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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:
v.	:	C.A. No. 2021-0262 KSJM
KEVIN BROWN,	:	**Original Version Filed: August 15, 2024**
Plaintiff and Counterclaim Defendant Below/Appellee	:	**Public Version Filed: August 27, 2024**

APPELLEE KEVIN BROWN'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

After a two-day trial—where the Court of Chancery heard testimony from the central fact witnesses and admitted 527 exhibits into evidence—Chancellor McCormick found that Plaintiff Kevin Brown complied with the governing contracts and Appellants (collectively, "Court Square") breached them, wrongfully withholding $5.3 million in carried interest from Brown. The Court of Chancery ordered Court Square to make Brown whole and to pay him carried interest (commonly referred to as carry) going forward. Rather than pay Brown what he is owed, Court Square appealed.

After evaluating the credibility of Brown and Court Square's principals, the trial court made detailed factual findings undercutting each of Court Square's arguments. The trial court also ruled that Court Square did not even attempt to carry its evidentiary burden on several dispositive topics. To overcome these fatal findings, Court Square must show clear error below. ***Court Square does not even mention or cite that governing standard of review in its opening brief***, let alone try to apply it here.

The decision below confirmed what Kevin Brown has long alleged: Court Square is vindictively withholding millions of dollars of his hard-earned compensation. For years, Brown ranked among Court Square's best investment professionals—he received promotions, rave reviews, and carry in two Court Square

funds, Fund II and Fund III. That carry entitled Brown to a percentage of the funds' profits even after he left Court Square in June 2016.

Or so he thought. Starting in 2016, Court Square experienced a "mass employee exodus" of senior professionals to Brown's new employer, MSD's private-equity group. Those remaining were left fuming and the firm's fundraising was in serious peril. Post-Trial Memorandum Opinion (Dec. 15. 2023) (Appellant's Br. Ex. B) ("Op.") at 15. So Court Square looked to settle the score with Brown, but his restriction on recruiting Court Square employees had long expired. Court Square terminated his carry payments anyway and, to justify this retaliation, falsely claimed that Brown breached his contractual noncompete obligations *three years earlier* by participating in MSD's acquisition of Hayward Industries—a fact Court Square had long known and never before considered a breach.

Discovery proved Brown did not acquire an interest in Hayward during his restricted period. Undeterred, Court Square pivoted to the new argument that Brown violated his noncompete by simply *analyzing* two pool companies (Hayward and Zodiac Pool Systems) within his one-year restricted period. This new theory—which the Court of Chancery rejected as "strained"—violates multiple canons of interpretation. Court Square's governing noncompete (1) restricts a former employee from receiving third-party compensation that is *based on* his advice about a Deal Sheet company; (2) prohibits *acquiring*, not *pursuing*, companies, and (3) applies

only if Court Square is *actively considering* the acquired company. At trial, Court Square failed to prove these requirements:

- "Court Square did not prove that Brown's salary or bonus were tied to any Investment Opportunity." Op. 24.
- Brown "did not an acquire an interest during the prohibited period, directly or indirectly, in Zodiac or Hayward." Op. 23.
- "Brown's arguments find strong support in the factual record, particularly under the 'actively considered'" requirement. Op. 22–23.

Getting nowhere with the noncompete, Court Square concocted another theory, claiming Brown was not entitled to his carry because he breached his confidentiality obligations—an argument the Court of Chancery determined was ***"of dubious merit for many reasons***." Op. 28 (emphasis added). Court Square claims Brown breached his agreement by receiving and then sharing certain memoranda (called Heads Up Memos or HUMs) with a low-level MSD employee to use as templates. Here too, the Court of Chancery's findings establish that the memos were stale, no longer confidential, used only as templates, and never treated as confidential before this litigation. The trial court also correctly found that Court Square did not suffer any damages from this so-called "breach." So even if Brown's conduct technically breached any obligation (it did not), it was immaterial and harmless, and does not justify stripping millions in compensation.

Finding no help in the record—in large part because it "made no effort" to carry its evidentiary burden at trial (Op. 14)—Court Square turns to this Court's recent decision in *Cantor Fitzgerald, L.P. v. Ainslie*, 312 A.3d 674 (Del. 2024). But *Cantor Fitzgerald* cannot save Court Square's case. The Court there held that forfeiture-for-competition provisions are not analyzed using the heightened "reasonableness" standard used for noncompetes, and instead are treated like standard contract provisions. Here, the confidentiality provision does not concern competition at all. And because forfeitures are subject to standard principles of contract law, a party can abandon performance only if the counterparty's breach is material.

In sum, Court Square's vendetta cannot be shoehorned into Brown's noncompete or confidentiality restrictions, and Appellants have not shown clear error in the factual findings below. The Court should affirm.

SUMMARY OF ARGUMENT

1. Denied. For one year after his departure, Brown could not "acquire a direct or indirect interest in any . . . investment opportunity . . . that could reasonably be construed as being actively considered as a potential investment in a Portfolio Company and, with respect to [former employees], is set forth on the Deal Sheet that is provided to such [employee] . . ." A1382 § 5.14(a). A former employee "shall be deemed to have acquired an indirect interest in an Investment Opportunity if [he] 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." *Id.*

The trial court correctly held Brown did not violate his noncompete because he did not receive any compensation "based on" his "investment advice" about Zodiac or Hayward. Court Square's overbroad reading also leaves former employees "functionally unable to work for competitors," Op. 25, violating another provision of the noncompete. And the record provides "strong support," Op. 22–23, that Court Square was not actively considering Zodiac or Hayward—a finding Court Square does not argue is clearly erroneous—so Court Square fails a third requirement.

1(a). Denied. Brown's new employer, MSD, was contractually obligated to pay Brown exactly the same salary, bonus, and benefits even if he never said a word

about Hayward and Zodiac, Op. 23, so the causal nexus imposed by the contract's "based on" requirement is not met.

1(b). Denied. The trial court found Brown's noncompete unambiguous, and this Court should too. But even if the Court considers evidence about intent, it uniformly cuts in Brown's favor.

1(c). Denied. The Court of Chancery correctly determined the noncompete is unambiguous.

2. Denied. Court Square suffered no harm from Brown using the memoranda as templates, so cannot abandon performance.

2(a). Denied. *Cantor Fitzgerald* held forfeiture-for-competition provisions are construed using general principles of contract (rather than the reasonableness test for noncompetes). *Cantor Fitzgerald* did not mention or disturb Delaware's requirement that a breach must be material to justify abandonment.

2(b). Denied. Even if § 5.8(b) imposes a condition, Court Square cannot abandon performance, because Court Square has not shown prejudice, did not unambiguously bargain for forfeiture, and cannot obtain disproportionate forfeiture (as it seeks here).

2(c). Denied. The Court of Chancery found Court Square "made no effort" to carry its burden to show that information in the HUMs was confidential. Op. 14.

COUNTERSTATEMENT OF FACTS

A. Brown's Tenure at Court Square

Court Square awarded Brown carried interest in Fund II and Fund III. During his tenure, Brown was promoted twice, received excellent reviews from the firm, and "satisfied all contractual requirements to earn and retain his carried interest." Op. 3–4.

As relevant here, Brown's carried interest is governed by the Fund III LLC Agreement. A1341–1398. Brown had no "opportunity to negotiate [the] terms" of this contract, which Court Square drafted. A0632–633 167:7–10, 168:14–17.

While at Court Square, Brown developed an interest in pool manufacturers. Op. 7. Exploring the pool industry was "something that [Brown] proactively took on [himself]" after meeting Larry Silber, the former COO of Hayward Industries, around 2013. A0613 148:8–24. But Hayward and Zodiac were not for sale, so Court Square took no action over the coming years. A0616–617 151:22–152:5.

In the first half of 2016, Brown and other employees "researched Zodiac, which they expected would go on the market later that year." Op. 7. Before Brown left Court Square, Zodiac was never "officially for sale" or soliciting bids, so he took no further action. A0621 156:5–11. Collectively, he spent only five to six hours—less than a "full day's work"—learning about Zodiac while at Court Square. A0621–

622 156:23–157:7. Before leaving, Brown got Silvestri up to speed on Zodiac and made him Court Square's point of contact. A1484; A0723 258:8–11.

When he left Court Square, Brown had done virtually nothing regarding Hayward. He did not analyze the company, which was not for sale or being marketed, or speak with its management. A0619 154:7–11, A0674–675 209:22–210:5.

B. Brown Joins MSD and Works on Zodiac

Brown left Court Square on June 3, 2016 and, a few weeks later, joined MSD. Court Square listed about 400 companies on Brown's "Deal Sheet," including Hayward and Zodiac, Op. 6, even though the LLC Agreement limits this document to only those companies the firm is "actively considering making an Investment." A1369 § 4.2(c); *see* A1497–A1504 (Brown's Deal Sheet). Court Square did not limit its Deal Sheets for departing employees to just the handful of companies "it was actively considering," as indicated by its "weekly tracker." Op. 6. Indeed, the firm was doing nothing concerning Hayward in June 2016. But Brown did not object, because he understood his restrictive covenant was limited to "acquiring an interest in a company that Court Square was actively considering." A0642–643 177:2–178:8, 178:16–20. Under his separation agreement, Brown also could not disclose to MSD that Zodiac or Hayward were listed on his deal sheet. A1543 ¶ 14 ("the Deal Sheet (and the contents thereof) may not be disclosed"); A0770–771 305:18–306:12.

When Brown joined MSD on June 15, 2016, he remained interested in the pool industry. But Zodiac, a company "owned by another private-equity firm," was not a good fit for MSD, which "focuses on acquiring family-led or family-owned businesses." Op. 7. Brown participated in Zodiac's sale process anyway to learn more about the industry. "MSD witnesses credibly testified that MSD, like other private-equity firms, would sometimes participate in a sales process for companies MSD had no intention of acquiring to gain insight into an industry, and MSD was pursuing this strategy as to Zodiac." Op. 7.

In late June 2016, Credit Suisse commenced the sale process, with initial bids due July 19, 2016. Op. 8. Court Square submitted a preliminary bid and was rejected. *Id.*; *see* A0535–536 70:3–5, 70:18–71:1 (bid was "immediately unsuccessful," not "even close"). Court Square then stopped considering Zodiac and removed it from its internal deal tracker. Op. 8.

MSD, however, did not place a bid for Zodiac by the July 19 deadline. That was no accident: Brown did not know whether Court Square would bid on Zodiac, and did not want to "interfere with their ability to pursue an investment in Zodiac." Op. 8 (quoting Brown's testimony). So Brown waited. Two days after the deadline, Credit Suisse told Brown that Court Square was out of the running. *Id.* at 8–9. Only then did MSD place a nonbinding bid to acquire Zodiac. *Id.* at 9. Brown was not

obligated to give Court Square this first bite at the apple, but did so anyway. A0723 258:1–15.

MSD was not seriously interested in Zodiac, so declined to attend a meeting with Zodiac's management and quickly dropped out of the process. *Id.* For MSD, Zodiac "was not a major investment in time." A0724 259:12–20. "Neither Brown nor MSD acquired any interest in or received any compensation from Zodiac." Op. 9.

C. Court Square's Bid for Hayward Fails

In the months that followed, both Court Square and MSD tracked an opportunity to acquire Hayward, another pool company. Goldman Sachs, leading Hayward's auction process, set a deadline of April 13, 2017 for preliminary bids. Op. 9. On the deadline, Court Square submitted a bid of $1.7 billion. MSD did not bid. *Id.*

Court Square's $1.7 billion bid—which was "[d]ramatically larger" than Court Square's "normal investments," A0544–545 79:23–80:20—did not come close. Goldman Sachs informed Court Square it needed to offer significantly more to remain competitive, but Silvestri confirmed Court Square was "out" because it didn't "want to line up to compete with the megas at 2BB . . . [Hayward will] go to a mega like KKR, TPG, Carlyle who can write a large enough equity check." A1588–589; *see* Op. 10. Silvestri then sold Silber—the firm's consultant on pool

companies—that it was "no problem" for him to advise other private-equity firms about Hayward. *Id.* Court Square also deleted Hayward from its internal deal tracker. Op. 10.

D. After Brown's Restricted Period Ends, MSD Acquires Hayward

MSD had also received Goldman Sachs' March 2017 "teaser" for Hayward (widely circulated among PE firms), but did not bid before the April 17 deadline. A0673–674 208:3–209:7; A0676 211:15–17; Op. 9.

After Court Square's bid was rejected and bidding formally closed, another private-equity firm contacted MSD about partnering on the deal. A0678 213:16–23. Brown first confirmed that Court Square was not in the running. A0679–680 214:10–215:22, A0682–683 217:9–218:9, A0886–887 421:14–422:1. After obtaining this verification, MSD, along with two other firms, successfully bid to acquire Hayward. Op. 10.

On June 3, 2017, Brown's noncompete with Court Square expired. Op. 11.

On June 19, 2017, MSD publicly announced it would (along with other firms) acquire Hayward. "The press release identified Brown as leading the effort." *Id.* It is undisputed that Brown did not acquire any carried interest in Hayward until the deal was finalized—*months after his restricted period ended*. *Id.*

E. Court Square Congratulates Brown on MSD's Acquisition

Brown testified he had no hesitation attaching his name to public press releases about the Hayward acquisition "[b]ecause I wasn't doing anything wrong." A0685 220:15–22. ***Court Square agreed***. Several Court Square employees, including a firm partner, congratulated Brown on the deal as soon as it was announced. Op. 11; *see* B100 ("Congrats"); B094–95 ("Congrats!"); A0686–688 221:11–223:1.

Over the next three years, Court Square never raised any issue with Brown's role in the Hayward transaction or service on Hayward's board. A0687–688 222:20–223:1.

F. Court Square Suffers Departures

About three years after Brown's departure, in March 2019, former plaintiff Chris Bertrand left Court Square to join MSD. Op. 15; *see* A0523 58:9–16. John Civantos, a managing partner, also left Court Square in early 2019. Op. 15. Civantos was a rainmaker, and his departure gutted Court Square's fundraising for its new Fund IV—which missed targets by hundreds of millions of dollars. *See* B101–02. This fundraising letdown prompted concerns about the firm's future prospects. *Id.*; *see* B049–50 (Deposition of Court Square founding partner Thomas McWilliams) 158:1–159:8; B043 (Delaney Dep.) 75:15–22.

The following year, three more employees departed Court Square and joined MSD, including former plaintiff Steven Lamb. "Actively concerned about a mass employee exodus after the July 2020 resignations, Court Square began to craft a legal strategy targeting Brown and the other former employees, who they referred to as the 'MSD Refugees.'" Op. 15.

Seeking to punish those who left and deter others from following, managing partner David Thomas dug up and emailed Court Square's CFO the "more-than-three-years-old press release announcing the Hayward transaction," Op. 15, searching for a connection to Brown's noncompete:

> **From:** David Thomas <dthomas@courtsquare.com>
> **To:** David Thomas; Anthony Mirra
> **Sent:** 8/4/2020 1:45:03 PM
> **Subject:** CCMP Capital and MSD Partners, L.P. to Acquire Hayward Industries | Business Wire
>
> NEED EXACT DATE OF BROWN'S RESIGNATION. ALSO NEED DEAL LIST WE GAVE HIM.
> https://www.businesswire.com/news/home/20170619005477/en/CCMP-Capital-MSD-Partners-L.P.-Acquire-Hayward

B104; *see* Op. 15. Court Square recognized that the "EXACT DATE OF BROWN'S RESIGNATION" was crucial: Brown's noncompete applies only if the acquisition occurred exactly within one year of that date.

G. Court Square Cooks Up Allegations of Breach

After Lamb and other "MSD Refugees" departed, Court Square commenced a "letter campaign" targeting Brown, Bertrand, and Lamb. Op. 16.

Delaney and Brown spoke on the phone in December 2020. Delaney's contemporaneous, handwritten notes indicate Court Square's concerns stemmed from perceived poaching of its employees (even though Brown's nonsolicit obligations had expired in 2017). B155–62. He told Brown: "First, you hire Chris [Bertrand] . . . a year later, you hire 2 more of our guys on the same morning. Again no call . . . [S]urely there are other places to fish than our pond." B155. He added: "Another concern is you hired John [Civantos] . . ." B156. Tellingly, Delaney's gripes did not focus on Hayward—Court Square's claims have always been pretext to punish Brown for *fishing in its pond*.

Since late 2020, Court Square has withheld about $5.3 million in carry from Brown, and Brown's remaining carry in Fund III is estimated at about $5 million more.

PROCEDURAL HISTORY

Brown filed this case along with Bertrand and Lamb, whose carry Court Square also withheld, in March 2021. Court Square asserted counterclaims, which were dismissed in part, and Court Square twice amended its counterclaims. Court Square settled with Bertrand and Lamb. Op. 1.

Trial included 527 exhibits and live testimony from Brown, Bertrand, and Lamb, as well as Court Square managing partners Silvestri and Delaney. Court Square's expert report and related deposition testimony were also admitted into

evidence, though Court Square did not call its expert, Charles Moore, at trial, because of highly damaging admissions he made in deposition. The trial court repeatedly credited and relied upon those admissions. *See, e.g.*, Op. nn. 43, 90. After post-trial briefing and argument, the Court of Chancery ruled in Brown's favor on all claims.

Court Square appealed, but only as to the trial court's findings as to Fund III. (Court Square does not challenge the ruling that it breached the Fund II LLC Agreement. Appellants' Br. 1–2 n.1.) Court Square also does not challenge the trial court's order of pre- and post-judgment interest and costs.

ARGUMENT

I. The Court of Chancery Correctly Held Brown Did Not Breach His Noncompete

A. Question Presented

Did the trial court correctly conclude that because Brown did not receive compensation based on his work on Zodiac and Hayward during his one-year restricted period, he did not violate his noncompete? (Preserved at A1134–A1153.)

B. Scope of Review

The Court reviews the trial court's legal rulings de novo. *Gilbert v. El Paso Co.*, 575 A.2d 1131, 1142 (1990). The Court reviews factual findings for clear error, and "give[s] substantial deference to factual determinations based on live testimony." *Energy Transfer, LP v. Williams Cos.*, --- A.3d ----, 2023 WL 6561767, *13, n.83 (Del.). At trial, Court Square bore the burden of proof. Op. 18–19.

C. Merits of Argument

Court Square asks the Court to find that merely because Brown *analyzed* or *pursued* Zodiac and Hayward while receiving his standard MSD salary, he somehow "acquired an indirect interest" in those two companies. Under that absurd construction, it does not matter that MSD never acquired Zodiac. It does not matter that Brown advised MSD *not* to acquire Zodiac. It does not matter that Brown received no carry in either company during his one-year period. And finally, it does

not matter that Court Square ceased actively considering Zodiac and Hayward before MSD even placed a bid.

The Court of Chancery rightly rejected this "strained" reading. First, Brown did not receive any compensation "based on" his work on Zodiac or Hayward during his restricted period. Second, Court Square was not actively considering Zodiac or Hayward when MSD placed a bid, flunking a second contractual requirement. Third, the trial court correctly credited Brown's testimony that a prohibition on advising MSD about the 400+ companies on his Deal Sheet would make it impossible to work in the private-equity industry for a year, flunking a third. Fourth, though the noncompete is unambiguous, the extrinsic evidence weighs in Brown's favor.

1. Brown Received No Compensation During the Restricted Period "Based On" His Work on Hayward and Zodiac

To satisfy the definition of "indirect interest" and trigger the noncompete, Brown must have received payment or compensation "based on" his investment advice for Hayward or Zodiac. A1382. "In common talk, 'based on' indicates a but-for causal relationship and thus a necessary logical condition." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 49 (2007); *accord Sisvel Int'l S.A. v. Sierra Wireless, Inc.*, 81 F.4th 1231, 1240 (Fed. Cir. Sept. 1, 2023) ("based on" requires one variable to be "impacted by" the other and finding this test not met where one variable would be the same without the other); *McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1111 (9th Cir. 2000) ("In the context of statutory interpretation, courts have held that the plain

meaning of 'based on' is synonymous with 'arising from' and ordinarily refers to a 'starting point' or a 'foundation.') (collecting cases).

Consider the many types of compensation private-equity firms like Court Square and MSD provide *based on* an employee's work on a deal:

- Carried-interest points in a fund, which in turn owns the acquired company;
- An equity interest in the company;
- A year-end bonus tied to an employee's work on a particular deal;
- A cash bonus paid for the successful closing of a deal; *or*
- Compensation for service on a company's board of directors.

Brown received none of these forms of compensation during his restricted period. It is undisputed that Brown received no carry in Zodiac—which MSD did not even acquire—and none in Hayward until after his restricted period ended. Op. 23.

Brown's advice on Hayward and Zodiac was irrelevant to whether he received his salary or bonus. Brown gave unrebutted testimony that he "[a]bsolutely" would "have received the exact same salary and bonus if [he] hadn't said a word to anyone about Hayward or about Zodiac." A0773 308:4–7, A0626 161:9–12, A0672 207:6–11. As Brown explained, "[i]t didn't matter whether I worked on 2 deals or 12 deals and whether they were Hayward or Zodiac, I received that compensation." A0761–

762 296:18–297:9. "Court Square did not prove that Brown's salary or bonus were tied to any Investment Opportunity," let alone specifically his work on Zodiac or Hayward. Op. 24.

Court Square insists that Brown received compensation "based on" Zodiac and Hayward merely because (a) he drew a salary, and (b) his general job description at MSD was to advise on transactions. This interpretation—which the trial court rejected as a "strained"—strips any requirement of causality from the contract and wrongly "preclude[s] Brown from *working on* any Investment Opportunity, regardless of whether he acquired an interest in it." Op. 23–24.

By ignoring the contract's "based on" nexus, Court Square dramatically expands the scope of the noncompete. It would have been easy enough for Court Square and its lawyers to write such a requirement into the contract, along the following lines: A former employee "shall be deemed to have acquired an indirect interest in an Investment Opportunity if [he] receives any form of direct or indirect fee, payment or other compensation ~~**based on the**~~ **while** rendering ~~**of**~~ investment advice to a third party regarding such Investment Opportunity."

"But that is not what the Non-Compete Provisions say," as the Court of Chancery rightly recognized. Op. 24. Court Square tries to escape this plain meaning by focusing on the words "any form" and "indirect." But those broader words are cabined by the "narrow," Op. 22, phrase "based on," which Court Square continues

to ignore. "Any form" and "indirect" capture the varied forms of compensation private-equity firms can pay (above), but § 5.14(a) still requires that an employee's work on the particular "Investment Opportunity" be the but-for cause of the former employee's "fee, payment or other compensation." A1382.

The but-for nature of the "based on" requirement confirms that the definition of "indirect interest" applies to finder's fees, where a private-equity firm gives a *discrete* payment to a non-employee for alerting or advising it about a *particular* opportunity. *See* A0636–638 171:1–173:3. Court Square's long-time managing partner—who Court Square did not bring to trial—agreed "that the final sentence [of § 5.14(a)] is targeted at the finder's fee situation." B047–48 (McWilliams Dep.) 81:21–82:4; *accord* A0486 21:8–21, A0638–639 173:10–174:6.

In sum, Court Square's failure of proof on the "based on" requirement of § 5.14(a), as the Court of Chancery held, is fatal to its theory of breach.

2. Court Square Stopped Considering Zodiac and Hayward Before MSD Bid

To prove a violation of § 5.14(a), Court Square must separately prove it was *actively considering* the company at issue at the time its former employee acquired an interest in that company. *See* A1382 ("'Investment Opportunity' . . . could

reasonably be construed as being actively considered as a potential investment").[1] But Court Square stopped actively considering Zodiac and Hayward before MSD even bid on these companies. "Brown's arguments" that "Zodiac and Hayward were [not] Investment Opportunities for Court Square . . . find strong support in the factual record, particularly under the 'actively considered' language of the Fund III LLC Agreement." Op. 22–23.

Court Square barely mentions the active-consideration requirement in its opening brief (despite extensively litigating it below), and does not try to demonstrate clear error in the trial court's related factual findings. It cannot.

Start with Zodiac: Court Square bid was "immediately unsuccessful." A0534–535 69:9–70:5; A0535–536 70:18–71:1 ("we weren't even close"); A0875–876 410:23–411:1. Court Square promptly removed Zodiac from its internal weekly deal sheet. Op. 8; *see* B089 ("Can you remove Zodiac[?]"); A0497 32:4–14 (internal deal sheet is best indicator of companies Court Square is actively considering). There is no evidence Court Square reconsidered Zodiac after losing its bid. A0537–A0538 72:17–73:1; A0540 75:11–19. Silvestri conceded the point. A0859 394:13–19,

[1] The "Investment Opportunity" must also be listed on the former employee's Deal Sheet, thus under active consideration upon his departure. A1369 § 4.2(c). These twin active-consideration requirements cabin the noncompete to situations where Court Square is pursuing an opportunity at the time of an employee's departure, and that employee helps another firm outcompete Court Square for the deal within one year.

A0877 412:16–20. MSD bid on Zodiac only after Brown confirmed Court Square dropped out. Op. 8–9.

So too for Hayward: Court Square didn't make it past the first round of bidding and immediately removed Hayward from its internal deal sheet. Op. 9–10. Silvestri conceded that Court Square did not reconsider Hayward. A0859 394:20–24, A0885 420:7–12; *accord* A0551–552 86:21–87:4. Indeed, Silvestri released the firm's informal advisor on Hayward *to work with direct competitors* because Court Square could not "write a large enough equity check." A1588. "These are not the actions of an entity that had a continued interest in the Hayward transaction." Op. 10. MSD bid on Hayward only after Brown confirmed Court Square was out of the running.

Court Square now claims it "chose to see how the process played out and if it would be invited to re-engage" and "monitor[ed] the sale process" for Zodiac and Hayward after losing its bid, because "things change." Appellants' Br. 19, 22. But Court Square lacks documentary evidence to support these claims, instead relying only on its own witnesses' direct-examination testimony. The Court of Chancery rejected the notion that hoping "things change" satisfies the ***active*** consideration requirement. That provides independent grounds to affirm.[2]

[2] Court Square below tried to evade § 5.14(a)'s active-consideration requirement, claiming it applied only to current employees or that "do[ing] nothing

3. Court Square's Interpretation Cannot Be Reconciled with Section 5.14(a)

Court Square's interpretation of § 5.14(a) improperly impedes former employees from making a living and leads to absurd results.

Unlike other private-equity firms, Court Square does not "ban former employees from working in private equity for a period or place them on garden leave" or impose "a blanket non-compete restriction." Op. 5. Instead, the noncompete provides: "in no event shall this Section 5.14 be construed in 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. Op. 22 (quoting A1382 § 5.14(a)).

The trial court credited Brown's testimony that a prohibition on "rendering advice on 100 companies in his vertical" listed on his Deal Sheet (in addition to 300 other companies) would be "incredibly restrictive" and "would certainly restrict him from working for a competitor." Op. 25. That is because private-equity firms often bid on a company to learn about its industry and competitors even if they have no interest in acquiring the company, like MSD did for Zodiac. *See* Op. 7 (making this finding based on credibility determinations).

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for 90 days" constituted active consideration. *See, e.g.*, A0998 533:14–22. Court Square does not make these arguments on appeal, so they are waived. *See also* A1247–A1251; B014–16, 21–26.

Under Court Square's interpretation, it's also impossible to know *when* Brown actually acquired an interest in Hayward or Zodiac. Was it every monthly pay period while Brown analyzed either company (one "indirect interest" "acquired" per direct deposit)? If Brown was paid biweekly instead, did the number of acquisitions double? And what about reimbursement for a late-night car service (§ 5.14(a) applies to "any form of . . . payment") while writing a memo related to the company's industry? Silvestri conceded that Court Square's reading makes "[t]he idea of acquire" in § 5.14(a) "completely superfluous," leading to absurd results. A0925–926 460:22–461:3; *accord* A0921–922 456:24–457:5.

Court Square's interpretation of the noncompete is thus "discordant with other aspects of the LLC Agreements" and violates the parties' bargain. Op. 24–25.

4. Section 5.14(a) Is Not Ambiguous

The Court of Chancery held that § 5.14(a)'s terms are "unambiguous and the plain language drives the analysis," so did not consider parol evidence. Op. 25–26. Court Square now claims that was error for one reason: because the trial court supposedly "adopted" Court Square's preferred interpretation of the noncompete when granting in part Brown's motion to dismiss.

The trial court squarely rejected this argument and lambasted Court Square for going "so far as to argue that the court already resolved all of the interpretive disputes in Court Square's favor," making clear "that is not true." Op. 26, n.147.

Court Square now seems to contest Chancellor McCormick's understanding of her own motion-to-dismiss ruling, *id.*, claiming she is "simply" confused, Appellants' Br. 38. The proper arbiter of what Chancellor McCormick decided is, unsurprisingly, Chancellor McCormick.

5. The Extrinsic Evidence Favors Brown

Even if § 5.14(a) is ambiguous, the extrinsic evidence favors Brown's interpretation.

First, Court Square acquiesced without objection to the conduct it complains about now. *See Sun-Times Media Gp., Inc. v. Black*, 954 A.2d 380, 398 (Del. Ch. 2008) (for ambiguous contracts, "any course of performance accepted or acquiesced in without objection is given great weight" (citation omitted)). Court Square was long aware that Brown advised MSD about a Deal Sheet company during his restricted period, even congratulating Brown for his work on Hayward (Op. 11). According to Court Square, the timing of MSD's announcement meant Brown "*necessarily* would have played a central role" in pursuing Hayward during his restricted period, which ended just 16 days earlier, A0366 ¶ 12, and this was "obvious just from looking at the press release," A0984 519:13–21; *accord* A0685–686 220:23–221:6, A0555–556 90:7–91:11; A0984–985 519:22–520:22. Court Square acquiesced for years, claiming breach only when "MSD Refugees" left the firm.

Second, Court Square knew how to write a provision prohibiting the *pursuit* of companies on a Deal Sheet—the conduct it now claims § 5.14(a) covered—because that's exactly what it presented to former plaintiff Lamb when he left the firm in 2020. *See Ostroff v. Quality Servs. Lab'ys, Inc.*, 2007 WL 121404, *11 (Del. Ch.) ("parties' conduct before any controversy has arisen is given great weight" (cleaned up)).

Lamb, like Brown, was a member of Fund III. In Lamb's separation agreement, Court Square restated § 5.14(a) and then added *another* restrictive covenant, asking Lamb not to "pursue an acquisition of" a company on his Deal Sheet. B107–08 ¶ 13; *cf.* B104 (Court Square concocted this new covenant weeks after analyzing the "EXACT DATE" of Hayward acquisition). Delaney admitted that "the separation agreement that [he] sent Mr. Lamb contained language that was not found anywhere in the Fund III restrictive covenant" that bound Brown. A0999 534:6–10; *see* B067 (Moore Dep.) 387:5–11 ("the ordinary import of those words suggests that [acquisition and pursuit] are two different things"). If § 5.14(a) prohibited *pursuit* of deal-list companies, there was no need to supplement Lamb's noncompete with this brand-new language in his separation agreement. Brown, of course, never agreed to any limitation on "pursuit."

Third, Court Square misrepresents the only documented prelitigation conversation between Court Square and Brown about § 5.14(a) (Appellants' Br. 40).

By way of background, the terms of Brown's employment at MSD automatically entitled him to carry in successful deals, whether he worked on them or not. B086. But Brown's Deal Sheet included many companies in industries in which he did not work. Brown thus asked Court Square not to withhold its "consent/waiver" to Brown receiving carry in a Deal Sheet company "unreasonably," so he could still receive compensation for MSD deals in which he played no role. Court Square said no. A1514–515; A0646–A0649 181:14–184:16. During this negotiation, Brown told Court Square that his noncompete should protect "CSC's interest" where the "asset" is "actually for sale" and "*CSC is actively pursuing*" that asset, "not to serve as an *impediment to me making a living* in a situation where CSC's interests are not detrimentally impacted." A1514 (emphasis added); A0646–648 181:14–183:7. These statements mirror Brown's position here, including that § 5.14(a) applies only if Court Square is "actively pursuing" a company and should not impair subsequent employment.

Silvestri testified that he told departing employees Court Square's now-preferred noncompete interpretation. Appellants' Br. 40. No documentary evidence supports this claim, the trial court did not credit this testimony, and the three former Court Square employees who testified at trial did not recall such conversations. In his one documented exchange with Brown, Silvestri did not contest Brown's claim that the noncompete requires "CSC [to be] actively pursuing" the company or tell

him, "you got this all wrong; you can't even look at these [Deal Sheet] companies." A0648 183:8–17. That silence forecloses Court Square's (incorrect) interpretation of the contract now.

Fourth, ambiguity is construed against the drafter, particularly where the drafter had a stronger bargaining position. *VH5 Cap., LLC v. Rabe*, 2023 WL 4305827, *17 (Del. Ch.). Court Square drafted the LLC Agreement, and gave employees no opportunity to negotiate. A0479 14:1–5 ("take-it-or-leave-it"); A0632–633 167:7–10, 168:14–17. Investment professionals at Court Square agreed to the same form contracts to govern their carry; renegotiation with any one employee was exceedingly unlikely. *See* A1514 (Court Square "prefer[s] to stay within the language as drafted in the GP agreements we all signed"). Ambiguities thus must be construed in Brown's favor.[3]

* * *

Court Square claims that § 5.14(a) protects its "intellectual property." *See, e.g.*, Appellants' Br. 2, 34. But the noncompete does not mention intellectual property—it concerns *acquisitions*. Court Square seeks to rewrite the contract, using

[3] The contract contains a boilerplate "waiver" of *contra proferentem*, A1397–398 § 12.10, but that waiver is unenforceable. *See Arcadis U.S., Inc. v. Stryker Demolition & Env't Servs., LLC*, 2023 WL 4280924, *6 (W.D. La.) (*contra proferentem* cannot "be contracted away in an instance where there was no joint drafting of the contract"). *Contra proferentem*'s protections would be gutted if the drafting party could simply insert a waiver into a non-negotiated contract.

§ 5.14(a) to impose broad and amorphous restrictions about disclosure and trade secrets. Section 5.14(c)'s restriction on sharing confidential information is the only covenant addressing *information* or *knowledge* a former employee cannot bring to a new firm. And there is no evidence that Brown used any confidential information in pursuing Zodiac or Hayward.

At bottom, Court Square "could have crafted language tailored to prohibit th[e] conduct" it now complains about. Op. 24. "Instead, it narrowly defined the prohibited conduct in terms of an acquired interest." *Id.* Because Brown did not violate that narrow restriction, the Court should affirm.

II. The Court of Chancery Correctly Held Brown Did Not Breach His Confidentiality Duties

A. Question Presented

Did the Court of Chancery correctly determine that Court Square failed to carry its burden of proof to show Brown violated his confidentiality covenant and, even if it did, that his purported "breach" was immaterial and does not allow Court Square to abandon performance? (Preserved at A1153–A1167.)

B. Scope of Review

The Court reviews the trial court's contract interpretation *de novo* and factual findings for clear error.

C. Merits of Argument

Like many private-equity firms, Court Square prepares one-page memoranda to analyze potential investments (known as heads-up memoranda or HUMs). Court Square employees have long recycled HUMs: The metadata for the HUMs at issue in this case shows they were originally created by an employee who left Court Square *15 years ago*. A0663–664 198:24–195:19. Silvestri brought the HUM template from Citi to Court Square in 2006. Silvestri 206:20–207:3. So when Brown left, he asked Bertrand, then Vice President at Court Square, to provide an "old" HUM to "use as a template." Op. 11 (cleaned up) (crediting Brown's testimony).

Court Square's Bertrand emailed seven HUMs that Brown had authored himself, all relating to investment opportunities Court Square rejected long ago.

A1516–1530. Bertrand picked these HUMs based on several criteria: (1) Brown authored the memos, so was "already aware of the[ir] substance," (2) the memos were old and "stale," and (3) the investment opportunities were not "actionable," because they "were either sold or Court Square had long since stopped considering the investment." Op. 11–13, 29; A0559–560 94:18–95:22.

Brown forwarded those memos to a junior employee at MSD and "instructed the employee to use the HUMs to create a formatting template." Op. 12. Brown gave no "thought about the fact that he sent them from his Gmail account" to do so, Op. 27, because Brown "did not ask for or expect to receive confidential information from Bertrand," Op. 11–12, and viewed Court Square and then-Vice-President Bertrand as "one and the same. Mr. Bertrand is a representative of Court Square," A0756–757 291:24–292:6.

Court Square did not learn about this purported "breach" until discovery, *years* after it stopped paying Brown his carried interest in 2020. On appeal, Court Square trots out the same arguments the Court of Chancery rejected as "dubious" and "merit[less]." Op. 28.

The Court should affirm for three independent reasons: First, Court Square did not carry its burden at trial to show Brown breached § 5.14(c). Second, Court Square never treated the HUMs as confidential before this litigation, so cannot do so now. Third, even if Brown breached § 5.14(c), the trial court correctly determined

any such breach was immaterial and did not permit Court Square to abandon performance.

1. Court Square Did Not Prove the HUMs Contain Confidential Information

Court Square failed to carry its burden to show the information in the HUMs is confidential: "Court Square ***made no effort*** to argue that the information contained in the HUMs was non-public or not otherwise known to Brown." Op. 14 (emphasis added); *accord* Op. 28–29 (Court Square did not carry its "burden of demonstrating that the information in the HUMs was not generally known to or available for use by the public"). This Court must defer to these factual findings. *See Terzes v. Bonsall*, 47 A.3d 972 (Del. 2012) (table) ("We will not disturb a judge's discretionary factual findings if they are supported by the record."). Because Court Square did not establish that the HUMs contain confidential information, it failed to prove Brown violated § 5.14(c)—and cannot remedy that failure of proof on appeal.

Yet Court Square insists the HUMs contained two categories of confidential information: (1) analyses and conclusions by Court Square concerning its "angles" and strategy, and (2) financial information received from the target company under NDAs. Appellants' Br. 20–21. The trial court rightly rejected these arguments.

Start with the memos' discussion "Court Square's 'Angle' in pursuing a particular investment" (category 1). Appellants' Br. 47. Brown authored each of the

HUMs at issue and led the seven deal teams, so he "developed the strategies and angles reflected in the HUMs." Op. 29.

Court Square's expert recognized that "some of the material in the HUMs, some of the strategy points and things like that, would be things that Mr. Brown would very possibly retain as he moved from one firm to the other in the sort of **general knowledge** category." B063–64 (Moore Dep.) 297:20–298:5; B060 277:9–13 (emphasis added). It is black-letter law that "confidential information does not encompass an employee's **general knowledge** and skills and any increase in knowledge and skills the employee obtains in the ordinary course of employment." *See Metro Storage Int'l LLC v. Harron*, 275 A.3d 810, 870 (Del. Ch. 2018) (cleaned up and emphasis added). The trial court credited Moore's admission that HUMs cannot be confidential against their own author. *See* Op. 29 n.157 (citing B060–62 (Moore Dep.) 277:15–279:21).

Nor did Court Square prove that the NDAs (category 2)—which are riddled with exceptions and carveouts—apply to the financial information in the HUMs. (As discussed below, quasi-estoppel separately bars Court Square from using NDAs to prove its claim.) To start, two of the seven NDAs were expired by the time Bertrand sent the HUMs. *See* A1400–1402 (expired 159 days before Bertrand sent HUMs); B071–76 (41 days before).

The remaining NDAs contain multiple carveouts for types of information that are not confidential. For example, the InterWrap NDA states that information is not confidential if it "is, or becomes, generally available to the public" or "*is*, or becomes, *available to you from a source other than us or the Company Representatives*," among other reasons. A1434 ¶ 3 (emphasis added). The financial information in the HUMs was "widely circulated among private-equity firms and would have been *easily accessible to anyone in Brown's position*." Op. 29 (emphasis added); Op. 14 (crediting Silvestri's admission that "the financial information found in the HUMs is usually disseminated to many other private equity firms"); *accord* B065–66 (Moore Dep.) 301:15–302:19.

Similarly, the Polynt NDA carves out information that "is or was independently developed by Potential Buyer or any of its Representatives," A1424 ¶ 2.2(d), yet the related HUM is littered with Brown's general views on the composites industry, A1521. And swaths of information in the HUM for PLZ Aeroscience were public knowledge, like the company's corporate history, so not covered by its NDA either. *Compare* A1403 ¶ 1, *with* A1527. The same goes for the other memoranda, which are filled with information that is "generally known to or available for use by the public" and thus not confidential. Op. 28–29.

Besides, the materiality of financial information generally "lessens as it ages." *Rivest v. Hauppauge Digital, Inc.*, 2022 WL 203202, *11 (Del. Ch.) (analyzing a

books-and-records claim) (cleaned up). While the exact date by which information is no longer confidential depends on context, *id.*, the HUMs were stale under any test, as they had no utility in July 2016. The seven HUM companies were off the market and no longer "actionable." Op. 12, n.83. Court Square's "internal deal tracker" also "verified" that "none of the companies discussed in the HUMs were 'under consideration' at the time Betrand sent them to Brown." Op. 12–13.

Court Square now cites its own witnesses' direct examinations to claim financial information "never go[es] stale," Appellants' Br. 47 n.145, but ignores the trial court's contrary factual findings that the memos "contain[ed] stale information for companies that were no longer on the market," Op. 29, let alone demonstrates clear error. The HUM companies had been off the market between 8 to 23 months. The highly leveraged nature of private-equity acquisitions and the rapid changes that private-equity firms impose on companies after acquiring them means that the information and financials contained in the HUMs were functionally useless. *See* A0896 431:7–17; B056–67 (Moore Dep.) 181:15–182:9. Court Square focuses on the memos' confidentiality at the time they were written, but that has no bearing on their status months and years later, when they were functionally useless.

In short, "Court Square did not comb through each of the HUMs to identify the confidential valuation, angles, and strategy purportedly contained therein." Op. 28–29. The HUMs are filled with Brown's general knowledge about various

industries, information widely and easily accessible to the public or any private-equity firm, stale and useless data, and information outside the scope of the governing NDAs. Court Square "made no effort" below to separate the wheat (confidential information, if any exists) from the chaff (non-confidential information). Op. 14. That failure of proof at trial haunts and dooms Court Square's appeal.[4]

2. Court Square is Quasi-Estopped from Using HUMs to Prove a Confidentiality Violation

The Court of Chancery found that until this litigation, Court Square never treated the HUMs or the information they contain as confidential or sensitive. Op. 13. Court Square does not challenge these findings as clearly erroneous and has waived any such claim. Because Court Square regularly failed to comply with NDAs, including the ones relating to the HUM companies, it cannot use the purported confidentiality of the HUMs or NDAs as reason to withhold Brown's carry. "When a person has gained some advantage for himself or produced some disadvantage to another by maintaining a position, quasi-estoppel acts to prevent that

[4] The Court can affirm "on the basis of a different rationale than that which was articulated by the trial court." *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995). But the Court cannot, as Court Square urges, determine that Brown *did* breach § 5.14(c) without "remand[ing] the case for further findings." Appellants' Br. 46. At the very least, if the Court disagrees with the finding of immateriality below, it should remand for the Court of Chancery to consider, based on the trial record, whether Brown breached § 5.14(c).

person from changing his position." *Bank of New York Mellon v. Commerzbank Capital Funding Trust II*, 2012 WL 2053299, *1 (Del. Ch.) (cleaned up); *see also Simon-Mills II, LLC v. Kan Am USA XVI Ltd. P'ship*, 2017 WL 1191061, *35 (Del. Ch.) (no reliance requirement).

The NDAs for the HUM companies required Court Square to (i) delete all "confidential" information received under NDA after Court Square stopped considering the company (Op. 13–14; *id.* n.88; *see, e.g.*, B073, § 4.1), (ii) delete or segregate "confidential" information after receiving a return-or-destroy notice (*see, e.g.*, A1404 ¶ 4), and (iii) inform the seller as soon as it discloses "confidential" documents or information received under NDA in litigation (*see, e.g.*, B072–73, § 3.3; B073 § 4.2 (duty never expires for archival copies)). Court Square did not take any of these steps for the HUMs:

- Bertrand's access to the HUMs in July 2016, months or years after the companies were sold, and Court Square's production in this litigation of hundreds of documents received under these NDAs confirm Court Square never deleted information related to these long-dead deals.
- Court Square's ignored return-or-destroy notices, including for HUM companies. Op. 13 n.88; A0598–599 133:8–134:2; *see, e.g.*, B083.

- Court Square never told its NDA counterparties about its production of thousands of purportedly "confidential" documents in this case. A0910 445:7–17.

Here's the nub: If Court Square considered HUMs or their contents confidential, it would have deleted or restricted access to them months or years before they were sent to Brown and advised its NDA counterparties about the productions in this case. *See* B054–55 (Moore Dep.) 147:13–148:20 (PE firms comply with deletion obligations for any information they believe confidential).[5] Court Square instead took the position that this information was not confidential.

Next, "[t]he process by which Court Square entered into and executed NDAs . . . was 'informal'" and "[t]here was no system or program tracking which NDAs were in effect and which had expired." Op. 13. With no system or oversight, Court Square did not treat the information in the HUMs and related materials as confidential. *See* Op. 13 n.88; A0530–531 65:17–66:7, A0597–598 132:22–133:7. Court Square's highest executives conceded this point. A0900–901 435:20–436:1.

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[5] Some NDAs permit Court Square to keep a copy of confidential information as "required by law." *See, e.g.*, JX-022, § 4.1. But Court Square did not even comply with these archival provisions: Court Square identified U.S. Pipe as a "Dead Deal" as early as November 2, 2015. B164. Court Square never deleted U.S. Pipe's HUM, and Bertrand access in July 2016 proves Court Square did not limit the document to compliance or IT personnel, as required by the NDA. B079 § 5. *Cf.* B053–54 (Moore Dep.) 146:12–147:6 (archival carveouts require "locked filing cabinet" or digital equivalent, which Court Square did not use, Op. 13 n.88).

Even in this litigation, Court Square showed little concern about the confidentiality of this information. It did not bother marking many of the documents received under NDAs "highly confidential" under the parties' protective order. *See, e.g.*, B165–B179. It placed documents received under NDAs in the public record as joint exhibits, not asking for sealing or redactions. *Id.* And it displayed purportedly confidential documents received under NDAs in open court. A0911 446:1–21.

The Court of Chancery correctly found: "Generally, Court Square did not treat the HUMs as super confidential." Op. 13. Court Square's own behavior is the best evidence that this information was not truly confidential. Court Square is quasi-estopped from treating this information as confidential, for the first time, to pursue its vendetta against Brown.

3. Court Square Suffered No Damages or Injury, So Cannot Abandon Performance

Even if the HUMs were "confidential" and quasi-estoppel didn't apply, Brown's alleged breach of the LLC Agreement was immaterial—Court Square suffered *no harm*—so Court Square cannot cut off millions in Brown's carried interest.

The trial court found that Brown used the "stale" memos only "as templates." Op. 29. "Neither MSD nor Brown ever considered investing in the seven HUM companies, and MSD did not retain the HUMs on its servers." Op. 29; *see* B142–145, B148 (third-party discovery from MSD); A0659–662 194:24–197:22. The trial

court thus recognized that "Court Square does not argue Brown's breach of the Confidentiality Provisions was material or resulted in any harm to Court Square." Op. 29; *accord* B058–59 (Moore Dep.) 200:17–201:4 (no evidence of "any harm" to Court Square). Court Square tries to overcome its own waiver with speculation, conceding it has no "direct evidence" of harm or "Brown us[ing] the HUMs for purposes other than formatting," but instead pointing to "circumstantial evidence" because Brown apparently engaged in "skullduggery." Appellants' Br. 46 n.142. Vague claims—premised on testimony not credited by the trial court and not reckoning with unchallenged third-party discovery from MSD—do not show clear error.

Breaches that are "relatively minor and not of the essence" do not permit a counterparty to "abandon performance." *See AB Stable VIII LLC v. Maps Hotels & Resorts One LLC,* 2020 WL 7024929, *101 (Del. Ch.) (quoting 23 Williston on Contracts § 63:3), *aff'd*, 268 A.3d 198 (Del. 2021); *accord BioLife Sols., Inc. v. Endocare, Inc.*, 838 A.2d 268, 278 (Del. Ch. 2003) (this principle is "firmly" rooted in "Delaware law"). Materiality is a question of fact. *See* 14 Williston on Contracts, § 43:6. Even if Brown's actions "constituted breach," the trial court correctly determined that "it was exceptionally minor and did not permit Court Square to abandon performance." Op. 29.

4. *Cantor Fitzgerald* Does Not Permit Converting an "Exceptionally Minor" Breach into a Windfall

Court Square's reliance on *Cantor Fitzgerald, L.P. v. Ainslie*, 312 A.3d 674 (Del. 2024) is misplaced. To start, neither § 5.8 (the purported "forfeiture" provision on which Court Square relies) or *Cantor Fitzgerald*'s rule have any application without underlying breach,[6] and Brown did not breach § 5.14(c) in the first place. But even if the Court reaches this issue, *Cantor Fitzgerald* did not mention, let alone alter, the black-letter rule that breaches must be material for a counterparty to abandon performance. To the contrary, this Court made clear that so-called forfeiture-for-competition provisions do not override longstanding contract doctrines or equitable considerations. When applying those ordinary contract principles, Court Square's argument fails.

Noncompetes are "restraints of trade" impeding the freedom of employment, so Delaware courts review them for reasonableness, considering factors like geographic and temporal scope, the interests of the party seeking enforcement, and the equities. 312 A.3d at 684 n.65. The issue presented in *Cantor Fitzgerald* was whether "forfeiture-for-competition" provisions in partnership agreements—in which a partner agrees to forfeit some future benefit in exchange for not competing

[6] In *Cantor Fitzgerald*, the Court remanded to determine "whether the plaintiffs engaged in" prohibited conduct. 312 A.3d at 692–93. Here, the trial court's factual findings make clear Brown did not engage in prohibited conduct.

against his former partnership—are "restraints of trade subject to review for reasonableness." *Id.* at 692. The answer is no. Forfeiture-for-competition provisions are not analyzed under the legal framework for noncompetes, and are instead treated like any other contract provision under Delaware law.

Court Square seeks to dramatically extend *Cantor Fitzgerald*'s teachings and craft a blanket rule that if a contract provides for *forfeiture* for an alleged breach, the *materiality* of that breach is irrelevant as a matter of law. That turns *Cantor Fitzgerald* on its head and wrenches the case from its carefully considered context.

Under *Cantor Fitzgerald*, the *normal rules of contract*, not the heightened scrutiny for noncompetes "typically foreign to judicial review in contract actions," govern forfeiture provisions. 312 A.3d at 691. For example, forfeiture provisions are not enforceable if they are "unconscionabl[e]," derived by "bad faith," or other "extraordinary circumstances" are present, *id.* at 677, and are void if they offend public policy or harm the public, *id.* at 689. Delaware courts thus police forfeiture provisions using long-established contract doctrines—including materiality. And Court Square's request to snatch away $10 million of compensation because of a "breach" that caused no harm or damages is an impermissible response to (at best) an immaterial breach, unconscionable, and extraordinary.

At best, Court Square is confusing two distinct doctrines. One of the "circumstances" relevant to determine whether "a failure to render or to offer

performance is *material*" is whether "to perform or to offer to perform will suffer *forfeiture*." Restatement (Second) of Contracts § 241 (emphasis added).

Cantor Fitzgerald's reasoning is also premised on employee choice and competition—circumstances that are entirely missing here. Section 5.14(c) is not a "forfeiture-for-competition" provision (it concerns confidentiality, not competition); the Fund III Agreement is an LLC agreement, not a partnership agreement;[7] and the trial court did not review § 5.14(c) for reasonableness or find it to be an unreasonable restraint of trade.

Court Square also relies on the LLC Act, but *Cantor Fitzgerald* makes clear that such statutes do not displace the common law's disfavor for forfeiture provisions where forfeiture leads to an "inequitable outcome." 312 A.3d at 692. *Cantor Fitzgerald* did not apply this equitable exception because the departing partners there "voluntarily" competed with Cantor Fitzgerald and thus "assumed the risk of the forfeiture." *Id.* The factual findings here compel the opposite result: Unlike those departing partners, even if Brown breached his confidentially obligations, he did not do so "voluntarily" or knowingly—Brown "did not ask for or expect to receive confidential information from Bertrand," Op. 12—and thus did not assume the risk

[7] It is an open question whether *Cantor Fitzgerald* even applies outside the partnership context. This Court has agreed to answer that question in response to a certified question from the United States Court of Appeals for the Seventh Circuit. *See LKQ Corp. v. Rutledge* (No. 110, 2024).

of forfeiture. *Cantor Fitzgerald*'s equitable exception weighs strongly in Brown's favor.

In any event, the trial court's factual findings and the several alternative reasons to affirm make this appeal a poor vehicle to morph *Cantor Fitzgerald*'s narrow holding into blanket rules governing restrictive covenants of all stripes and disrupt bedrock principles of Delaware contract law like materiality.

5. Court Square's "Condition" Argument is Meritless

Court Square lastly argues that the trial court erred because Brown violated a condition. For the same reasons as above, the Court need not reach this issue. Nevertheless, Court Square's argument fails: Court Square suffered no prejudice, the operative provisions do not expressly provide for forfeiture, and forfeiture here would be grossly disproportionate.

"[B]efore any forfeiture can result" from a condition, the counterparty "has the burden of showing that it has thereby been prejudiced." *State Farm Mut. Auto. Ins. Co. v. Johnson*, 320 A.2d 345, 347 (Del. 1974) (insurance context); *see Nucor Coatings Corp. v. Precoat Metals Corp.*, 2023 WL 6368316, *14 (Del. Super.) (applying rule in non-insurance, breach-of-contract case). Court Square, which has nowhere argued that Brown's purported breach "resulted in any harm" (Op. 29), cannot show prejudice. That alone dooms its conditions argument.

Besides, "[i]f the language does not clearly provide for a forfeiture, then a court will construe the agreement to avoid causing one." *QC Holdings, Inc. v. Allconnect, Inc.*, 2018 WL 4091721, *7 (Del. Ch.).[8] While Court Square conditioned *other rights* in the Fund III Agreement *by expressly using the words* "forfeit" or "forfeited," such language is tellingly absent in the operative provisions here. *Compare* A1353–1354 ("Incentive Pool" and "New Hire Pool"), A1368 (§ 3.3(g)), *with* A1377–378 (§ 5.8(b)), A1383 (§ 5.14(c)). By mandating "forfeiture" elsewhere in the contract but omitting it from Brown's confidentiality covenant, Court Square—which drafted the Fund III Agreement and presented it to Brown on a take-it-or-leave it basis—did not contract for forfeiture as a remedy for violating § 5.14(c). *Leatherbury v. Greenspun*, 939 A.2d 1284, 1291 (Del. 2007) ("expressio unius est exclusio alterius").[9]

Even if § 5.8(b) is construed as a forfeiture condition, courts "may, of course, ignore trifling departures" from conditions to avoid "disproportionate forfeiture." Restatement (Second) of Contracts § 229 cmt. c. That "flexible" inquiry is left "the

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[8] *Cantor Fitzerald*'s equitable exception, *supra* Section II.C.4, preserves this common-law rule here.

[9] Court Square's primary authority for its conditions argument is the decision this Court *overruled* in *Cantor Fitzgerald*. That overruled decision did not reckon with *State Farm* or its progeny and is not analogous, let alone persuasive, precedent; it also requires "unambiguous intent" and "read[ing] the contract as a whole" to determine "the presence of a condition," which, as discussed above, is lacking here. 2023 WL 106924, *11.

sound discretion of the court," *id.* cmt. b, and controlled by the trial court's finding that held that even if Brown breached a condition, it "did not permit Court Square to abandon performance" because it was "exceptionally minor," Op. 29.

CONCLUSION

Court Square seeks to impose a forfeiture of about $10 million in carry—all for two purported "breaches" of contract for which, it is undisputed, Court Square did not suffer a *penny* of damages. Neither law nor equity can justify such a punitive outcome. Because Brown did not violate his restrictive covenants and Court Square has not shown clear error below, the Court should affirm.

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CERTIFICATE OF SERVICE

Jamie L. Brown, Esquire, hereby certifies that on August 27, 2024, a copy of the foregoing Public Version of the Answering Brief of Appellee Kevin Brown was served electronically upon the following:

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