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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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, DELAWARE STATE CHAMBER OF COMMERCE, MANAGED FUNDS ASSOCIATION, AND SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICI CURIAE* SUPPORTING APPELLANT AND REVERSAL

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IDENTITY AND INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Delaware State Chamber of Commerce ("Delaware Chamber") is the largest business organization in the state of Delaware. The Delaware Chamber serves as a unified voice for business with a mission to promote an economic climate that enables businesses of all sizes and types to become more competitive in a constantly changing, increasingly global, and unpredictable environment.

The Managed Funds Association ("MFA"), based in Washington, D.C., New York, Brussels, and London, represents the global alternative asset management industry. MFA's mission is to advance the ability of alternative asset managers to raise capital, invest, and generate returns for their beneficiaries. MFA advocates on behalf of its membership and convenes stakeholders to address global regulatory, operational, and business issues. MFA has more than 170 member firms, including

traditional hedge funds, credit funds, and crossover funds, that collectively manage nearly $2.2 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time.

The Securities Industry and Financial Markets Association ("SIFMA") is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. SIFMA advocates on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. SIFMA serves as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. SIFMA also provides a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association.

On behalf of the business communities they represent, the Chamber, Delaware Chamber, MFA, and SIFMA have an interest in ensuring that Delaware remains a leader of sensible business practices and policies that are predictably upheld by its courts. Businesses regularly rely upon forfeiture-for-competition agreements because of their many pro-competitive benefits. Given that Delaware is home to two-

thirds of all Fortune 500 companies,[1] amici have a strong interest in ensuring that Delaware courts properly recognize those benefits and consistently enforce forfeiture-for-competition agreements.

[1] *See* Delaware Division of Corporations, *2021 Annual Report*, *available at* https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2021-Annual-Report.pdf.

SUMMARY OF ARGUMENT

1. Appellant Cantor Fitzgerald, L.P. focuses on the unprecedented decision by the Court of Chancery to analyze a condition on post-departure payments in a limited partnership agreement through the lens of an employer-employee relationship. Amici do not address that aspect of the Court of Chancery's decision. Instead, in this brief, amici highlight the important business interests that the Court should weigh *if* it follows the Court of Chancery's decision to analyze the enforceability of terms in a limited partnership agreement based on principles from the employer-employee context.

2. If the Court analyzes the conditional payment provision in the parties' limited partnership agreement as the equivalent of a forfeiture-for-competition provision, it should recognize the significance of the business interests that such provisions protect. Through forfeiture-for-competition agreements, employers agree to pay their former employees in exchange for those former employees agreeing not to compete against their former employer. Such agreements promote productive innovation by protecting proprietary information, trade secrets, confidential business plans, pricing or bidding strategies, and other confidential and valuable business information. They also encourage employers to make investments in employee training and development that they otherwise would not make, while also allowing businesses to grow and preserve their goodwill.

3. In addition, the Court should recognize the unique benefits that forfeiture-for-competition agreements provide to employers *and* employees. Instead of preventing workers from accepting employment with a competitor, forfeiture-for-competition agreements give employees an economic incentive that aligns their interests to those of their former employers. Forfeiture-for-competition agreements also provide a clear understanding of the consequences of competition, which results in more efficient enforcement and allows employees to negotiate with new employers to backfill the forfeited compensation. Finally, forfeiture-for-competition agreements protect the right of businesses not to pay a former employee out of profits that the former employee is actively seeking to reduce. Notably, other jurisdictions consistently and predictably enforce forfeiture-for-competition agreements in light of their unique benefits.

4. The appropriateness of forfeiture-for-competition provisions is starkest when highly compensated professionals, such as the plaintiffs in this case, agree to these provisions as an upfront condition of their employment and compensation. Such employees are best positioned to take advantage of the unique benefits of forfeiture-for-competition agreements, both on the front end (when their compensation reflects their acceptance of such provisions), and on the back end (when they have the opportunity to negotiate with new employers for additional compensation to mitigate any benefits forfeited under such agreements).

ARGUMENT

I. In Deciding This Case, the Court Should Recognize and Give Weight to the Numerous Benefits of Forfeiture-for-Competition Agreements.

Cantor Fitzgerald argues that the Court of Chancery improperly analyzed a condition on post-departure payments in its limited partnership agreement as a forfeiture-for-competition provision in the employment context. In contrast to the partnership agreement provision at issue, forfeiture-for-competition agreements require employees to forfeit (or repay) some form of post-employment compensation if they compete with their former employers. For the reasons stated in Cantor Fitzgerald's Brief, the Court should treat terms in limited partnership agreements differently from terms in employment agreements. (App. Br. at 20-24.)

If the Court is nonetheless inclined to analyze the limited partnership provision at issue as the equivalent of a forfeiture-for-competition provision, it should center its analysis on the significant and legitimate business interests that forfeiture-for-competition provisions protect. Forfeiture-for-competition provisions not only provide the benefits present in reasonable noncompete agreements, they also have distinct features that provide additional benefits to both businesses and employees. The Court should weigh these factors in deciding this case.

A. Forfeiture-for-Competition Provisions Protect the Same Significant Business Interests as Reasonable Noncompete Agreements.

Businesses in every sector of the economy—including amici's members—rely on noncompete agreements to protect critical business interests. Forfeiture-for-competition agreements protect those same interests. In deciding this case, the Court should recognize the importance of these interests and ensure that businesses can continue to rely on predictable and consistent enforcement of forfeiture-for-competition agreements in Delaware.

First, forfeiture-for-competition agreements, like reasonable noncompete agreements, protect proprietary information, trade secrets, special business relationships (customer, vendors, etc.), confidential business plans, pricing or bidding strategies, and other confidential and valuable business information. *See Tristate Courier and Carriage, Inc. v. Berryman*, 2004 WL 835886, at *10 (Del. Ch. Apr. 15, 2004) (enforcing noncompete agreement when employee "has complete knowledge of . . . proprietary information, including its business strategies, logistics, and costs"); Evan P. Starr et al., *Noncompete Agreements in the U.S. Labor Force*, 64 J.L. & ECON. 53, 64 (2021) (noting that "the incidence of noncompete[] [agreements] is much higher among those who report possessing some type of trade secret or valuable information.").

The protection of confidential business information promotes innovation by

"increas[ing] the returns to research and development." John McAdams, *Non-Compete Agreements: A Review of the Literature* at 6 (Fed. Trade Comm., Working Paper, 2019). "[I]nnovation and business developments take large amounts of time, money and trial and error." *Id.* If the result of that investment is to have an employee with confidential business information poached by a competitor (who was unwilling to invest its own resources), it would reduce the incentive for businesses to make similar investments in the future.

Moreover, absent the ability to rely on restrictive covenants like forfeiture-for-competition agreements, businesses would be forced to keep confidential business information limited to a select group of employees, stifling the flow of valuable information and ideas that support innovation and bring value to customers. When consistently enforced, forfeiture-for-competition agreements, like reasonable noncompete agreements, reduce the incentive of competitors to engage in free-riding behavior and lead "to increases in firm-sponsored training, riskier [research and development] investments, and increases in firm value and the likelihood of acquisition." Norman D. Bishara & Evan Starr, *The Incomplete Noncompete Picture*, 20 Lewis & Clark L. Rev. 497, 535 (2016); *see also Hough Assocs., Inc. v. Hill*, 2007 WL 148751, at *14 (Del. Ch. Jan. 17, 2007) (enforcing a noncompete agreement when the agreement "safeguarded" the employer by "prevent[ing] a rival . . . from enlisting" employees.).

Alternative agreements—such as nondisclosure agreements or reliance on trade secret laws—do not suffice. Nondisclosure agreements assume that employees can join a competitor and not rely upon the confidential business information they obtained from a former employer. But an employee working for a competitor cannot easily compartmentalize the valuable, proprietary, and confidential information obtained from a former employer, and competitors will still be incentivized to free-ride on other businesses' investments. Trade secrets law is likewise inadequate because the confidential information that businesses seek to protect is often broader than trade secrets. The best option for an employer to preserve its legitimate interest in its confidential, valuable business information is to prevent or, in the case of forfeiture-for-competition provisions, disincentivize employees from working for competitors.

Second, employers are more likely to spend resources on employee training and development when they do not fear that the employees may immediately take those skills to a competitor. Forfeiture-for-competition provisions, like reasonable noncompete agreements, can solve this "'holdup' problem," which emerges when employers "forgo making certain investments in their workforce knowing that employees would be able to subsequently quit and appropriate the value of the investment." Camila Ringeling et al., *Noncompete Clauses Used in Employment Contracts, Comment of the Global Antitrust Institute* at 4-5, & n.7, n.9 (George

Mason Law & Economics, Research Paper No. 20-04, Feb. 7, 2020). "[B]y discouraging worker attrition before the firm has had the time to recoup the cost of its upfront investment," such agreements encourage "mutually beneficial" investments. McAdams, *Non-Compete Agreements* at 6; *see also Computer Aid, Inc. v. MacDowell*, 2001 WL 877553, at *2 (Del. Ch. July 26, 2001) (enforcing a noncompete agreement to protect an employer's legitimate business interests in the "specialized training" provided to an employee).

Third, forfeiture-for-competition agreements, like reasonable noncompete provisions, allow businesses to grow and preserve their goodwill. *See Sensus USA, Inc. v. Franklin*, 2016 WL 1466488, at *7 (D. Del. Apr. 14, 2016) (enforcing a noncompete agreement when employees' duties involved "cultivating client relationships" including "work[ing] on some of [the employer's] largest accounts"). A business that relies on its employees to obtain customers is at risk of its employees leaving to form their own firm or to join a competitor and taking those customers. Forfeiture-for-competition agreements help "preserv[e] employer goodwill" by incentivizing employees not to compete with their employers by using the same benefits that their employers have bestowed upon them—including the use of their employers' brands to develop a customer base.

If the Court analyzes the conditional payment provision in the parties' limited partnership agreement as the equivalent of a forfeiture-for-competition provision, it

should recognize the significance of the business interests that such provisions protect. Just like reasonably crafted noncompete agreements, forfeiture-for-competition provisions are an essential component of how businesses protect their confidential and proprietary information and preserve their goodwill, while also promoting employee development. It is essential that the business community can rely on Delaware's predictable and consistent enforcement of such provisions.

B. Forfeiture-for-Competition Agreements Are Uniquely Beneficial for Both Employers and Employees.

Forfeiture-for-competition agreements have at least four distinct features that further benefit both employers and employees, and that eliminate concerns that courts have often expressed in assessing noncompete agreements.

First, forfeiture-for-competition agreements do not prevent workers from accepting employment elsewhere, even with a competitor. *See Hough Assocs.*, 2007 WL 148751, at *17 (noting that "[e]mployees, for many legitimate reasons, often desire to move elsewhere" and that traditional noncompete agreements may restrict such movement). Rather, forfeiture-for-competition agreements align the interests of employees with those of their former employers by giving employees an economic incentive to refrain from joining a competitor.

Second, employees subject to forfeiture-for-competition agreements have a clear understanding ahead of time of the additional compensation they will forgo in the event they elect to join a competitor. By contrast, noncompete agreements typically require employers to seek injunctive relief, which results in court intervention, costly litigation, and the uncertainty associated with a possible injunction that will prevent new employment for an unpredictable period. Forfeiture-for-competition agreements eliminate this costly cloud of uncertainty by setting clear terms relating to an employee's decision to join a competitor.

Third, the clarity provided by forfeiture-for-competition agreements often

works to the benefit of employees, who can negotiate with their new employers for higher compensation to mitigate the loss of compensation under their forfeiture-for-competition provisions. New employers often agree to backfill the forfeited compensation, thus fostering employee mobility while respecting the terms of the forfeiture-for-competition agreement. In other words, the marketplace handles the issue without the need for judicial intervention or contract invalidation.

Fourth, forfeiture-for-competition agreements protect the right of employers to contract not to compensate employees who join competitors. That business interest is especially strong when the deferred competition tied to a forfeiture-for-competition provision is in the form of equity or stock grants. Businesses have a legitimate interest in not sharing their profits with former employees who are actively competing with them and attempting to *reduce* those profits. Forfeiture-for-competition agreements protect this interest by allowing an employer and employee to sever ties if the employee elects to compete against the employer.

Given that forfeiture-for-competition agreements protect strong business interests while also addressing the concerns that some courts express about noncompete agreements, other jurisdictions have adopted "the 'employee choice' doctrine, which provides that courts should not review forfeiture-for-competition provisions for reasonableness so long as the employee voluntarily terminated her employment." *Ainslie v. Cantor Fitzgerald, L.P.*, 2023 WL 106924, at *21 (Del. Ch.

Jan. 4, 2023) (citing *Morris v. Schroder Cap. Mgmt. Int'l*, 859 N.E.2d 503 (N.Y. 2006); *Fraser v. Nationwide Mut. Ins. Co.*, 334 F. Supp. 2d 755, 760 (E.D. Pa. 2004); *Courington v. Birmingham Tr. Nat. Bank*, 347 So. 2d 377, 383 (Ala. 1977); *Alco-Columbia Paper Serv., Inc. v. Nash*, 273 So. 2d 630, 634 (La. Ct. App. 1973); *Swift v. Shop Rite Food Stores, Inc*., 489 P.2d 881, 882 (N.M. 1971)). "The strong weight of authority holds that forfeitures for engaging in subsequent competitive employment … are valid, even though unrestricted in time or geography." *Rochester Corp. v. Rochester*, 450 F.2d 118, 122-23 (4th Cir. 1971).

If the Court views the conditional payment provision at issue as a forfeiture-for-competition provision, it should note the significant weight that these jurisdictions give to the unique features of forfeiture-for-competition agreements. These features provide distinct benefits to both businesses and employees that the Court should consider in making its decision.

II. The Value of Forfeiture-for-Competition Agreements Is Even Greater When Highly Compensated Professionals Enter Into Them.

Cantor Fitzgerald is a global financial services company with a global institutional brokerage business. *Ainslie*, 2023 WL 106924, at *2. Each of the plaintiffs is a former Cantor Fitzgerald limited partner. Like most counterparties to forfeiture-for-competition provisions, they are all sophisticated and highly compensated professionals. *Id.* at *6. If the Court elects to view the limited partnership agreement's conditioned payment provision through the lens of forfeiture-for-competition agreements, it should recognize that the value of such agreements is especially high in precisely this factual context.

Highly compensated professionals are much more likely to have access to confidential business information that could damage their former employers if shared with competitors. They are also more likely to be closely intertwined with a firm's goodwill and to have benefited from investment by their employers. Thus, the business interests that forfeiture-for-competition agreements protect are particularly strong where highly compensated professionals are concerned.

At the same time, highly compensated professionals are also best positioned to take advantage of the unique benefits that forfeiture-for-competition agreements provide to employees. Highly compensated professionals, like the plaintiffs in this case, are likely to be sophisticated parties who can independently retain counsel to help them understand the financial consequences of agreeing to, and potentially

violating, their forfeiture-for-competition agreements. Further, these professionals are much more likely to use the clarity that forfeiture-for-competition agreements provide to bargain with new employers for higher compensation to mitigate the lost compensation from a previous employer. *See, e.g.*, Kurt Lavetti et al., *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians*, at 3-4 (2018) (noting in the context of noncompete agreements that highly skilled workers subject to a restrictive covenant receive higher wages).

In short, in the context of highly compensated professionals, both the business interests that forfeiture-for-competition agreements protect and the benefits that such agreements provide to employees are at their height. It would be fundamentally inconsistent with Delaware law and public policy not to enforce agreements between sophisticated parties according to their terms.

CONCLUSION

This case presents an opportunity for Delaware to reaffirm its role as a leader in sensible, business-first policies and practices that are predictably upheld by its courts. If the Court analyzes the conditional payment provision in Cantor Fitzgerald's limited partnership agreement as a forfeiture-for-competition provision, it should give significant weight to the benefits of such provisions for businesses and employees alike. Forfeiture-for-competition agreements protect critical business interests, give employees an incentive to refrain from competition, and provide advance clarity that is both beneficial in its own right and because it allows employees to negotiate with new employers to mitigate their lost compensation. The business community has a significant interest in the predictable and consistent enforcement of forfeiture-for-competition provisions in Delaware.

Amici respectfully ask the Court to reverse the Court of Chancery.

Date: July 25, 2023

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