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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

In its Opening Brief, LKQ addressed the two legal questions certified and accepted by the Court for review. *See* Appellant's Amended Opening Brief (also "LKQ Br."). *First*, LKQ established why this Court should not apply a reasonableness test to the analysis of the RSU Agreements and should not limit the application of the employee choice doctrine to the narrow context of limited partnership agreements (Certified Question No. 1). *Second*, LKQ established that the Court should decline to adopt a multi-factor "gateway" test to determine whether a forfeiture-for-competition agreement (such as the RSU Agreements at issue here) is enforceable (Certified Question No. 2).

Appellee's Answering Brief (also "Rutledge Br.") is a disjointed attempt to distract from the key Delaware legal principles and holdings that directly bear upon these issues. Faced with this Court's adoption of the employee choice doctrine in *Cantor Fitzgerald, L.P., v. Ainslie*, 312 A.3d 674 (Del. 2024), and other directly analogous Delaware case law, Rutledge's arguments rest upon a hodge-podge of irrelevant holdings, out-of-state authority, dicta, and immaterial distinctions that are not grounded in the law. Upon closer review, the most striking feature of Appellee's Answering Brief is the lack of on-point, Delaware authorities cited in support of Rutledge's arguments.

Accordingly, LKQ respectfully requests that this Court: (1) conclude that the holding in *Ainsle* applies outside the narrow context of partnership agreements, including, specifically, application to stock equity agreements (and the RSU Agreements in this case); and (2) decline to apply the identified "gateway" equitable factors to consideration of enforcement of a forfeiture-for-competition provision.

II. LEGAL ARGUMENT

A. The Court's Holding in *Ainsle* Supports the Application of the Employee Choice Doctrine to Cases Outside the Context of Limited Partnerships (Certified Question No. 1).

Rutledge's effort to cherry-pick and limit the Court's holding in *Ainsle* is meritless. In his response, Rutledge repeatedly latches on to the Court's statement that, "under the circumstances of this case, we balance the relevant policy considerations differently [than the Court of Chancery]." Rutledge Br. at 18-19. *Ainsle*, 312 A.3d at 677. Contrary to Rutledge's argument, the "circumstances" of the *Ainsle* decision are, like in this case, the distinction between a forfeiture-for-competition provision that does not prevent the individual from working for a competitor and a conventional restrictive covenant that does so restrict the individual.

In *Ainsle*, the Delaware Court of Chancery found that the Conditioned Payment Device in a limited partnership agreement and resulting forfeiture were a "forfeiture for competition" provision. *See* LKQ's Br. at 27-28. In reversing the Delaware Court of Chancery, this Court found that the scope of the Conditioned Payment Device and related forfeiture were not subject to the reasonableness analysis applied to traditional restrictive covenants. *Ainsle*, 312 A.3d at 691-92. Therefore, the Court should enforce the agreements as written. *Id.* Hence, the former partners' objections (on reasonableness grounds) were insufficient to

overcome the strong, competing Delaware public policy considerations in support of freedom of contract. *Id.*

The Court in *Ainsle* recognized the fundamental distinction between a non-competition covenant that precludes employment and a non-competition covenant that merely results in the forfeiture of an economic benefit. *Id*. at 690-91. The former implicates restraint of trade policy considerations whereas the latter does not. Significantly, this distinction applies equally to agreements involving former executive or managerial employees and is not tethered to the review of covenants in the context of a limited partnership agreement.

The enforcement of the RSU Agreements at issue in this litigation falls squarely within the Court's holding in *Ainsle.* Like the Conditioned Payment Device at issue in *Ainsle,* Rutledge's RSU Agreements did not prevent him from working in the auto salvage industry. All the RSU Agreements required of Rutledge is that he return the benefits he received under the RSU Agreement. As Rutledge concedes (Rutledge Br. at 27), his participation in the RSU program was not mandatory and Rutledge could have elected not to participate. That Rutledge was subject to these limited restrictions was no surprise–he accepted these agreements along with the benefit of the stock grants over the course of many years. LKQ Br. at 13. Nevertheless, Rutledge made a voluntary choice to resign his employment and immediately go to work for a direct competitor, which resulted in the forfeiture of a

financial benefit. *See Ainsle*, 321 A.3d at 690 (stating that the "employee choice" doctrine assumes that an employee who elects to leave a company makes an informed choice between forfeiting a certain benefit or retaining the financial benefit).

In *Ainsle*, the Court recognized that it was adopting the employee choice doctrine. Specifically, the Court in *Ainsle* surveyed authorities on this issue in various jurisdictions, before concluding: "In *Pollard v. Autote*, 852 F.2d 67 (3d Cir. 1998), the United States Court of Appeals for the Third Circuit surmised that we would follow this [the reasonableness] approach. By our decision today, we respectfully confute that prediction." *Id.* at 690, n.103. Had the Court sought to limit the adoption of the employee choice doctrine to cases involving limited partnership agreements, it could have easily drawn this explicit distinction. It did not.

Rutledge also fails to acknowledge or address the Court's reliance on the broader public policy relating to freedom of contract. This Court has made clear that "[t]he courts of this State hold freedom of contract in high—some might say, reverential—regard." *Id.* at 676-77. In *Ainsle*, this contractarian policy consideration was not limited to the narrow partnership agreement context. The Court also found that the commitment to freedom of contract manifested in the DRUPA "corresponds with our courts' tradition of 'ensuring freedom of contract to

facilitate commerce. We uphold [] the freedom of contract and enforce [] as a matter of *fundamental public policy*, the voluntary agreements of sophisticated parties.'" *See Id.* at 688-89 (quoting *NAF Holdings, LLC v. LI Fung (Trading) Ltd.*, 118 A.3d 175, 180 n.14 (Del. 2015)) (emphasis added).

Indeed, under the public policy of Delaware it is axiomatic that when parties have knowingly and voluntarily entered into a contract under Delaware law, those terms should be enforced. *See New Enter. Assoc. 14 L.P. Rich*, 295 A.3d 520, 566 (Del. Ch. May 2, 2023). "When parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract." *Libeau v. Fox*, 880 A.2d 1049, 1056 (Del. Ch. 2005), *aff'd in pertinent part*, 892 A.2d 1068 (Del. 2006). Delaware law rarely supports the invalidation of contract terms based on notions of public policy that are not enshrined in legislative enactments. *See Sycamore Partners Mgmt., L.P. v. Endurance Am. Ins. Co.*, 2021 WL 761639, *11 (Del. Super. Feb. 26, 2021) ("As the Supreme Court has cautioned, public policy is the General Assembly's domain, and judges should avoid the temptation to legislate from the bench.").

Here, Rutledge fails to point to any statute that sets forth any public policy against the enforcement of the clawback provisions in the RSU Agreements and

outside the context of limited partnership agreements. The Delaware legislature has not enacted any such law. Absent a statutory mandate, the Court should not restrict the holding in *Ainsle* to cases in the limited partnership context, and there is no indication from this Court's decision that it intended such a narrow limitation. *See RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 903 (Del. 2021) ("Such public policy considerations are not to be lightly found, as the wealth-creating and peace-inducing effects of civil contracts are undercut if citizens cannot rely on the law to enforce their voluntary-undertaken mutual obligations.").

Rutledge also fails to address a host of policy considerations (cited in LKQ's opening brief and the *amici* briefing) that support the broader application of the employee choice doctrine. The non-competition restrictions in the RSU Agreements (and other similar agreements) make Delaware corporations more competitive by protecting confidential business information and valuable customer relationships. Further, the consideration exchanged between the corporation and the employee in support of these equity agreements ultimately benefits employees, by encouraging companies to provide financial benefits to which employees may not otherwise be entitled, and further align the interests of key employees and their companies. The enforcement of these provisions (particularly in stock equity agreements) also promotes stability and consistency in Delaware law, as numerous Delaware corporations have drafted these agreements in consideration of Delaware's

prevailing contractarian doctrine and with the reasonable expectation that Courts will enforce these agreements in accordance with the parties' expectations.

Finally, Rutledge relies on *Dickerson v. State*, 975 A.2d 791 (Del. 2009), and *Cushner v. State*, 214 A.3d 443 (Del. 2019), for the proposition that the Court should not "extend" the holding of *Ainsle* to the facts in this case. *See* Rutledge Br. at 18-19. The Court need not "extend" the holding of *Ainsle* to find that the employee choice doctrine applies to the RSU Agreements. Rather, the Court's holding, fairly construed, plainly already encompasses agreements like these outside the partnership context. Regardless, *Dickerson* and *Cushner* have no factual or legal nexus to this proceeding. In *Dickerson*, the primary legal issue was a constitutional question relating to a conviction for carrying a concealed weapon. *Dickerson*, 975 A.2d at 795-96. In *Cushner*, the primary legal issue was whether the State of Delaware had failed to present sufficient evidence to establish that a handprint was impressed at the time a crime was committed. *Cushner*, 214 A.3d at 444, 446. Therefore, these authorities are irrelevant to the questions presented here.

B. Rutledge's Arguments and Legal Authorities in Support of the Application of a Reasonableness Test to the RSU Agreements Are Meritless (Certified Question No. 1).

Rutledge's arguments that the Court should apply a reasonableness test to the RSU Agreements (*i.e.*, to forfeiture-for-competition covenants outside the partnership context) also fall flat. Initially, Rutledge argues that this Court

"inherently" conducted a reasonableness test to the forfeiture-for-competition provisions at issue in *Ainsle*. Rutledge Br. at 7. It did not. Rather, the Court pointedly found that the forfeiture-for-competition provisions were not subject to a reasonableness analysis. "To sum up, we disagree with the Court of Chancery's conclusion that forfeiture-for-competition provisions like the one at issue here are restraints of trade subject to review for reasonableness." *Ainsle*, 312 A.3d at 692. The explicit holding of *Ainsle* rejects a reasonableness analysis in this context.

The sparse Delaware authorities on which Rutledge relies in support of the application of a reasonableness test are not on point. Rutledge cites to *QC Holdings, Inc. v. Allconnect, Inc.*, 2018 WL 4091721 (Del. Ch. Aug. 28, 2018) in support of the position that Delaware public policy is against enforcing employment-related forfeiture-for-competition provisions. Rutledge Br. at 23. Yet *QC Holdings* does not shed any light on Delaware public policy in enforcing employment-related forfeiture-for-competition provisions. Rather, *QC Holdings* involved the enforcement of a putative forfeiture provision in a put option agreement that defendant, Allconnect, granted to plaintiff, QC Holdings, giving the right to repurchase shares of common stock in return for a cash payment of $5 million. *QC Holdings, Inc.*, 2018 WL 4091721, at *1-2. The agreement there did not arise in the "employment-related" context and was, instead, a commercial transaction. Moreover, the forfeiture provision at issue in *QC Holdings* concerned the failure to

meet an obligation to pay the "Put Price" at a certain time—there were no "competition" covenants that triggered any obligation or forfeiture. *Id.* at *6-7. The court ultimately declined to enforce the putative forfeiture because the language of the contract providing for a forfeiture was "not unambiguous." *Id.* at *7. "If the language does not clearly provide for a forfeiture, then a court will not construe the agreement to avoid causing one." *Id.*

In this case, and contrary to *QC Holdings*, there is no dispute that the pertinent forfeiture provisions unambiguously require the forfeiture of Rutledge's restricted stock should he join a competitor. The *QC Holdings* decision is irrelevant and Rutledge's attempts to analogize the court's findings in *QC Holdings* to the issues before this Court have no legal resonance.

Rutledge also cites to two other cases that were previously considered and distinguished by the Court in reaching the *Ainsle* decision. *See* Rutledge Br. at 24-25 (citing *Lyons Ins. Agency, Inc. v. Wark*, 2020 WL 429114 (Del. Ch. Jan. 28, 2020), and *Faw, Casson & Co., LLP v Halpen*, 2001 WL 985104 (Del. Super. Aug. 7, 2021)). Notably, the central legal issue in both of these cases involved liquidated damages. *See Wark*, 2020 WL 429114, at *2; *Halpen*, 2001 WL 985104, at *1. Both *Wark* and *Halpen* dealt with lawsuits initiated by former employers seeking to enforce liquidated damages provisions contained in ordinary restrictive covenant agreements against former employees. *Id.* In both cases, the court "considered

whether the damages the employer demanded for breach of the restrictive covenant were reasonable in light of the employees' actions and concluded that damages provisions untethered to an employer's reasonable interests in preventing competition, and unrelated to any action taken by a former employee, were unreasonable restraints of trade." *See Ainsle*, 312 A.3d at 678 (citing *Wark*, 2020 WL 429114, at *7; *Halpen*, 2001 WL 985104, at *1).

Here, LKQ is not seeking to enforce a liquidated damages provision for an employee's breach of a restrictive covenant in an employment agreement. Instead, the issue before the Court is whether a Delaware court may invalidate a forfeiture-for-competition provision that arises outside the limited partnership context using the same reasonableness test that is applied to traditional noncompete agreements. As the Court recognized in *Ainsle*, a forfeiture-for-competition provision is not akin to a liquidated damages provision contained in a non-compete agreement, and involves analytically distinct, separate legal issues. *See Ainsle*, 312 A.3d at 678.

In a desperate effort to avoid application of the employee choice doctrine here, Rutledge strains to distinguish between non-competition restrictions that provide for the forfeiture of a past financial benefit (a "clawback") and restrictions that serve as a condition to pay future benefits. Rutledge Br. at 25-26. According to Rutledge, this distinction between the RSU Agreements (which contain a clawback) and the Conditioned Payment Device (where compliance was a condition precedent to a

future obligation to pay) is a get-out-of-jail-free card for him. Rutledge does not, however, cite to any legal authority wherein a Delaware court held that a clawback forfeiture-for-competition provision was subject to the reasonableness analysis applied to traditional restrictive covenants. Rutledge's self-serving conjecture regarding the importance of this distinction is not grounded in Delaware law.

Rutledge's argument overlooks key Delaware authorities, cited with approval by the Court in *Ainsle*, finding that clawback provisions within the specific context of a stock equity agreement are not subject to the reasonableness analysis applied to traditional restrictive covenants. *See* LKQ Br. at 32-36. The *Hall* and *Dunai* decisions cited in LKQ's principal brief provide abundant authority for the proposition that Delaware courts enforce this type of clawback provision. *W.R. Berkley Corporation v. Hall*, No. 03C-12-146-WCC, 2005 WL 406348, *2 (Del. Super. Feb. 16, 2005); *W.R. Berkley Corp. v. Dunai*, No. 19-01223, 2021 WL 1751347 (D. Del. May 4, 2021). Each of the above cases: (1) involved the analysis of clawback provisions under a stock benefit plan; (2) found such provisions were enforceable; and (3) did not apply a reasonableness analysis relating to the scope of the non-competition covenant, including any analysis of its temporal or geographic scope. LKQ Br. at 32-36. To the contrary, the court in *Dunai* found: "Though Dunai improperly classifies her contract provision as a 'non-compete' it is actually a clawback. She was free to work for a competitor right away. The only

condition was, if she did so within one year, she had to repay the stock grants that the company had given her." *Dunai*, 2021 WL 1751347 at *2.

On appeal in *Dunai*, and relying on this Court's opinion in *Ainsle*, the Third Circuit Court of Appeals similarly found that "Delaware's tradition of 'contractarian deference' support[s] upholding and enforcing Dunai's stock clawback provision." *See W.R. Berkley Corp. v. Dunai*, Nos. 22-2963 and 23-1079, 2024 WL 511040 (3d Cir. Feb. 9, 2024). Here, too, Rutledge, undisputedly a Key Employee (less than 2% of LKQ's workforce), was offered stock grants under a restricted stock benefit plan, under which such benefits could be clawed back If he violated the contractual terms by unfairly competing.

These authorities, unlike the liquidated damages cases advanced by Rutledge, are directly on point. The *Dunai* and *Hall* cases also both categorically rejected the argument that the clawback provisions in the stock equity agreements constituted an unenforceable liquidated damages provision, further gutting the alleged precedential or persuasive value of the *Wark* and *Helpen* decisions. LKQ Br. at 34-35, 37.

Rutledge's efforts to distinguish *Dunai* and *Hall* are weak and ineffective. Rutledge Br. at 29-30. *First*, Rutledge argues that the cases were decided under an arbitrary and capricious standard. This is a red herring and conflates the issues in these cases. While the courts may have applied an arbitrary and capricious standard to review of the committees' respective factual determinations that a breach took

place, this is a separate issue from whether the underlying agreement is legally unenforceable as a matter of law. *See Dunai*, 2021 WL 17151347, *2-4; *Hall*, 2005 WL 406348, at *2-5. *Second*, Rutledge argues that the courts in *Dunai* and *Hall* applied a reasonableness test to the non-competition covenants. This is wrong. The courts in *Dunai* and *Hall* made no effort to apply a traditional reasonableness test to the non-competition covenants, as there is no discussion of the geographic and temporal scope of the covenants in accordance with Delaware law.[1] *See Id.*

The holdings in *Dunai* and *Hall* are also consistent with the logic and holdings in numerous other cases that have considered, and enforced, clawback forfeiture-for-competition provisions, including specifically in the context of stock equity agreements. For example, in *J.P. Morgan & Co. v. Pierce*, 517 F. Sup. 2d 945, 967-68 (E.D. Mich. 2007), where the employee resigned and obtained competitive employment, a Federal District Court in Michigan (applying Delaware law) enforced a non-competition forfeiture provision in a stock award agreement that provided for the clawback of amounts gained through the exercise of stock options. *See also In re Citigroup, Inc.*, 535 F.3d 45, 50-51 (1st Cir. 2008) (finding that forfeiture provisions in a restricted stock unit agreement that required the forfeiture of

[1] Delaware courts review noncompete and nonsolicit agreements subject to Delaware law to ensure that they are (i) reasonable in geographic scope and temporal duration, (ii) advance legitimate economic interests of the party seeking enforcement, and (iii) survive a balancing of the equities. *See FP UC Holdings, LLC v. Hamilton*, 2020 WL 1492783, at *6 (Del. Ch. Mar. 27, 2020).

restricted stock that had already been issued to an employee were enforceable and not in violation of Florida public policy); *Smythe v. Raycom Media, Inc.*, No. 1:13-CV-12 CEJ, 2013 WL 4401811, at *1 (E.D. Mo. Aug. 15, 2013) (applying Delaware law and finding that, for purposes of a Rule 12(b)(6) motion to dismiss, a forfeiture provision that called for the clawback of shares of stock that had already been issued to an employee pursuant to a stock equity plan was legally enforceable). In *Press Ganey Assocs., Inc. v. Dye*, No. 3:12-CV-437-CAN, 2014 WL 1116890 (N.D. Ind. Mar. 19, 2014), a Federal District Court in Indiana enforced a non-competition provision allowing the plaintiff to claw back severance payments and rejected the defendant's argument that a stock grant agreement conditioned on the defendant not working for a competitor for 12 months was an unenforceable non-compete covenant. *Id.* at *6-7 (also finding Delaware law to be in accord on this point).

Rutledge argues that the "employment related" context of the RSU Agreements distinguishes the clawback provisions in the RSU Agreements from the forfeiture-for-competition covenants at issue in *Ainsle*.[2] Rutledge Br. at 26. Again, however, a plethora of pertinent authority (including, most notably, abundant

[2] Rutledge references the Federal Trade Commission's issuance of a rule that has not yet taken effect and that is currently subject to various legal challenges. Rutledge Br. at 28-29. The rule does not constitute applicable law and is irrelevant, particularly as to the RSU Agreements, which involve a different analysis than restrictive covenants in a non-compete agreement. *Id.* Similarly, Rutledge's citations to non-precedential out-of-state authorities are not a valid source of Delaware's public policy. *Id.* at 28, 34-36.

Delaware authority) reveals that this does not change the outcome. The *Hall*, *Dunai* (including the Third Circuit appeal), *Pierce*, *Smythe*, and *Dye* decisions, cited *supra*, each arose in the employment context, and not in partnership agreements. Further, the courts in these cases either applied Delaware law in enforcing a forfeiture-for-competition provision or otherwise found Delaware law to be in accord. The forfeiture provisions in the RSU Agreements also arise in the context of a stock equity agreement—they are not an effort to claw back earned wages from employment. These agreements are only provided to "key employees" (roughly 2% of LKQ's workforce) with senior managerial and operational responsibilities—facts that are not rebutted by Rutledge.

Rutledge cites to a bevy of cases referenced by the Court in *Ainsle*, noting various examples of cases that involved a condition precedent to the payment of future compensation, rather than a clawback of past payments or awards. Rutledge Br. at 32-33. These cases (primarily, if not exclusively) are found in footnotes in the *Ainsle* decision merely surveying the law in various jurisdictions and citing to dozens of cases with respect to the employee choice doctrine. *See Ainsle*, 312 A.3d at 690, nn.102 & 104. The fact that certain of these non-Delaware cases involved forfeiture conditions, and not a clawback, is unremarkable.

More telling is Rutledge's conspicuous failure to cite affirmative Delaware authority in support of his argument. Rutledge fails to cite any case applying

Delaware law finding that a non-competition restriction in a clawback provision is either (a) unenforceable or (b) subject to a reasonableness analysis. Nor does he affirmatively cite to any case wherein a court in any jurisdiction drew a distinction between a clawback and a condition precedent forfeiture-for-competition provision and determined that the Court should apply a reasonableness analysis to one and not the other. In contrast, LKQ has cited numerous authorities, including Delaware authorities cited with approval by this Court, declining to apply a reasonableness test to a clawback forfeiture-for-competition provision.

Drawing an arbitrary line between the application of the employee choice doctrine in the context of a clawback provision as opposed to a conditional payment provision would also contravene Delaware's public policy. This would only incentivize Delaware companies to defer financial payments or obligations to employees, which is not in the interest of employees. There is also no practical reason why the Court should adopt a preference for enforcing conditional payment agreements, while at the same time potentially invalidating the clawback provisions found in many stock equity agreements involving potentially hundreds of Delaware companies if not more. Such an outcome would not advance the public policy interests of promoting stability and consistency in interpreting Delaware corporate law. *See* LKQ Br. at 40 (discussing Delaware public policy on this point).

Rutledge's conjecture that the "employee choice" doctrine is not the majority position in various jurisdictions around the country is also irrelevant. Rutledge Br. at 31-35. In *Ainsle*, this Court already surveyed the law in various jurisdictions (acknowledging opinions that state the employee choice doctrine is the "majority approach" and surmising that jurisdictions were "split") and chose to adopt the employee choice doctrine based on the public policy considerations embodied in Delaware law. *Ainsle*, 312 A.3d at 689, n.102. Rutledge's citations to out-of-state authority and non-precedential authorities are immaterial, as they address issues that were already considered and addressed by the Court in *Ainsle*.

C. Rutledge Relies Upon Unfounded Factual And Reasonableness Factors that Have No Place in Considering Whether the Employee Choice Doctrine Should Be Applied Here (Certified Question No. 1).

Rutledge attempts to draw factual distinctions between the non-competition covenants at issue in the RSU Agreements and the forfeiture provision in *Ainsle* that are lacking in support. Initially, these factual arguments are really a back-door effort to engage in a reasonableness analysis that is not appropriate under this Court's holding in *Ainsle*. Nevertheless, LKQ addresses some of these purported distinctions below.

Rutledge argues that the clawback provisions in the RSU Agreements are a penalty that impose financial hardship on Rutledge. They are not. The benefits that Rutledge received under the RSU Agreements were independent of the more than

six figure annual compensation (including wages, bonuses, and other benefits) that Rutledge received as a Plant Manager in Lake City, Florida. Rutledge would not have received the restricted stock *but for* his limited, post-employment restrictions. A provision that restores the parties to the *status quo ante* and provides LKQ with the benefit of its bargain is not a penalty. If he had elected to keep his RSUs and not compete for a limited nine-month period (which he could have), Rutledge would have profited handsomely from this arrangement. Furthermore, Rutledge was not required to sell his stock grants and thus risk being required to return their cash value if he unfairly competed. Rather, that was his choice to do so.

In *Ainsle*, the departing partners similarly argued that their relinquishment of financial benefits based on their breach of the non-competition restrictions in the partnership agreement resulted in financial hardship. As the *Ainsle* Court noted, "[p]arties have a right to enter into good and bad contracts[;] the law enforces both." *See Ainsle*, 312 A.3d at 697 (*citing Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010)). Thus, an analysis of the equities of whether an employee would incur "serious financial hardship" is contrary to the Court's holding in *Ainsle*.

Similarly, Rutledge's arguments relating to the size and scope of the clawback under the RSU Agreements (*i.e.*, LKQ seeks to recover grants conferred dating back to 2013) are effectively reasonableness arguments that are not applicable to the analysis of the RSU Agreements. Regardless, Rutledge cites to no legal authority

wherein a court has held that there is a *de facto* limitations period (depending on the year of the stock grant) on an employer's ability to recover under a forfeiture provision in a contract. Moreover, the paternalistic depiction of Rutledge as a mere middle manager incapable of understanding the benefit of his bargain is belied by the record evidence, which demonstrates the substantial role he played managing the full scope of LKQ's operations in Lake City, Florida. It is also belied by Rutledge's own testimony that he received, accepted, and voluntarily entered into these agreements. A122-23; A252-253; A264-268.

Rutledge's reference to a provision for "injunctive relief" within the RSU Agreements (Rutledge Br. at 14) is also irrelevant for the same reasons a similar provision was irrelevant to this Court's holding in *Ainsle*. *See* LKQ Br. at 47-48. LKQ does not and has not sought injunctive relief under the competitive restrictions in the RSU Agreements, as reflected in the First Amended Complaint, at summary judgment or at any other point in this litigation.[3] A522. Rutledge does not provide

[3] While Rutledge alleges that LKQ seeks injunctive relief under the RSU Agreements (Rutledge Br. at 14), a review of the First Amended Complaint reveals that the only injunctive relief that LKQ seeks under the RSU Agreements relates narrowly and exclusively to the disposition and sale of his restricted stock units. A522. This narrow request does not seek to utilize any competitive restrictions in the RSU Agreements to prevent Rutledge from working for a competitor. In other words, LKQ's request for relief relating to the disposition of Rutledge's restricted stock is entirely consistent with the employee choice doctrine after Rutledge elected to work for a direct competitor of LKQ. Indeed, LKQ has never sought to prevent Rutledge from working for a competitor through any request for injunctive relief under the RSU Agreements at any point in this litigation, period.

any evidence to the contrary. Rutledge also does not dispute that LKQ has renounced any claim for injunctive relief under the RSU Agreements. In *Ainsle*, the Court noted that the limited partnership agreement contained a provision that allowed Cantor Fitzgerald to obtain injunctive relief. *Ainsle*, 312 A.3d at 680. Further, the Court noted that Cantor Fitzgerald had sought injunctive relief against two of the departing partners in a separate forum. *Id.* at 680, n.31. At summary judgment, the Court noted that Cantor Fitzgerald was not seeking injunctive relief—"[f]rom Cantor Fitzgerald's perspective, as far as the Conditioned Payment Device was concerned, the plaintiffs were free to compete but only at the cost of forfeiting their rights to the Conditioned Amounts." *Id.* at 683. Similarly, here, LKQ is not seeking injunctive relief under the RSU Agreements to preclude competitive employment. Rutledge is free to compete but only at the cost of reimbursing LKQ from the proceeds of his restricted stock obtained under the RSU Agreements.

For all these reasons, the Court should apply the employee choice doctrine to cases that are outside the narrow context of limited partnership agreements, and, more specifically, to the stock equity agreements at issue in this litigation.

D. Delaware Law and Policy Do Not Support Creating A Layered, Multi-Factor Analysis (Certified Question No. 2).

With respect to Certified Question No. 2, Rutledge fails to rebut or even address the key arguments advanced by LKQ in its principal brief. Rutledge does not dispute the fact that Delaware common law already provides numerous defenses

to a claim for breach of contract, including safeguards relating to the formation of the agreement, procedural and substantive unconscionability, and the good faith administration of contractual terms. *See* LKQ Br. at 41.

Rutledge also does not dispute that none of the courts applying Delaware law in *Hall*, *Dunai* (including in the appeal to the Third Circuit Court of Appeals), *Pierce*, or *Ainsle* set forth a gateway test to determine whether a forfeiture-for-competition provision should be subject to a straightforward contract analysis, or otherwise discuss threshold factors that inform the application of the employee choice doctrine. *Id.* at 41-42. In his response, Rutledge does not cite to any Delaware case that supports the application of a multi-factor gateway test. *Id.*

Perhaps most significantly, Rutledge fails to address or rebut that the administration of such a gateway multi-factor test would be contrary to public policy considerations of clarity, stability and efficiency in Delaware law. *Id.* at 44-45. Instead of addressing these legitimate public policy considerations with respect to the administration of a gateway test, Rutledge provides the Court with the standard for the reasonableness analysis applied to traditional restrictive covenants under Delaware law. Rutledge Br. at 39-40. Rutledge then proposes that the Court apply the same reasonableness factors as a gateway test (a reasonableness test within a reasonableness test). *Id.* at 39-40. Rutledge's argument merely reinforces LKQ's point by proposing two layers of analysis with potentially overlapping equitable

factors. While Rutledge cites to various Delaware authorities for application of these factors, each of these cases (with the exception of *Ainsle*) was decided in the context of the review of a traditional restrictive covenant. *Id.* Thus, while they may be illustrative in terms of the proposed application of a reasonableness factor to a non-compete agreement, these cases do not establish that the application of any of these reasonableness factors is legally appropriate in the context of forfeiture-for-competition provisions.

Again, it is noteworthy that Rutledge has not affirmatively cited to any Delaware case or authority (or authority in any jurisdiction) wherein a Court grappled with or decided to apply such gateway factors in determining whether to apply a reasonableness test to a forfeiture-for-competition provision. Such a gateway test would lead Delaware courts further astray from adherence to the public policy of freedom of contract.

For all these reasons, the Court should decline to impose additional threshold requirements for enforcing clawback provisions and instead should apply the employee choice doctrine consistent with its holding in *Ainsle.*

III. CONCLUSION

For all the above reasons, LKQ respectfully requests that this Court: (1) rule that the holding in *Ainsle* applies outside the narrow context of partnership agreements, including, specifically, stock equity agreements (and the RSU Agreements in this case); and (2) decline to apply the identified "gateway" equitable factors to consideration of enforcement of a forfeiture-for-competition provision.

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2024, true and correct copies of the foregoing *Appellant's Reply Brief* were caused to be served on the following counsel by File & ServeXpress:

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