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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 Below, Appellee.	)	

CORRECTED BRIEF OF *AMICUS CURIAE*, WASHINGTON LEGAL FOUNDATION IN SUPPORT OF APPELLANT

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Washington Legal Foundation ("WLF") is a nonprofit, public-interest law firm and policy center with supporters nationwide, including many in Delaware. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus curiae* to advance these principles in state courts of last resort. *See, e.g.*, *Frlekin v. Apple Inc.*, 457 P.3d 526 (Cal. 2020); *Burningham v. Wright Med. Grp.*, 448 P.3d 1283 (Utah 2019); *Delisle v. Crane Co*., 258 So. 3d 1219 (Fla. 2018).

Businesses "crave certainty as much as almost anything: certainty is what allows them to make long-term plans and long-term investments." Alan Greenspan & Adrian Wooldridge, *Capitalism in America: A History* 258 (Penguin Press, 1st ed. 2018). This need for business certainty is at the heart of this case. Companies rely on contracts with the expectation that they will be enforced as written. When courts, based on their own assumptions and public-policy preferences, disregard those contracts, businesses lose the certainty they so desperately need, and the economy suffers. WLF urges the Court to make clear how rarely (if ever) sophisticated parties should be penalized when they fail to foresee and obey post hoc public-policy decrees from the bench.

SUMMARY OF ARGUMENT

This Court should reject at least one aspect of the Chancery Court's reasoning. The Chancery Court applied a reasonableness review to invalidate a forfeiture-for-competition ("FFC") provision in the parties' agreement. But Delaware courts—and courts outside Delaware relying on Delaware common law—enforce FFC provisions according to their terms, without a reasonableness review. Both law and public policy counsel against the Chancery Court's approach when the provision is not used to actually prevent competition.

FFC provisions cannot yield injunctive relief. Accordingly, they do not restrain competition, preclude employees from working in their chosen profession, or require employees to withhold their services from the public. Nor are FFC provisions unfair to the employee. The employee can either compete—and accept new compensation—or forego competition and keep the benefit under the agreement. Indeed, employees with FFC provisions attached to benefits commonly negotiate substitute rewards from new employers to replace those they are giving up. The employee can even find non-competitive employment and still retain the benefit. Forfeiture is always within the employee's control. Thus, unlike non-competes, FFC provisions should be enforced according to their terms.

As a contractarian state, Delaware's public policy counsels against post hoc reasonableness review of such private agreements. If the Court affirms the ruling

below, sophisticated private parties will be unable to rely on freely negotiated agreements. Affirming would effectively reverse many decades of Delaware case law and place Delaware at odds with the great weight of authority across the country. Affirming would also potentially place at risk a wide variety of rewards that companies, including many Delaware entities, provide to individuals. Delaware's fundamental respect for contracts and maintaining predictability for sophisticated private parties outweighs the Chancery Court's policy considerations.

ARGUMENT

I. Agreements Between Sophisticated Parties Should Be Enforced According to Their Plain Terms.

The American experiment relied on freedom of contract as the "legal underpinning of a dynamic and expanding free enterprise system." E. Allan Farnsworth, *Contracts* § 1.7 (Aspen Publishers, 4th ed. 2004). The Framers understood that treating existing contracts as "inviolable" would benefit society by ensuring that all citizens could rely on the ability to enforce promises lawfully made to them—even if those agreements later proved unpopular. *Sturges v. Crowninshield*, 17 U.S. 122, 206 (1819). As James Madison observed, "impairing the obligation of contracts" is "contrary to the first principles of the social compact, and to every principle of sound legislation." *The Federalist Papers: No. 44* (New York Packet, 1788).

This "strong American tradition of freedom of contract" is "especially strong" in Delaware, "which prides itself on having commercial laws that are efficient." *ev3, Inc. v. Lesh*, 114 A.3d 527, 529 n.3 (Del. 2014) (quoting *Abry Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032, 1059-60 (Del. Ch. 2006)). As this Court has emphasized, "Delaware upholds the freedom of contract and enforces as a matter of *fundamental public policy* the voluntary agreements of sophisticated parties." *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 180 n.14 (Del. 2015)

(emphasis added) (quoting *NACCO Indus. v. Applica Inc*., 997 A.2d 1, 35 (Del. Ch. 2009)).

Thus, "[w]hen parties have ordered their affairs voluntarily through a binding contract, Delaware law is *strongly inclined* to respect their agreement." *Lesh*, 114 A.3d at 529 n.3 (emphasis added) (quoting *Libeau v. Fox*, 880 A.2d 1049, 1056-57 (Del. Ch. 2005), *aff'd in relevant part*, 892 A.2d 1068 (Del. 2006)). When reviewing a contract, a court's duty is to "assess the parties' reasonable expectations at the time of contracting and not rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal." *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) (citation omitted). "Parties have a right to enter into good and bad contracts"; "the law enforces both." *Id*. As former Chancellor Strine so eloquently put it,

> It is of course common for a party to a contract who has received the benefits flowing from the contract to wish to forsake the burdens it accepted to obtain them. But the refusal of American contract law to indulge that natural human desire is critical to the important economic and social value generated by voluntary contracts. Unless both parties to a contract have their reasonable expectations respected by the courts, then contracts will not serve their intended purpose. Ultimately, disrespecting contracts seems to threaten far more harm to investors in a capitalist economy than it does good.

Martin Marietta Materials, Inc. v. Vulcan Materials Co., 56 A.3d 1072, 1144 (Del. Ch.), *aff'd*, 45 A.3d 148 (Del. 2012), *and aff'd*, 68 A.3d 1208 (Del. 2012).

Exercising one's freedom to cabin one's freedom is nothing new. Delaware law gives parties wide latitude in exercising their contractual rights. This Court has held that stockholders in a Delaware corporation have significant leeway to contract away from common-law rules. *See Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 118 (Del. 1952). A party may contract away its right to sue within the time afforded by the relevant statute of limitations. *See Wesselman v. Travelers Indem. Co.*, 345 A.2d 423, 424 (Del. 1975). One party may release another from liability for future injury, even for prospective negligence. *See, e.g.*, *Ketler v. PFPA, LLC*, 132 A.3d 746, 747 (Del. 2016). A sophisticated party may contractually assume the risk that another will act in a negligent, grossly negligent, or even reckless manner. *See Express Scripts, Inc. v. Bracket Holding Corp.*, 248 A.3d 824, 830 (Del. 2021). And stockholders are free to contractually waive their statutory appraisal rights. *See Manti Holdings, LLC v. Authentix Acquisition Co.*, 261 A.3d 1199, 1204 (Del. 2021).

This freedom has been especially strong for Delaware's limited partnerships. *See Del. C.* § 17-1101(c) (stating that "maximum effect" must be given "to the principle of freedom of contract and to the enforceability of partnership agreements"). This has led to desired predictability in Delaware contract law: "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." *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d

286, 292 (Del. 1999) (quoting Martin I. Lubaroff & Paul Altman, *Delaware Limited Partnerships* § 1.2 (1999)). Indeed, "only where the agreement is inconsistent with mandatory statutory provisions," such as those intended to protect third parties, "will the members' agreement be invalidated." *Id.*; *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 170 (Del. 2002).

The predictability of contract enforceability comes with the added responsibility of understanding its terms; sophisticated parties are uniquely capable of that. The "contractual freedom accorded partnership agreement drafters" imposes "corresponding responsibilities on the part of investors to read carefully and understand their investment." *Dieckman v. Regency GP LP*, 155 A.3d 358, 366 (Del. 2017). Sophisticated parties "must appreciate that 'with the benefits of investing in alternative entities often comes the limitation of looking to the contract as the exclusive source of protective rights.'" *Id.* (quoting *Haynes Fam. Trust v. Kinder Morgan G.P., Inc.*, 135 A.3d 76 (Table), 2016 WL 91284, *2 (Del. 2016)).

Certainly, the freedom of contract is not absolute; some contractual provisions are void or voidable based on longstanding public policy. Even so, this Court will "only interfere" with the terms of parties' voluntary agreement "upon a strong showing that dishonoring the contract is required to vindicate a public policy interest *even stronger than freedom of contract*." *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 903 (Del. 2021) (emphasis added) (citations omitted). Indeed, these "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 voluntarily undertaken mutual obligations." *Id*.

Plaintiffs consciously entered the partnership agreement here with full knowledge of the FFC provisions. They are sophisticated brokers in the financial services industry and former limited partners of Appellant Cantor Fitzgerald who withdrew from the partnership "in coordinated fashion" to immediately compete at two wholesale institutional brokerages. (Dkt. No. 12 at p. 1.) As Appellant Cantor Fitzgerald argues, this Court should enforce the FFC provisions just as it would any other contractual provision. Scrapping the FFC provisions to save Plaintiffs from their voluntary, arm's-length contract would inject great uncertainty into businesses contracts in Delaware and even across the nation. It would also diverge from this Court's longstanding precedent.

II. Courts Have Not Historically Reviewed FFC Provisions for Reasonableness.

Before the Chancery Court's decision, the law in Delaware was settled and in accord with most other courts: reasonableness review is rarely proper for an FFC provision.

A. Delaware law was clear: FFC provisions are not restraints on competition.

The Chancery Court began its discussion by citing three cases for the proposition that "Delaware law is not clear on whether [FFC] provisions are restraints of trade that should be evaluated for reasonableness." *Ainslie v. Cantor Fitzgerald, L.P.*, Consul. C.A. No. 9436-VCZ, 2023 WL 106924, at *20 n.162 (Del. Ch. Jan. 4, 2023) (citing *W.R. Berkley Corp. v. Hall*, 2005 WL 406348 (Del. Super. Ct. Feb. 16, 2005), *Pollard v. Autotote, Ltd.*, 852 F.2d 67, 70 (3d Cir.), *amended*, 872 F.2d 1131 (3d Cir. 1988), and *W. R. Berkley Corp. v. Dunai*, 2021 WL 1751347 (D. Del. May 4, 2021)).[1] That is not a fair characterization of Delaware law. Courts treat FFC provisions as restraints on competition *only* where the employee was terminated without cause.

[1] The Chancery Court also cited *Faw, Casson & Co., L.L.P. v. Halpen*, 2001 WL 985104, at *1 (Del. Super. Ct. Aug. 7, 2001) and *Lyons Ins. Agency, Inc. v. Wark*, 2020 WL 429114, at *1 (Del. Ch. Jan. 28, 2020), but neither case involved an FFC provision.

The facts of *Pollard* highlight the Chancery Court's error. The employee did not choose to resign; the employer eliminated his position. *Pollard*, 852 F.2d at 69 ("Autotote eliminated Pollard's position as General Manager, Field Operations, and terminated his employment."). So the Third Circuit considered a narrower question—that is, the proper standard of review for FFC provisions where the employee was involuntarily terminated without cause. *Id.* at 70 ("Delaware courts have not addressed the enforceability of a forfeiture provision against an employee who was *involuntarily terminated without fault* and who subsequently accepts employment with a competitor." (emphasis added)). Under those circumstances, *Pollard* held, the provision serves as a restraint on competition and should be reviewed for reasonableness. *Id.* at 71-72. But *Pollard* did not address the proper standard of review where the individual voluntarily resigns, which happened here. And even if it had, the Third Circuit was merely "predicting Delaware law." *Id.* at 71; *see AT & T Corp. v. Clarendon Am. Ins. Co.*, 931 A.2d 409, 420 n.29 (Del. 2007) (citing favorably *Raymond Townes v. Sunbeam Oster Co.*, 50 S.W.3d 446, 452 (Tenn. App. 2001) for the proposition that, "[w]hen a federal court undertakes to decide a state law question in the absence of authoritative state precedent, the state courts are not bound to follow the federal court's decision"); *Shook & Fletcher Asbestos Settlement Tr. v. Safety Nat. Cas. Corp.*, 2005 WL 2436193, at *5 (Del. Super. Ct. Sept. 29, 2005) ("Federal court pronouncements or predictions of what a

state court might decide, however, are not binding on the court of the forum state"), *aff'd*, 909 A.2d 125 (Del. 2006).

Delaware courts have since closed the loop left open by *Pollard* by applying what is commonly known as the employee-choice doctrine. In *Hall*, the employee agreed to forfeit any profits realized from exercising his stock options if he competed within six months of terminating his employment. 2005 WL 406348, at *1. He exercised his stock options, resigned, and competed two months later. *Id*. W.R. Berkley sued to recapture his gain. *Id.* The Superior Court held the FFC provision was "simply a contractual obligation that requires a senior management employee to remain with the company for six months if he wants to retain the full benefit of the stock option." *Id.* at *5. The Superior Court disagreed with the defendant that the provision was really a non-compete or liquidated damages provision, as the defendant's "ability to seek or move to a new job was not abridged by the [p]laintiff nor were there any limitations on the [d]efendant to seek any job he so desired." *Id.* Accordingly, the Superior Court enforced the provision according to its terms and without regard to a reasonableness test.

Many courts have since relied on *Hall* to enforce FFC provisions without reasonableness review following an employee's resignation and subsequent

competition.[2] These cases are fully consistent with *Pollard*. *See Smythe*, 2013 WL 4401811, at *3-4 (explaining how reasonableness review is appropriate in involuntary termination cases pursuant to *Pollard* but not in voluntary resignation cases pursuant to *Hall*). In other words, the law *was* settled in Delaware until the Chancery Court injected uncertainty in this case. This Court should not take lightly that affirming the Chancery Court's opinion would abrogate *Hall* and all the decisions relying on it. *See Zeeb v. Atlas Powder Co.*, 87 A.2d 123, 126 (Del. 1952) ("The decisions of the trial courts of this state . . . are entitled to be given great weight and consideration and ought not to be disregarded unless, upon re-examination, they appear clearly to have been decided erroneously.")

B. Reasonableness review of FFC provisions is the minority approach nationwide.

As even the Chancery Court was forced to recognize, "employee choice is the majority approach." *Ainslie*, 2023 WL 106924, at *21; *accord Schlumberger Tech.*

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[2] *See, e.g.*, *Dunai*, 2021 WL 1751347, at *2 (applying Delaware law and enforcing FFC provision in stock-benefit agreement); *Seniorlink Inc. v. Landry*, No. 19-CV-11248-DJC, 2021 WL 3932309, at *9-10 (D. Mass. Sept. 2, 2021) (same); *W.R. Berkley Corp. v. Niemela*, No. CV 17-32 (MN), 2019 WL 5457689, at *5 (D. Del. Oct. 24, 2019) (same); *Press Ganey Assocs., Inc. v. Dye*, No. 3:12-CV-437-CAN, 2014 WL 1116890, at *6 (N.D. Ind. Mar. 19, 2014) (same); *Smythe v. Raycom Media, Inc.*, No. 1:13-CV-12 CEJ, 2013 WL 4401811, at *3-4 (E.D. Mo. Aug. 15, 2013) (same and expressly rejecting the defendant's request for reasonableness review); *JPMorgan Chase & Co. v. Pierce*, 517 F. Supp. 2d 954, 962 (E.D. Mich. 2007) (same); *Xu v. Castleton Commodities Intern. LLC*, No. 654803/2019, 2022 WL 5519662, at *5-6 (Sup. Ct. N.Y. Cnty. Oct. 7, 2022) (same as *Smythe*).

Corp. v. Blaker, 859 F.2d 512, 516 (7th Cir. 1988) ("New York and the majority of other states that have considered the question enforce these agreements."); *Lawson v. Spirit AeroSystems, Inc.*, No. 18-1100-EFM, 2023 WL 4026509, at *8 (D. Kan. June 15, 2023) ("[E]mployee choice is the majority approach." (citation omitted)); *Viad Corp v. Houghton*, No. 08-CV-6706, 2010 WL 748089, at *4 (N.D. Ill. Feb. 26, 2010) ("[T]he majority view in this country seems to be that a forfeiture for competition clause in an employment agreement is enforceable without regard to the reasonableness of the restraint on the former employee." (citation omitted)); *see also* (Dkt. No. 12 at p. 31 n.8 (collecting cases).) Affirming the Chancery Court's decision would place Delaware firmly among the minority of jurisdictions to have considered the issue. In other cases, this Court has appropriately considered a great body of extra-jurisdictional authority as persuasive. *See, e.g.*, *ABB Flakt, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 731 A.2d 811, 817 (Del. 1999) (observing that "[t]he vast majority of courts" take one approach and "agree[ing] with the Superior Court that *this body of authority is persuasive*" (emphasis added)); *Cheswold Volunteer Fire Co. v. Lambertson Const. Co.*, 489 A.2d 413, 419 (Del. 1984). Moreover, some courts in the minority have relied on state statutes voiding

non-competes to justify additional scrutiny of FFC provisions.[3] Delaware has no analogous statute.

Before considering the merits of the Chancery Court's decision, this Court should have an accurate lay of the land. The Chancery Court's decision to review the FFC provisions for reasonableness—notwithstanding Plaintiffs' voluntary resignations—diverges from settled Delaware law and is out of step with most courts across the country.

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[3] *See Graham v. Hudgins, Thompson, Ball & Assocs., Inc.*, 540 P.2d 1161, 1163 (Okla. 1975); *Muggill v. Reuben H. Donnelley Corp.*, 398 P.2d 147, 149 (Cal. 1965).

III. Reasonableness Review Is Unsuited to FFC Provisions.

There are good reasons why this Court should formally adopt the employee-choice doctrine.

A. FFC provisions neither restrain competition nor operate as unfair penalties.

The Chancery Court suggested that scrutinizing FFC provisions for reasonableness serves the public interest in "encouraging competition and ensuring that individuals are free to earn a living." *Ainslie*, 2023 WL 106924, at *24. But FFC provisions are not at odds with these policy concerns.

Violating an FFC provision results in *forfeiture*, not injunctive relief precluding the employee from working for a competitor. *Id.* at *21 ("[T]he employee is not actually prohibited from working because the forfeiture clause does not support injunctive relief, like a traditional noncompete."). Therefore, "a forfeiture clause *does not deprive the public of the benefits of competition* when, as in this case, the ex-employee[s] go[] into competition despite the clause[.]" *Schlumberger Tech. Corp. v. Blaker*, 859 F.2d 512, 517 (7th Cir. 1988) (emphasis added). The employee agreed to accept one thing in exchange for a promise not to do another; under an

FFC, she can make an informed decision about which she prefers. In either case, the employer is not stopping her from participating in the marketplace.

The Chancery Court next analogized to inapposite cases involving overbroad liquidated-damages provisions to suggest that FFC provisions restrain competition. *Ainslie*, 2023 WL 106924, at *23-24.

In *Faw, Casson & Co., L.L.P. v. Halpen*, the Superior Court enforced a liquidated-damages provision in a non-solicitation agreement when an accountant solicited one of his former employer's clients for his new employer. 2001 WL 985104, at *2 (Del. Super. Ct. Aug. 7, 2001). Another of the accountant's former employer's clients became a client of his new employer, however, and the accountant had nothing to do with it. *Id.* In refusing to enforce the provision as to that client, the Superior Court reasoned that, "[s]hould the clause be applied indiscriminately, then it would have an unlawful *in terrorem* purpose and effect." *Id.* at *3.

In *Lyons Ins. Agency, Inc. v. Wark*, the court relied on *Halpen* to reach a similar conclusion under like circumstances. 2020 WL 429114, at *7 (Del. Ch. Jan. 28, 2020) (refusing to enforce liquidated damages provision because "the harm to [the employer] of the loss of the . . . account [wa]s unrelated to any action taken by [the employee]"). The *Wark* court explained that enforcing a liquidated-damages provision—untethered from any solicitation by the employee—meant the employee

"could erect as strong a firewall as the mind of man could devise between herself and her prior clients; liquidated damages could result nonetheless." *Id.* at *8.

The Chancery Court incorrectly said these cases were "only a small step" removed from this one. 2023 WL 106924, at *24. In the *Halpen* and *Wark* cases, however, the employers sought enforcement of the liquidated-damages provisions where breach *was not caused by any affirmative action or choice of the former employees*. The new employers unilaterally opened accounts with the former employer's clients. Those courts' refusal to enforce the provisions underscored that doing so under such circumstances would have transformed the provisions into penalties. *See Wark*, 2020 WL 429114, at *8 ("Such a *penalty* is not enforceable as liquidated damages in this context." (emphasis added)).

By contrast, FFC provisions are not penalties under Delaware law. *See Hall*, 2005 WL 406348, at *4-5 (rejecting employee's argument that FFC provision was "a non-compete liquidated damage provision that is an unenforceable penalty"); *Dunai*, 2021 WL 1751347, at *2 (observing forfeiture of stock benefits meant employee "would never be worse off than she would have been before the agreements"). Rather, they give the employee "the *choice* of preserving his rights under his contract by refraining from competition or risking forfeiture of such rights by exercising his right to compete." *Morris v. Schroder Cap. Mgmt. Int'l.*, 859 N.E.2d 503, 506 (N.Y. 2006) (emphasis added). That is why Delaware law favors

FFC provisions to non-competes. *Dunai*, 2021 WL 1751347, at *2 ("Delaware law often *favors* this type of clawback provision."). "Viewed under one light," FFCs offer an employee "an insurance program whereby if [he] chose not to compete for a year, or if perhaps he couldn't find another position, he would" still get paid. *Fraser v. Nationwide Mut. Ins. Co.*, 334 F. Supp. 2d 755, 760 (E.D. Pa. 2004) (holding Pennsylvania courts would not review FFCs for reasonableness). The employee bears a forfeiture only if he *affirmatively chooses* to violate the condition.

The Superior Court's decision in *Hall* further illustrates why FFC provisions do *not* unfairly penalize the employee:

> *[Defendant] knew of this obligation and simply now is asking the Court to free him of this responsibility*.
>
> . . . .
>
> [W]hatever happened to the business world of *a person being bound by his word and accepting the consequences of his personal decision[?]* When did we turn from a business environment of personal integrity to one of litigation simply for greed and self interest? If one ever hoped that a business world of high integrity existed, it is not evidenced by this litigation. What is clear to the Court is that this litigation can only be characterized as a *desperate attempt by the Defendant to avoid an agreement entered into in good faith by all the parties.* The Court will not condone the Defendant's conduct nor accept its legally creative arguments in this matter.

2005 WL 406348, at *5 (emphases added).

In this case, where the forfeiture resulted from informed choices of sophisticated parties, the Chancery Court should not have relied on cases in which overbroad liquidated-damages provisions punished employees through no fault of

their own. *See Lawson*, 2023 WL 4026509, at *9 (D. Kan. June 15, 2023) ("*Ainslie* relied on an analogy to Delaware decisions subjecting liquidated damages clauses to reasonableness review. Neither of the two cited cases involve a conditional forfeiture, and are distinctly lacking in relevance." (footnote omitted)). Violating an FFC provision necessarily requires the employee to compete deliberately and consciously forfeit the benefit under the agreement. Under these circumstances, there is hardly a "public policy interest even stronger than freedom of contract" supporting the Chancery Court's decision to rewrite the parties' agreement. *Murdock*, 248 A.3d at 903.

B. Delaware law provides sufficient checks on FFC provisions when warranted.

As the Chancery Court recognized, the FFC provisions at issue are conditions. *Ainslie*, 2023 WL 106924, at 13-14. Because Delaware law already invalidates FFCs in exceptional circumstances, adopting reasonableness review would be not only unwise but also unnecessary.

For example, "[t]he prevention doctrine provides that 'where a party's breach by nonperformance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused.'" *Snow Phipps Grp., LLC v. Kcake Acquisition, Inc.*, 2021 WL 1714202, at *52 (Del. Ch. Apr. 30, 2021) (citation omitted). Additionally, "the Court may excuse the nonoccurrence of a condition that would cause a disproportionate forfeiture unless its occurrence was a material part

of the agreed [e]xchange." *Eisenmann Corp. v. Gen. Motors Corp.*, 2000 WL 140781, at *18 n.16 (Del. Super. Ct. Jan. 28, 2000). In that way, "[t]he Court will not impose a non-material condition precedent on the parties when it would create an absurd result." *Id.* With such exceptions already firmly established in Delaware law, adopting reasonableness review as an additional hurdle for FFC provisions to clear makes their enforceability questionable in nearly any agreement, no matter the terms.

Reasonableness review is further superfluous in view of Delaware law's requirement that any determination about the satisfaction of a condition be made in good faith. The FFC provision expressly required it in this case. *See Ainslie*, 2023 WL 106924, at *5. But that matters little. "An implied covenant of good faith and fair dealings is engrafted upon *every* contract." *Gilbert v. El Paso Co.*, 490 A.2d 1050, 1054 (Del. Ch. 1984) (emphasis added), *aff'd*, 575 A.2d 1131 (Del. 1990). Thus, "if one party is given discretion in determining whether the condition in fact has occurred that party must use good faith in making that determination." *Id.*; *see also Hall*, 2005 WL 406348, at *4 ("[W]hen a stock option committee is vested with . . . authority to determine a participant's right to receive or retain benefits, that decision . . . will not be second guessed by the Court absent a showing of fraud or bad faith.").

Moreover, the Chancery Court cited no authority for its *dictum* that Appellant Cantor Fitzgerald's Managing General Partner's discretion to determine whether Plaintiffs engaged in competition "expands the scope of prohibited employment." *Ainslie*, 2023 WL 106924, at *19. Even if there was authority to support it, that conclusion does not logically follow. Just as the Managing General Partner could erroneously find competition where there was none, so too could the Managing General Partner erroneously determine there was *no competition* where it actually exists.

C. FFC provisions serve salutary purposes.

It is not difficult to foresee the ramifications of the Chancery Court's opinion. In addition to destabilizing extant agreements to employers' detriment, the ruling below will also disserve the interests of employees. Employers appropriately offer a wide array of important *supplemental* benefits with FFCs attached to ensure the payments are not for naught, including, for example, pension benefits, *Clark v. Lauren Young Tire Ctr. Profit Sharing Tr.*, 816 F.2d 480, 481 (9th Cir. 1987), retirement payments, *Everett v. Nefco Corp.*, 2007 WL 2936210, at *2 (D. Conn. Oct. 9, 2007), deferred bonuses, *Morris*, 859 N.E.2d at 506, severance payments, *Barfield v. GuideOne Mut. Ins. Co.*, No. 1:19-CV-0053-ODE, 2020 WL 13526604, at *15 (N.D. Ga. Mar. 24, 2020), and incentive compensation programs like profit-sharing plans, *Collister v. Bd. of Trustees of McGee Co. Profit Sharing Plan*, 531

P.2d 989, 990 (Colo. App. 1975), stock benefits, *Lawson*, 2023 WL 4026509, at *1, restricted stock, *Welland v. Citigroup Inc.*, 116 F. App'x 321, 322 (2d Cir. 2004), and stock options, *Landry*, 2021 WL 3932309, at *10. The Chancery Court's broad ruling undermining *all* FFC provisions lessens employers' incentive to offer these valuable supplemental benefits and programs to employees.

As in this case, incentive-compensation programs align the interests of the employee with those of the company and motivate the employee to stay and work to make the employer profitable. *See Tatom v. Ameritech Corp.*, 305 F.3d 737, 745 (7th Cir. 2002). FFC provisions in incentive-compensation agreements prevent former employees whose interests become adverse to the company from maintaining an ownership interest in the company as opposed to preventing or restraining wrongful competition. *See James H. Washington Ins. Agency v. Nationwide Mut. Ins. Co.*, 643 N.E.2d 143, 150 (Oh. Ct. App. 1993) ("Washington is not barred from practicing his profession. Rather, he is being denied a reward that is intended only for agents who are loyal to Nationwide."). Such FFC conditions also serve the interests of the remaining employee-participants. *See Courington v. Birmingham Tr. Nat. Bank*, 347 So. 2d 377, 383 (Ala. 1977) (enforcing FFC resulting in cancelation of employer's matching contribution to employee's profit-sharing account because employer was right to "offset the effect of [employee's] competition with it in order to continue the Plan *for the benefit of those who remain*" (emphasis added)). The Chancery Court

erred by focusing exclusively on the impact of forfeiture on the specific recipient of the benefit without sparing a thought for employers offering these benefits and the other employees who would receive them.

Moreover, "[f]or decades, Delaware courts have *required* stock grants to include conditions ensuring that the grants do not constitute waste or a gift of corporate assets." *Dunai*, 2021 WL 1751347, at *2 (emphasis added) (citing *Beard v. Elster*, 160 A.2d 731, 735–36 (Del. 1960)). Accordingly, absent FFCs or other conditions dissuading employees from leaving and competing shortly after receiving stock benefits, public corporations could face derivative corporate-waste claims. *E.g.*, *Telxon Corp. v. Bogomolny*, 792 A.2d 964, 975-76 (Del. Ch. 2001). The Chancery Court's decision penalizes corporations for attempting to ensure their stock grants do not go to waste and places corporations squarely in the crosshairs of these corporate waste claims.

CONCLUSION

This Court should reverse the Chancery Court's opinion in pertinent part and hold that reasonableness review does not apply to FFC provisions in the context of voluntary resignations and terminations for cause.

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CERTIFICATE OF SERVICE

I, David G. Holmes, hereby certify that on this 2nd day of August, 2023, I caused a true and correct copy of the *Corrected Brief of Amicus Curiae, Washington Legal Foundation in Support of Appellant* to be served on the persons listed below via File & ServeXpress.

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