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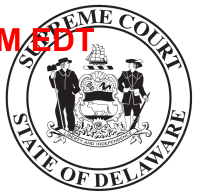

IN THE SUPREME COURT OF THE STATE OF DELAWARE

COURT SQUARE CAPITAL MANAGEMENT, L.P., COURT SQUARE CAPITAL GP, LLC and COURT SQUARE CAPITAL GP, III, LLC,	No. 205, 2024
Defendants and Counterclaim Plaintiffs Below/Appellants,	On Appeal From The Court of Chancery, C.A. No.: 2021-0262-KSJM
v.	
KEVIN BROWN,	**PUBLIC VERSION FILED JULY 24, 2024**
Plaintiff and Counterclaim Defendant Below/Appellee.	

APPELLANTS' OPENING BRIEF

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Dated: July 9, 2024

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NATURE OF PROCEEDINGS

For nearly a decade, Appellee Kevin Brown worked as an investment professional at Court Square Capital Management, L.P. ("Court Square Capital"), a leading middle-market private equity firm. During this time, he rose to the level of Partner. Brown was a member of Court Square Capital GP, LLC ("Fund II GP") and Court Square Capital GP III, LLC ("Fund III GP," and together with Court Square Capital and Fund II GP, "Appellants" or "Court Square"). Fund II GP and Fund III GP are the general partners of two of Court Square's investment funds, known as "Fund II" and "Fund III" (and together, the "Funds"). Brown's membership in Fund II GP and Fund III GP made him potentially eligible to receive millions of dollars in carried interest payments (both during his employment and after his departure) arising from the Funds' investments. As a condition to the receipt of this carried interest, which continued following his resignation from Court Square, Brown agreed to abide by a limited number of restrictive covenants contained in the LLC Agreements for Fund II GP and Fund III GP (the "LLC Agreements"), including a limited non-compete obligation and a typical covenant not to use or disclose any of Court Square's confidential information.[1]

[1] Due to differences in the language of the LLC Agreements concerning forfeiture of carried interest, and because there is no expectation of any future payments under Fund II, Appellants have only asserted claims for forfeiture of Brown's carried interest entitlement under the Fund III GP Agreement. Accordingly, Court Square

The covenants to which Brown agreed were clear. The "non-compete" provision of the Agreements, Section 5.14(a), was narrow—it did not prevent Brown from going immediately into the employ of a competitor. Nor did it stop him from pursuing any new investment opportunity which might arise while at his new employer. Rather, the only limitation was that, for a period of one year after Brown left Court Square, Brown, personally, was precluded from rendering investment advice for any form of compensation with respect to specific investment opportunities which were under active consideration by Court Square at the time of his departure and which were listed on a "Deal Sheet" that Court Square provided to him when he left. This provision was calibrated to protect Court Square's intellectual property and investor interests by preventing departing employees, like Brown, from taking the information and contacts which they had gathered while at Court Square and promptly deploying that same information at their new employer. At the time of his departure from Court Square, Brown executed a settlement agreement and release which, among other things, agreed to the Deal Sheet which had been provided to him. Included on Brown's Deal Sheet were Zodiac Pool Systems ("Zodiac") and Hayward Industries, Inc. ("Hayward"), both potential deals Brown helped lead while at Court Square.

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addresses only the Fund III Agreement provisions in its briefing.

Brown was also prohibited under Section 5.14(c) of the Agreements from sharing any of Court Square's confidential information with third parties. That confidential information included sensitive information which had been entrusted to Court Square on the promise that it would not divulge that information to anyone outside the walls of its business.

At the time Brown decided he wanted to leave Court Square, he was eligible to receive millions of dollars in future carried interest payments based on the performance of the Funds, including performance that occurred after his departure, as long as he complied with his obligations under the LLC Agreements, including those set out above. Brown knew that any breach of his obligations would result in a forfeiture of his ability to receive those payments.

The trial record in the court below demonstrates that Brown began immediately to engage in conduct violative of these obligations. *First*, upon leaving Court Square in June 2016, Brown joined a competing private equity firm, MSD Partners ("MSD"), where he was paid a guaranteed salary of $500,000 and a bonus for the remainder of 2016 of $1.2 million for "working on new investment opportunities." With days of joining MSD, Brown began to provide investment advice to MSD regarding Zodiac, a company that Brown had been actively pursuing at Court Square in the months and even days before he left. *Second*, Brown violated

the LLC Agreements by leading MSD's successful acquisition of Hayward, which was also on his Deal Sheet. *Third*, Brown cajoled his former subordinate and then current Court Square employee, Christopher Bertrand, to send him seven confidential investment memorandums, known as "Heads Up Memos," or "HUMs," belonging to Court Square. Notably, to evade detection by Court Square, Bertrand sent these memoranda to Brown using his private email account and then Brown, in turn, sent them to an analyst at MSD using Brown's private email account, breaching his restrictive covenant with Court Square. These memoranda contained confidential information of both Court Square, as well as of third parties that had been provided to Court Square pursuant to non-disclosure agreements ("NDAs").

At trial, Brown did not contest the critical facts. He admitted that, once at MSD, he promptly began to pursue Zodiac and then Hayward. He also admitted that he had secretly importuned his former subordinate to send him the confidential memoranda at issue in this case via their private email accounts. Brown's only "defense" to his conduct was that he claimed his conduct was permissible based on interpretations of the LLC Agreements that rendered his restrictive covenants essentially meaningless.

In reaching its decision in favor of Brown, the Court of Chancery did not rely on any factual findings or credibility determinations. Instead, it accepted two of

Brown's facial attacks on the applicability of his restrictive covenants finding, with respect to Section 5.14(a), that provision to be "unambiguous." Specifically, it held (1) that Brown did not breach his obligation under Section 5.14(a) because he did not receive compensation from MSD that was specifically "tied to" the investment advice he provided with respect to Zodiac and Hayward; and (2) that any confidentiality breaches were excusable because they were not "material" and did not result in specific harm to Court Square.[2]

Because the lower court's conclusions are plainly inconsistent with the language of the LLC Agreements and basic legal principles governing the interpretation and application of forfeiture clauses in LLC agreements, the lower court's decisions were erroneous and should be reversed. Indeed, the Court of Chancery's ruling with respect to Brown's confidentiality obligations imposed the same type of improper restrictions on Court Square that this Court explicitly rejected in *Cantor Fitzgerald, L.P. v. Ainslie*, 312 A.3d 674 (Del. 2024).

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[2] *See* Post-Trial Memorandum Opinion attached hereto as Exhibit B to Appellants' Opening Brief at 24, 29.

SUMMARY OF ARGUMENT

1. The trial court erred in concluding that the Fund III LLC Agreement's prohibition on providing investment advice coupled with the receipt of "any form of direct or indirect compensation" for that work did not apply to Brown's admitted provision of investment advice with respect to Zodiac and Hayward.

a. The trial court ignored the plain language of Section 5.14(a), which states that receiving "any form of direct or indirect" compensation for providing investment advice meets the compensation requirement of the prohibition. Section 5.14(a) does not require payment to be uniquely "tied" to a particular investment opportunity, as the trial court concluded. Indeed, that atextual view of the provision, at a minimum, impermissibly reads the words "any form" and "indirect" out of the contract. Because Brown's employment contract with MSD paid him handsomely to "work[] on new investment opportunities" (*i.e.*, to identify and pursue potential acquisitions) including Zodiac and Hayward, the investment advice he provided to MSD on Zodiac and Hayward fell within the prohibitions of Section 5.14(a).

b. The trial court's interpretation of Section 5.14(a) is completely inconsistent with the intention of the parties' agreement. Section 5.14(a) imposes a limited restriction that permits a Terminated Member to work for a competitive

private equity firm as long as the Member does not provide investment advice with respect to a clearly delineated list of companies.

c. Even if Section 5.14(a) is not unambiguous in favor of Court Square, the trial court erred by finding that it unambiguously favored Brown and excluding extensive evidence supporting Court Square's interpretation.

2. The trial court departed from the plain language of the LLC Agreements and failed to adhere to the Delaware LLC Act when it held that Court Square was required to prove materiality and specific harm with respect to Brown's breach of his confidentiality obligations set forth in Section 5.14(c).

a. The parties expressly agreed in Section 5.8(b) of the Fund III LLC Agreement that *any* breach of the covenants therein would result in a forfeiture of the right to carried interest. As this Court recognized in *Cantor Fitzgerald, L.P.*, *supra*, forfeiture provisions embodied in LLC Agreements must be enforced strictly and in accordance with their plain terms.

b. As the trial court recognized at the outset of the case, Brown's continued compliance with the covenants in Section 5.14 was a condition of Court Square's obligation to make payments of carried interest to him. Where a contract establishes a condition to a party's performance under a contract, any failure to comply with the condition, whether or not material or resulting in harm, relieves

the other party from performance. Accordingly, because Brown failed to comply with the conditions to his entitlement to carried interest, Court Square was not obligated to make any carried interest payments to him.

c. The undisputed evidence at trial established that Court Square's "HUMs" contained confidential information and that Brown breached his non-disclosure obligations by inappropriately obtaining and disclosing to a third-party competitor Court Square's HUMs.

STATEMENT OF FACTS

A. Brown's Employment at Court Square and Obligations under the LLC Agreements

Court Square is a middle-market private equity firm that primarily focuses on investing in and acquiring companies within four key sectors or "verticals": business services, healthcare, industrials, and technology and telecommunications.[3] Brown joined Court Square as a Vice President in 2006.[4] He was a high-level, sophisticated investment professional who, during all times relevant to this case, was assigned to the industrials sector and responsible for handling investment opportunities and overseeing portfolio companies.[5] At the time of his departure in June 2016, Brown was a Partner in Court Square and Member of Fund II and Fund III and thus bound by the LLC Agreements.[6]

As a Member of Fund II GP and Fund III GP, Brown was eligible to receive carried interest from the Funds, both during and after his employment, based on how successfully the Funds had performed ("Carried Interest Payments").[7] These payments, however, were conditioned on Brown's on-going compliance with the

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[3] A0784 at 319:5-15.
[4] A0332 at 12:22-14:20.
[5] A0785 at 320:2-5.
[6] A1283-A1340; A1341-A1398.
[7] A0341-A0342 at 51:21–52:1.

restrictive covenants in the Agreements, both during and following his employment with Court Square.[8] Fundamental to this case are the covenants designed to prevent departing employees from providing investment advice to a new employer as to specific deals that were listed on a departing employee's Deal Sheet.[9] In this case, Brown's Deal Sheet included two potential deals, Zodiac and Hayward, which Brown had worked on while at Court Square.[10] In addition, Brown was obligated to continue to maintain confidentiality.[11]

1. Limited Covenant Protecting Court Square's Intellectual Property

Section 5.14(a) of the Fund III LLC Agreement provides that:

> [D]uring the period such Member remains employed by the Company … and for a period of one year following such Member's Termination Date, such Member shall not, directly or indirectly through any Person, acquire a direct or indirect interest in any partnership, firm, corporation, business organization, entity or other investment opportunity (each, an "Investment Opportunity") that could reasonably be construed as being actively considered as a potential investment in a Portfolio Company and, with respect to the period after such Member becomes a Terminated Member, is set forth on the Deal Sheet that is provided to such Member as soon as practicable after such Member's Termination Date[.][12]

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[8] A1382; A1376.
[9] A1382.
[10] A1497-A1504.
[11] A1383.
[12] A1382.

Critically, Section 5.14(a) defines what it means to acquire an indirect interest in an investment opportunity.[13] That provision states that a Terminated Member is deemed to have acquired an indirect interest in an "Investment Opportunity" on the Member's Deal Sheet if the Terminated Member "receives *any form of* direct or *indirect fee, payment or other compensation based on the rendering of investment advice* to a third party regarding such Investment Opportunity."[14] It is undisputed that both Zodiac and Hayward were on Brown's Deal Sheet, and that he agreed to the Deal Sheet.[15] Thus, at the time he departed Court Square, Brown was on notice that, while he was free to work on a broad range of potential deals at MSD, he was not permitted to provide investment advice to his new employer about Zodiac and Hayward during the one-year restricted period.[16]

2. Confidentiality Obligations

As is standard practice in the private equity industry, the LLC Agreements also contained confidentiality obligations. Those provisions protect against the disclosure of confidential information belonging to Court Square or that has been entrusted to Court Square by third parties (*e.g.*, through NDAs). Specifically, Section 5.14(c) of the LLC Agreements provides that, during employment and at all

[13] *Id*.
[14] *Id*. (emphasis added).
[15] A1497-A1504.
[16] A1382.

times thereafter, Members and Terminated Members are not permitted to "directly or indirectly use, rely on, disclose, divulge, furnish or make accessible to anyone any Confidential Information" of Court Square or its funds or affiliates.[17] Confidential Information is defined broadly to include any "information, materials or data … that are not generally known to or available for use by the public[,]" and includes any information that Court Square is "required by . . . agreement to keep confidential."[18]

3. Forfeiture of Carry in the Event of any Breach of Section 5.14

In exchange for complying with these obligations, Members and Terminated Members are eligible to receive Carried Interest Payments from Fund-specific investments. That is, compliance with the restrictive covenants is a condition to receiving the Carried Interest Payments. Therefore, if the "Terminated Member breaches any of the covenants set forth in Section 5.14 (whether such breach occurred prior to, on or after such Terminated Member's Termination Date), such Terminated Member[]" forfeits the entitlement to carried interest payments.[19] This provision is absolute and does not require any proof of materiality or harm to trigger a forfeiture of the Carried Interest Payment.[20]

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[17] A1383.
[18] A1350.
[19] A1376.
[20] *Id*.

B. Brown's Work on Hayward and Zodiac on Behalf of Court Square

While at Court Square, Brown was responsible for identifying new investment opportunities in the industrials sector.[21] In or around 2014, Court Square began to consider investing in entities in the pool equipment industry.[22] Through its diligence efforts and industry contacts, including its relationship with the former Chief Operating Officer of Hayward, Larry Silber, Court Square came to focus on two pool equipment companies: Hayward and Zodiac.[23] Brown was responsible for overseeing diligence and market research for these potential acquisitions.[24]

On May 9, 2014, at Brown's direction, Hayward was first added to Court Square's weekly deal sheet.[25] The weekly deal sheet was used by Court Square's deal teams to flag new potential investment opportunities for discussion at weekly meetings.[26] Over the next two years, Court Square closely monitored Hayward and the pool equipment industry, and Hayward repeatedly appeared on Court Square's weekly deal sheets.[27]

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[21] A0610 at 145:9–16; A0612-A0613 at 147:14-148:7.
[22] A0795-A0796 at 330:20-331-11.
[22] A0795-A0796 at 330:20-331-11.
[23] A0795-A0799 at 330:20-334:10.
[24] A0619-A0621 at 154:12-156:1; A0701-A0704 at 236:14-239:17.
[25] A1399; A1646-A1647.
[26] A0817 at 352:7-22.
[27] A1646-A1647 (listing dates Hayward was on Court Square's weekly deal sheets).

By early 2016, Brown was leading Court Square's effort of conducting detailed diligence and research into the pool equipment industry to prepare for an investment in or acquisition of Hayward and/or Zodiac.[28] This effort included conducting market research and interviews of several Hayward and Zodiac executives.[29] Court Square also continued to work closely with Silber to evaluate Hayward as a potential investment standing alone or as a joint acquisition with Zodiac.[30]

At around this time, Zodiac came to the market. In May 2016, Court Square entered into a non-disclosure agreement to obtain confidential information about Zodiac.[31] Brown led Court Square's deal team for Zodiac, including (i) discussing the potential transaction with various bankers at Credit Suisse, which was marketing Zodiac, and (ii) attending the "gold card" meeting (or "fireside chat") with Zodiac's management.[32] Brown was actively working to prepare for and bid on the acquisition of Zodiac up until he left to join MSD.[33]

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[28] A0699-A0709 at 234:2-244:14; *see* A1472.
[29] A1442-A1461.
[30] A1441; A1535.
[31] A1659-A1667.
[32] A1439-A1440; A1462; A1463; A1464-A1469; A1470-A1471; A1475-A1476; A1477.
[33] A1484.

Just prior to and at the time of Brown's departure, Court Square was preparing a bid to acquire Zodiac. As Brown acknowledged, when he left Court Square, he and Court Square knew that Hayward "was going to come to market" in the near future.[34] As a result, both companies were on the June 6, 2016 weekly deal sheet.[35]

C. Brown signs his separation agreement and deal sheet prior to joining MSD

On or around May 20, 2016, Brown informed a Senior Partner at Court Square that he was joining MSD.[36] Brown also informed Joseph Silvestri and Michael Delaney, both then Managing Partners at Court Square, of his decision.[37] In discussing his departure, Silvestri informed Brown that for one year following his departure, Brown was prohibited from working on the investment opportunities listed on the Deal Sheet that Brown would be receiving following his separation.[38] During this same discussion, Silvestri advised Brown that, although he was personally precluded from working on these deals, MSD was free to pursue those companies.[39]

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[34] A0796 at 331:23-24; *see also* A1531-A1534.
[35] A1485-A1496.
[36] A0626-A0627 at 161:13-162:21.
[37] *Id*.
[38] A0830-A0832 at 365:15-367:20.
[39] *Id*.

Brown's last day at Court Square was June 3, 2016.[40] Court Square provided Brown with his Separation Agreement, Release, and Deal Sheet.[41] The Separation Agreement reaffirmed Brown's obligations under the LLC Agreements and Brown was provided a Deal Sheet which expressly included Hayward and Zodiac.[42] It is undisputed that Brown signed the Separation Agreement and Release and accepted this Deal Sheet, which became an attachment to his executed Separation Agreement.[43]

D. Brown's Employment at MSD

1. Brown's Employment by MSD

Brown started at MSD on or around June 15, 2016, less than two weeks after leaving Court Square, as a Principal of the firm and Managing Director of MSD's Private Capital Group ("PCG").[44] As Managing Director, Brown's responsibilities included acting as a "deal team leader . . . *working on new investment opportunities*."[45] Pursuant to the terms of his offer letter, for performing those

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[40] A0628 at 163:17-19.
[41] A1540-A1560.
[42] A1497-A1504.
[43] A1540-A1560.
[44] A0649 at 184:17-20; A1478-A1483.
[45] A1478-A1483 (emphasis added).

duties, Brown was entitled to (and in fact received) a salary of $500,00 per year as well as a bonus for calendar year 2016 in the amount of $1.2 million.[46]

2. Brown Immediately Continued his Efforts to Acquire Zodiac, Only Now on Behalf of MSD Instead of Court Square.

Court Square received and began reviewing a confidential information memorandum ("CIM") for Zodiac on June 21, 2016,[47] and worked to prepare its bid to acquire the company by preparing financial models, which included an analysis of the "synergies" that could result from a joint acquisition of Zodiac and Hayward.[48]

As a final step toward submitting its bid, Court Square prepared a HUM dated July 18, 2016 outlining the business case for acquiring the company, including the "Angle" that Court Square believed would make it an attractive bidder.[49] In discussing the "Angle," Court Square emphasized its relationship with Silber.[50]

Prior to Brown's arrival, MSD was not aware of Zodiac.[51] In fact, Brown testified that "MSD [was] aware of Zodiac as a result of me."[52] Brown wasted no time working on Zodiac upon his arrival at MSD—at the same time that Court

[46] *Id.*; A0734-A0736 at 269:16-271:6.
[47] A1506-A1508; A0572 at 107:3-15.
[48] A1531-A1534; A0574 at 109:4-19.
[49] A1531-A1534.
[50] *Id.*
[51] A0716 at 251:5-11.
[52] *Id.*

Square was preparing to bid on Zodiac. Indeed, on June 21, 2016, Brown reached out to the same banking and finance contacts he established while working at Court Square to let them know he was now working for MSD and interested in acquiring Zodiac.[53] Brown also proceeded to arrange for MSD to execute the NDA and prepare a bid to acquire Zodiac.[54]

Over the next several weeks, Brown was busy leading MSD's deal team and providing investment advice.[55] Brown directed an MSD junior investment professional to add Zodiac to MSD's "pipeline," which tracked "anything … active" that MSD was working on,[56] and to prepare a financial model for Zodiac using a form that Brown took from Court Square.[57] Ultimately, on July 18, 2016, the same day that Court Square's investment committee considered its HUM concerning Zodiac, Brown presented a formal memorandum to MSD's Investment Committee recommending that it submit a bid to acquire Zodiac for $900 million.[58] In doing so, Brown used a memorandum that was initially created at Court Square.[59] Brown's memorandum also prominently touted "the opportunity to work with Larry Silber"

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[53] A1505.

[54] A0713 at 248:18-20; *compare* A1509-A1512 *with* A1769.

[55] A0652-A0653 at 187:24-188:9.

[56] A1513; A0714-A0715 at 249:23-250:2.

[57] A0715 at 250:3-16.

[58] A0716 at 251:17-20; A1536-A1537.

[59] A1536-A1537.

and presented the same strategy that was developed while he was at Court Square, *i.e.*, that the acquisition of Zodiac could be combined with another pool company like Hayward.[60]

On July 19, 2016, Court Square submitted its bid of $850 million for Zodiac.[61] Shortly thereafter, Court Square was informed by Zodiac's bankers that its bid was too low and that it needed to increase the amount of its bid to continue in the process.[62] At that point, rather than immediately increasing its bid, Court Square chose to see how the process played out and if it would be invited to re-engage.[63] On or around July 22, 2016, Brown submitted MSD's bid of $900-$950 million, just over the $850 million bid submitted by Court Square.[64] By his actions, Brown did precisely what 5.14(a) prohibited he provided investment advice to MSD on Zodiac as part of performing his job duties for which he was substantially compensated.

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[60] *Compare* A1531-A1534 *with* A1536-A1537.
[61] A1538-A1539.
[62] A0811 at 346:15-22.
[63] *Id*. It is common for private equity firms to decline to increase their bid and wait and see how the process to plays out and whether other bidders will drop out. A0812 at 347:6-24. Often, when the process breaks down, bankers will reengage Court Square to negotiate a deal on an investment opportunity because, as Brown himself testified, "things change" in the process. A0812-A0814 at 347:17-349:352:2.
[64] A0669-A0670 at 204:18-205-12.

3. Requesting and Distributing Court Square's Confidential HUMs to an MSD Investment Professional.

On July 14, 2016, just weeks after his departure from Court Square and start at MSD, Brown contacted Bertrand (who was then still employed at Court Square and had worked closely with and had been a subordinate of Brown prior to Brown's departure) to request that Bertrand send him copies of HUMs prepared by Court Square to evaluate potential investments.[65] The same day, Bertrand emailed Brown seven unredacted HUMs.[66] Although they both had company email addresses, Bertrand and Brown each used personal email addresses to exchange the HUMs. Brown went one step further and forwarded these confidential HUMs to an analyst at MSD, thus placing the documents on MSD's email platform.[67]

As Court Square demonstrated at trial, its HUMs generally, and the HUMs that Bertrand sent to Brown in particular, are highly confidential for two primary reasons. *First*, they contain Court Square's analyses, valuation assessment, bidding strategy, contacts, and insights into whether an entity is a sound investment and what would make Court Square a successful bidder over a competing private equity firm.[68]

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[65] A1516-A1530. Court Square did not learn of Bertrand's conduct until the underlying email and attached HUMs were produced in discovery. *Id.*; A0845 at 380:4-10; A0974 at 509:9-17.

[66] A1516-A1530.

[67] *Id*.

[68] A0846 at 381:4-15.

For example, one of the HUMs provided to Brown by Bertrand, noted in its "angle" section its long relationship with [redacted] and his in-depth knowledge of the industry:

> [redacted] will be assisting us in diligence . . . He also has a strong relationship with Rinker's President and has been following the asset and sector for several years. We believe [redacted] in-depth knowledge of the industry gives us a strong angle in the process.[69]

Second, the HUMs contain financial and other information that Court Square receives from third parties pursuant to non-disclosure agreements which prohibit Court Square from disclosing the information.[70] That information includes an acquisition target's business plan and its actual and projected financial performance, among other competitively sensitive non-public information. Pursuant to those agreements, Court Square is not permitted to disclose that information to any other third party which, of course, includes MSD.

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[69] A1516-A1530.

[70] A0855 at 390:4-23. Of the seven HUMs that Brown received and disclosed to MSD, five related to companies with which Court Square had active NDAs at the time of Brown's disclosure. A1403-A1405 (PLZ), A1412-A1414 (Plaskolite), A1415-A1420 (USP), A1421-A1432 (Polynt), A1438 (Interwrap). The other remaining expired NDAs each required that any confidential information that Court Square retained be kept confidential A1400-A1402 (Distribution Int'l), A1406-A1411 (Rinker).

4. Brown Leads MSD's Deal Team to Acquire Hayward During his Non-compete Period and Receives Significant Compensation Shortly Thereafter.

As anticipated prior to Brown's departure, Hayward came to the market for sale in early 2017.[71] Court Square jumped at the opportunity and prepared a HUM to discuss the acquisition with its Investment Committee.[72] Court Square's HUM discussed its longstanding relationship with Silber and knowledge of the pool equipment industry that it had developed over the last several years.[73] Court Square's Investment Committee approved a bid of $1.7 billion, which was submitted on April 11, 2017.[74] In response, Hayward's bankers told Court Square that it should increase its bid to $2 billion.[75] Court Square decided not to increase its bid at that time and instead to monitor the sale process to evaluate whether and when to up its bid.[76]

While Court Square was bidding to acquire Hayward, Brown was once again busy leading MSD's team to do the same.[77] In March 2017, Brown received the confidential information packet and NDA, which was promptly executed,[78] and he

[71] A0821-A0822 at 356:3–357:13; A1573-A1574; A1575-A1579.
[72] A1583-A1584.
[73] *Id*.
[74] A1585-A1587.
[75] A0826 at 361:16-22; A1588-A1589.
[76] A0826-A0827 at 361:22-362:5.
[77] A0750-A0751 at 285:23-286:10.
[78] A1563-A1572; A0674 at 209:16-20.

and one of his colleagues reached out to another private equity firm to discuss a potential joint bid for Zodiac and Hayward.[79] Brown directed his team to prepare a memorandum and financial model for Hayward.[80] Brown presented the memorandum to MSD's Investment Committee on April 10, 2017, recommending that MSD bid $1.875 billion for Hayward.[81]

Although MSD initially decided not to submit a bid to acquire Hayward,[82] Brown entered into discussions with CCMP Capital, another private equity firm, a few weeks later about a potential joint bid to acquire Hayward.[83] On May 25, 2017, MSD, CCMP, and a third investor, submitted a bid for Hayward for $2 billion.[84] MSD praised Brown for leading the Hayward deal to completion, especially his critical role in connecting with CCMP and partnering with them to submit a bid.[85] This time, Brown's efforts, coupled with the information and contacts he obtained while at Court Square, were successful as MSD and its co-investors entered into a definitive agreement to acquire Hayward.[86] MSD issued a press release on June 19,

[79] A1561-A156.
[80] A1580-A1582; A0747 at 282:9-15.
[81] A1580-A1582.
[82] A0748-A0749 at 283:9-284:23.
[83] A0678-A0679 at 213:16-214:4.
[84] A1590-A1610.
[85] A1611-A1612.
[86] A0685 at 220:1-2.

2017, approximately two weeks after Brown's non-compete period expired, announcing that Brown had successfully led its pending acquisition of Hayward.[87]

At trial, Brown admitted that he provided extensive investment advice to MSD regarding Hayward during his one year restrictive period and that he led MSD's efforts.[88] As a result of his role in closing the Hayward transaction, and pursuant to his Offer Letter, MSD awarded Brown carried interest "points" in Hayward.[89] Ultimately, these carried interest points, along with additional points he was subsequently awarded, proved extremely valuable, as Brown testified that their current value is approximately $30 million.[90]

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[87] A1613-A1614.

[88] A0750-A0751 at 285:23-286:10.

[89] A1478-A1483; A0688 at 223:9-11.

[90] A0337 at 163:9-17, A0741-A0743 at 276:6-278:14.

PROCEDURAL HISTORY

A. The Parties' Claims and the Court of Chancery's Rejection of Brown's Motion to Dismiss

In November 2020, Court Square ceased making carried interest payments to Brown until it could be determined if he had complied with his obligations under the LLC Agreements. On March 26, 2021, Brown sued Court Square seeking payment of carried interest.[91] In response, on May 13, 2021, Court Square answered and filed counterclaims alleging Brown breached the LLC Agreements when he provided investment advice in connection with the Hayward transaction.[92]

Brown filed a motion to dismiss Court Square's counterclaims on the basis that the claims regarding his role with the Hayward transaction were time-barred and that Court Square failed to state a claim for breach of contract.[93] Among the arguments he made was that Section 5.14(a) only prohibited a completed "acquisition" of a company on his Deal Sheet and that the last sentence of Section 5.14(a) was limited to situations "where the former employee is paid in connection with an acquisition but is not affiliated with the entity that acquired the direct interest" (*i.e.*, a finder's fee).[94]

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[91] A0083-A0090.
[92] A0091-A0131.
[93] A0132-A0156; *see also* A0206-A0247.
[94] A0146-A0150 at 10-14.

The Court of Chancery considered Brown's contractual interpretation arguments and rejected nearly all of them. Of particular note, the court agreed that Brown's receipt of a salary and bonus from MSD in exchange for providing investment advice constituted an "acquisition of an indirect interest" as defined in Section 5.14(a).[95] Indeed, the court held that Court Square's arguments on this point were "compelling" and "adopted" them as its own.[96]

As the case proceeded, discovery revealed that: (1) in addition to Hayward, Brown provided extensive investment advice on Zodiac immediately following his departure from Court Square, and (2) Brown obtained HUMs from Bertrand and disclosed them to MSD. As a result, Court Square amended its counterclaims concerning the additional breaches.[97]

B. Trial and the Court of Chancery's Decision

A two-day trial was conducted in the Court of Chancery on May 31 and June 1, 2023. At the trial, Brown offered testimony from Brown, Bertrand, and another former Court Square employee, Steven Lamb, and Court Square called Joseph

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[95] *See* A0139, A0146, A0151 at 3, 10 and 15; Order Resolving Brown's Mot. to Dismiss, attached as Exhibit A ("Ex. A") ¶ 24 n.32 ("I have studied the parties respective briefing on these issues and find the defendants' arguments compelling … *I adopt them as if fully set out in this Order*.") (emphasis added and citation omitted). *See also* A0187-A0196 at 23-32..

[96] *Id*.

[97] A0248-A0331; A0345-A0438.

Silvestri and Michael Delaney. Following post-trial briefing, the Court of Chancery issued a Post-trial Memorandum Opinion in favor of Brown on all claims.[98]

Despite the numerous arguments advanced by the parties, the bases for the Court of Chancery's decision were narrowly circumscribed. *First*, the court found that the language of Section 5.14(a) was unambiguous and could only be breached where a Terminated Member received compensation explicitly "tied to" investment advice concerning an Investment Opportunity listed on a Deal Sheet. In this regard, the Court held, contrary to its prior ruling adopting Court Square's interpretation, that "Brown's salary and bonus" did not constitute such compensation.[99] *Second*, the court found that Brown did not breach his confidentiality obligations under Section 5.14(c) of the LLC Agreements because, although there was no dispute that he took and disclose the HUMs, Court Square did not prove that Brown's breach was "material or resulted in any harm to Court Square."[100] According to the Court, "[i]f Brown's actions constituted breach, then it was exceptionally minor and did not permit Court Square to abandon performance."[101]

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[98] *See* Ex. B.
[99] Ex. B at 24.
[100] *Id.* at 29.
[101] *Id.*

ARGUMENT

I. THE COURT OF CHANCERY ERRED WHEN IT CONCLUDED SECTION 5.14(a) UNAMBIGUOUSLY PERMITTED BROWN TO PROVIDE INVESTMENT ADVICE TO MSD ON ZODIAC AND HAYWARD DURING THE RESTRICTED PERIOD.

A. Question Presented

Did the Court of Chancery err when it ruled that: (1) the phrase "acquire a direct or indirect" interest in the Fund III GP Agreement was unambiguous; and (2) despite having admittedly provided investment advice regarding Zodiac and Hayward during his one-year restricted period, Brown did not breach his obligations to Court Square because he did not receive compensation during that period that was explicitly tied to those companies?

This issue has been preserved.[102]

B. Standard and Scope of Review

Because the Court of Chancery's decision with respect to the meaning of the parties' contract was one of pure contract interpretation, this Court's review is *de novo*. *Daniel v. Hawkins*, 289 A.3d 631, 645 (Del. 2023).

C. Merits of Argument

The record below established that Brown breached the plain contractual language of the LLC Agreements. It is undisputed that Brown brought the Zodiac

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[102] A1066-A1075; A1120-A1123.

deal to MSD from Court Square.[103] It is also undisputed that Brown began working for MSD on a competing bid for Zodiac immediately upon leaving Court Square.[104] Also undisputed is that, within one year of leaving Court Square, Brown led MSD's efforts to pursue and successfully acquire Hayward.[105] Yet the Court of Chancery held that Brown's actions were permissible solely because the compensation he received from MSD for his duties pursuing "investment opportunities" did not explicitly mention Zodiac or Hayward. That decision was wrong as a matter of law.

1. Brown Violated Section 5.14(a)'s Plain Terms

The Fund III GP LLC Agreement stated that Brown would not, during his employment and for a period of one year thereafter, "acquire a direct or indirect interest" in any "Investment Opportunity" that "could reasonably be construed as being actively considered as a potential investment" and was listed on the Deal Sheet provided to him following his termination.[106] The Agreement also included, in the last sentence of Section 5.14(a), a specific definition of "acquire an indirect interest." Specifically, it stated that "a Member or Terminated Member shall be deemed to have acquired an indirect interest in an Investment Opportunity if such Member or Terminated Member receives *any* form of direct or *indirect* fee, payment or *other*

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[103] A0750-A0751 at 285:23–286:10.
[104] Ex. B at 7.
[105] A0750-A0751 at 285:23–286:10.
[106] A1382.

compensation based on the rendering of investment advice to a third party regarding such Investment Opportunity."[107] Brown violated those plain terms.

a. A Breach of Section 5.14(a) Does Not Occur Only Where There Is a Completed Purchase of an Investment Opportunity

The meaning of the last sentence of Section 5.14(a) is one of the critical issues in this case. Yet the lower court paid this key language surprisingly little attention. Instead, the court focused on the generic meaning of "acquire," concluding that "Brown's only interest in any potential Investment Opportunity—Brown's carried interest related to Hayward—occurred after the prohibited period."[108] In fact, despite Court Square's consistent argument that by providing investment advice to MSD concerning Zodiac and Hayward during the restricted period, Brown "acquired an indirect interest" within the meaning of the last sentence of Section 5.14(a),[109] the court went so far as to conclude that "Court Square does not dispute that Brown's only interest in any potential Investment Opportunity…occurred after the prohibited period."[110]

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[107] *Id.* (emphasis added).
[108] Ex. B at 23.
[109] A1066-A1075 at 31-40; A1120-A1123 at 7-10.
[110] Ex. B at 23.

But it is axiomatic that the parties to a contract may define the terms therein in any manner they wish.[111] And there is nothing in Section 5.14(a) that requires a completed investment, nor is "indirect interest" synonymous with an "ownership interest." Rather, under the contractual language to which the parties agreed, an "acquisition" of an "indirect interest" in an Investment Opportunity occurs whenever a Terminated Member provides investment advice with respect to such an Opportunity and is compensated for providing that advice.

b. Brown Was Compensated "Based on" His Provision of Investment Advice Concerning Zodiac and Hayward

To the extent that the lower Court addressed the critical language of Section 5.14(a), it offered only the cursory conclusion that Brown's compensation was not "based on" his rendering of investment advice because "Court Square did not prove that Brown's salary or bonus were tied to any specific Investment Opportunity."[112] But Brown provided investment advice to MSD about Zodiac and Hayward as part of his core job duty at MSD, for which MSD compensated him. Section 5.14(a) does not limit its application to circumstances where a Terminated Member receives a discrete payment for advice about a particular investment. In fact, the contract provides precisely the opposite, by defining acquisition of an indirect interest to

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[111] A1120-A1121 at 7-8.
[112] Ex. B at 24.

include any time the Terminated Member "receives *any form* of direct *or indirect* fee, payment or *other compensation* based on the rendering of investment advice to a third party regarding such Investment Opportunity."[113]

Those terms capture Brown's actions here. MSD hired Brown specifically to provide investment advice with respect to potential investments.[114] He performed those duties with respect to Zodiac, Hayward, and other potential investments in exchange for a base salary of $500,000 and a $1.2 million bonus for the final six months of 2016.[115] Under the plain language of Section 5.14(a), that compensation was paid "based on" the provision of Brown's investment advice, including his advice about Zodiac and Hayward. Although Brown could have honored his obligations to Court Square by focusing solely on other investments, and be compensated for doing so, he chose not to. Once he chose to render advice regarding Zodiac and Hayward, there is no doubt that his compensation encompassed that advice. Nothing in the record remotely suggests that Brown was working for free while leading MSD's efforts and its $850 million bid for Zodiac and $2 billion bid for Hayward. Thus, his salary and bonus at a minimum, constitute "any form" of

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[113] A1382 (emphasis added).
[114] A1478-A1483 (Brown's job duties included "working on new investment opportunities").
[115] A0626 at 161:3-8.

"indirect compensation" for that work. That is all that Section 5.14(a) requires.

The Court of Chancery's reading of Section 5.14(a) as applying only when compensation is *directly* tied to advice concerning a specific potential investment impermissibly reads the reference to "any form of . . . indirect . . . compensation" out of the final sentence of the provision. That legal error conflicts with this Court's direction to "read a contract as a whole and…give each provision and term effect, so as not to render any part of the contract mere surplusage." *See, e.g., Kuhn Constr., Inc. v. Diamond State Port Corp.,* 2010 WL 779992, at *2 (Del. Mar. 8, 2010).

By requiring compensation directly "tied to" a particular investment opportunity, the Court of Chancery violated this cardinal rule of contractual interpretation. It failed to even discuss the term "indirect," let alone attempt to analyze its significance here. Instead, it was improperly treated as surplusage.

Brown testified at trial that his understanding of the last sentence of 5.14(a) was that it was a "finder's fee" provision.[116] The problem with Brown's argument is that the use of the phrase "indirect" is not consistent with this interpretation. Indeed, Brown acknowledged at trial that the provision "didn't explicitly state it that way[,]" referring to a "finder's fee" provision.[117] Further, Delaney and Silvestri

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[116] A0636-A0639 at 171:1-174:6.
[117] A0636 at 171:3-11.

testified that Section 5.14(a) was never considered to be or discussed as a "finder's fee" provision.[118] The Court of Chancery, nevertheless, adopted this erroneous interpretation.

2. The Court of Chancery's Interpretation Is Inconsistent with the Intent of Section 5.14(a)

The Court of Chancery correctly noted that "the role of the court is to effectuate the parties' intent" and that the court must "give priority to the parties' intentions as reflected in the four corners of the agreement, construing the agreement as a whole and giving effect to all of its provisions[.]"[119] The language and structure of Section 5.14(a) make clear that, as both Delaney and Silvestri confirmed in their unrefuted trial testimony, the intent of Section 5.14(a) was to protect the investment that Court Square has made and the intellectual property it has developed regarding potential investment opportunities—including its relationships with key stakeholders with respect to such companies and strategies for pursuing and acquiring such investments.[120] The Chancery Court's decision, however,

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[118] A0792-A0793 at 327:13-328:1; A0955 at 490:6-21.

[119] Ex. B at 19 (citing *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006), *In re Viking Pump, Inc.*, 148 A.3d 633, 648 (Del. 2016)).

[120] A0791 at 326: 5–11 (Silvestri) (Section 5.14 "protects our intellectual property."). As Delaney further testified, when seeking and considering potential opportunities, Court Square "spend[s] a lot of time and a lot of money … investigating sub-verticals, developing investment themes, meeting companies, paying for industry experts[.]" A0954-A0955 at 489:22–490:5; *see also* A0741-A0742 at 329:1–330:3 (Silvestri's unrefuted testimony to the same).

impermissibly excised the reference to "indirect" compensation and ignored Section 5.14(a)'s clear purpose, rendering the provision effectively meaningless.

The Court of Chancery's interpretation enables Terminated Members to easily evade Section 5.14(a) by negotiating generic compensation packages that do not directly tie discrete payments to specific investment opportunities (*i.e.*, "finder's fees").[121] In contrast, Court Square's interpretation furthers Section 5.14(a)'s purpose by providing protection to Court Square and its investors while allowing departing employees to freely go to other private equity firms.

Under the lower court's erroneous interpretation, Brown was free to go to a competitor and to begin immediately providing investment advice on companies on his Deal Sheet, and to even submit a competitive bid against Court Square. According to Brown, there is no violation if that bid is unsuccessful (*e.g.*, Zodiac), regardless of the impact that Brown's activities may have had on Court Square's involvement in the bid process. For example, suppose Brown's investment advice as to an opportunity led to a bidding war between Court Square and MSD that Court

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[121] The illogic of the court's interpretation is confirmed by the fact that when investment professionals leave Court Square, they overwhelmingly do so to go to other private equity firms, not to become consultants trying to earn "finder's fees." A0956 at 491:1-9, A0960 at 495:5-9. Indeed, Delaney testified that, to his knowledge, no employee has ever left Court Square to work as an independent contractor. A0956 at 491:13-15.

Square ultimately won, but only by paying a dramatically inflated price. Brown's view (accepted by the lower court) is there would be no violation because Brown did not receive any form of payment explicitly tied to MSD's successful completion of the deal.

Moreover, even in the case of a successful bid, Brown could avoid a breach by manipulating the timing of the closing of the deal, or manipulating when he received compensation for that closing, so that it fell outside the one-year restricted period (*e.g.*, Hayward). For example, Brown could attempt to escape responsibility for his actions simply by postponing his receipt of compensation "tied" to that transaction until after the restrictive period ends. Allowing such gamesmanship and manipulation, as the Court of Chancery has done, is inconsistent with Section 5.14(a)'s manifest intent.

The lower court's interpretation thus also violates another cardinal doctrine of contract interpretation, namely, avoiding an interpretation that leads to absurd results. *Accord Osborn ex rel. Osborn v. Kemp,* 991 A.2d 1153, 1160-61 (Del. 2010) (declining to interpret contract in a manner that would lead to an absurd result); *Capella Holdings, LLC v. Anderson,* 2017 WL 5900077, at *5 (Del. Ch. Nov. 29, 2017) ("In this regard, the court will reject a party's proffered interpretation of contract language if that construction will yield an absurd result or is one that no

reasonable person would have accepted when entering the contract") (internal quotations and citationomitted). The interpretation of Section 5.14(a) adopted by the lower court rendered that provision meaningless and left Court Square's significant investment in its intellectual property fair game for the taking by departing investment professionals.

Finally, in rejecting the most logical interpretation of Section 5.14(a), the lower court placed heavy emphasis on the language stating that "in no event shall this Section 5.14(a) be construed in and of itself, as prohibiting a Member from … obtaining employment with, or investing in, a fund or any entity involved in similar activities as" Court Square.[122] According to the Court, "if salary was included in 'payment or other compensation' then former employees would be functionally unable to work for competitors."[123] By Brown's own admission, Zodiac and Hayward were the only companies on his Deal Sheet that he worked on during his restricted period.[124] Therefore, he could have performed his duties for MSD while simply recusing himself from providing investment advice on those two deals. Indeed, nearly all of the investment professionals who have left Court Square have gone on to work at other private equity firms. But Brown is the only one who has

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[122] Ex. B at 22.
[123] *Id*. at 25.
[124] A1622-1623, Brown's Supplemental Response to Interrogatory 6.

ever run afoul of his non-compete obligations.[125]

3. At the Very Least, Section 5.14(a) Is Ambiguous and Requires Consideration of Extrinsic Evidence, Which the Court of Chancery Ignored

In rejecting Brown's motion to dismiss, the Court of Chancery held that Court Square's interpretation of Section 5.14(a) was "compelling" and "adopt[ed] [it] as if fully set out in this Order."[126] While the court concluded in its Post-Trial Opinion that this conclusion no longer applied because it was based on application of a "deferential standard" applicable "at the pleading stage,"[127] this simply was not the case. The language had not changed in the interim, and the facts and arguments before the lower court at the motion-to-dismiss stage were precisely the same as they were after trial.[128] If the same court, considering the precisely the same language without resort to any external evidence, could reach such diametrically opposed conclusions, that language at the very least is subject to two plausible readings, and therefore by definition is ambiguous. *See, e.g.*, *West Willow-Bay Ct., LLC v. Robino-Bay Ct. Plaza, LLC*, 2007 WL 3317551, at *1 (Del. Ch. June 19, 2007) , *aff'd*, 985 A.2d 391 (Del. 2009) (noting that courts "are instructed . . . not to consider extrinsic evidence unless the contract is ambiguous—reasonably susceptible of two (or more)

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[125] A0956 at 491:1-9, A0960 at 495:5-9.
[126] Ex. A ¶ 24, n.32.
[127] Ex. B at 26 n.147.
[128] Ex. A ¶ 24, n.32; s*ee also* A0148-A0150 at 12-14; A0187-A0196 at 23-32.

plausible interpretations"); *Merchants Nat'l Props., Inc. v. Meyerson*, 2000 WL 1041229 at *8 (Del Ch. July 24, 2000) ("Because both interpretations are plausible, the 1992 Accipiter Consulting Agreement is ambiguous with respect to the scope and meaning of the word 'products.'"). Indeed, it is difficult to fathom how the language of Section 5.14(a) could be read unambiguously in Court Square's favor at the outset of the case, yet be viewed as unambiguously requiring the *opposite* reading after trial.

At the very least, the court should have not viewed the language as unambiguous in Brown's favor and instead should have considered the considerable extrinsic evidence that supports Court Square's interpretation, including the following:

- Testimony that Court Square had followed a consistent practice over the years of informing departing investment professionals that under Section 5.14(a) they were personally prohibited for one year from providing investment advice regarding investment opportunities on their Deal Sheet, but that this did not bind their new private equity firm.[129]
- Testimony that Silvestri had this same discussion with Brown when he left Court Square. Silvestri testified that shortly before Brown's departure he

[129] A0958-A0960 at 493:4-495:4.

told Brown: "[W]e can't keep MSD from investing. We don't have any contractual relationship with MSD . . . We have a contractual relationship with you. You can't work on or advise on these transactions. And if something comes up and MSD wants to work on one, you have to recuse yourself from them and not provide any advice on them."[130]

- Evidence that Brown sought to modify and limit his obligations to Court Square at the time of his departure from Court Square, which Silvestri rejected. Specifically, Brown asked Silvestri to agree that Court Square would waive his non-compete obligations as to any company on his Deal Sheet that Court Square was not actively pursuing, thus recognizing the applicability of his post-termination restrictions to advice he would be providing at MSD. Silvestri rejected Brown's request, stating that "[w]e don't want to make any "special deals, but rather, prefer to stay with the language as drafted in the GP agreements we all signed."[131]

The lower court's failure to consider this evidence was reversible error.

[130] A0830-A0832 at 365:15-367:20.
[131] A1514.

II. THE COURT OF CHANCERY ERRED BY REQUIRING COURT SQUARE TO PROVE MATERIALITY AND HARM WITH RESPECT TO BROWN'S BREACH OF HIS CONFIDENTIALITY OBLIGATIONS.

A. Question Presented

Did the court err when it held that, despite Brown's admitted breach of his confidentiality obligations, Court Square had the burden of proving that Brown's breach was "material" and caused "specific harm" to Court Square?

This issue has been preserved.[132]

B. Standard and Scope of Review

Because the Court of Chancery's error related to its resolution of a pure question of law, this Court's standard of review is *de novo*. *Daniel*, 289 A.3d at 645.

C. Merits of the Argument

Brown's breaches of his confidentiality obligations similarly result in his forfeiture of carried interest from Court Square. In its post-trial briefing, Court Square argued that it was *not* required to show that Brown's breach of his confidentiality obligations was material and caused specific harm to Court Square.[133] Among these reasons was that, under the Delaware Limited Liability Company Act (the "LLC Act"), "[a] limited liability company agreement may provide that…[a]

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[132] A1186-A1188; A1211-A1212.
[133] *Id*.

member who fails to perform in accordance with, or to comply with the terms and conditions of, the limited liability company agreement shall be subject to specified penalties or specified consequences," including forfeiture. 6 *Del. C.* §§ 18-306, 18-502. Court Square also argued that fundamental contract law principles dictate that where, as here, a contract unqualifiedly imposes a condition that must be satisfied before a party receives the benefits of the contract, failure of the condition deprives that party of the right to the benefits, regardless of materiality.[134]

The lower court's error is even clearer now in light of this Court's decision in *Cantor Fitzgerald*. This Court's confirmation that forfeiture provisions like those here must be enforced strictly in accordance with their terms requires reversal of the Court of Chancery's atextual requirement that Court Square prove materiality and specific harm. 312 A.3d at 692.

1. The Court of Chancery's Decision Is Plainly Inconsistent with *Cantor Fitzgerald*, the Delaware LLC Act, and Basic Contract Law Principles.

The Court of Chancery's sole basis for ruling that Brown did not breach his confidentiality obligations was that any breach was not material and did not result in harm to Court Square.[135] According to the court, "[i]f Brown's actions constituted breach, then it was exceptionally minor and did not permit Court Square to abandon

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[134] A1186-A1187.
[135] Ex. B at 29.

performance."[136] Nowhere in its decision, however, did the court address the salient provision of the Fund III GP LLC Agreement, Section 5.8(b), which provides that, if a "Terminated Member breaches *any* of the covenants set forth in Section 5.14(a) … (whether such breach occurred prior to, on or after such Terminated Member's Termination Date), such Terminated Member's Vested Carried Interest Points shall be [equal to zero]."[137]

In *Cantor Fitzgerald*, this Court held that Delaware law reflects a strong tradition of "contractarian deference" and that forfeiture provisions in limited partnership agreements should be enforced according to their terms. 312 A.3d at 692.

> When sophisticated actors avail themselves of the contractual flexibility embodied in the Delaware Revised Uniform Limited Partnership Act—a statute that is expressly designed 'to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements'—and agree that a departing partner will forfeit a specified benefit should he engage in competition with the partnership, our courts should, absent unconscionability, bad faith, or other extraordinary circumstances, hold them to their agreements.

Id. at 677 (footnote omitted). Delaware's LLC Act reflects this same policy and states that: "[a] limited liability company agreement may provide that . . . [a] member

[136] *Id.*
[137] A1319 § 5.8(b) (emphasis added).

who fails to perform in accordance with, or to comply with the terms and conditions of, the limited liability company agreement shall be subject to specified penalties or specified consequences," including forfeiture. 6 *Del. C.* §§ 18-306; 18-502(c).

In entering into the Fund III LLC Agreement, Brown agreed that he would forfeit his carried interest if he failed to comply with the covenants contained in Section 5.14, including his duty to protect Court Square's confidential information. Accordingly, as in *Cantor Fitzgerald*, Brown should be held to the terms of his bargain and subject to the agreed-upon consequences of his breach of his confidentiality obligations.

Further, even if Brown's agreement with Court Square were not subject to the "contractarian" policies reflected in Delaware law, the Court of Chancery's imposition of requirements of materiality and proof of harm was erroneous for a second reason. As the Court of Chancery recognized in deciding Brown's motion to dismiss, it was a condition of Brown's entitlement to the payment of carried interest that he remain in compliance with his restrictive covenants.[138] Under the well-established law governing contractual conditions, where a condition to a party's performance is not satisfied, the party has no obligation to perform under a contract

[138] *See* Ex. A, ¶ 22 ("First, they contend that Brown's compliance with the non-compete covenant was a condition to his right to receive Carried Interest payments. That is a fair reading of Section 5.8(b) of the LLC Agreements.").

regardless of materiality or harm. *See Ainslie v. Cantor Fitzgerald, L.P.*, 2023 WL 106924, at *15 (Del. Ch. Jan. 4, 2023), *rev'd on other grounds*, 312 A.3d 674 (Del. 2024) ("A condition represents a contractual agreement that something less than a material breach will prevent the duty to perform from arising."). Accordingly, "[t]o require that the condition be material would undermine the very purpose of including such conditions in contracts, and our law imposes no such requirement." *Id.*; *see also Williston on Contracts* § 38:12; Restatement (Second) of Contracts § 227 cmt. b ("The policy favoring freedom of contract requires that, within broad limits, the agreement of the parties should be honored even though forfeiture results.").

As the Court of Chancery recognized at the outset of this case, Section 5.8(b) of the LLC Agreement made Brown's compliance with his covenants a condition of Court Square's obligation to pay carried interest.[139] Court Square's obligation to make each carried interest payment accordingly only arose so long as Brown was in compliance with all of his obligations to the Funds. Once Brown breached his confidentiality obligations, whether materially or not, the condition to Court Square's performance became unsatisfied, and no further payments to Brown were due.

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[139] Ex. A, ¶ 24.

2. Brown Breached His Obligations under Section 5.14(c)

While the Court of Chancery stated in its Opinion that it "does not need to reach the merits of the confidentiality breach claim,"[140] the facts recited in its decision establish that Brown breached his non-disclosure obligations under Section 5.14(c) of the Fund III LLC Agreement. There is thus no need for this Court to remand the case for further findings. Here, the Court of Chancery expressly found that Brown "asked Bertrand to share an old HUM," "Bertrand sent seven HUMs [to] Brown[,]" and "Brown forwarded them to an MSD analyst's work email[.]" [141] While the Court of Chancery ascribed certain innocent motives to Brown, that is immaterial.[142] It is undisputed that by engaging in these actions Brown breached Section 5.14(c) in at least two ways.

First, Section 5.14(c) prohibited Brown from disclosing any information relating to Court Square that was "not generally known to or available for use by the

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[140] Ex. B at 29.
[141] *Id*. at 26-27.
[142] The lower court erroneously found that "Court Square does not dispute Brown's contention that his sole purpose in seeking and forwarding these documents was to create a formatting template." Ex. B at 28. While this is irrelevant, it is incorrect. Although Court Square did not have direct evidence that Brown used the HUMs for purposes other than formatting (as is often the case when a party engages in skullduggery to hide its conduct), it certainly argued that the circumstantial evidence established that Brown used the HUMs for competitive purposes. *See* A0846-A0847 at 381:4-382:24; A0850-A0847 at 385:4-387:14; A0857-A0858 at 392:12-393:6; A0974-A0976 at 509:18-511:10.

public[.]"[143] There can be no dispute that numerous pieces of information in the HUMs fall within this definition. Every witness who testified at trial acknowledged that the HUMs were confidential when they were created.[144] Further, the evidence at trial demonstrated that much of the information in the HUMs, including Court Square's "Angle" in pursuing a particular investment and financial information concerning a company obtained pursuant to an NDA, remained confidential when Brown pilfered it.[145] *Accord UtiliSave, LLC v. Miele*, 2015 WL 5458960, at *8 (Del. Ch. Sept. 17, 2015) (concluding that since information at issue was approximately two years old, "it is reasonable to infer that the information was not stale at that time").

The lower court glossed over Brown's actions by suggesting that Court Square did not regard the HUMs as "super confidential" and that Brown may already have known some of the information in the HUMs.[146] However, *Brown's* possible

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[143] A1347.

[144] A065712-18 ("[I]s it likely that there's confidential information in the memos at the time that they're written?" Brown testifying, "Yes."); *see also* A0508 at 43:14-22; A0585 at 120:16-121:5; A0846 at 381:4-15; A0975 at 510:8-18.

[145] A0850-A0852 at 385:22-387:4 (Silvestri stating that "historical financials never go stale"; A084 at 383:11-24 (Silvestri stating that the Angle section contains confidential information that would allow Court Square to be viewed as "smarter [and] faster" and to be viewed as "a more credible buyer, to have more credibility with lenders").

[146] Ex. B at 13, 29.

"knowledge" of the information contained in the HUMs hardly establishes that the information had somehow become generally known to MSD or to the public at large. Nor did it authorize him to obtain those HUMs from Court Square or disseminate their contents to MSD since even if Brown arguably "already knew" what was in the HUMs, MSD did not, and Brown had no right to share that information with them.

Second, the Court of Chancery also improperly ignored the impact of Court Square's obligations to third parties under the NDAs it signed prior to preparing the HUMs. Indeed, the lower court made no mention of the NDAs in waving away Brown's breaches. But it is indisputable that Brown placed Court Square in breach of the NDAs. By doing so, Brown breached Section 5.14(c) by disseminating third party confidential information outside of Court Square.

Although Court Square had no obligation to demonstrate materiality and harm, Brown's breaches clearly rose to this level. As Silvestri testified, maintenance of confidentiality is "table stakes" in the private equity business and any breach of a company's obligations creates a risk of serious reputational harm to a firm.[147] Not surprisingly, therefore, both Silvestri and Delaney testified that Brown's misconduct

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[147] A0857 at 392:12-20.

was without precedent at Court Square and, more broadly, in their many years of experience in the industry.[148]

[148] *Id*. (Silvestri testifying in his decades of experience he had never experienced an employee disclosing confidential information to a competitor as Brown did here); A0975-A0976 at 510:24–511:10 (Delaney testifying to the same).

CONCLUSION

For the foregoing reasons, Court Square respectfully requests that this Court reverse the Order of the Court of Chancery and remand for further proceedings consistent with this Court's Order.

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