EFiled: Jun 03 2024 03:36PM EDT
Filing ID 73294001
Case Number 110,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LKQ CORPORATION,	§	No. 110, 2024
Plaintiff/Counter-Defendant, Appellant	§	Certification of Questions of Law from the United States Court of Appeals for the Seventh Circuit
v.	§	(No. 23-2330)
ROBERT RUTLEDGE,	§	There on appeal from the United States District Court for the Northern District of Illinois, Eastern Division
Defendant/Counter-Plaintiff. Appellee.	§	(No. 1:21-cv-03022)

APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

The appeal arises from LKQ Corporation's ("LKQ") attempt to claw back hundreds of thousands of dollars of compensation earned by Rutledge from 2013 to 2021. LKQ bases its claim on a restrictive covenant found in annual RSU Agreements entered into between Rutledge and LKQ during this period. The RSU Agreements required Rutledge to be employed by LKQ to earn the benefits and purported to allow LKQ to claw back all benefits paid if Rutledge competed with LKQ within nine months of ending his employment relationship with LKQ. LKQ's attempt to claw back Rutledge's earned and paid compensation is contrary to Delaware law. The United States District Court for the Northern District of Illinois correctly dismissed LKQ's claims.

On June 4, 2021, LKQ filed its Original Complaint in this matter claiming breaches of various restrictive covenants contained in two sets of agreements. Rutledge had already forfeited his *future* deferred compensation in unvested stock units based on leaving his employment with LKQ. Regardless, LKQ sought to enjoin Rutledge's employment and claw back hundreds of thousands of dollars of past compensation. Among other allegations, the Original Complaint claimed that Rutledge potentially disclosed LKQ's confidential information and breached provisions barring the solicitation of LKQ's customers and employees. A501, at ¶ 10. LKQ had no evidence to support these allegations when they were made.

A111–12, at ¶¶ 51–55. Discovery did not provide the evidence LKQ lacked. A112, at ¶¶ 56, 57; A502, at ¶ 11. Therefore, LKQ amended its claims.

LKQ's First Amended Complaint only claimed Rutledge violated the terms of two sets of non-compete provisions, removing the allegations of solicitation and misuse of confidential information contained in the Original Complaint. A502, at ¶ 12; *see generally*, A045–68. Rutledge moved to dismiss the First Amended Complaint. A622. As a result, the District Court dismissed LKQ's claim for unjust enrichment. A629–631.

After discovery, the parties each moved for summary judgment on LKQ's claim for breach of the RSU Non-Compete. Rutledge also moved for summary judgment on LKQ's claim for breach of the Confidentiality Agreement Non-Compete. The District Court entered judgment in favor of Rutledge on both claims. A470–482. LKQ appealed the District Court's grant of summary judgment and the earlier dismissal of LKQ's unjust enrichment claim. The United States Court of Appeals for the Seventh Circuit affirmed the District Court in relation to the unjust enrichment claim and the Illinois non-compete claim.

The Seventh Circuit also certified the two questions of Delaware law that this Court accepted. These two certified questions concern the scope of the Court's recent decision in *Cantor Fitzgerald, LP v. Ainslie*, 312 A.3d 674 (Del. 2024). The Seventh Circuit recognized the fundamental differences between *Cantor Fitzgerald*

and this case. *LKQ Corp. v. Rutledge*, 96 F.4th 977, 984 (7th Cir. 2024). The certified questions sought guidance as to whether *Cantor Fitzgerald* was intended to reach agreements that are not subject to the Delaware Revised Uniform Limited Partnership Act and seek to claw back already paid compensation to a middle manager instead of the forfeiture of future benefits granted to a limited partner. *Id.* at 986.

SUMMARY OF THE ARGUMENT

I. Certified Question One: Whether *Cantor Fitzgerald* precludes reviewing forfeiture-for-competition provisions for reasonableness in circumstances outside the limited partnership context?

1. *Denied*. This Court should limit *Cantor Fitzgerald* to its facts and allow a reasonableness analysis review of forfeiture-for-competition restrictive covenants not in the limited partnership context. The employee-choice doctrine is particularly ill-suited to situations like this case where LKQ seeks to claw back over eight years of already paid compensation instead of the forfeiture of future benefits.

2. *Denied*. Delaware's policy of upholding contracts is not absolute. This Court itself acknowledged the limitations of this principle in *Cantor Fitzgerald* when it stated that the *Cantor Fitzgerald* appeal put Delaware's high regard for the freedom of contract "to the test." *Cantor Fitzgerald*, 312 A.3d at 677. Delaware does not enforce contracts between employees and employers with restrictive covenants when the balancing of an employer's protection of its economic interests versus the hardship to the former employee tips in favor of the employee.

3. *Denied*. Delaware's restriction on stock grants to high-level executives does not extend to claw backs of over eight years of already paid compensation to non-high-level executives instead of the forfeiture of future benefits. This is particularly true when the decision to claw back compensation is not made by a corporate committee.

4. *Denied*. This Court's decision in *Cantor Fitzgerald* is limited to its facts. That decision relied heavily on the fact that it arose in the context of the Delaware Revised Uniform Limited Partnership Act. This Court found that the statutory language in that statute controlled and overrode the normal reasonableness analysis of employee-employer restrictive covenants. A majority of courts in this country do not apply the employee-choice doctrine, which is inapplicable because it does not apply to the attempted claw back of eight years of already paid compensation to a middle manager instead of the forfeiture of future benefits granted to a limited partner.

5. *Denied*. The courts in both *Hall* and *Dunai* conducted a reasonableness analysis to the forfeiture-for-competition restrictive covenants in those cases, which involved much different facts than this case. The additional authority reviewing forfeiture-for-competition provisions almost exclusively enforces only those restrictions that forfeit unpaid, future benefits, not claw backs of years of paid compensation.

II. Certified Question Two: If *Cantor Fitzgerald* does not apply in all other circumstances, what factors inform its application? For example, does it matter what type of agreement the forfeiture provision appears in, how sophisticated the parties are, whether the parties retained counsel to review the provision, whether the forfeiture involves a contingent payment or claw back, how far backward a claw back reaches, whether the employee quit or was involuntarily terminated, or whether the provision also entitled the company to injunctive relief?

1. *Denied.* The Court should hold that the already familiar reasonableness balancing test used for non-compete restrictive covenants should apply to forfeiture-for-competition restrictive covenants not contained in limited partnership agreements. Doing so would acknowledge the reality of forfeiture-for-competition restrictive covenants outside the context of sophisticated partners agreeing to be bound by the provisions of the Delaware Revised Uniform Limited Partnership Act. The factors raised by the United States Court of Appeals for the Seventh Circuit properly balance the interests of employers and employees when determining the enforceability of forfeiture-for-competition restrictive covenants.

2. *Denied.* LKQ's attempt to shoehorn the RSU Agreements into *Cantor Fitzgerald*'s substantially different fact pattern is improper. Courts will have no problem applying the already existing standard balancing test for non-compete restrictive covenants to forfeiture-for-competition restrictive covenants. This standard balancing test already permits consideration of the factors identified by the Seventh Circuit that demonstrate why LKQ seeks to enforce an unenforceable forfeiture-for-competition restrictive covenant against Rutledge.

3. *Denied.* The forfeiture-for-competition restrictive covenant at issue in this case is the definition of an inequitable agreement that requires a reasonableness analysis under Delaware precedent. While Rutledge voluntarily entered into the RSU Agreements, he was required to remain employed in order to earn any of the benefits, and Rutledge provided ample benefit to LKQ over his decade of service to justify the past grants of stock that LKQ now seeks to claw back. Again, Rutledge is not seeking any future benefits he earned but had to forfeit.

COUNTERSTATEMENT OF THE FACTS

LKQ is the largest national supplier of salvaged and recycled automobile parts. A508, at ¶ 8; A138, at 24:16–22.[1] Rutledge began working for LKQ on or about October 1, 2009. A508, at ¶ 13; A144, at 30:15–20. Prior to working for LKQ, in 2001, Rutledge worked at a company called Greenleaf. A142, at 28:13–22. Greenleaf was also in the auto salvage and recycling business and was eventually purchased by LKQ while Rutledge worked there. A142, at 28:17–19; A115, at 78:2–6. Rutledge's entire career has been spent in the auto salvage and recycling business. A137–38, at 23:9–24:10.

While at LKQ, Rutledge was always employed as a Plant Manager of LKQ's Lake City, Florida plant. A148, at 34:1–3, 12–18. Rutledge's job duties as a Plant Manager included overseeing all departments at the facility, overseeing the daily operations of the plant from selling and delivering parts to local customers, hiring and firing facility employees, and he would look at daily revenue and had access to customer lists. A152–53, at 38:15–39:22, A157–58, at 44:9–45:4. Rutledge was not responsible for customer service or sales. A159, at 46:5–17. LKQ required Rutledge to be physically present at his LKQ facility. A727, at 84:5–8.

A. Rutledge enters Restricted Stock Unit Agreements.

[1] *See* Supplemental Appendix to Appellee's Answering Brief.

As part of his employment compensation with LKQ, Rutledge entered into Restricted Stock Unit Agreements with LKQ. A685, at 197:6–13. The Restricted Stock Unit Agreements have a restrictive covenant section titled "Non-Competition and Confidentiality." (the "RSU Non-Compete"). A532, at § 16; A537, at § 16; A543, at § 16; A551, at § 17; A556, at § 17; A562, at § 17; A569, at § 17; A576, at § 17. The RSU Non-Compete purports to prevent Rutledge from:

> directly or indirectly (1) be[ing] employed by, engage or have any interest in any business which is or becomes competitive with [LKQ] or its subsidiaries or is or becomes otherwise prejudicial to or in conflict with the interests of [LKQ] or its subsidiaries.

A533, at § 16(a)(i); A537–38, at § 16(a)(i); A543–44, at § 16(a)(i); A551, at § 17(a)(i); A556–57, at § 17(a)(i); A562–63, at § 17(a)(i); A569, at § 17(a)(i); A576, at § 17(a)(i).

The RSU Non-Compete also includes an injunctive relief provision for violations. A533, at § 16(b); A538, at § 16(b); A544, at § 16(b); A551, at § 17(b); A557, at § 17(b); A563, at § 17(b); A569, at § 17(b); A577, at § 17(b).

The Restricted Stock Unit Agreements provided Rutledge with a certain number of shares in LKQ stock that he could cash out or sell based on a set vesting schedule. A531, at §§ 1 & 3; A535, at §§ 1 & 3; A541, at §§ 1 & 3; A548–49, at §§ 1 & 3; A554, at §§ 1 & 3; A560, at §§ 1 & 3; A566, at §§ 1 & 3; A573, at §§ 1 & 3.

The Restricted Stock Units are part of Rutledge's wages, benefits, and overall compensation tied to his employment. A150, at 36:1–9; A152, at 38:9–14; A244–

45, at 200:16–201:3; A251, at 207:11–18; A698, at 247:23–24. The Restricted Stock Unit Agreements state any tax withholding due for the Restricted Stock Units are to be paid through LKQ payroll at LKQ's sole discretion, and any over withholding is to be reimbursed through LKQ payroll. A532, at § 7; A536, at § 7; A542, at § 7; A549, at § 7; A555, at § 8; A561, at § 8; A567, at § 8; A574–75, at § 8.

The Restricted Stock Unit Agreements did not provide stock options. A755, at 194:24–195:7.

B. Rutledge resigns from LKQ and begins working for Fenix Auto Parts in a non-competitive position.

Rutledge tendered his resignation from LKQ on March 23, 2021. A672, at 143:12–144:14. On April 14, 2021, Rutledge stopped working for LKQ. A171, at 58:7–13. Nine-months from April 14, 2021 is January 14, 2022. A109, at ¶ 31. Therefore, the restrictive covenants, to the extent they are enforceable, ended on January 14, 2022.

Rutledge began working for Fenix Auto Parts ("Fenix") on April 19, 2021. A198, at 111:15–17. Rutledge started his employment at Fenix as Vice President of Capital Projects or Vice President of Capital Procurement and Projects. A777, at 25:12–20; A222–23, at 157:23–158:3. As Vice President of Capital Projects, Rutledge worked at home, like many employees during the COVID-19 Pandemic, or physically in Houston, with approximately 50% of his work occurring at home. A205–06, at 134:18–135:14; A209, at 138:8–12. As Vice President of Capital

Projects, Rutledge oversaw large projects that were outside the normal buying of inventory and purchased long-term vehicle assets. A778, at 26:11–18; A779, at 31:21–32:3. Rutledge was not involved in purchasing cars that Fenix stripped for OEM parts to be resold to consumers. A775, at 16:1–17:7; A780, at 36:13–17. In April 2022, Rutledge's job at Fenix was shifted to area director but this was more than nine months after Rutledge stopped working for LKQ. A787, at 64:13–65:3.

C. LKQ's justification for enforcing overbroad restrictive covenants.

LKQ contends that by working for Fenix, Rutledge is harming LKQ's business interests found in vendor and supplier relationships. A522, at ¶ 80. During discovery, LKQ shifted its position and claimed that through the RSU Non-Compete, LKQ seeks to protect its business interests of specific customer pricing, customer discounts, customer contact information, vendor and supplier pricing, any potential rebates, financial information, revenue, margin data, expense data, profitability data, and any marketing strategies for Rutledge's market. A730–31, at 97:15–98:11. LKQ only protects this through the RSU Non-Competes and Confidentiality Agreement Non-Competes. A732, at 104:22–105:8. Despite this, there are employees of LKQ with access to its customer information, financial information, and other confidential and proprietary information that are not subject to restrictive covenants. A732–33, at 105:10–107:13. LKQ's sales team members

have access to this information but are not subject to non-competes. A733, at 108:12–20.

LKQ considers it a violation of the RSU Non-Compete to work for a competitor in any capacity during the restrictive period, even as a janitor, administrative assistant, or mailroom personnel. A757, at 202:13–204:1. LKQ believes Rutledge's job duties and responsibilities are irrelevant since his new job is with a competitor. A757, at 204:13–24.

Rutledge did not solicit any LKQ customer or any LKQ employee. A653, at 67:22–68:1; A797–99; A739, at 131:13–24; 132:3–15. Rutledge did not misappropriate any LKQ confidential information. A736, at 121:1–14; A739, at 133:11–23.

D. LKQ's pre-suit investigation of its claims revealed Rutledge did not harm LKQ.

LKQ conducted a pre-suit investigation. A708–09, at 9:21–11:23. LKQ's pre-suit investigation included running a sales trend report that demonstrated nothing suspicious. A722, at 62:17–20, 64:10–16. LKQ's pre-suit investigation included interviewing LKQ employees that uncovered no evidence of solicitation. A746, at 158:21–159:5, 159:23–160:3; 161:3–7. LKQ's pre-suit investigation did not uncover any evidence that Rutledge had contacted LKQ customers. A720, at 54:2-9; A745, at 155:14-21; A746, at 158:6-20. LKQ's pre-suit investigation also did not uncover any evidence that Rutledge had contacted vendors of LKQ. A746–47, at

161:8–162:18. LKQ's continued investigation has uncovered no solicitation of any LKQ customer. A712, at 22:23–23:9, 25:11–22; A713, at 27:8–12. In fact, there is no evidence that Rutledge solicited any employee, vendor, supplier, or customer of LKQ. The only basis on which LKQ has asserted that Rutledge allegedly violated any restrictive covenant with LKQ is the mere fact of Rutledge's employment with Fenix. A720, at 54:23–55:4; A741, at 139:12–15.

E. LKQ's attempt to claw back paid compensation from Rutledge.

LKQ does not seek to force Rutledge to forfeit deferred compensation of future stock grants. LKQ seeks to recoup $639,924.88 it claims constitutes proceeds of Rutledge's sale of LKQ stock. A817, at ¶ 32; A829, at ¶¶ 10, 11. These sales allegedly stretch from 2014 to 2021. A817, at ¶ 32; A829, at ¶¶ 10, 11. However, LKQ's claims for claw back are inconsistent with the RSU Agreements, in that LKQ seeks recovery for LKQ stock grants to Rutledge that predate the first RSU Agreement. A817, at ¶ 32; A829, at ¶¶ 10, 11.

F. Proceedings Below.

On June 4, 2021, LKQ Corporation ("LKQ") filed its Original Complaint in this matter claiming breaches of various restrictive covenants contained in two sets of agreements. Rutledge had already forfeited his future deferred compensation in unvested stock units based on leaving his employment with LKQ. Regardless, LKQ sought to enjoin Rutledge's employment and claw back hundreds of thousands of

dollars of past compensation. Among other allegations, the Original Complaint claimed that Rutledge potentially disclosed LKQ's confidential information and breached provisions barring the solicitation of LKQ's customers and employees. A501, at ¶ 10. LKQ had no evidence to support these allegations when they were made, and discovery did not provide the evidence LKQ lacked. A502, at ¶ 11. Therefore, LKQ amended its claims.

LKQ's First Amended Complaint, the operative pleading for this appeal, only claimed Rutledge violated the terms of two sets of non-compete provisions, removing the allegations of solicitation and misuse of confidential information contained in the Original Complaint. A502, at ¶ 12; *see generally*, A506–28. LKQ's First Amended Complaint seeks injunctive relief under the RSU Non-Compete, specifically asking the trial court to exercise its equitable powers in enforcing the RSU Non-Compete. A522, at ¶¶ 82–83. Additionally, LKQ's First Amended Complaint seeks a permanent injunction for the return of proceeds on the sale of RSU grants. A526, at ¶ 110.

Rutledge moved to dismiss the First Amended Complaint. A622. As a result, the District Court dismissed LKQ's claim for unjust enrichment. A629–631. After discovery, the parties each moved for summary judgment on LKQ's claim for breach of the RSU Non-Compete. A470. Rutledge also moved for summary judgment on LKQ's claim for breach of an Illinois non-compete. *Id.* The District Court entered

judgment in favor of Rutledge on both claims. A470–482. LKQ appealed the District Court's grant of summary judgment and the earlier dismissal of LKQ's unjust enrichment claim. The United States Court of Appeals for the Seventh Circuit affirmed the District Court in relation to the unjust enrichment claim and Illinois non-compete claim. *LKQ Corp. v. Rutledge*, 96 F.4th 977, 987 (7th Cir. 2024).

The Seventh Circuit also certified the two questions of Delaware law accepted by this Court. These two certified questions focus on the scope of this Court's recent decision in *Cantor Fitzgerald v. Ainslie*, 312 A.3d 674 (Del. 2024). The Seventh Circuit recognized the fundamental differences between *Cantor Fitzgerald* and this case. *LKQ Corp.*, 96 F.4th at 984. The certified questions sought guidance as to whether *Cantor Fitzgerald* was intended to reach agreements not subject to the Delaware Revised Uniform Limited Partnership Act and to the claw back of already paid compensation to a middle manager instead of the forfeiture of future benefits granted to a limited partner. *Id.* at 986–87.

ARGUMENT

I. Cantor Fitzgerald Is Limited To A Forfeiture-For-Competition Restrictive Covenant Contained In A Limited Partnership Agreement Applying The Delaware Revised Uniform Limited Partnership Act.

A. Certified Question One

Whether *Cantor Fitzgerald* precludes reviewing forfeiture-for-competition provisions for reasonableness in circumstances outside the limited partnership context? The question was certified by the Seventh Circuit United States Court of Appeals and accepted by this Court. *LKQ Corp. v. Rutledge*, Case No. 110, 2024, at 3 (Del. March 21, 2014); *LKQ Corp. v. Rutledge*, 96 F.4th 977, 987 (7th Cir. 2024).

B. Scope of Review

The Court's review of Certified Question One is *de novo* because it arose in the context of federal appellate court review of a grant of summary judgment and concerns questions of public policy. *Rales v. Blasband*, 634 A.2d 927, 931 (Del. 1993); *Ellison v. USPS*, 84 F.4th 750, 755 (7th Cir. 2024); *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 902 (Del. 2021).

C. Merits Of Argument

Cantor Fitzgerald does not preclude reviewing forfeiture-for-competition restrictive covenants for reasonableness outside the limited partnership context. In fact, the language of *Cantor Fitzgerald* shows that it should be limited to only those restrictions that adopt the Delaware Revised Uniform Limited Partnership Act.

This Court, in reaching its decision in *Cantor Fitzgerald*, relied heavily on the fact that the restrictive covenant at issue was contained in a contract governed by the Delaware Revised Uniform Limited Partnership Act ("DRULPA"). By its statutory terms, DRULPA favors enforcing contract language over common law equitable protections. Without this limitation, *Cantor Fitzgerald* does not prevent a reasonableness review of forfeiture-for-competition restrictive covenants. Moreover, even though it claimed it was not conducting a reasonableness review, the Court in *Cantor Fitzgerald* inherently did so when it determined the restrictive covenant at issue was reasonable because of the proscriptions of DRULPA.

1. The Court chose specific language limiting *Cantor Fitzgerald* to contracts utilizing DRULPA.

Cantor Fitzgerald begins by framing the question on appeal as "the enforceability of the 'forfeiture for competition' provision of a limited partnership agreement." *Cantor Fitzgerald*, 312 A.3d at 677. In framing the appeal in this manner, this Court explicitly stated the *Cantor Fitzgerald* appeal was putting Delaware's high regard for the freedom of contract "to the test." *Id.* The implication of this language being that Delaware's high regard for the freedom of contract has limits impacted by the forfeiture-for-competition restrictive covenant at issue.

The Court further stated its analysis was undertaken "[u]nder the circumstances of this case." *Id.* The intentional opening language of *Cantor*

Fitzgerald demonstrates that the specific circumstance of a forfeiture-for-competition restrictive covenant arising in the context of a limited partnership agreement was key to the Court's holding.

Throughout *Cantor Fitzgerald*, this Court was mindful to note that its decision was limited to the facts of that case, which involved a partnership agreement that specifically bound sophisitcated parties to DRULPA. In announcing its reversal of the Court of Chancery, this Court states, "[u]nder the circumstances of this case, we balance the relevant policy interests differently [than the Court of Chancery]." *Id.* (emphasis added). The fact that *Cantor Fitzgerald* concerned an agreement allowing a sophisticated former partner to compete at the cost of relinquishing a contingent benefit was "significant." *Id.* at 691. As a result, *Cantor Fitzgerald* should not be extended beyond these facts.

Delaware courts do not automatically extend expressly limited holdings. In *Dickerson v. State*, this Court refused to extend a prior opinion concerning the right to carry a concealed weapon in one's home to all of one's private property when the prior opinion was limited to the carrying of a concealed weapon in one's home. *Dickerson v. State*, 975 A.2d 791, 796 n.8 (Del. 2009). The prior case was not followed because of a difference in important facts. *Id.* at 796. In *Cushner v. State*, the Court expressly distinguished a prior opinion that stated its decision was limited to the facts before it. *Cushner v. State*, 214 A.3d 443, 447 (Del. 2019). Because the

facts of *Cushner* were different than the facts of the prior limited case, the Court found the prior case "[wa]s not applicable." *Id.*

Like in *Dickerson* and *Cushner*, the Court should not extend the holding of *Cantor Fitzgerald* to a different fact pattern because the facts are not the same. The facts deemed decisive in *Cantor Fitzgerald* were the sophisticated nature of the parties, the choice of the parties specifically availing themselves of DRULPA, the forfeiture of deferred future payments, not a claw back of past payments, and the use of the restriction at issue against other prior departing partners to the benefit of litigating employees. *Cantor Fitzgerald*, 312 A.3d at 677. Importantly, none of these facts are present in this case.

2. The policies advanced in *Cantor Fitzgerald* are limited to the facts of that case.

The language limiting *Cantor Fitzgerald* to the facts of that case is supported by the policies discussed by this Court in that opinion. The fact that *Cantor Fitzgerald* arose in the context of a limited partnership agreement applying DRULPA is significant as noted throughout the opinion.

The Court, in transitioning to Delaware's public policy interests under the circumstances of the case, stated the relevant policy interests were found in the precise language of DRULPA:

> In ascertaining the public policy of this State as it relates to the enforceability of the provisions of limited partnership agreements, we need not look far. The Delaware General Assembly explicitly declared

> that it is the policy of [DRULPA] "to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements."

Cantor Fitzgerald, 312 A.3d at 688 (citing 6 Del. C. § 17-1101(c)). Again, this Court tellingly framed the issue of the enforceability of restrictive covenants in the context of limited partnership agreements and highlighted the significance of the parties' use of DRULPA in their agreement. The Court noted that limited partnership agreements are sacrosanct in Delaware and courts assume the sophisticated parties entering such agreements know the consequences of that choice. *Cantor Fitzgerald*, 312 A.3d at 688 (quoting *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 291 (Del. 1999)).

The use of DRULPA is directly tied to the case-specific relevant policy interest when the Court states: "The emphatic policy statement in DRULPA corresponds with our courts' tradition of "ensur[ing] freedom of contract . . . in order to facilitate commerce." *Cantor Fitzgerald*, 312 A.3d at 688. In other words, without the limited partnership agreement subject to DRULPA in *Cantor Fitzgerald*, different policy interests are at issue.

As noted by this Court, there is an inherent tension between policies favoring "enforcing private agreements on [the] one hand, and disfavoring restraints of trade and allowing individuals to freely pursue their profession of choice, on the other" in the competing policy considerations over employment-relative restrictive covenants, including forfeiture-for-competition clauses. *Cantor Fitzgerald*, 312 A.3d at 677.

When the contracting parties are sophisticated and avail themselves of DRULPA, the contractual language controls. *Id.* This is because DRULPA declares it is the public policy of Delaware to give maximum effect to contractual terms in partnership agreements. *Id.* at 688. The statutory text states: "It is the policy of [DRULPA] to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements." 6 Del. C. § 17-1101(c). DRULPA further states that the common law "rule that statutes in derogation of the common law are to be strictly construed shall have no application." 6 Del. C. § 17-1101(b). Therefore, the statutory language of DRULPA expressly overrides any contrasting common law. Neither LKQ nor the *amici* briefs in this matter point to any Delaware statute in the employee-employer context that contains similar statutory considerations.[2]

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[2] In fact, the *amici* submitted in favor of LKQ support Rutledge's position because the *amici* completely ignore the important differences between the forfeiture-for-competition restrictive covenant in *Cantor Fitzgerald* and the RSU Non-Compete in this case. Like LKQ, neither of the *amici* acknowledge that Rutledge does not contest the forfeiture of his prospective stock grants.

The *amicus* brief filed by the Managed Funds Association ignores that the RSU Non-Compete seeks to claw back eight years of compensation granted to Rutledge. The Managed Funds Association goes on to state that forfeiture-for-competition restrictive covenants actually benefit employees more than limited partners. This contention lacks any support because it is not accurate.

The *amicus* brief filed by the U.S. Chamber of Commerce focuses on how forfeiture-for-competition restrictive covenants protect trade secrets, confidential information, and customer relationship. However, none of these issues are present in this case as LKQ has admitted Rutledge did not solicit an LKQ customer or

This Court recognized the limitations of *Cantor Fitzgerald* when discussing two competing policy concerns. First, the Court discussed the difference between restrictive covenants that prevent an employee from earning a living in his chosen field and those that relinquish a contingent benefit. *Cantor Fitzgerald*, 312 A.3d at 691. A restrictive covenant that effectively deprives an employee of his livelihood and the corresponding risk of serious financial hardship is against public policy. *Id.* These restrictive covenants are subject to reasonableness analysis and balancing of the equities. *Id.* This discussion implies the application of a reasonableness analysis when the enforcement of a restrictive covenant results in serious financial hardship even if it relinquishes a benefit. Moreover, even when discussing these competing interests, the Court highlighted DRULPA and its "directive to 'give maximum effect to the principle of freedom of contract and the enforceability of partnership agreements.'" *Id.* Therefore, even when discussing the tension between the competing policies at issue in *Cantor Fitzgerald*, the Court focused on the fact the relevant agreement was governed by DRULPA.

misappropriate any confidential information or trade secret. Further, the U.S. Chamber of Commerce brief cites articles and cases discussing regular non-competition restrictive covenants not forfeiture-for-competition restrictive covenants. Because Delaware already reviews regular non-competition restrictive covenants for reasonableness outside the limited partnership agreement context, Delaware should review forfeiture-for-competition restrictive covenants for reasonableness as well.

This focus on DRULPA folds into the second policy consideration discussed by the Court – Delaware's disfavor of forfeitures. *Id.* at 692. The Court specifically stated it disagreed with the Court of Chancery's determination that Delaware law's disfavor of forfeitures extends to limited partnership agreements. *Id.* This was because DRULPA permits contractual penalties greater than standard commercial contracts. *Id.* Again, the statutory language of DRULPA provided a thumb on the scale to apply the strict terms of the contract at issue in *Cantor Fitzgerald*.

Absent DRULPA policy considerations, Delaware public policy is against enforcing employment-related forfeiture-for-competition provisions. In *QC Holdings*, the Court of Chancery refused to enforce the strict terms of a put agreement when doing so resulted in the forfeiture of future conditional redemption rights in an asset sale. *QC Holdings, Inc. v. Allconnect, Inc.*, No. 2017-0715-JTL, 2018 WL 4091721, at *7 (Del. Chan. Aug. 28. 2018). The strict interpretation sought by the defendant led to an irrational result on the party that would suffer the forfeiture. *Id.* at *8.

There is no dispute that restrictive covenants in relation to an asset sale are subject to lower reasonableness threshold than employment related restrictive covenants. If forfeiture provisions in asset sales can be unenforceable as unreasonable, there is no policy justification for treating employment related agreements more harshly especially in the instant case where Mr. Rutledge would

be forced to choose between working in the single industry, auto parts, he has spent his entire career in following high school or pay more than six times his annual salary to his former employer whose competitors include virtually every entity that touches an auto part. In fact, policy considerations favor treating employees more favorably.

In *Cantor Fitzgerald*, this court distinguished two prior cases relied on the by the Court of Chancery in determining that Delaware's disfavor of forfeitures does not apply to forfeiture-for-competition restrictive covenants in limited partnership agreements. These factual distinctions for dismissing *Wark* and *Halpen* do not apply outside the limited context of forfeiture-for-competition restrictive covenants in limited partnership agreements.

In *Wark*, the plaintiff sought only money damages against a former employee for allegedly competing in violation of a restrictive covenant. *Lyons Ins. Agency, Inc. v. Wark*, No. 2017-0348, 2020 WL 429114, at *5 (Del. Ch. Jan. 28, 2020). The agreement at issue provided that the former employee would owe the plaintiff money for competition. *Id.* at *5. The Chancery Court found this effectively operates as a restrictive employment covenant and prohibited the plaintiff from engaging in competitive behavior. *Id.* The mere fact of employment with a competitor, even as a janitor, constituted competition under certain circumstances. *Id.* at *6. There was no causal relation between the contractual breach and the claimed damages rendering the provision unenforceable. *Id.* at *7. This is exactly what LKQ seeks. *Wark* relies,

in part, on *Faw, Casson & Co., LLP v. Halpen*. In *Halpen*, a restrictive covenant barred a former employee from competition with a former employer on pains of a monetary penalty. *Faw, Casson & Co., LLP v. Halpen*, No. CIV.A.00c-01-015, 2001 WL 985104, at *2 (Del. Super. Ct. Aug. 7, 2021). As a result, the Delaware Superior Court found the restrictive covenant had an anticompetitive effect and was an employment restriction. *Id.* at *2 n.1. As such, it is subject to reasonableness. *Id.* at *2.

In distinguishing *Wark* and *Halpen*, this Court noted that the provision at issue in *Cantor Fitzgerald* "is not a penalty enforced against an employee based on the breach of a restrictive covenant; it is a condition precedent that excuses Cantor Fitzgerald from its duty to pay . . . a deferred financial benefit." *Cantor Fitzgerald*, 312 A.3d at 687. As LKQ has argued, the RSU Non-Compete is not a condition precedent. Appellant Brief, 7th Cir. Dkt. 13, at 42; Appellant Reply Brief, 7th Cir. Dkt. 21, at 20. Rutledge agrees that the RSU Non-Compete is not a condition precedent. For a contractual provision to constitute a condition precedent, Rutledge must satisfy a condition before LKQ has a duty to perform. *See AB Stable VIII LLC v. Maps Hotel & Resorts One LLC*, No. 2020-0310, 2020 WL 7024929, at *49 (Del. Chan. Nov. 30, 2020). In this case, LKQ seeks to claw back compensation paid between 2013 and 2021. LKQ's own arguments in the Seventh Circuit demonstrate why *Cantor Fitzgerald* should be limited to its facts. LKQ in its lawsuit seeks to

claw back already granted compensation to Rutledge, not cease paying in the future, which was the issue in *Cantor Fitzgerald*.

In arguing that Delaware public policy supports enforcement of LKQ's forfeiture claw back against Rutledge, LKQ quotes a portion of *RSUI Indem. Co.* that cites former Chief Justice Strine emphasis of the wealth creating effect of civil contracts if citizens can rely on the law to enforce contracts. Appellant Corrected Opening Brief, at 23. However, *RSUI Indem. Co*. is inapt for two reasons. First, that case concerned the interpretation of a D&O insurance policy, not a restrictive covenant applied to a former employee with no relation to a limited partnership agreement. *RSUI Indem. Co.*, 248 A.3d at 890. Second, the quote of former Chief Justice Strine is from *Libeau v. Fox* – a case regarding a contract governing ownership of real property by three individuals – which is also factually different to the instant case. 880 A.2d 1049, 1050–51 (Del. Chan. 2005). In fact, none of the cases cited by LKQ for its argument that Delaware has a public policy interest to enforce presumably all contracts as written arise in the context of an employment relationship. As noted above and in *Cantor Fitzgerald*, Delaware treats contracts related to employment relationships differently than other contracts and will override the language of a contract in certain circumstances depending on the competing policy interests of the case-at-issue. Delaware's contractarian deference is tempered

when contracts offend public policy. *Kodiak Building Partners, LLC v. Adams*, No. 2022-0311-MTZ, 2022 WL 5240507, at *6 (Del. Chan. Oct. 6, 2022).

Moreover, LKQ's claim that the RSU Agreements are not related to employment ignores the language of the contracts. The RSU Agreements specifically state that grants of RSUs are tied to continued employment at LKQ:

> In the event a Key Person's employment . . . with [LKQ] is terminated for any reason other than death or Disability, all RSUs of such Key Person that are unvested at the date of termination shall be forfeited to [LKQ.]

See, e.g., A312, at § 4. While entering the RSU Agreement is optional, continued employment is required for payment of the compensation like any other employment related restrictive covenant. LKQ's argument that forfeiture-for-competition agreements outside the context of limited partnership agreements do not restrict competition or employment ignores the reality for employees subject to such restrictions.

"If forfeiture for competition provisions were enforced without regard to the reasonableness of their terms while covenants not to compete were subjected to such a test, overreaching employers would be tempted to rely on the threat of forfeiture as a means of restraining employees from seeking employment with competitors." *Cheney v. Automatic Sprinkler Corp. of Am.*, 385 N.E.2d 961, 965 n.7 (Mass. 1979). While this quote is from the Supreme Court of Massachusetts, its concerns are directly relevant to the case and scope to be afforded *Cantor Fitzgerald*. When

DRULPA is not implicated by the forfeiture-for-competition restrictive covenant, reviewing courts need to consider other competing Delaware policy interests and the reasonableness of the restrictive covenants should be analyzed based on the specific facts of that case. If a former employee is technically free to work for a competitor but has to pay back eight years of compensation to do so, is the employee really free? It is this reality that led to the Federal Trade Commission's issuance of a final rule banning forfeiture-for-competition restrictive covenants for employees that are not senior executives. Non-Compete Clause Rule, 89 Fed. Reg. 38342-01, at *38364, *38432 (May 7, 2024) (to be codified at 16 C.F.R. pt. 910 & 912). As noted in the final rule:

> The common thread that makes each of these types of agreements non-compete clauses, whether they "prohibit" or "penalize" a worker, is that on their face, they are triggered where a worker seeks to work for another person or start a business after they leave their job—i.e., they prohibit or penalize post-employment work for another employer or business. As elaborated in Part IV, such non-competes are inherently restrictive and exclusionary conduct, and they tend to negatively affect competitive conditions in both labor and product and service markets by restricting the mobility of workers and preventing competitors from gaining access to those workers.

Id. Both the Supreme Court of Massachusetts and the FTC recognize the real-world impact of forfeiture-for-competition restrictive covenants. This Court implicitly did the same in *Cantor Fitzgerald* when it discussed the relevant policies to the facts of that case.

This Court specifically focused on the fact that the forfeiture-for-competition restrictive covenant in *Cantor Fitzgerald* was contained in a limited partnership agreement subject to DRULPA. When that fact is removed, Delaware public policy and precedent inform that reviewing courts should apply a reasonableness analysis when examining such provisions. This is consistent with the reality of employee-employer relationships when the employee is not a senior executive.

3. In reaching its decision in *Cantor Fitzgerald*, the Court employed a reasonableness review based on the specific facts of the case without stating it.

In weighing the differing policy considerations, this Court consistently fell back on DRULPA language to find a reasonableness analysis did not apply to the forfeiture-for-competition provision in that case. By doing so, the Court fundamentally conducted an implicit reasonableness review.

In holding a reasonable analysis does not apply to a forfeiture-for-competition restrictive covenant in a limited partnership agreement, this Court relied heavily on the fact that the sophisticated parties in *Cantor Fitzgerald* expressly based their limited partnership agreement on DRULPA, the lawsuit was initiated by the former partners seeking compensation, and there was no claw back. *Cantor Fitzgerald*, 312 A.3d at 677, 682, 687. All of these considerations are factors a court should consider when determining whether a restrictive covenant is reasonable. All of these considerations were used to find the forfeiture-for-competition restrictive covenant

at issue in *Cantor Fitzgerald* was fair to the former partners under the circumstances of the case.

In *Cantor Fitzgerald*, this Court relied on *W.R. Berkely Corp. v. Dunai* and *W.R. Berkely Corp. v. Hall* to support the application of forfeiture-for-competition restrictive covenant at issue. *Cantor Fitzgerald*, 312 A.3d at 687–88. LKQ does as well in its Corrected Opening Brief. Appellant Corrected Opening Brief, at p. 31–34. These cases are distinguishable from the instant case. First, *Dunai* and *Hall* were decided under a deferential arbitrary and capricious standard for review of corporate committee decisions that is not applicable here. *W.R. Berkely Corp. v. Dunai*, No. 1:19-cv-1223, 2021 WL 1751347, at *1 (D. Del. May 4, 2021); *W.R. Berkely Corp. v. Hall*, No. 03C-12-146, 2005 WL 406348, at *4 (Del. Super. Ct. Feb. 16, 2005). Second, and more importantly, both *Dunai* and *Hall* apply a reasonable analysis. In *Dunai*, the District of Delaware had an entire section of its opinion titled "B. The contract is reasonable." *Dunai*, 2021 WL 1751347, at *2.[3] In *Hall*, the Superior Court of Delaware found the provision at issue reasonable, in part because the parties

[3] The Third Circuit panel affirming the district court in *Dunai* recognized the limiting language in *Cantor Fitzgerald, W.R. Berkley Corp. v. Dunai*, No. 22-2963, 23-1079, 2024 WL 511040, at *2 n.2. (3d Cir. Feb. 9, 2024) ("The Delaware Supreme Court has now clarified that at least certain forfeiture-for-competition provisions are not subject to a reasonableness inquiry.")

did not contest its reasonableness. *Hall*, 2005 WL 406348, at *4 ("there appears to be no dispute the provisions of the agreement are reasonable").

Therefore, even though not explicitly stating it, this Court in *Cantor Fitzgerald* and the other Delaware cases on which it and LKQ rely, apply a reasonableness analysis to determine that under the specific circumstances of each individual case the forfeiture-for-competition restrictive covenant at issue was fair and reasonable. A reasonableness analysis to the RSU Non-Compete in this case is warranted as well.

4. The employee-choice doctrine is not the majority rule and does not justify expansion of *Cantor Fitzgerald* beyond the limited partnership context.

In *Cantor Fitzgerald*, this Court referred to the treatment of forfeiture-for-competition restrictive covenants in other states and their use or lack of use of the employee-choice doctrine. *Cantor Fitzgerald*, 312 A.3d at 690 nn.103, 104. In turn, LKQ refers to the "numerous jurisdictions" across the country that have applied this doctrine to enforce forfeiture-for-competition restrictive covenants. Appellant Corrected Opening Brief, at 34–35. However, reviewing the cases cited by this Court and LKQ demonstrate this is not the majority position, especially in the case of a forfeiture-for-competition restrictive covenant that claws back an unlimited period of past payment of compensation.

Of all the cases cited by this Court and LKQ, only two dealt with a claw back of already paid money – *Allegis Grp.* and *Dunai*. But, in *Allegis Grp.*, in applying Maryland law, the contract provision at issue was a condition precedent, not a forfeiture-for-competition restrictive covenant. *Allegis Grp., Inc. v. Jordan*, 951 F.3d 203, 210–11 (4th Cir. 2020) (applying Maryland law). As noted above, LKQ concedes the covenant in this case is not a condition precedent. Further, Maryland law applies a reasonableness analysis to forfeiture-for-competition restrictive covenants. *Allegis Grp., Inc.*, 951 F.3d at 210 ("And in Maryland specifically, courts apply a similar reasonableness standard to determine the enforceability of provisions that subject employees to a forfeiture of employment benefits should they engage in competition." *citing Food Fair Stores, Inc. v. Greeley*, 285 A.2d 632, 638 (Md. Ct. App. 1972)). In *Dunai*, as described above, the court applied a reasonableness analysis in all but name when it enforced the forfeiture-for-competition restrictive covenant in that case. These cases are therefore not relevant.

In all the other cited jurisdictions, only future benefits or future stock grants were forfeited. *See Lucente v. Int'l Bus. Mach. Corp.*, 310 F.3d 243, 248 (2d Cir. 2002) (applying New York law to cancellation of unexercised stock options in forfeiture provision); *S. Farm Bureau Life Ins. Co. v. Mitchell*, 435 So.2d 745, 747 (Ala. Civ. App. 1983) (forfeiture of future commission payments because of competition); *Collister v. Bd. Of Trs. Of McGee Co. Profit Sharing Plan*, 531 P.2d

989, 990 (Colo. App. 1975) (forfeiture of future deferred profit sharing because of competition); *Trumble v. Farm Bureau Mut. Ins. Co. of Idaho*, 456 P.3d 201, 207 (Idaho 2019) (forfeiture of bonus commission because of competition); *Miller v. Foulston, Siefkin, Powers & Eberhardt*, 790 P.2d 404, 412 (Kan. 1990) (forfeiture of future retirement benefits from partnership agreement because of competition); *Alco-Columbia Paper Serv., Inc. v. Nash*, 273 So.2d 630, 633 (La. Ct. App. 1973) (forfeiture of future stock benefit because of competition); *Alldredge v. City Nat'l Bank & Tr. Co. of Kansas City*, 468 S.W.2d 1, 3 (Mo. 1971) (claimed forfeiture of unvested retirement payments because of competition); *Grebing v. First Nat'l Bank of Cape Girardeau*, 613 S.W.2d 872, 874 (Mo. Ct. App. 1981) (forfeiture of future retirement benefits for competition); *Swift v. Shop Rite Food Stores, Inc.*, 489 P.2d 881, 881 (N.M. 1971) (forfeiture of future benefits for competition); *Kristt v. Whelan*, 4 A.D.2d 195, 197 (N.Y. App. Div. 1957) (forfeiture of unvested future benefits for competition); *Rochester Corp. v. Rochester*, 450 F.2d 118, 123 (4th Cir. 1971) (applying Virginia law) (forfeiture of future retirement benefits for competition); *Garner v. Girard Tr. Bank*, 275 A.2d 359, 360 (Pa. 1971) (forfeiture of unpaid deferred compensation for competition); *Ekman v. United Film Serv., Inc.*, 335 P.2d 813, 813–14 (Wash. 1959) (forfeiture of deferred compensation for competition); *Exxon Mobil Corp. v. Drennen*, 452 S.W.3d 319, 329 (Tex. 2014)

(forfeiture of unexercised stock options for competition). Forfeiture of future benefits is not at issue in this case.

This Court in *Cantor Fitzgerald* also referred to those jurisdictions that do not automatically enforce forfeiture-for-competition restrictive covenants. *Cantor Fitzgerald*, 312 A.3d at 690, n.102. These cases demonstrate why the employee choice doctrine does not apply to forfeiture-for-competition restrictive covenants outside the context of a DRULPA limited partnership. The Arizona Supreme Court required a reasonableness analysis of a forfeiture-for-competition restrictive covenant in a law firm partnership agreement. *Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C.*, 139 P.3d 723, 729 (Ariz. 2006). That court relied on a prior Arizona case that found forfeiture-for-competition restrictive covenants are subject to reasonableness analysis even though they are less restrictive than a traditional non-compete because a former employee was required to pay contractual damages to its former employer if competing. *See Oliver/Pilcher Ins., Inc. v. Daniels*, 715 P.2d 1218, 1220 (Ariz. 1986). The Connecticut Supreme Court likewise determined that forfeiture-for-competition restrictive covenants are subject to a reasonableness analysis because they are inherently restraints of free trade through their powerful deterrent effect. *Deming v. Nationwide Mut. Ins. Co.*, 905 A.2d 623, 634–35 (Conn. 2006). In other states, forfeiture-for-competition restrictive covenants are subject to a reasonableness analysis like all restrictive covenants because of their negative

impact on freedom of trade. *A.L. Williams & Assocs. v. Faircloth*, 386 S.E.2d 151, 153 (Ga. 1989); *Cheney v. Automatic Sprinkler Corp. of Am.*, 385 N.E.2d 961, 963–65 (Mass. 1979); *Torrence v. Hewitt Assocs.*, 493 N.E.2d 74, 77–78 (Ill. App. Ct. 1986); *Van Hosen v. Bankers Tr. Co.*, 200 N.W.2d 504, 508 (Iowa 1972); *Woodward v. Cadillac Overall Supply Co.*, 240 N.W.2d 710, 721 (Mich. 1976); *Harris v. Bolin*, 247 N.W.2d 600, 602–03 (Minn. 1976); *Brockley v. Lozier Corp.*, 488 N.W.2d 556, 563 (Neb. 1992); *Ellis v. Lionikis*, 394 A.2d 116, 119 (N.J. Super. Ct. 1978); *Lavey v. Edwards*, 505 P.2d 342, 345 (1973); *Almers v. S.C. Nat'l Bank of Charleston*, 217 S.E.2d 135, 139 (S.C 1975); *Selmer Co. v. Rinn*, 789 N.W.2d 621, 630 (Wisc. Ct. App. 2010). These states accurately recognize the imbalance in bargaining power between employees and employers, and the clear anticompetitive effect of giving up substantial monetary benefits to compete.

> The idea that under such forfeiture provisions an employee has a real 'freedom of choice' has been strongly criticized upon the ground that . . . these decisions ignore the inhibitory effect of such a forfeiture clause upon an employee in making the decision whether to accept a new job, in that ordinarily the new employment will not compensate him for the loss of the pension, which may represent a substantial portion of what he must depend upon when he retires and which he cannot risk by competing.

Lavey, 505 P.2d at 345. As a result, when the forfeiture-for-competition restrictive covenant is broader than necessary to protect an employer's interest it is invalid. *See, e.g. Harris*, 247 N.W.2d at 603.

A handful of other states either consider forfeiture-for-competition restrictive covenants the same as traditional non-compete restrictive covenants requiring a reasonableness analysis or bar them outright along with traditional non-competes. *See Flammer v. Patton*, 245 So.2d 854, 858 (Fla. 1971); *Prudential Locations, LLC v. Gagnon*, 509 P.3d 1099, 1107 (Haw. 2022); *Mungas v. Great Falls Clinic, LLP*, 221 P.3d 1230, 1238 (Mont. 2009). *Also, Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 20 Cal. App. 3d 668, 672 (Cal. Ct. App. 1971) (all employment restrictive covenants barred); *Werlinger v. Mut. Serv. Cas. Ins. Co.*, 496 N.W.2d 26, 29–30 (N.D. 1993) (same); *Graham v. Hudgins, Thompson, Ball & Assocs., Inc.*, 540 P.2d 1161, 1164 (Okla. 1975) (same).

The Georgia Supreme Court recognized the absurdity of blindly enforcing a forfeiture-for-competition restrictive covenant when the same restrictive covenant would not be enforceable if applied in a traditional context. *A.L. Williams & Assocs.*, 386 S.E.2d at 153 ("a forfeiture provision that is conditioned expressly upon an invalid covenant must be invalid *in se*"). The employee-choice doctrine is not the majority opinion in relation to the enforcement of forfeiture-for-competition restrictive covenants. Based on the cases referenced above, thirteen states do not apply a reasonableness analysis to forfeiture-for-competition restrictive covenants, thirteen states apply a reasonableness analysis per common law, and an additional six states employ a reasonableness analysis or bar them via statute. There is no

majority and no cited opinion enforces a forfeiture-for-competition restrictive covenant similar to the RSU Non-Compete that requires a forfeiture of an unlimited claw back period for mere work at a competitor even if the work is non-competitive.

The employee-choice doctrine fails to acknowledge the reality of the employer-employee relationship as noted above. It is the existence of the sophisticated parties' choice of DRULPA to govern their agreement in *Cantor Fitzgerald* that justifies enforcement of that forfeiture-for-competition restrictive covenant. The employee-choice doctrine does not.

For the reasons stated above, *Cantor Fitzgerald* should be limited to its specific circumstances and forfeiture-for-competition restrictive covenants should be reviewed for reasonableness outside the context of a limited partnership agreement.

II. This Court Should Apply The Standard Reasonableness Test To Forfeiture-For-Competition Restrictive Covenants Not Contained In Limited Partnership Agreements That Includes Consideration Of Relevant Facts Of The Particular Case.

A. Certified Question Two.

If *Cantor Fitzgerald* does not apply in all other circumstances, what factors inform its application? For example, does it matter what type of agreement the forfeiture provision appears in, how sophisticated the parties are, whether the parties retained counsel to review the provision, whether the forfeiture involves a contingent payment or claw back, how far backward a claw back reaches, whether the employee quit or was involuntarily terminated, or whether the provision also entitled the company to injunctive relief? *LKQ Corp. v. Rutledge*, Case No. 110,2024, at 3, 4 (Del. March 21, 2014); *LKQ Corp. v. Rutledge*, 96 F.4th 977, 987 (7th Cir. 2024).

B. Scope of Review.

The Court's review of Certified Question Two is *de novo* because it arose in the context of federal appellate court review of a grant of summary judgment and concerns questions of public policy. *Rales v. Blasband*, 634 A.2d 927, 931 (Del. 1993); *Ellison v. USPS*, 84 F.4th 750, 755 (7th Cir. 2024); *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 902 (Del. 2021).

C. Merits of Argument.

As stated above, Rutledge contends that *Cantor Fitzgerald* does not apply outside the limited partnership context. In determining the enforceability of

forfeiture-for-competition restrictive covenants not contained in limited partnership agreements, reviewing courts should apply the familiar reasonableness review they are familiar with in the context of other employment-related restrictive covenants.

In Delaware, it is well established that a post-employment restrictive covenant is enforceable only if it: (1) is no greater than is required in temporal and geographic scope for the protection of a legitimate business interest of the employer; (2) does not impose undue hardship on the employee, and (3) is not injurious to the public. *FP UC Holdings, LLC v. Hamilton*, No. 2019-1029-JRS, 2020 WL 1492783, at *6 (Del. Chan. March 27, 2020). The fundamental construct of this reasonableness analysis that must be considered when evaluating forfeiture-for-competition restrictive covenants is fairness in balancing an employer's protection of its economic interests versus hardship to the former employee. *Id.* The factors referenced by the Seventh Circuit are considerations a reviewing court should consider, as well as the other relevant factors based on the specific circumstances of the case, as supported by Delaware precedent.

These considerations include as appropriate:

- The temporal and geographic scope of the restrictions, *Gordian Med., Inc. v. Vaughn*, No 22-cv-319, 2024 WL 1344481, at *15 (D. Del. March 30, 2024); *FP UC Holdings, LLC*, 2020 WL 1492783, at *6;

- The relative sophistication of the parties and any power imbalances, *Cantor Fitzgerald*, 312 A.3d at 692; *Kodiak Building Partners, LLC*, 2022 WL 5240507, at *7;
- Limited partnership agreements subject to DRULPA, *Cantor Fitzgerald*, 312 A.3d at 691;
- Whether the case was initiated by the employee or employer, *Cantor Fitzgerald*, 312 A.3d at 687;
- Whether the provision is a claw back or forfeiture of future payment and whether this is tied to a legitimate business interest. *Cantor Fitzgerald*, 312 A.3d at 691; *Centurian Serv. Grp., LLC v. Wilensky*, No. 2023-0422-MTZ, 2023 WL 5624156, at *5 (Del. Chan. Aug. 31, 2023);
- Whether the plaintiff sought injunctive relief, *Cantor Fitzgerald*, 312 A.3d at 691.
- The nature of the business at issue and whether it involves specialized knowledge of clients or a specialized field, *Faw, Casson & Co. v. Cranston*, 375 A.2d 463, 468 (Del. Chan. 1977).
- Whether the parties had the opportunity to retain counsel. *NuVasive, Inc. v. Miles*, No. 2017-0720-SG, 2018 WL 4677607, at *2 (Del. Chan. Sept. 28, 2018).

Despite the protestation from LKQ and the *amici*, as noted above, these considerations have been considered by this Court and other Delaware courts in the past when deciding whether to enforce restrictive covenants. The existence of the forfeiture-for-competition clause within the restrictive covenant does not impose any additional burden on the courts. Much like the rejection of blue-penciling restrictive covenants when they are overreaching, courts should not provide a carve-out of existing restrictive covenant jurisprudence to allow ambitious employers the threat of forfeiture as a means of restraining employees from seeking employment. *See FP UC Holdings, LLC*, 2020 WL 1492783, at *8 (blue-penciling overbroad restrictive covenants gives employers the perverse incentive to draft the broadest possible restrictive covenant with the fallback of judicial saving if the unlawful restraint of trade is challenged). The public interest favors competition. *Kodiak Building Partners, LLC*, 2022 WL 5240507, at *4.

For the reasons stated above, a reasonableness review of forfeiture-for-competition restrictive covenants should include all factors relevant to balancing the company's interest in protecting is legitimate business interest with the ability of an employee to earn a living unburdened by overly restrictive provisions.

CONCLUSION

For the reasons stated above, the Court should answer the Certified Questions as follows:

For Certified Question One: *Cantor Fitzgerald* does not preclude reviewing forfeiture-for-competition restrictive covenant for reasonableness in circumstances outside the limited partnership context.

For Certified Question Two: reviewing courts should apply the normal employer-employee restrictive covenant reasonableness analysis to forfeiture-for-competition restrictive covenants not contained in a limited partnership agreement, which would include consideration of how sophisticated the parties are, whether the parties retained counsel to review the provision, whether the forfeiture involves a contingent payment or claw back, how far backward a claw back reaches, whether the employee quit or was involuntarily terminated, or whether the provision also entitled the company to injunctive relief.

Respectfully submitted,

Dated: June 3, 2024

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