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IN THE SUPREME COURT OF THE STATE OF DELAWARE

VILLAGE PRACTICE MANAGEMENT COMPANY, LLC, Defendant Below, Appellant, v. RYAN WEST, Plaintiff Below, Appellee.	)	No. 232, 2024 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2022-0562-MTZ

APPELLANT'S OPENING BRIEF

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Dated: August 13, 2024

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules & Statutes

Other Authorities

NATURE OF PROCEEDINGS

Defendant-Below/Appellant Village Practice Management Company, LLC ("VPM" or the "Company") is a healthcare provider that offers a suite of primary-care services. In 2019, VPM hired Plaintiff-Below/Appellee Ryan West ("West") as Vice President of Practice, later promoting him to Senior Vice President, Practice Management. The following year, VPM awarded West certain Class B Units in the Company, subject to the terms of the Company's equity incentive plan, the award agreements and the Company's operating agreement.

Among other things, West agreed that, as a "Participant" under the plan, he would forfeit his Class B Units if he engaged in pre- or post-employment "Detrimental Activity," defined to include "the rendering of services for any Competitor." On June 1, 2021, after 3,748.91667 of his Class B Units had vested, West left VPM to work for one of its competitors, Midwest Physician Administrative Services, LLC, d/b/a Duly Health and Care ("Duly Health"). By doing so, West triggered the "forfeiture-for-competition" clause, and VPM declared that West had forfeited all vested and unvested Class B Units.

To contest the forfeiture, West commenced the underlying action on July 5, 2022 by filing a verified complaint in the Court of Chancery against VPM asserting seven counts:

> **Count I:** a declaratory judgment that VPM wrongfully declared forfeiture of West's vested Class B Units in accordance with Section

4(a) (the "Forfeiture Clause") of the Notices of Grant of Class B Units and Class B Units Award Agreements (the "Award Agreements") and Section 8(b) of the Management Incentive Plan (the "Plan") (collectively with the Forfeiture Clause, the "Detrimental Activity Provisions")[1] because West, as a former employee of VPM, was not a "Participant" within the meaning of the Forfeiture Clause;

Count II: alternatively, a declaratory judgment that the Detrimental Activity Provisions constitute an unlawful restraint of trade because they lack the requisite temporal and geographical limitations required under Delaware law;

Count III: alternatively, a declaratory judgment that the Detrimental Activity Provisions constitute an unlawful restraint of trade because they are not narrowly tailored to protect a legitimate business interest as required under Delaware;

Count IV: alternatively, a finding that VPM breached the Equity Documents by declaring forfeiture of West's vested Class B units upon the determination that West violated the Detrimental Activity Provisions;

Count V: alternatively, a finding that VPM breached the implied duty of good faith and fair dealing by declaring forfeiture of West's vested Class B units upon the determination that West violated the Detrimental Activity Provisions;

Count VI: alternatively, a finding that VPM violated the Illinois Wage Payment and Collection Act, 820 ILCS 115/1, et seq., by declaring forfeiture of West's vested Class B units upon the determination that West violated the Detrimental Activity Provisions; and

Count VII: alternatively, a finding that VPM is estopped from declaring forfeiture of West's vested Class B units.

[1] The Plan, the Award Agreements, and the Seventh Amended and Restated Operating Agreement (the "Operating Agreement") are referred to collectively herein as the "Equity Documents."

On September 2, 2022, West moved for judgment on the pleadings (the "Motion") on Counts I-IV of his Complaint. West argued, *inter alia*, that VPM's "declaration of forfeiture is plainly contrary to the Equity Documents and should be given no legal effect." A129.

On November 22, 2022, VPM filed its opposition to the Motion and argued, *inter alia*, that (1) because, by the plain language of the Equity Documents, West was a "Participant" and remained legally bound by all terms and conditions of the Equity Documents, including the Detrimental Activity Provisions, VPM had the right to declare forfeiture of West's Class B Units upon determining that West had engaged in Detrimental Activity; or (2) alternatively, the term "Participant" is ambiguous, rendering West's claims inappropriate for determination on the pleadings. A160-A164. VPM further argued that (3) any determination by the Court of Chancery as to the enforceability of the Detrimental Activity Provisions was premature in light of the material fact disputes regarding the appropriate standard of review for "forfeiture-for-competition" clauses under Delaware law, and (4) the plain language of the Equity Documents grants VPM the unequivocal right to cancel or declare forfeiture of West's Class B Units as a result of his engagement in Detrimental Activity, as determined by the Board in its discretion, rendering meritless any claim for breach of contract. A165.

On March 31, 2023, VPM requested a stay to allow VPM's Compensation Committee (or the Board if no committee is appointed) to determine in the first instance whether the dispute resolution language in Section 4(d) of the Plan governed the parties' dispute. A312. VPM noted that, similar to the contractual language that warranted a stay in *Terrell v. Kiromic Biopharma, Inc. (*"*Terrell I*"*)*, 2022 WL 175858 (Del. Ch. Jan. 20, 2022), Section 4(d) of the Plan delegates "full power and authority" to the committee "to interpret the provisions of the Plan and any Award Agreement, and to resolve all questions arising under the Plan." A317.

In response, West argued that Section 4(d) of the Plan is a limited delegation of authority that does not divest the Court of Chancery of subject matter jurisdiction and does not extend to what West characterized as "enforceability determinations." A337.

On May 4, 2023, this Court issued its opinion in *Terrell v. Kiromic Biopharma, Inc.*, 297 A.3d 610 (Del. 2023) ("*Terrell II*"). Shortly thereafter, the parties agreed to submit, and the Court of Chancery agreed to accept, supplemental briefing regarding the effect of *Terrell II* on this action.

In its May 19, 2023 supplemental brief, VPM argued, *inter alia*, that *Terrell II* mandated a stay pending the Committee's determination regarding the question raised by West as to the propriety of VPM's decision to declare forfeiture of his Class B Units under the terms of the Equity Documents. A343.

The same day, the Court of Chancery stayed a related action filed against VPM by another former employee on the grounds that Section 4(d) of the Plan entitled VPM's Committee to first interpret the provisions of the Equity Documents. *Erin Page v. Village Practice Mgmt. Gp., LLC*, C.A., 2023 WL 3563049 (Del. Ch. May 19, 2023).

On August 24, 2023, the Court denied VPM's request for a stay under the *Terrell* cases, this time holding that Section 4(d) was not "a dispute resolution procedure that would divest this Court of jurisdiction to hear West's declaratory judgment claim." Ex. A.

On December 5, 2023, the Court of Chancery held a hearing on West's Motion. During that hearing, the Court of Chancery found in part that "the contractually defined word "participant" does not include former employees, and nothing in the Equity [Documents] otherwise gave VPM the right to cancel vested shares based on engaging in detrimental activity after an employee left VPM. (Ex. B (hereinafter, "Tr.") at 45:7-12. The Court of Chancery granted West's Motion, entered judgment in favor of West on Count I of his Complaint, and dismissed the remaining counts as moot. Ex. C.

On January 3, 2024, West filed a motion for an award of attorneys' fees and expenses, principally claiming that he was a "prevailing party" under Section 12.13 of the Operating Agreement because VPM "validly asserted [the Operating

Agreement] as a defense." A431, A432. On March 21, 2024, VPM filed its opposition, explaining, among other things, that Section 12.13 of the Operating Agreement did not apply because, by entering judgment in West's favor, the Court of Chancery necessarily held that VPM had not validly raised the Operating Agreement as a defense. A449-A450.

On May 13, 2024, the Court of Chancery granted West's motion for attorneys' fees. Ex. D.

On June 12, 2024, VPM filed this appeal, seeking reversal of (i) the August 24, 2023 letter decision regarding the requested stay on West's Motion (Ex. A); (ii) the December 5, 2023 telephonic rulings on Plaintiff's Motion and Order Granting Plaintiff's Motion for Judgment on the Pleadings (the "Order") (Ex. B, Ex. C), and (iii) the May 13, 2024 Order Granting Plaintiff's Motion for Attorneys' Fees and Expenses (the "Fee Award") (Ex. D).

SUMMARY OF ARGUMENT

1. The Court of Chancery erroneously held as a matter of law that West was not a "Participant" under the Equity Documents and was not subject to the Forfeiture Clause. The Award Agreements do not limit the definition of "Participant" to current employees and in fact, along with the other Equity Documents, contain multiple provisions making clear that a former employee who received membership units under the Award Agreements remains a "Participant" within the meaning of the Equity Documents, including VPM's right under the Forfeiture Clause, to repurchase or revoke the "Participant's" units after termination of employment based on "Detrimental Activity" that occurs "at any time." "Detrimental Activity" is likewise expressly defined to include violations of a "Restrictive Covenant," which include violations of "any non-competition, confidentiality or non-solicitation obligation" in (among other types of agreements) a "severance agreement"—actions that necessarily occur post-employment. Under the Court of Chancery's erroneous interpretation, the term "Participant" means something different in multiple clauses of the same agreements, and the numerous provisions imposing post-employment obligations on "Participants" would make no sense. The Award Agreement reflects an express bargain that West's Class B Units could be cancelled or repurchased at a lower price if he engaged in Detrimental Activity at any time. This Court should apply the express contractual language as

written and intended by the parties, reject West's unreasonable construction, reverse the Court of Chancery's decision, and restore VPM's right to enforce the Forfeiture Clause. At a minimum, VPM's interpretation of the relevant provisions is at least reasonable, which precludes judgment on the pleadings for West.

2. The Court of Chancery erred in its analysis of the Detrimental Activity Provision as a restrictive covenant subject to review for reasonableness. Instead, under recent controlling authority from this Court, the Detrimental Activity Provision constitutes a "forfeiture-for-competition" clause subject to analysis under general principles of contract law, including a determination on the material fact question of whether West engaged in Detrimental Activity.

3. Alternatively, the Court of Chancery incorrectly denied VPM's request for a stay of these proceedings under *Terrell* and related decisions. As in *Terrell II* and *Page*, the Court of Chancery should have stayed this action to allow VPM's Board (or designated Committee) to interpret the relevant contractual language. *See Terrell II*, 297 A.3d at 619; *Page*, 2023 WL 3563049, at *2.

4. The Court of Chancery erroneously granted the Fee Award. The Operating Agreements fee-shifting provision is inapplicable because VPM did not assert a defense under the Operating Agreement and, by definition, could not have done so "validly," as the Court of Chancery necessarily deemed any such defense insufficient to survive a motion for judgment on the pleadings. And notwithstanding

its inapplicability, the fee-shifting provision precludes any attempt by West to rely on the Operating Agreement's general indemnification provision as an alternative means to recover his fees.

STATEMENT OF FACTS

A. West's Employment with VPM

VPM is a healthcare provider and developer of primary care clinics. VPM also provides practice management services to primary care healthcare clinics and other healthcare providers. West joined VPM in 2019 as Vice President of Practice Management, and was later promoted to Senior Vice President, Practice Management. A21.

B. VPM Grants West Equity Interest

In connection with his employment, VPM issued West a number of Class B Units. A22. West thereby became a "Participant" in the Plan and related Equity Documents, all of which set forth West's rights and obligations with respect to his Class B Units. A23. These obligations, as explained in more detail below, include those set forth in the Forfeiture Clause.

C. "Participant" As Contemplated By the Award Agreements

The Award Agreements define "Participant" as simply "the participant identified on the cover page"—i.e., West—with no caveat or contingency related to his employment status. A57. The first page of each Award Agreement states that "[u]pon your Termination of Service, regardless of the reason therefor, the Class B Units will be subject to the repurchase rights set forth in Section 9 of the Plan," which in turn provides VPM the right to "repurchase all or any portion of the vested Class B Units acquired by a Participant pursuant to an Award issued under this Plan

. . . within 185 days following the later of (i) the date of such Participant's Termination of Service . . . and (ii) the date such Class B Units vest if such date follows a Termination of Service." A51. The repurchase price is subject to a different formula if "the Participant engages in a Detrimental Activity ***at any time***." A51 (emphasis added). The Award Agreements thus expressly contemplate the possibility that West's Class B Units are subject to repurchase by VPM ***after*** his employment based on Detrimental Activity.

The Award Agreements contain multiple other provisions imposing ***post-employment*** obligations on a "Participant." These provisions include:

> 4. Termination of Class B Units; Repurchase Rights.
>
> (a) Termination of Service for Cause; Detrimental Activity. In the event of the ***Participant's Termination of Service for Cause*** or upon the Participant's commission of a Detrimental Activity, all the Class B Units, vested and unvested, shall immediately terminate and be forfeited without payment therefore.
>
> 5. Participant Cooperation. In the event of the exercise by the Company and/or its designee of ***the repurchase right and/or in the event of any forfeiture of Class B Units***, as set forth herein or in Section 9 of the Plan, ***the Participant shall*** deliver the certificate(s) (if any) representing the Class B Units ***and will take all other steps as provided in Section 9(c) of the Plan*** to facilitate the consummation or the repurchase and the cancellation of the Class B Units in a timely manner.
>
> *****
>
> 7. Operating Agreement. The Participant acknowledges and agrees that the issuance of Class B Units hereunder ***require the Participant to become a party to the Operating Agreement***. The ***Participant further acknowledges that his or her rights as a Company equityholder*** will be limited by, and subject to, the terms of the

Operating Agreement, including, but not limited to those terms relating to transfer restrictions and the Company's right of first refusal and "drag-along" rights of the Company and certain of its equityholders as set forth in the Operating Agreement.

*****

9. Public Offering. The Participant agrees that, in the event that the Company or an Affiliate of the Company files a registration statement under the Securities Act with respect to an underwritten public offering of any equity securities, ***the Participant will be subject to the "lock-up" requirements set forth Section 10 of the Plan***.

*****

12. No Evidence of Employment or Consulting Relationship. ***Nothing contained in the Plan or in this Agreement shall confer upon the Participant any right with respect to the continuation of his or her employment by, or service relationship with, the Company or any Affiliate or interfere in any way with the right of the Company or any Affiliate (subject to the terms of any separate agreement to the contrary), at any time to terminate such employment or service relationship*** or to increase or decrease the compensation of the Participant from the rate in existence at the time of the grant of the Class B Units. For the avoidance of doubt, ***this Agreement shall not guarantee employment for the length of all or any portion of the vesting schedule set forth in the Notice of Grant.***

*****

14. Miscellaneous

*****

(d) Governing Law. This Agreement shall be governed by, and construed in accordance with, the laws of the State of Delaware. . . . Each of the parties submits to the nonexclusive jurisdiction of any state or federal court in the State of Delaware . . . ; ***provided, however, that the Participant agrees that he or she will only commence action in the State of Delaware…***

*****

> (h) ***Participant Bound by Plan and Operating Agreement***. The Participant hereby acknowledges receipt of, and that the Participant has read and reviewed, a copy of the Plan and Operating Agreement and ***agrees to be bound by all of the terms and conditions thereof***.[2]

(*See* A175-A178 (emphasis added).)

These provisions make clear that the termination of West's employment did not alter his status as a "Participant" under the Award Agreements . Under Section 5, for example, a "Participant" is required "to deliver the certificate(s) (if any) representing the Class B Units and will take all other steps as provided in Section 9(c) of the Plan to facilitate the consummation or the repurchase and the cancellation of the Class B Units in a timely manner." Because repurchase rights are defined under the Plan as something that occurs "following" a Termination of Service, the obligation under Section 5 to deliver certificates and facilitate consummation of the repurchase is necessarily something that would occur ***after*** the Participant ceases employment with VPM. The restrictions and obligations imposed by Sections 7 and 9 of the Award Agreements with respect to transfers, drag-along rights, public offerings, and other matters likewise are continuing in nature and do not expire upon

[2] *See also* Exhibit B to the Grant Notice: "Investment Representation Statement: Any capitalized terms not defined in this Investment Representation Statement shall have the meaning set forth in the Village Practice Management Company, LLC Management Incentive Plan. In connection with the purchase of the above-listed securities (the "Securities"), ***the undersigned Participant represents to the Company the following***:…" (A185 at p. B-1 (emphasis added).)

termination of employment. The obligations under Sections 14(d) and (h) to file litigation only in Delaware and to be bound by the other Equity Documents likewise endure post-employment. In addition, Section 12 divorces the concept of continued employment from "Participant" status and makes clear that being deemed a Participant under the Award Agreements confers no promise of continued employment. When read together, the Award Agreements plainly contemplate that West remained a Participant following the termination of his employment.

D. "Participant" as Contemplated by the Plan

The Plan likewise contemplates that "Participant" status survives termination of employment. Section 2(n) of the Plan defines "Detrimental Activity" in part as "the rendering of services for any Competitor" or "the breach of any Restrictive Covenant." A25. "Restrictive Covenants," in turn, are defined as "any non-competition, confidentiality or non-solicitation obligation to the Company or any of its Subsidiaries, including without limitation, any such obligation given by a Participant in favor of the Company and/or any of its Subsidiaries in any non-competition, confidentiality or non-solicitation agreement, any employment agreement or severance agreement and/or in this Plan." A46. The express reference to "severance agreement" necessarily contemplates that "Detrimental Activity" can occur after employment. This makes sense, as non-competition and confidentiality obligations commonly survive employment. Further, as stated in the prior section,

Section 9 of the Plan provides a different formula for calculating the repurchase price for Class B Units after termination of employment, if the Participant "engages in a Detrimental Activity ***at any time***." A51 (emphasis added).

Section 2(p) of the Plan defines "Employee" as "any person who is employed (within the meaning of the Code and regulations and interpretive guidance issued thereunder) by the Company or any [] Subsidiary and provides services to or for the benefit of the Company." A45. Section 2(u) goes on to define "Participant" as an "Employee or Consultant designated by the Committee to participate in the Plan." A46.

Under the plain language of the Plan, an Employee or a Consultant may be "designated by the Committee to participate in the Plan." *Id.* As with the Award Agreements, however, the Plan contains numerous provisions (including Section 9) indicating that once an Employee is "designated" to be a Participant, they continue to be a Participant as long as they hold vested or unvested Class B Units, including after termination of employment. For example, in the definition of "Termination of Service," Section 2(bb) references the "termination of a Participant's employment," with no indication that such termination changes the individual's status to something other than a "Participant." *Id*. Likewise, Section 4(e) sets forth the "Participant's Rights," with no distinction between current or former employees. A47. Section 5(b)(ii) further provides that "[d]istributions in respect of Awards of Class B Units

shall be made to a Participant in accordance with the provisions of the Operating Agreement," again with no suggestion that a Participant loses the right to receive distributions with respect to their Class B Units once their employment has concluded. A48 ¶ 5(i)(ii). And, much like the Award Agreements, Section 10 imposes restrictions on "each Participant" in connection with a potential future public offering, with no indication that such restrictions cease to apply post-employment. A52 ¶ 10.

Similarly, Section 8(b) of the Plan reads as follows:

> "(b) Commission of Detrimental Activity by Participant. Unless otherwise determined by the Committee and set forth in the applicable Award Agreement, ***an Award shall terminate and be cancelled for no consideration on the date on which the Participant engages in a Detrimental Activity."***

A51 (emphasis added).) Nothing in this provision states that the "Detrimental Activity" must occur before termination of employment—a restriction that would make no sense, as Detrimental Activity is expressly defined to include violations of provisions in a "severance agreement" that would necessarily occur after severance from employment.[3]

Likewise, as stated above, Section 9 of the Plan grants VPM the right to repurchase vested units from a "Participant" after said Participant's "termination of

[3] Indeed, both West and the Court of Chancery grappled with this incongruous and unlikely hypothetical during the December 5, 2023 hearing – without any tangible resolution. Tr. at 8:17-9:10.

service" and requires that (1) any required payment for such repurchase is to be paid to the "Participant" (with the Participant receiving a potentially lower price based on Detrimental Activity occurring "at any time") and (2) the "Participant" must cooperate with certain post-termination obligations. A51. These provisions again impose express obligations on a "Participant" after termination of employment based on "Detrimental Activity" occurring at "any" time.

Further, Section 17 of the Plan provides that a Participant "may ***from time to time*** name any beneficiary or beneficiaries . . . by whom any right under the Plan is to be exercised in case of such Participant's death," and that a designation "shall be effective only when filed by the Participant in writing with the Committee ***during his or her lifetime***." A53 § 17 (emphasis added.) Construing "Participant" to mean only former employees would be flatly contrary to the language used in this paragraph, which makes clear that Participants can designate beneficiaries or change their designations "from time to time" at any point "during his or her lifetime." Under such a construction, Participants would lose the ability to designate beneficiaries or make changes once they are no longer employed, which is an unworkable construction at odds with the provision's plain intent.

Lastly, Section 13 of the Plan (much like Section 12 of the Award Agreements) makes clear that "Participant" status is distinct from continued employment:

> **13. NO EVIDENCE OF EMPLOYMENT OR CONSULTING RELATIONSHIP.** Nothing contained in the Plan or in any Award Agreement ***shall confer upon any Participant*** any right with respect to ***the continuation of his or her employment by, or service relationship with***, the Company or any Affiliate or interfere in any way with the right of the Company or any Affiliate (subject to the terms of any separate agreement to the contrary), at any time, ***to terminate such employment or service relationship*** or to increase or decrease the compensation of the Participant from the rate in existence at the time of the grant of an Award. For purposes of clarification, Awards granted under the Plan shall not guarantee employment for the length of all, or any portion, of the vesting schedule of the underlying Awards.
>
> A53 (emphasis added)

In sum, both the Plan and the Award Agreements contain multiple provisions divorcing "Participant" status from continued employment and expressly contemplating that former employees with vested or unvested Class B Units remain "Participants" under those agreements. A person may need to be an Employee or Consultant to be initially "designated" as a Participant, but once designated, they remain a "Participant" as long as they continue to hold the Class B Units.

E. West Resigns His Employment, and VPM Determines that West's Subsequent Employment Violates the Detrimental Activity Provisions

West voluntarily resigned his employment effective June 1, 2021. A23. At some point thereafter, West joined Midwest Physician Administrative Services, LLC, d/b/a Duly Health and Care ("Duly Health"). VPM notified West that it was exercising its right under the Equity Documents to declare forfeiture of his vest Class B Units based on his employment with Duly Health, a VPM competitor. A24.

F. West Files Suit and Moves For Judgment on the Pleadings

West initiated this lawsuit by filing his Verified Complaint on June 28, 2022. VPM filed its Answer on August 26, 2022. West moved for judgment on the pleadings to adjudge and declare his rights to his vested Class B Units. On March 8, West requested to schedule a hearing on his Motion. The next day, VPM asserted by letter to the Court of Chancery that "supplemental briefing is necessary to address the nonwaivable issue of subject matter jurisdiction." On March 10, 2023, the Court of Chancery granted VPM's request to brief the issue of subject matter jurisdiction, and the Court of Chancery subsequently entered the parties' stipulated briefing schedule.

G. The Court of Chancery Grants West's Motion and His Request for Attorneys' Fees

Upon conclusion of the Parties' briefing and a hearing on December 5, 2023, the Court of Chancery granted West's Motion. Following its entry of judgment in West's favor, the Court of Chancery allowed West to file a motion seeking recovery of his attorneys' fees. West relied on the language in Section 12.13 of the Operating Agreement (the "Fee Clause") for his fee request:

> **Attorneys' Fees.** In any action or proceeding brought to enforce any provision of this Agreement, or where any provision hereof is validly asserted as a defense, the prevailing party shall be entitled to recover reasonable attorneys' fees and expenses from the non-prevailing party in addition to any other available remedy.

See A430-31. Alternatively, West argued that Section 12.5 of the Operating Agreement (the "Indemnification Clause") also entitled him to indemnification of his legal expenses. A430.

I. THE TRIAL COURT ERRONEOUSLY FOUND THAT WEST, AS A FORMER EMPLOYEE, WAS NOT SUBJECT TO THE FORFEITURE CLAUSE

A. Question Presented

Did the Court of Chancery erroneously grant judgment on the pleadings in West's favor with respect to Count I, which seeks a declaration that West is not a "Participant" and is not subject to the Forfeiture Clause? VPM raised this issue below (A161-A165), and the Court of Chancery considered it (Tr. at 44-52).

B. Scope of Review

The Court's review of the grant of a motion for judgment on the pleadings is limited to a review of the contents of the pleadings and exhibits attached to the pleadings or incorporated by reference. *Patheon Biologics LLC v. Humanigen, Inc.,* 2023 WL 5041233, at *1 (Del. July 31, 2023); *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993) (internal citations omitted). The Court must "determine whether the [trial] court committed legal error in formulating or applying legal precepts." *Id*. (internal citations omitted). Accordingly, the "review of the trial court's grant of a motion for judgment on the pleadings presents a question of law," which is reviewed *de novo*. *Id*. (internal citations omitted). The issue also involves legal interpretations of contractual provisions subject to similar *de novo* review.

C. Merits of Argument

1. Delaware Law Requires Courts to Strictly Enforce Contractual Rights in LLC-Related Agreements

Courts are generally required to enforce contracts relating to LLC membership interests as written. The express statutory "policy" of Delaware's Limited Liability Company Act ("LLC Act") is "to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements." 6 *Del. C.* 18-1101(b). As set forth in greater detail below, this Court consistently enforces equity forfeiture agreements in the partnership context, which involves analogous statutory provisions enshrining contractual rights and allowing forfeiture as are contained in the LLC Act. *See Cantor Fitzgerald, L.P. v. Ainslie*, 312 A.3d 674, 677, 688 (Del. 2024) (emphasizing Delaware's "strong interest in enforcing contracts as written" in upholding "forfeiture for competition" provision in partnership agreement); *see also W.R. Berkley Corp. v. Dunai*, 2024 WL 511040, at *3 (3rd Cir. Feb. 9, 2024) (citing *Cantor Fitzgerald* and emphasizing that a stock clawback provision should be enforced as a "bargained-for provision in agreements struck by sophisticated parties." *Cantor Fitzgerald, L.P. v. Ainslie*, 2024 WL 315193, at *13 (Del. Jan. 29, 2024)).

The Court of Chancery erred in failing to hold West to his contractual bargain with VPM. The bargain at issue here was, at its core, a simple one: any membership interests in VPM granted to West under the Award Agreements would be subject to

continuing obligations of West as a Participant, including consequences under the Forfeiture Clause for violations of any Restrictive Covenant or other Detrimental Activity. The Equity Documents are replete with references making clear that "Participant" status and the associated contractual obligations survive termination of employment, and that any membership interests in VPM awarded to West under the Award Agreements could be forfeited or repurchased at a potentially lower price if West engaged in Detrimental Activity ***at any time***. It makes logical and practical sense that an LLC would want the right to terminate a membership interest when the member becomes employed by a competing entity, particularly in light of the broad rights LLC members typically have to request internal books and records under Delaware law. *See Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 788-99 (Del. Ch. 2016) (abrogated on other grounds) (discussing books and records obligations). The Court erred by not holding West to his bargain.

2. The Court of Chancery's Decision Violates Bedrock Principles of Contract Construction and Is Erroneous

Under Delaware law, contracts should be interpreted "in a way that does not render any provisions 'illusory or meaningless,'" giving effect to each provision. *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287-88 (Del. 2001) (internal citation omitted). Courts should also interpret the same terms consistently when used in the same document and should avoid interpreting the same term to have different meanings in different provisions of the same agreement. *See Terrell v.*

Kiromic Biopharma, Inc., 2024 WL 370040, at *7 (Del. Ch. Jan. 31, 2024) (*"Terrell III"*) (applying rule that "identical words used in different parts of the same agreement are presumed to 'bear the same meaning throughout'") (internal citations omitted); *JJS, Ltd. v. Steelpoint CP Hldgs., LLC*, 2019 WL 5092896, at *6 (Del. Ch. Oct. 11, 2019).

The Court of Chancery's decision contravenes these principles and effectively rewrites the Forfeiture Clause to deprive VPM of its contractual bargain. The Forfeiture Clause states that "[in] the event of the Participant's Termination of Service for Cause or upon the Participant's commission of a Detrimental Activity, all the Class B Units" awarded to West under the Award Agreements "shall immediately terminate and be forfeited without payment therefore." A175. Nothing in the Forfeiture Clause suggests that Detrimental Activity is limited only to conduct occurring during West's employment, or that the Forfeiture Clause otherwise expires when West leaves VPM. Indeed, the fact that the Forfeiture Clause provides two separate triggers—one for "Termination of Employment" and one for "Participant's commission of a Detrimental Activity"—conveys the parties' intent for each trigger to be separate and independent, such that the timing of the "Detrimental Activity" was not dependent on the Participant's employment status. *See O'Brien*, 785 A.2d at 287-88; *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1182 (Del. 1992).

The Award Agreements likewise define "Participant" as "the participant identified on the cover page"—*i.e.*, West—with no suggestion that West ceases to be the "Participant" upon termination of his service. And the remaining language of the Award Agreements and other Equity Documents support this conclusion. As stated previously, the first page of the Award Agreement specifies that West, as a "Participant," would remain subject to the repurchase rights under Section 9 of the Plan ***after*** a "Termination of Service," when West would no longer be a VPM employee. And Section 9(a) of the Plan entitles VPM to reduce any repurchase price if "the Participant engages in a Detrimental Activity ***at any time***." *See* A51 (emphasis added). The intent of this language is unmistakable: West's obligations as a "Participant" endure after his employment ends, and he remains subject to forfeiture or repurchase as a "Participant" as long as holds vested or unvested Class B Units, regardless of whether VPM still employed him.

The Plan's definition of "Detrimental Activity" incorporated into the Forfeiture Clause further confirms that the Forfeiture Clause applies to post-employment conduct. Again, Section 2(n) of the Plan defines "Detrimental Activity" as including, among other things, "the rendering of services for any Competitor" or "the breach of any Restrictive Covenant." A45. Neither of these clauses is subject to a time restriction. "Restrictive Covenants," in turn, are defined to include "any non-competition, confidentiality or non-solicitation agreement, any

employment agreement or severance agreement and/or in this Plan." A46. A "severance agreement," by nature, imposes obligations after termination of employment. Indeed, non-competition and confidentiality agreements commonly impose post-employment obligations. The natural reading of this language is that "Detrimental Activity" includes post-employment conduct, and that West remains a "Participant" subject to the Forfeiture Clause so long as he retains the Class B Units, both during and after his employment at VPM.

As stated above (*see supra* at section I.C.1), the Award Agreements and Plan contain numerous other provisions confirming that West remains a "Participant" notwithstanding the termination of his employment. Under Section 5 of the Awards Agreement, the "Participant" is obligated "to deliver the certificate(s) (if any) representing the Class B Units and will take all other steps as provided in Section 9(c) of the Plan to facilitate the consummation or the repurchase and the cancellation of the Class B Units in a timely manner." A48; A52. Because repurchase rights are defined under Section 9(a) of the Plan as something that occurs "following" a Termination of Service, the obligations under Section 5 of the Awards Agreement to facilitate the repurchase are obligations that plainly apply to a "Participant" after termination of employment. Additionally, Section 12 of the Award Agreements and Section 13 of the Plan explicitly detach the status of "Participant" from the concept

of continued employment, as both provisions make clear that "Participant" status confers no promise of continued employment. A176 § 12; A53 § 13.

The restrictions and obligations imposed by Sections 7 and 9 of the Award Agreements with respect to transfers, drag-along rights, public offerings, and other matters likewise are continuing in nature and do not expire upon termination of employment. A176 §§ 7, 9. Similarly, the obligations under Sections 14(d) and (h) to file litigation only in Delaware and to be bound by the other Equity Documents do not expire post-employment. *Id*. § 14.

The Plan imposes numerous other post-employment obligations on "Participants." For example, in the definition of "Termination of Service," Section 2(bb) references obligations following the "termination of a Participant's employment," with no indication that such termination changes the individual's status to something other than a "Participant." A46. Likewise, Section 4(e) sets forth the "Participant's Rights," with no distinction between current or former employees. A47. Section 5(b)(ii) similarly lacks any suggestion that distributions cease to be payable upon termination of employment. A48 ¶ 5(i)(ii). Section 8(b) provides that an equity award under the Plan "shall terminate and be cancelled for no consideration on the date on which the Participant engages in a Detrimental Activity," with no reference to employment status. And, as stated above, Section 9 creates repurchase rights for VPM that contemplate both payment to the

"Participant" after termination of employment and a different payment formula if the Participant commits Detrimental Activity at "any time," with continuing obligations by the Participant to cooperate in facilitating the repurchase. A51.

Section 10 likewise imposes restrictions on "each Participant" in connection with a potential future public offering, with no indication that such restrictions cease to apply post-employment. A52 ¶ 10. The beneficiary designation provision in Section 17 also makes clear that beneficiaries may be designated or changed "from time to time" during the Participant's "lifetime," demonstrating again that "Participant" status does not cease at the end of employment. A53 § 17.

Lastly, to the extent the Court of Chancery relied on the purported unreasonableness of the Forfeiture Clause's scope as grounds for construing it to exclude West, that reliance is untenable following this Court's holding in *Cantor Fitzgerald*, 2024 WL 315193, at *13 that equity forfeiture agreements in the partnership context are not governed by the scope restrictions applicable to general non-competition agreements. As explained in detail below (*see infra* at II.C), the freedom-of-contract and forfeiture provisions contained in the LLC Act are similar to the partnership statute at issue in *Cantor Fitzgerald* and must be applied accordingly. There is no basis for artificially construing the Forfeiture Clause to exempt former employees under purported scope restrictions that do not apply to such clauses.

Interpreting "Participant" to include only current employees for the Forfeiture Clause, but not for the countless other provisions contained in the Equity Documents, defies logic and violates the bedrock contract construction principle that the same term should not have different meanings when used in the same agreement *See Terrell III* at *7. The Forfeiture Clause plainly applies to Detrimental Activity committed by West after his employment. The Court of Chancery's interpretation to the contrary, which improperly carves out an exception to the definitions of "Participant" and "Detrimental Activity" that is otherwise inapplicable to the plain language of the Equity Documents, is erroneous and should be reversed. *See, e.g., GMG Cap. Invs., LLC v. Athenian Venture P'rs I, L.P.*, 36 A.3d at 779 (Del. 2012) "The meaning inferred from a particular provision cannot control the meaning of the entire agreement if such an inference conflicts with the agreement's overall scheme or plan.").

3. VPM's Interpretation Is Correct as a Matter of Law. Alternatively, VPM's Interpretation Is at Least Reasonable and Makes Judgment on the Pleadings Inappropriate

The Court of Chancery's interpretation of the Forfeiture Clause was wrong as a matter of law, as West's interpretation cannot be reconciled with the plain contractual terms. Alternatively, VPM's interpretation of the terms at issue is at least reasonable, which makes judgment on the pleadings improper. *Ford Motor Co. v. Earthbound LLC,* 2024 WL 3067114, at *13 (Del. June 20, 2024) (noting that judgment on the pleadings is improper when contractual provisions "have multiple reasonable interpretations"; "At the pleadings stage of a contract dispute, the Court cannot choose between two differing reasonable interpretations of ambiguous contract language."); *GMG Cap. Invs.,* at 783 ("[W]here two reasonable minds could differ as to the contract's meaning, a factual dispute results…In those cases, [judgment as a matter of law] is improper.") (citations omitted); *ITG Brands, LLC v. Reynolds Am., Inc.*, 2019 WL 4593495, at * 9 (Del. Ch. Sept. 23, 2019) (same); *Appriva S'holder Litig. Co. v. EV3, Inc.*, 937 A.2d 1275, 1292 (Del. 2007) ("Even if the Court considers the movant's interpretation more reasonable than the non-movant's on a 12(b)(6) motion it is error to select the 'more reasonable' interpretation as legally controlling.") (cleaned up)).

Unless West's interpretation is the only permissible reasonable interpretation as a matter of law (which it was not), the Court of Chancery was required to credit

VPM's express denials of West's contractual allegations at the pleading stage and deny West's Rule 12 motion. *See Desert Equities*, 624 A.2d at 1206; *Halpert on behalf of AsiaInfo-Linkage, Inc. v. Zhang,* 47 F. Supp. 3d 214, 217 (D. Del. 2014) ("In determining Halpert's motion for judgment on the pleadings, the court must now draw all inferences in favor of defendants…Defendants' denials, discussed above, must be accepted as true and demonstrate that a material issue of fact remains to be resolved.") (internal citations omitted).

II. THE "FORFEITURE-FOR-COMPETITION" CLAUSE SHOULD BE ANALYZED UNDER STANDARD CONTRACT RULES RATHER THAN AS A NONCOMPETE PROVISION

A. Question Presented

Did the Court of Chancery erroneously construe the Detrimental Activity Provisions as restrictive covenants subject to reasonableness restrictions, as opposed to a forfeiture provision subject to (and valid under) ordinary rules of contract? VPM raised this issue below (A167-68), and the Court of Chancery considered it (Tr. at 52-54).

B. Scope of Review

Because this issue was decided in the context of a motion for judgment on the pleadings, it is subject to *de novo* review to the same extent as the Court of Chancery's other determinations with respect to that motion. *See Desert Equities, Inc.*, 624 A.2d at 1204. The Court's must "determine whether the [trial] committed legal error in formulating or applying legal precepts." *Id*. (internal citations omitted).

C. Merit of Argument

Alternatively, West argued that the Detrimental Activity provision is an overbroad and unenforceable post-employment restraint on trade. In finding that "Participant" does not include former employees, the Court of Chancery relied in part on its tentative determination that the Detrimental Activity provision is an unreasonable post-employment restraint on trade. (Tr. 52:14-53:22) ("That

conclusion, and the canon favoring enforceable and reasonable interpretations, also favors interpreting 'Participant' under its plain meaning of present employees and contractors."). However, subsequent decisions by this Court definitively settled this question: forfeiture-for-competition provisions like the one at issue in this case are not subject to the reasonableness review applicable to restraints of trade but are instead enforceable "bargained-for provision[s] in agreements struck by sophisticated parties." *Dunai*, 2024 WL 511040, at *3 (citing *Cantor Fitzgerald*, 2024 WL 315193, at *13).

Accordingly, to the extent the Court of Chancery relied in any way on its determination as to the enforceability of the Detrimental Activity provision in granting judgment in favor of West, such reliance was erroneous as a matter of law. Notably, the *Cantor Fitzgerald* decision expressly relied on the broad "freedom of contract" and forfeiture provisions in the Delaware Revised Uniform Limited Partnership Act ("DRULPA"). *See* 2024 WL 315193, at *10 (citing 6 *Del. C.* §17-1101(c)), 692 (citing 6 Del. C. §17-306). The LLC Act contains similar provisions endorsing the freedom of contract and allowing forfeiture of membership interests. *See* 6 *Del. C.* §§ 18-1101(b), 18-306, 18-502(c). The Court of Chancery's "unreasonableness" holding is untenable following *Cantor Fitzgerald* and does not support the judgment.

III. THE TRIAL COURT ERRONEOUSLY DENIED VPM'S REQUEST FOR A STAY BASED ON THE *TERRELL* DECISIONS

A. Question Presented

Did the Court of Chancery erroneously deny VPM's request for a stay under the *Terrell* decisions to allow the Committee to first issue a determination as to whether VPM properly interpreted the Equity Documents in declaring forfeiture of West's Class B Units? VPM raised this issue below (A316), and the Court of Chancery considered it (Ex. A).

B. Scope of Review

The Court's review of the grant of a motion for judgment on the pleadings is limited to a review of the contents of the pleadings and exhibits attached to the pleadings or incorporated by reference. *Patheon Biologics* at *1; *Desert Equities* at 1204. The Court must "determine whether the [trial] court committed legal error in formulating or applying legal precepts." *Id*. (internal citations omitted). Accordingly, the "review of the trial court's grant of a motion for judgment on the pleadings presents a question of law," which is reviewed *de novo*. *Id*. (internal citations omitted).

C. Merits of Argument

1. West's Challenge to VPM's Interpretation of the Detrimental Activity and Forfeiture Provisions is Subject to Committee Review Under Section 4(d) of the Plan

At the core of the parties' dispute on this issue is whether West's claim—that VPM wrongfully declared forfeiture of his Class B Units—should have first been presented to the Committee pursuant to Section 4(d) of the Plan. The Court of Chancery held that Section 4(d) is not a "dispute resolution provision" like that found in *Terrell* and similar cases. VPM respectfully disputes this finding as erroneous.

In *Terrell I*, the Court Chancery found that the express language of the parties' agreement required the defendant's board of directors (or designated committee) to determine whether a dispute resolution provision *Terrell I*, 2022 WL 175858, at *7. In *Terrell II*, this Court affirmed that holding, finding the Court of Chancery "properly stayed the action to permit the board's committee to interpret the agreement and notice in the first instance" under the dispute resolution provision. *Terrell II*, 297 A.3d at 613.

Just fifteen days later, the Court of Chancery, applying *Terrell II*, entered a stay in a related action filed against VPM by another former employee involving the same Equity Documents and nearly identical claims. *Page*, 2023 WL 3563049. The

facts at issue in the present matter are functionally indistinguishable from those at issue in *Page* and warrant the same conclusion.

As here, the plaintiff in *Page* sought a declaratory judgment that (1) the Detrimental Activity provision did not apply to her post-termination activity, (2) her current/prospective employer was not a competitor of VPM, and (3) the Detrimental Activity provision was overbroad and unenforceable. *Page*, 2023 WL 3563049, at *1 (citing D.I. 27). As here, the plaintiff in *Page* filed a motion for judgment on the pleadings. *Id.* As here, the Court of Chancery concluded that any determination regarding the question of subject matter jurisdiction depended on the interpretation of Section 4(d) of the Plan. *Id.* at *2. As here, the Court of Chancery directed the parties to provide supplemental briefing on the issue of the court's subject matter jurisdiction in light of *Terrell II*. *Id.* As here, the Court of Chancery compared the provision at issue in *Terrell II* with the language of Section 4(d) in VPM's Plan, as reflected below:

Terrell – Section 15.1	***Page and West – Section 4(d)***
Interpretation. Any dispute regarding the interpretation of this Agreement shall be submitted by Optionee or the Company to the Committee for review. The resolution of such a dispute by the Committee shall be final and binding on the Company and Optionee.	**Interpretation.** Except as otherwise expressly provided in the Plan, the Committee shall have all powers with respect to the administration of the Plan, including, without limitation, full power and authority to interpret the provisions of the Plan and any Award Agreement, and to resolve all questions arising under the Plan. All decisions of the Committee shall be conclusive and binding on all persons.

Page, at *1 n. 8 (citing *Terrell II*'s analysis of Section 15.1).

But this is where the similarities end. In *Page*, the Court of Chancery found that Section 4(d) required a stay of the proceeding to "afford an opportunity for review of the Committee's legal determinations." *Page* at *2. Specifically, the Court of Chancery stayed the action "***until the Committee interprets the plan***: (a) to determine the Committee's scope of authority; and (b) if the committee decides it has the authority, to determine ***(i) whether the 'Detrimental Activity Provision' governs the plaintiff's employment after her employment with the defendant is terminated ('post employment activities'); (ii) whether the plaintiff's prospective employer…is a 'Competitor'; (iii) whether the plaintiff remains the holder of her 'Class B Units'; and (iv) whether the defendant has any basis under the Plan to cancel any of the plaintiff's Class B Units.***" *Id*. (emphasis added).

On its face, the *Page* decision cannot be reconciled with the Court of Chancery's denial of a stay in this case. In both cases, the former employees challenged VPM's ability to cancel or declare forfeiture of their vested Class B units under the Detrimental Activity provision based on their employment with a competitor, as determined in VPM's sole discretion. Stated differently, there is no meaningful way to distinguish West's obligation to present his dispute to the Committee pursuant to Section 4(d) from the obligations recognized by the Court of Chancery under the comparable contract provision in *Terrell* and the identical

contract provision in *Page*. The function of both provisions is, in part, to establish the process for resolving disagreements regarding the interpretation of the Plan. *See Terrell I* at *5 (treating the contract provision at issue as a dispute resolution provision because it "gives the Committee the authority to interpret the Agreement" in the face of a *disagreement* between the parties over contract interpretation); *Page* at *1-2 (same).

To the extent the Court of Chancery decision was based on a distinction between a prospective action by VPM in *Page* and an executed action by VPM in this case, such a distinction is unavailing and inconsistent with *Terrell*. In both *Terrell* and this case, the defendants effected the cancellation of the plaintiffs' ownership rights under the respective plans at issue in those cases. *Compare Terrell I* at *1 (plaintiff challenged interpretation by defendant that "language in the notice granting the director's most recent options ***extinguished*** two earlier, more lucrative option grants") emphasis added) *with* A26 (West challenged interpretation by VPM that his employment with a competitor warranted forfeiture of his vested Class B units under the Plan).

Under the standard set forth in the *Terrell* cases and applied in *Page*, the Court of Chancery should have granted a stay of these proceedings to permit the Committee to "resolve the questions" raised by West "under the Plan"—*i.e.*, whether VPM properly declared forfeiture of his Class B Units based on his violation of the

Detrimental Activity provisions, as determined by the Committee in its sole discretion. A19; A42; A174.

IV. THE TRIAL COURT ERRONEOUSLY GRANTED WEST'S MOTION FOR ATTORNEYS' FEES

A. Question Presented

Did the Court of Chancery err as a matter of law when it granted the Fee Award? VPM raised this issue below (A445), and the Court of Chancery considered it (Ex. D at 3).

B. Scope of Review

A trial court's assessment of attorneys' fees is subject to review for abuse of discretion. *Bako Pathology LP v. Bakotic*, 288 A.3d 252, 266-67 (Del. 2022) (internal citations omitted). However, this Court reviews a trial court's interpretation of a contractual fee-shifting provision *de novo*. *Id*. Further, to the extent the fee determination depends on the underlying Rule 12 merits determination, it would likewise be entitled to *de novo* review. Because the attorneys' fee issue depends on whether West was entitled to judgment on the pleadings in the first instance, or alternatively on the legal question of whether the contractual provision at issue confers a right to fees, the decision on the fee question is subject to *de novo* review. *See Desert Equities* at 1204. This Court must "determine whether the [trial] court committed legal error in formulating or applying legal precepts." *Id*. (internal citations omitted).

C. Merit of Argument

West petitioned the Court of Chancery to recover his attorneys' fees as a "prevailing party" under Section 12.13 and, alternative, Section 12.5 of the Operating Agreement. Ex. D. There is likely no dispute that if this Court reverses the Court of Chancery order, the Court must also reverse the Fee Award. However, VPM also contends that even if this Court affirms the grant of judgment on the pleadings, the Fee Award was independently erroneous and cannot stand.

1. West's Claim for Attorneys' Fees Fails Under the Plain Language of Section 12.13

Under Delaware law and the "American Rule," parties ordinarily bear their own fees in litigation. *See Braga Inv. & Advisory, LLC v. Yenni*, 2023 WL 3736879, at *18 (Del. Ch. May 31, 2023). To rebut the American Rule's presumption, a purported fee-shifting provision "'must be a clear and unequivocal agreement triggered by a dispute over a party's failure to fulfill obligations under the contract,'" with "'specific language'" making clear that the prevailing party is entitled to recover fees. *See Braga*, 2023 WL 3736879, at *18 (quoting *Murfey v. WHC Ventures, LLC*, 2022 WL 214741, at *2 (Del. Ch. Jan. 25, 2022)).

West relies on the language in the Fee Clause (Section 12.13 of the Operating Agreement) and, alternatively, the Indemnity Clause (Section 12.5 of the Operating Agreement) for his fee request. Neither provision entitles West to fee-shifting for his claims, let alone in a "clear and unequivocal" manner.

The Fee Clause provides:

> Attorneys' Fees. In any action or proceeding brought to enforce any provision of this Agreement, or where any provision hereof is validly asserted as a defense, the prevailing party shall be entitled to recover reasonable attorneys' fees and expenses from the non-prevailing party in addition to any other available remedy.

A271 § 12.13. West did not argue in his fee motion that he sued to "enforce" a provision of the Operating Agreement, but contended he was entitled to fees under the second prong of the Fee Clause because VPM "validly" (but unsuccessfully) asserted the Operating Agreement as a defense, and that he "prevailed" over that defense. A432.

In a six-sentence order granting the fee application, the Court of Chancery reasoned that West was a prevailing party under the Fee Clause because "VPM's defense asserted the Court should read the [Operating Agreement] together with the Plan, as one agreement, to color its interpretation of the Plan term 'Participant.' The defense was valid in that it was good faith." Ex. D. Accordingly, in the Court of Chancery's view, a provision of the Operating Agreement was "validly asserted as a defense" by *VPM*, thereby making *West* a "prevailing party" entitled to fees under the Fee Clause. The Court of Chancery's ruling was wrong for at least two reasons.

First, VPM did not assert the Operating Agreement as a "defense" to West's claims. Instead, VPM argued that it properly declared the forfeiture of West's equity interests pursuant to Section 8(b) of the Plan and Section 4(a) of the Award

Agreements. A85. VPM maintains that a determination regarding the interpretation of the term "Participant" (as addressed above) relies upon a collective reading of all the Equity Documents. But West's attempts to expand this rationale to his attorneys' fees argument is unavailing.

West's Complaint and Motion seek to challenge VPM's reliance on the Detrimental Activity Provisions to cancel his equity. A19; A119. Neither the Plan nor the Award Agreements contain any fee-shifting provision. And while the Operating Agreement allows for fee-shifting in an action "brought to enforce any provision of *this Agreement*," it expressly defines "Agreement" **only** as "This SEVENTH AMENDED AND RESTATED LIMITED LIABILITY COMPANY AGREEMENT." A193.

Fee-shifting provisions like the one at issue here are contractual in nature and, as such, "require this Court's traditional approach to contract interpretation." *Bako Pathology*, 288 A.3d at 280-81. The unambiguous language of the Fee Clause makes clear that only a party who prevails on a claim or defense *under the Operating Agreement* may recover its fees *under the Operating Agreement*. Because West secured no such victory, the Fee Award is erroneous as a matter of law. *See Bako Pathology*, 288 A.3d at 282 (affirming denial of attorneys' fees where request was not based on claims raised under the agreement containing the operative fee-shifting provision). At a minimum, the Fee Clause does not provide a "clear and

unequivocal" right to fees under these circumstances, where no claim to "enforce" the Operating Agreement was made and no meritorious Operating Agreement defense was asserted. *See Braga*, 2023 WL 3736879, at *18.

Second, even assuming arguendo that VPM asserted the Operating Agreement as a defense, the defense was not "validly" asserted within the meaning of the Fee Clause. The plain meaning of the word "validly" in this context is that the alleged Operating Agreement defense was ***meritorious***—or, at the very least, capable of surviving a motion to dismiss—and not merely whether it was made in "good faith" as the Court of Chancery reasoned. *See*, *e.g.*, *Braddock v. Zimmerman*, 906 A.2d 776, 779, 786 (Del. 2006) (construing phrase "validly in litigation" as excluding claims that did not survive a motion to dismiss for purposes of assessing demand excusal for derivative complaints); *Chase v. Chase*, 2019 WL 6833958, at *3 n. 23 (Del. Ch. Dec. 13, 2019) ("In the dictionary, 'validity' is defined as 'the state of being acceptable according to the law'"). To the extent the Operating Agreement was raised as a defense in this proceeding, it was plainly unsuccessful in preventing judgment on the pleadings and could not have been deemed to be "valid."

The Court of Chancery thus erred in concluding that VPM "validly" asserted an Operating Agreement defense that would entitle West to a fee award. The purpose of the phrase "validly asserted as a defense" is to prevent parties subject to a meritorious Operating Agreement defense from artfully pleading around the Fee

Clause by omitting any mention of the Operating Agreement. Adopting the Court of Chancery's interpretation would produce the absurd result that VPM is liable under the Fee Clause for making a good-faith (but failed) Operating Agreement defense but would face no liability under the Fee Clause for mounting a completely frivolous defense in bad faith (and thus "invalidly"). There is nothing in the Operating Agreement evidencing a "clear and unequivocal" intent to expand the universe of claims subject to the Fee Clause to include claims wholly outside the Operating Agreement, particularly where a potential Operating Agreement-related argument is unsuccessfully asserted in response. *See Braga*, 2023 WL 3736879, at *18.

In short, "validly" does not mean "unsuccessful," and the Fee Clause does not support the Fee Award regardless of whether VPM is deemed to have raised an unsuccessful "defense" under the Operating Agreement. If the alleged defense were legally "valid," it could not by definition have been rejected at the pleading stage, and judgment on the pleadings would be improper. *See Braddock*, 906 A.2d at 786. The Court of Chancery's interpretation of "validly asserted" is internally contradictory and unsupportable.

2. West's Claim for Attorneys' Fees Fails Under the Plain Language of Section 12.5

While the Court of Chancery did not grant the Fee Award based on the Indemnification Clause (Section 12.5 of the Operating Agreement), it would have been plainly erroneous to have done so. Section 12.5 allows "Covered Person[s]"

to pursue indemnification only if such Covered Person "was or is made a party or is threatened to be made a party to or is involved in any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative, arbitrative or investigative (a 'Proceeding')." A266 § 12.5.

No fee-shifting is available under the Indemnification Clause. Parties to rely on indemnification provisions to shift fees in contracts that have separate provisions governing fee-shifting in suits between the parties, as the Fee Clause does here. *See Paul Elton v. Rommel Del., LLC*, 2022 WL 793126, at *2 (Del. Ch. Mar. 16, 2022) ("When a contract contains both an indemnification provision and a 'prevailing party' provision elsewhere in the contract, the courts of this state will not construe the indemnification provision to allow first-party fee-shifting"); *Deere & Co. v. Exelon Generation Acqs., LLC*, 2016 WL 6879525, at *1 (Del. Super. Nov. 22, 2016); *Senior Hous. Cap., LLC v. SHP Senior Hous. Fund, LLC*, 2013 WL 1955012, at *45 (Del. Ch. May 13, 2013). Because the Operating Agreement already contains a separate provision addressing fee-shifting (the Fee Clause), and because nothing in the Indemnification Clause itself suggests a "clear and unequivocal" intent to shift fees, it would be inappropriate to construe the Indemnification Clause to permit a fee award here.

The Indemnification Clause alternatively does not apply because it contemplates a proceeding where a covered individual is *sued in* (*i.e.,* "made a party

to") a civil action *in place of* VPM, not where a covered individual affirmatively *sues VPM itself*. The Indemnification Clause is therefore patently inapplicable. *See, e.g., Baker v. Impact Hldg., Inc.*, 2010 WL 2979050, at *9 (Del. Ch. July 30, 2010) (dismissing claim for indemnification under similar language on the grounds that provision did not mandate indemnification or advancement for "affirmatively filed actions" against the contracting entity).

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment and the Fee Award.

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