – *W. R. Berkley Corp. v. Dunai*, 2021 WL 1751347, at *2 (D. Del. May 4, 2021) and *W.R. Berkley Corp. v. Hall*, 2005 WL 406348, at *4 (Del. Super. Feb. 16, 2005) – were considered by the Court of Chancery in its review of the Delaware authority. Op. 53 n. 162. The Court of Chancery's decision in *Wark* also postdates the Superior Court's decision in *Hall* by fifteen years, making it unclear why CFLP believes that *Hall* "gutted" its "precedential value."

More fundamentally, the underlying facts and reasoning in *Dunai* and *Hall* support the Court of Chancery's conclusion. In *Dunai*, the forfeiture-for-competition clause at issue provided that the employer could demand repayment of stock grants if a former employee competed within one year of termination. 2021 WL 1751347 at *1. The stock grants at issue vested this determination with a "Compensation Committee." *Id.* Even though the court found the forfeiture-for-competition clause at issue was not a "noncompete," *it nevertheless* proceeded to apply a reasonableness analysis, expressly finding the provision at issue "reasonable." *Id.* at *2 (recognizing

that the question of reasonableness is a "question of law that I can resolve on a motion to dismiss").

In *Hall*, the forfeiture-for-competition provision was even narrower: it could only be enforced within six months of termination,[2] the forfeited amount was not the entire value of the grant (only the difference between the option price and the stock price), and like the clause in *Dunai*, its enforcement was controlled by a committee. 2005 WL 406348, at *2-3. Given its narrow scope, there was "no dispute [amongst the parties] that the provisions of the agreement are reasonable," and thus no occasion for the court to scrutinize its overbreadth. Thus, both *Dunai* and *Hall* stand for the unremarkable proposition that forfeiture-for-competition provisions can be enforceable so long as they are reasonable. *See* Op. 62 ("Whether a forfeiture-for-competition provision will effectively restrain trade or an employee's ability to earn a living will vary by provision and by employee.").

CFLP's citation to out of state authority is inapposite. None of the cases concern forfeiture of direct investments like the capital account contributions at issue

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[2] Unlike the Conditioned Payment Device, the forfeiture-for-competition provision in *Hall* was *only* enforceable if (1) the employee engaged in a "Noncompetitive Action" within six months of departure ***and*** (2) exercised the options at issue within the six months prior to his departure. 2005 WL 406348, at *2. The Conditioned Payment Device, on the other hand, applies to partnership units acquired at *any point* during the former partner's employment.

here. *See e.g. S. Farm Bureau Life Ins. Co. v. Mitchell*, 435 So. 2d 745, 746 (Ala. Civ. App. 1983) (payments at issue concerned insurance renewal premium commissions); *Barr v. Sun Life Assur. Co. of Canada*, 200 So. 240, 240 (Fla. 1941) (same). Some of the authority CFLP relied upon expressly found the conditions at issue reasonable. *See e.g. Tatom v. Ameritech Corp*., 305 F.3d 737, 745 (7th Cir. 2002) (finding provision relating to the forfeiture of stock options reasonable and acknowledging that an Illinois court might "pierce the formal wrappings of a stock option forfeiture provision and deem it the equivalent of an anti-competitive provision") (citation omitted).

Indeed, other courts that have considered financial disincentives in partnership agreements like the Conditioned Payment Device have found that they must be reasonable to be enforceable. *See DeLeo v. Equale & Cirone, LLP*, 184 A.3d 1264, 1276 (Conn. App. 2018) (analyzing partnership agreement that did not "prohibit a former partner from providing accounting services to former client of the partnership; rather, it requires the former partner compensate the partnership"); *Holloway v. Faw, Casson & Co.*, 572 A.2d 510 (Md. 1990) (finding "[t]he covenants in [the partnership agreement] are sufficiently similar to covenants not to compete to invoke, in general, the analysis applied under the law bearing on covenants not to compete.").

(2) The Conditioned Payment Device is Unreasonable

The Conditioned Payment Device is facially unreasonable under any standard, including the "more lenient [and] employer-friendly" standard applied below. Op. 65-66. While CFLP attempts to distinguish the cases relied upon by the Court of Chancery, it appears to have abandoned the argument that the Conditioned Payment Device is reasonable. *See* A0956-61. As far as Plaintiffs are aware, the Conditioned Payment Device and the Restrictive Covenant are the most restrictive provisions that *any* Delaware court has *ever* confronted.

For a restrictive covenant to be enforceable, it must (1) be "reasonable in geographic scope and temporal duration, (2) advance a legitimate economic interest of the party seeking its enforcement, and (3) survive a balancing of the equities." Op. 43 (citation omitted). Applying these factors, the Court of Chancery correctly found that both the No Breach Condition and the Competitive Activity Condition – which both trigger the Conditioned Payment Device – are premised on unenforceable promises. Op. 43-53, 66-67.

As to the *first* prong, the Court of Chancery correctly recognized that while the absence of a geographic limitation "'does not render [a] restrictive covenant unreasonable per se,'" such covenants must be otherwise "narrowly tailored to serve the employer's interests." Op. 45 (citing *Del. Exp. Shuttle, Inc. v. Older*, 2002 WL

31458243, at *12 (Del. Ch. Oct. 23, 2002); *see also Chart Indus., Inc. v. Spagnoletti*, 2012 WL 4505899, at *3 (N.D. Ohio Sept. 28, 2012) (applying Delaware law and finding that a covenant that does not contain "any geographic restriction whatsoever must be highly scrutinized"). The No Breach Condition is thus unreasonable under this prong because CFLP advances "only the conclusory argument that Cantor Fitzgerald is a global business" to justify its global scopt. Op. 45-46.

As to the *second* prong, the Court of Chancery correctly found that the Restrictive Covenant's breadth is "patently unreasonable" in scope. Op. 47. It prohibits actions not just against CFLP, but also any Affiliated Entity. *Id.* CFLP could not dentify all "Affiliated Entities" that the Restrictive Covenant covers. *Id.* at 48 n. 151. It prohibits former limited partners from becoming "connected with" any "Competing Business" anywhere in the world, regardless of that former partner's new position at that "Competing Business" or taking "any action that results directly or indirectly in revenues or other benefit for that Limited Partner or any third party that is or could be considered to be engaged in such Competitive Activity." *Id.* at 47 (citation omitted). The Court of Chancery recognized that "[u]nder these standards, it is highly possible a partner could unknowingly engage in a Competitive Activity" and thus forfeit not only partnership interests they received in lieu of a bonus, but also money they invested into their capital account. *Id.* at 47-48. This issue is further

exacerbated because the Restrictive Covenant is breached "not when [a former partner] actually competes, but when [Lutnick] determines she has competed." *Id.* at 50.

CFLP cannot point to "any legitimate business interest" justifying this breadth, arguing only that "Plaintiffs have profited from Cantor's other business lines." *Id.* at 49. Because CFLP could not articulate any legitimate business interest these provisions served, the Court of Chancery found the Restrictive Covenant's temporal scope unreasonable. *Id.* at 50.

As to the *third* prong, the Court of Chancery recognized that while some facts tipped against the Plaintiffs, the equities still weighed largely against a finding of reasonableness. Op. 51-52. In enforcing the Restrictive Covenant, CFLP "relied on the determination of [Lutnick] . . . rather than establishing Plaintiffs actually breached the agreement before a factfinder." Op. 52; *cf. Hall*, 2021 WL 1751347 at *4 (complaint alleged "how the Compensation Committee determined she had breached" the forfeiture provisions); *Dunai*, 2005 WL 406348, at *3 (committee provided with a "48 page document" showing competitive nature of former employee's new employment). Given this breadth, the Court below found "it would be difficult, and so vague that it would be risky, for former CFLP partners to find employment in or adjacent to the financial services field." Op. 52.

For these same reasons, the Court found the Competitive Activity Condition was not reasonable because it "pulls in the same exact conduct as the Restrictive Covenants," and "effectively restrains former partners for at least two years longer." *Id.* at 65-67. Like the Restrictive Covenant, CFLP "advanced no compelling interest that could justify the breadth of the" Competitive Activity Condition because "[n]early any legitimate interest it had in the scope of the Restrictive Covenants in years one and two is stale by years three and four." *Id.* at 67.

CFLP does not dispute the Court of Chancery's interpretation of the scope of the Restrictive Covenant and the Competitive Activity Condition. Instead, it attacks the public policy considerations the Court of Chancery considered in support of its reasonableness analysis. These attacks are unjustified.

First, the Court's analogy to liquidated damages was appropriate, especially given the economic realities of the Conditioned Payment Device.[3] Each Plaintiff besides Kirley directly *purchased* a substantial sum of the partnership interests at issue in this litigation. Op. 17 (citing A0686); *see also* A2049-50 (CFLP's attorney explaining at oral argument that partners "borrow in order to make the investment

[3] CFLP argues (at 34) that both liquidated damages provisions and forfeiture-for-competition provisions would be exempt from reasonableness scrutiny under DRUPLA. As set forth above (*see supra* Section I(C)(1)), that argument is wrong because it ignores 6 *Del. C.* § 2103.

in the partnership"). Accordingly, unlike the employees in *Dunai* and *Hall*, Plaintiffs forfeited not only bonuses they received in connection with their employment (the "Grant Amounts"), but also the Additional Amounts that they invested into the partnership. The punitive nature of the Conditioned Payment Device is thus harsher than the liquidated damages provisions at issue in *Halpen* and *Wark*.[4] CFLP's claim (at 34) that that this forfeiture does not "jeopardize [Plaintiffs'] finances" is conclusory and belied by the economic realities at issue. Op. 52 (recognizing the financial consequences range from "meaningful to the extraordinary").

Second, CFLP inaccurately claims (at 34) that the Court's observation that the Conditioned Payment Device impacted "Plaintiffs' ability to 'earn a living' and 'meaningfully deter[red]' them from 'seeking other employment'" is unsupported in the record. To support this argument, CFLP characterizes the payments at issue as "windfall[s]", "extra benefit[s]," and "subsidies." These characterizations lack merit because they ignore the capital investments Plaintiffs made into the partnership. Lutnick acknowledged in his deposition that the "HD II Units" at issue are

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[4] The amounts at issue in *Halpen* and *Wark* were $10,950.00 and $74,404.05 respectively – far less than the amounts Plaintiffs forfeited here from investments they made. *See Halpen*, 2001 WL 985104, at *1; *see also generally Lyons Insurance Agency, Inc. v. Wark, Kelly, et al.*, Plaintiff's Opening Brief in Support of its Motion for Summary Judgment, 2017-0348-SG, Trans. Id. 63091102.

"purchased by employees." A0829 at 41:11-24. CFLP's own interrogatory responses reflect that Plaintiffs collectively paid millions in exchange for the HD II Units at issue. A0686; *see also* A0308. The Court considered this evidence when it found the forfeiture at issue "significant" and in conflict with Delaware's concern for the *in terrorem* effects such financial consequences can have on a person's ability to earn a living. Op. 64.

Third, for the reasons set forth above, the Court did not err when it evaluated the LP Agreement *as written. Delaware Elevator, Inc.*, 2011 WL 1005181, at *10 (considering whether provision is "facially invalid"); Op. 20 n. 61, 51 n. 156 (explaining that the Court did not reach the question of whether Plaintiffs engaged in Competitive activity because they prevail "on striking the Conditioned Payment Device as unenforceable"). CFLP cites no law holding otherwise.

But even if the law required a restrictive covenant to be reviewed *as applied* (it does not), such review would not save the Conditioned Payment Device. The record shows that that CFLP expects departing partners to request exemptions before exploring any other form of work, demonstrating the incredible scope of enforcement. A0839 at 80:15-81:25. Indeed, when asked whether a former employee could move to Myanmar to avoid the Conditioned Payment device, Lutnick testified that:

> [I]f someone wants to leave and go to a jurisdiction that we don't do business, doing it with clients that we don't do now and we had no intention of doing it, we weren't expecting to do it. And we would say fine. And *we would give them an exception*.

Id. (emphasis added). Lutnick also testified that the Conditioned Payment Device can be enforced to penalize a former partner from doing any profession they "could" possibly have performed at CFLP or any of its affiliates, *even if* that was not the profession they practiced at CFLP. In recalling the reason that CFLP had determined that Boyer had "competed," Lutnick testified that:

> [Boyer] had the ability to do many kinds of business with us. We didn't really constrain him on what business he did. He went [to Reorient] and he did the – he acted for himself. So he's the same person . . . He could have done it for us. He did it for them.

A0866 at 186:10-25. The evidence also shows that CFLP applies the Conditioned Payment Device so broadly that it estimates that 40% of partners will forfeit their partnership units. B32. Thus, the record demonstrates the Conditioned Payment Device is patently unreasonable even as applied.

Lastly, CFLP's advocacy of the employee choice doctrine is irrelevant to the issue before this Court. As the Court of Chancery reasoned, the "doctrine operates only where the employee voluntarily terminates her employment, but the Conditioned Payment Device works a forfeiture regardless of the reason a partner ceases to become a partner." Op. 64. Jurisdictions that have adopted the employee

choice doctrine have made clear that application of the doctrine would be "unconscionable" without "mutuality of obligation on which a covenant not to compete is based." *Lucente v. International Bus. Machines Corp*., 310 F.3d 243, 254 (2d Cir. 2002) (citing *Post v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 421 N.Y.S.2d 847, 849 (N.Y. 1979)).[5]

Application of the employee choice doctrine may also offend Delaware public policy. To the extent that the financial disincentives of a post-employment covenant operate as an unreasonable "restraint of trade," the General Assembly has mandated that such provisions are "unlawful." 6 *Del. C.* § 2103. While courts adopting the employee choice doctrine emphasize that its application does not infringe "the liberty of a man to earn his living," they ignore the societal harm such provisions have on restraining free competition.

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[5] CFLP's emphasis on the laws of other states ignores the recent legislative efforts by states like New York seeking to ban noncompetes. Bill No. S3100A § 191-d(b)(3); *see also* Eric Hoffman et al., *New York's Imminent Non-Compete Ban* (June 28, 2023), *available at* https://www.sidley.com/en/insights/newsupdates/2023/06/new-yorks-imminent-non-compete-ban (counsel of record for CFLP explaining that "New York State is poised to join a growing number of states banning outright nearly all non-compete agreements" and recognizing that "forfeiture-for-competition" provisions have been found to violate a similar noncompete ban in California).

III. THE COURT DID NOT ERR IN DECLINING TO SEVER OR BLUE-PENCIL THE LP AGREEMENT

A. Question Presented

Whether the Court of Chancery's failure to sever or blue pencil the LP Agreement was plain error requiring review in the interests of justice.

B. Scope of Review

"Only questions fairly presented to the trial court may be presented for review." *Protech Mins., Inc. v. Dugout Team, LLC*, 284 A.3d 369, 378 (Del. 2022) (citing Supr. Ct. R. 8.). "However, 'when the interests of justice so require, the Court may consider and determine any question not so presented.'" *Id.* "The Court will apply this narrow exception if it finds that the trial court committed plain error requiring review in the interests of justice." *Id.* (citations omitted). "'[T]he doctrine of plain error is limited to material defects . . . which clearly deprive an accused of a substantial right, or which clearly show manifest injustice." *Id.* at 378-79 (quoting *Turner v. State*, 5 A.3d 612, 615 (Del. 2010)).

C. Merits of Argument

This Court should deny CFLP's request to sever or blue-pencil the unenforceable clauses in the LP Agreement because these arguments were not presented to the Court of Chancery. As explained below, the request is also unsupported by the law.

(1) CFLP Did Not Present its Requested Relief to the Court of Chancery

CFLP did not present any argument concerning severability or blue-penciling in its briefs below. *See* A0912-63; A1034-101. Indeed, CFLP did not use the word "blue-pencil" or "sever," once in either of its briefs or at oral argument.

Under Rule 8, this Court may consider questions not presented below only when the error is a "material defect which [would] clearly deprive an accused of a substantial right, or which clearly show manifest injustice." *Protech Mins., Inc.*, 284 A.3d at 378-79. CFLP cannot meet this limited exception. Any argument "that contracts must always be considered in the interest of justice because of the contractarian nature of this State would eviscerate Rule 8 in the contract context." *Id*. at 379.

(2) The Court Appropriately Applied the LP Agreement's Severability Clause in Not Striking Down the Entire Agreement

The Court of Chancery did not render the LP Agreement unenforceable; it severed out only the specific provisions it found unenforceable. Op. 52 (finding only "the promises not to engage in Competitive Activity for the specified Restricted Periods in Section 3.05(a)(ii) and (iii)" unenforceable); *Id.* 67 (finding the Competitive Activity Condition unenforceable). In other words, the Court of Chancery enforced the severability provision.

CFLP cites no case for the proposition that a Delaware Court may sever an otherwise unenforceable restrictive covenant to make it enforceable. Rather, the cases it cites stand for the unremarkable proposition that where a partnership agreement contains a severability clause, and one provision is found to be invalid, it "will not defeat the contract." *Hildreth v. Castle Dental Centers, Inc*., 939 A.2d 1281, 1282-84 (Del. 2007) (provision at issue concerned unenforceable conversion of common stock); *R.S.M. Inc. v. All. Cap. Mgmt. Holdings L.P*., 790 A.2d 478, 488-89 (Del. Ch. 2001) (provision at issue concerned an unenforceable amendment to a voting procedure under the partnership).

In advancing the position (at 38-39) that it would have won summary judgment "[h]ad the Court narrowed the time period to one or two years," CFLP simply ignores the Court of Chancery's findings. As explained above, the scope of the Restrictive Covenant was found "patently unreasonable" because CFLP could "not point[] to any legitimate business interest that could be served by protecting all its unspecified affiliates." Op. 47-48. Section 3.05(a)(ii) and (iii) are two years in length and the Opinion gave no indication that a shorter period would save these provisions.

CFLP also fails to articulate how the Conditioned Payment Device could be severed in a manner to render it enforceable. Given the interlocking nature of the LP

Agreement and the conditions at issue, the Court of Chancery correctly gave maximum legal effect to the severability clause. *See Ameritox, Ltd. v. Savelich*, 92 F. Supp. 3d 389, 400 (D. Md. 2015) ("A court may only blue pencil a restrictive covenant if the offending provision is neatly severable.") (internal citation omitted); *see also Hamrick v. Kelley*, 392 S.E.2d 518, 519 (Ga. 1990) ("The 'blue pencil' marks, but it does not write.").

(3) The Court Did Not Err In Refusing To Blue Pencil The Conditioned Payment Device

The relief CFLP seeks is more appropriately styled as a request to blue pencil the LP Agreement. This request should be denied.

"While, in some circumstances, a court may use its discretion to blue pencil an overly broad non-compete to make its restrictions more reasonable, [the Court of Chancery] has also exercised its discretion in equity not to allow an employer to back away from an overly broad covenant by proposing to enforce it to a lesser extent than written." *FP UC Hldgs., LLC v. Hamilton*, 2020 WL 1492783, at *8 (Del. Ch. Mar. 27, 2020) (citations omitted); *see also Del. Elevator, Inc.*, 2011 WL 1005181, at *10 (explaining that disparate bargaining power between employers and employees "lead[s] [the Court] to conclude that when a restrictive covenant is unreasonable, the [C]ourt should strike the provision in its entirety" instead of blue

penciling restrictive covenants to create a "no-lose" situation for employers) (citations omitted).

CFLP cites no legal authority in advancing its request for blue penciling. Instead, it conclusively argues (at 40) that because the Court's holding was "novel," it should have narrowed the Conditioned Payment Device to make it enforceable.

This argument ignores the obvious inequities that would be borne by Plaintiffs. If CFLP had a narrow forfeiture-for-competition clause, like the ones at issue in *Dunai* and *Hall*, Plaintiffs would have been presented with more palpable choices: sit out for a reasonable period (six to twelve months) or relocate to a different jurisdiction (as Kirley, Servant, and Cornaire did). CFLP's proposal would eliminate nearly all risk to an employer seeking to enforce an illegal contractual provision, placing that risk on the former employee who is left to guess how a Court will later reshape it. *See* Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 689-94 (2008) (arguing courts' willingness to modify non-competes creates confusion, encourages employers to overreach, and encourages litigation "by building a degree of uncertainty into every employment agreement"). Such a rule would also do little to protect Delaware's interest in keeping competition free from the effects of unlawful restraints of trade. 6 *Del. C.* § 2103.

IV. THE COURT DID NOT MISCONSTRUE THE RELATIONSHIP BETWEEN THE PARTIES

A. Question Presented

Whether the Court of Chancery's decision was based in part on a misapprehension of the contractual relationship between the Parties.

B. Scope of Review

"On an appeal from a decision granting summary judgment, this Court reviews the entire record to determine whether the Chancellor's findings are clearly supported by the record and whether the conclusions drawn from those findings are the product of an orderly and logical reasoning process." *In re Walt Disney Co. Derivative Litig*., 906 A.2d 27, 48 (Del. 2006). "This Court does not draw its own conclusions with respect to those facts unless the record shows that the trial court's findings are clearly wrong and justice so requires." *Id.*

C. Merits of Argument

CFLP claims (at 41) that the Court of Chancery erred because it "misapprehend[ed] the nature of CFLP's business and its relationship to Plaintiffs" and inappropriately "relied on cases that consider the interests of an employer, not a global parent company." These arguments simply ignore the Court's detailed analysis and are otherwise unpersuasive for at least three reasons.

First, the Court of Chancery did not misunderstand the nature of the relationships between the parties. It recognized that "[e]ach Plaintiff is a former employee of nonparty Cantor Fitzgerald Hong Kong Limited" and that each Plaintiff was also a limited partner in CFLP. Op. 6. Indeed, it was this distinction, in part, that led the Court of Chancery to apply "the more lenient" review afforded to restrictive covenants in the sale of a business. Op. 65-66.

CFLP asks this Court to cast aside Plaintiffs' employment status at a CFLP-Affiliated Entity and focus only on their limited partnership relationship with CFLP. As a threshold matter, CFLP cites no case to suggest that this distinction is relevant in determining whether a post-termination restrictive covenant is void as a matter of public policy. As far as Plaintiffs are aware, no such authority exists. To the contrary, courts have expressly applied the same reasonableness test for covenants not to compete contained in partnership agreements. *See KPMG Peat Marwick LLP*, 709 A.2d at 1165; *DeLeo*, 184 A.3d at 1276.

Second, any theoretical distinction between the enforceability of a restraint on trade in a partnership compared to an employment agreement would have limited applicability here because several of the Plaintiffs' partnership interests were both comparatively minor and all were inextricably intertwined with their employment. *See Philip G. Johnson & Co. v. Salmen*, 317 N.W.2d 900, 903 (Neb. 1982) ("a

partner with such a minor interest . . . is in a real sense no different than an employee"). Indeed, CFLP has "never" allowed individuals who are not employees to buy into its partnership. A0833 at 57:17-22. And under the LP Agreement, whether a limited partner is "terminated" for purposes of the Conditioned Payment Device is explicitly linked to her employment at CFLP-Affiliated Entities. A0020.

The Court of Chancery also did not ignore CFLP's status as a "global business." It simply rejected as "conclusory" the argument that being a "global business" necessitated a "global restrictive covenant." Op. 45-46. Delaware courts have consistently rejected similar arguments. *Id.* at 46 n. 145, 49 n. 152 (collecting authority). In other words, if CFLP wanted to enforce its Conditioned Payment Device globally, such restriction would otherwise need to be narrowly tailored to protect its legitimate business interests. *See e.g. Med. Staffing Network, Inc. v. Ridgway*, 670 S.E.2d 321, 327-28 (N.C. Ct. App. 2009) (employer had no "legitimate business interest" in preventing competition with "affiliated companies that engage in business distinct from the medical staffing business in which Ridgway had been employed").

Lastly, CFLP's arguments seem to cast aside as irrelevant the important public policy concerns Delaware has in protecting competition. Indeed, in advocating for a rule that exempts forfeiture-for-competition provisions in limited partnerships

agreements from scrutiny, CFLP asserts (at 42) that the Plaintiffs here are competitors and "the Partnership is not obligated to pay its competition." This incredible concession shows that the restraints at issue may qualify as "horizontal restraint[s]" because they were imposed by agreements between competitors "on the way they will compete with one another" in the future. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 104 (1984); *see also Newburger, Loeb & Co. v. Gross*, 563 F.2d 1057, 1082 (2d Cir. 1977) ("Restraints on postemployment competition that serve no legitimate purpose at the time they are adopted would be *per se invalid*.") (emphasis added); *Polk Bros. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 189 (7th Cir. 1985) ("A covenant not to compete following employment does not operate any differently from a horizontal market division among competitors – not at the time the covenant has its bite, anyway."). While this Court need not confront whether CFLP's concession invites antitrust liability, it does underscore the serious public policy issues with the restraints at issue.

At bottom, this case does not present the "fundamental" or "novel" application of Delaware law that CFLP and its amici briefs suggest. It involves a straight-forward application of long-standing legal principles to determine whether an agreement that harms competition is void under Delaware public policy. 6 *Del. C.* §

2103. The Court did not err in finding the Conditioned Payment Device "patently unreasonable" and void as against this public policy.

CONCLUSION

For the reasons stated above, the Opinion and Order should be affirmed.

COOCH & TAYLOR P.A.

By: */s/ Blake A. Bennett*
Blake A. Bennett (#5133)
The Brandywine Building
1000 N. West Street, Suite 1500
Wilmington, DE 19801
(T): (302) 984-3800

Attorneys for Plaintiffs Below, Appellees Brad Ainslie, Jason Boyer, Christophe Cornaire, John Kirley, Angelina Kwan, and Remy Servant

Of Counsel:

Kyle W. Roche
KYLE ROCHE P.A.
260 Madison Avenue, 8th Fl.
New York, NY 10016
(T): (917) 909-8766

Velvel Freedman
Alex Potter
FREEDMAN NORMAND FRIEDLAND LLP
99 Park Avenue, Suite 1910
New York, NY 10016
(T): (646) 970-7509

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