EFiled: May 13 2024 03:34PM EDT
Filing ID 73042450
Case Number 110,2024

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 Question of Law from the United States Court of Appeals for the Seventh Circuit. No. 23-2330 D.C. No. 1:21-cv-03022

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING APPELLANT

OF COUNSEL:
Robert M. Palumbos
Ryan F. Monahan
DUANE MORRIS LLP
30 South 17th Street
Philadelphia, PA 19103
RMPalumbos@duanemorris.com
RFMonahan@duanemorris.com

Jordan L. Von Bokern
Tyler S. Badgley
U.S. Chamber of Commerce
1615 H Street, NW
Washington, DC 20062-2000

Richard L. Renck (#3893)
DUANE MORRIS LLP
1201 North Market Street, Suite 501
Wilmington, DE 19801
Telephone: (302) 657-4900
RLRenck@duanemorris.com

Counsel to the Chamber of Commerce of the United States of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

IDENTITY AND INTEREST OF AMICUS CURIAE

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

On behalf of the businesses it represents, the Chamber has an interest in ensuring that Delaware remains a leader of sensible business practices and policies that are predictably upheld by its courts. Businesses regularly rely upon forfeiture-for-competition agreements because of their many pro-competitive benefits. Given that Delaware is home to two-thirds of all Fortune 500 companies,[1] Amicus has a strong interest in ensuring that Delaware courts properly recognize those benefits and consistently enforce forfeiture-for-competition agreements.

---

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

SUMMARY OF ARGUMENT

1. Forfeiture-for-competition agreements are a sensible arrangement between an employer and employee to incentivize an employee to stay with a company or not compete against it for a set period in exchange for valuable consideration. In this case, Robert Rutledge received equity in LKQ Corporation in exchange for a commitment not to compete against his employer for a nine-month period after his resignation.

2. The Chamber submits this brief to highlight the significance of the business interests that forfeiture-for-competition agreements protect. Forfeiture-for-competition agreements promote productive innovation by protecting proprietary information, trade secrets, business plans, pricing or bidding strategies, and other confidential and valuable business information. They also encourage employers to make investments in employee training and development that they otherwise would not make, while allowing businesses to grow and preserve their goodwill.

3. Forfeiture-for-competition agreements provide unique benefits to employers *and* employees. Instead of preventing workers from accepting employment with a competitor as with a traditional noncompete agreement, forfeiture-for-competition agreements give employees an economic incentive that aligns their interests to those of their former employers. Forfeiture-for-competition agreements also provide a clear understanding of the consequences of competition,

which results in more efficient enforcement and allows employees to negotiate with new employers to backfill the forfeited compensation. Finally, forfeiture-for-competition agreements protect the right of businesses not to pay a former employee out of profits that the former employee is actively seeking to reduce.

4. This Court had the occasion to address forfeiture-for-competition agreements in the context of a limited partnership agreement in *Cantor Fitzgerald, LP v. Ainslie*, __ A.3d __, 2024 WL 315193 (Del. Jan. 29, 2024). In *Cantor Fitzgerald*, the Court adopted the view that forfeiture-for-competition agreements are *not* restraints of trade and should not be subject to a reasonableness analysis. That holding should not be cabined to the limited partnership context. The unique features of forfeiture-for-competition agreements highlighted in this brief underscore why they are not restraints of trade in any employer-employee arrangement. And even if the Court were to hold that some forfeiture-for-competition agreements should be reviewed for reasonableness, it should make clear that the unique features of such agreements weigh in favor of finding them enforceable.

ARGUMENT

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

Robert Rutledge was afforded the opportunity to participate in a restricted stock program—an opportunity reserved for "key persons," who represent less than 2% of LKQ's workforce. (7th Cir. Op. at 2.) There was no requirement to accept such an opportunity, but when he did, he was required to execute and abide by the terms of the Restricted Stock Unit Agreement (the "RSU Agreement"). (*Id.*) Under the terms of the RSU Agreement, Rutledge received stock distributed to him pursuant to a vesting schedule. (*Id.*) Rutledge sold the vested stock on the open market before he left to work for a competitor. (*Id.*) Under the terms of the RSU Agreement, Rutledge would have been entitled to retain the proceeds from the sale of the vested stock if he waited nine months from the date of his resignation to begin work with a competitor. Instead, Rutledge waited five days. (*Id.* at 3.)

These facts give the Court the opportunity to consider the significant and legitimate business interests that forfeiture-for-competition agreements protect in any employer-employee arrangement. Forfeiture-for-competition agreements' distinct features provide numerous benefits to both businesses and employees. The Court should weigh these factors in deciding this case.

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

Businesses across the economy—including the Chamber's members—rely on forfeiture-for-competition agreements to protect critical business interests. Those agreements have distinct features that benefit both employers and employees and eliminate concerns that courts have often expressed in assessing noncompete agreements. In deciding this case, the Court should recognize the importance of these interests while valuing the features that distinguish forfeiture-for-competition agreements from noncompete agreements and ensure that businesses can continue to rely on predictable and consistent enforcement of forfeiture-for-competition agreements in Delaware.

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

Employees who agree to forfeiture-for-competition agreements also have a clear understanding ahead of time of the additional compensation they will forgo in

the event they elect to join a competitor. By contrast, noncompete agreements typically require employers to seek injunctive relief, which results in court intervention, costly litigation, and the uncertainty associated with a possible injunction that will prevent new employment for an unpredictable period. Forfeiture-for-competition agreements eliminate this costly cloud of uncertainty by setting clear terms relating to an employee's decision to join a competitor. Such clarity works to the benefit of employees, who can often negotiate with their new employers for higher compensation to mitigate the loss of compensation under their forfeiture-for-competition agreements. New employers often agree to backfill the forfeited compensation, thus fostering employee mobility while respecting the terms of the forfeiture-for-competition agreement. In other words, the marketplace handles the issue without the need for judicial intervention.

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

Failure to enforce forfeiture-for-competition agreements will deny employers the benefits of these agreements, including stability, investment in employees, and structures that do not deter proper compliance and disciplinary measures. It will also deny employees significant and entirely voluntary forms of compensation, which, if these contracts are not enforced, would not be offered in the first place. And enforcement of forfeiture-for-competition agreements as written is consistent with Delaware's strong principle of freedom of contract. *See Holifield v. XRI Investment Holdings LLC*, 304 A.3d 896, 931 (Del. 2023) (concluding in context of limited liability company statute that "allow[ing] courts to simply rewrite the contract . . . would negatively impinge on the goal of achieving predictability in contracts and undermine the important principle of freedom of contract legislatively embodied in the alternative entity statutes"); *Abry Partners V, LP v. F&W Acquisition LLC*, 891 A.2d 1032, 1061-62 (Del. Ch. 2006) ("[T]here is also a strong American tradition of freedom of contract, and that tradition is especially strong in our State, which prides itself on having commercial laws that are efficient."); *Libeau v. Fox*, 880 A.2d 1049, 1056-57 (Del. Ch. 2005) ("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."); *see also Fleming v. U.S. Postal Service AMF O'Hare*, 27 F.3d 259,

261 (7th Cir. 1994) (Posner, J.) ("[A] premise of a free-market system is that both sides of the market, buyers as well as sellers, tend to gain from freedom of contract.").

Given that forfeiture-for-competition agreements preserve the freedom of employer and employee to contract, the Court properly recognized in *Cantor Fitzgerald* that many jurisdictions do not view them as restraints of trade or scrutinize them for reasonableness. *See Cantor Fitzgerald*, 2024 WL 315193, at *12 n.104; *see also Morris v. Schroder Cap. Mgmt. Int'l*, 859 N.E.2d 503 (N.Y. 2006); *Fraser v. Nationwide Mut. Ins. Co.*, 334 F. Supp. 2d 755, 760 (E.D. Pa. 2004); *Courington v. Birmingham Tr. Nat. Bank*, 347 So. 2d 377, 383 (Ala. 1977); *Alco-Columbia Paper Serv., Inc. v. Nash*, 273 So. 2d 630, 634 (La. Ct. App. 1973); *Swift v. Shop Rite Food Stores, Inc*., 489 P.2d 881, 882 (N.M. 1971). "The strong weight of authority holds that forfeitures for engaging in subsequent competitive employment … are valid, even though unrestricted in time or geography." *Rochester Corp. v. Rochester*, 450 F.2d 118, 122-23 (4th Cir. 1971). This Court came to the same conclusion in *Cantor Fitzgerald*, and its rationale is not limited to partnerships; rather it applies with even more force with application to employees.

In light of these unique characteristics, forfeiture-for-competition agreements are not restraints of trade, and should not be subject to a reasonableness analysis. But even if viewed through a reasonableness standard, the fact that a forfeiture-for-

competition agreement does not deprive an employee of the choice to go to a competitor strongly weighs in favor of its enforceability.

B. Forfeiture-for-Competition Agreements Protect Significant Business Interests.

Forfeiture-for-competition agreements not only are uniquely beneficial to employers and employees in aligning their incentives without the prospect of legal compulsion, they also achieve many of the same benefits as reasonable noncompete agreements, including protecting proprietary information, trade secrets, special business relationships (customer, vendors, etc.), business plans, pricing or bidding strategies, and other confidential and valuable business information. *See Tristate Courier and Carriage, Inc. v. Berryman*, 2004 WL 835886, at *10 (Del. Ch. Apr. 15, 2004) (enforcing noncompete agreement when employee "has complete knowledge of . . . proprietary information, including its business strategies, logistics, and costs"); Evan P. Starr et al., *Noncompete Agreements in the U.S. Labor Force*, 64 J.L. & ECON. 53, 64 (2021) (noting that "the incidence of noncompete[] [agreements] is much higher among those who report possessing some type of trade secret or valuable information.").

The protection of confidential business information promotes innovation by "increas[ing] the returns to research and development." John McAdams, *Non-Compete Agreements: A Review of the Literature* at 6 (Fed. Trade Comm., Working Paper, 2019). "[I]nnovation and business developments take large amounts of time,

money and trial and error." *Id.* If the result of that investment is to have an employee with confidential business information poached by a competitor (who was unwilling to invest its own resources), it would reduce the incentive for businesses to make similar investments in the future.

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

Employers are also more likely to spend resources on employee training and development when they do not fear that the employees may immediately take those skills to a competitor. Forfeiture-for-competition agreements, like reasonable noncompete agreements, can solve this "'holdup' problem," which emerges when

employers "forgo making certain investments in their workforce knowing that employees would be able to subsequently quit and appropriate the value of the investment." Camila Ringeling et al., *Noncompete Clauses Used in Employment Contracts, Comment of the Global Antitrust Institute* at 4-5, & n.7, n.9 (George Mason Law & Economics, Research Paper No. 20-04, Feb. 7, 2020). "[B]y discouraging worker attrition before the firm has had the time to recoup the cost of its upfront investment," such agreements encourage "mutually beneficial" investments. McAdams, *Non-Compete Agreements* at 6; *see also Computer Aid, Inc. v. MacDowell*, 2001 WL 877553, at *2 (Del. Ch. July 26, 2001) (enforcing a noncompete agreement to protect an employer's legitimate business interests in the "specialized training" provided to an employee).

While forfeiture-for-competition agreements foster training and development of employees, they also allow businesses to grow and preserve their goodwill, much as noncompete agreements aim to do. *See Sensus USA, Inc. v. Franklin*, 2016 WL 1466488, at *7 (D. Del. Apr. 14, 2016) (enforcing a noncompete agreement when employees' duties involved "cultivating client relationships" including "work[ing] on some of [the employer's] largest accounts"). A business that relies on its employees to obtain customers is at risk of its employees leaving to form their own firm or to join a competitor and taking those customers. Forfeiture-for-competition agreements help "preserv[e] employer goodwill," *id.*, by incentivizing employees

not to compete with their employers by using the same benefits that their employers have bestowed upon them—including training, development, and the use of their employers' brands to develop a customer base.

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

II. Because the Benefits of Forfeiture-for-Competition Agreements Are the Same in the Employment and Limited Partnership Contexts, the Court Should Apply the Reasoning of *Cantor Fitzgerald* to this Case.

In *Cantor Fitzgerald, LP v. Ainslie*, __ A.3d __, 2024 WL 315193 (Del. Jan. 29, 2024), the Court recognized the unique benefits of forfeiture-for-competition agreements that differentiate it from other noncompete agreements. The Court observed, "[t]he distinction between a restrictive non-competition covenant that precludes a former employee from earning a living in his chosen field and an agreement that allows a former partner to compete but at the cost of relinquishing a contingent benefit is, in our observation, significant." *Id.* at 13. It drew upon a forfeiture-for-competition agreement's unique features when it determined that "the strong policy interest that justifies the review of unambiguous contract provisions for reasonableness and a balancing of the equities . . . is diminished—if it does not vanish" when reviewing forfeiture-for-competition agreements. *Id.* "To put it another way, the interest to be vindicated when evaluating a covenant that prohibits competition and that might even preclude gainful employment is significantly weakened when competition—often (as in this case) highly remunerative—is permitted." *Id.*

In this case, LKQ afforded Rutledge an opportunity reserved for "key persons" in the company to participate in a restricted stock program that entitled him to stock paid out on a vested schedule, so long as he abided by the clear terms of a

forfeiture-for-competition provision. (Op. at 2-3.) Rutledge did not comply with those contractual terms and instead elected to work for a competitor. (Op. at 3.) *Cantor Fitzgerald* recognized the importance of freedom of contract in holding that agreement enforceable without a reasonableness review, and although the facts of that case involved a limited partnership agreement, the same freedom-of-contract principles apply to Rutledge, who was *not prohibited* from seeking employment elsewhere and freely entered into the RSU Agreement. *See, e.g.*, *Libeau*, 880 A.2d at 1057 (recognizing outside of limited partnership context that "[w]hen 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").

This Court recognized in *Cantor Fitzgerald* that forfeiture-for-competition agreements broadly serve these benefits and interests, and the Court did not suggest that a different conclusion would arise based on the type of agreement involved. To the contrary, in *Cantor Fitzgerald*, the Court expressly rejected the Third Circuit's prediction in *Pollard v. Autotote, Ltd.*, 852 F.2d 67 (3d Cir. 1988), that this Court would apply a reasonableness analysis to forfeiture provisions. 2024 WL 315193 at *11 n.102. Given that *Pollard*, like this case, involved a forfeiture agreement in the employment context, the Court should not newly cabin its analysis in *Cantor*

Fitzgerald to forfeiture-for-competition provisions in limited partnership agreements. It should, instead, answer the certified questions by holding that *Cantor Fitzgerald* applies to forfeiture-for-competition agreements in the employment context, including the RSU Agreement at issue in this case.

CONCLUSION

This case presents an opportunity for Delaware to reaffirm its role as a leader in sensible, business-first policies and practices that are predictably upheld by its courts. Forfeiture-for-competition agreements protect critical business interests, give employees an incentive to refrain from competition, and provide advance clarity that is both beneficial in its own right and because it allows employees to negotiate with new employers to mitigate their lost compensation. The business community has a significant interest in the predictable and consistent enforcement of forfeiture-for-competition agreements in Delaware.

The Chamber respectfully ask the Court to consider these significant business interests and to conclude that forfeiture-for-competition agreements are not restraints of trade and should be enforceable.

Date: May 13, 2024

DUANE MORRIS LLP

/s/ Richard L. Renck
Richard L. Renck (#3893)
1201 North Market Street, Suite 501
Wilmington, DE 19801
Telephone: (302) 657-4900
RLRenck@duanemorris.com

OF COUNSEL:

Robert M. Palumbos
Ryan F. Monahan
DUANE MORRIS LLP
30 South 17th Street
Philadelphia, PA 19103
RMPalumbos@duanemorris.com
RFMonahan@duanemorris.com

Jordan L. Von Bokern
Tyler S. Badgley
U.S. Chamber of Commerce
1615 H Street, NW
Washington, DC 20062-2000

Counsel for the Chamber of Commerce of the United States of America