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Case Number 232,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

Appellee/Plaintiff Below Ryan West ("West") is a former employee of Appellant/Defendant Below Village Practice Management, LLC ("VPM" or the "Company"). VPM created and offered a simple and appealing incentive to West and other employees and consultants ("Participant(s)") of VPM: provide outstanding services to VPM, and VPM will reward such work with equity in the Company pursuant to its Management Incentive Plan (the "Plan"). Equity was awarded pursuant to a "Notice of Grant" and governed by the terms of "Award Agreements." The Plan, Notice of Grants, Award Agreements and VPM's Operating Agreement (which was incorporated into the Plan) (collectively the "Equity Documents") formed the contractual relationship between VPM and West.

During his employment with VPM, West was awarded and became vested in Class B Units, in recognition of his outstanding service. West voluntarily left VPM and thereafter began working for another entity. After West's separation from VPM, VPM declared that West had forfeited the vested Class B Units he earned as part of his compensation with VPM because West had subsequently commenced employment with a company that VPM alleged was a competitor. The Equity Documents provided that a Participant would forfeit vested Class B Units for engaging in competitive activity while employed or providing services to VPM. The Equity Documents also provided that forfeiture would occur for breach of a

"Restrictive Covenant," but VPM and West had never entered into any Restrictive Covenant.

Contrary to the plain language of the Equity Documents, which were drafted by VPM, VPM took the position that any post-employment competition by a former employee would result in forfeiture of vested Class B Units. But the Equity Documents expressly provided that only competition by a "Participant," which VPM defined as a current "Employee" or "Consultant," would result in forfeiture of vested Class B Units. Former employees are not mentioned in, or covered by, the Plan or other Equity Documents.

West filed the action below seeking, *inter alia*, a declaration that VPM's purported forfeiture of West's vested interests was improper, *i.e.* a violation of the Equity Documents. West filed a motion for judgment on the pleadings ("MJOP") on that issue, and VPM opposed on the grounds that the definition of Participant should be extended to former employees, raising the Operating Agreement, Award Agreements, and the Plan, *inter alia*, as a defense to entry of judgment. The Court of Chancery granted West's MJOP based upon the plain language of the Equity Documents.

While West's MJOP was pending and had been fully briefed, VPM sought to stay the proceedings to require West to submit his dispute to VPM's Board or a Committee for determination. After briefing on that issue, the Court of Chancery

denied VPM's request for a stay, correctly finding that the provision of the Plan cited by VPM was not a dispute resolution provision and did not mandate a stay.

Finally, the Court of Chancery awarded West attorneys' fees and expenses under the prevailing party provision of VPM's Operating Agreement, which VPM incorporated into the Plan and the Award Agreements and which VPM validly, but unsuccessfully, asserted as a defense to the entry of judgment.

VPM appeals from the Court of Chancery's decision granting judgment on the pleadings, the denial of a stay, and the award of attorneys' fees to West.

SUMMARY OF ARGUMENT

1. West denies the first paragraph of Appellant's Summary of Argument. Contrary to Appellant's argument, the Court of Chancery did not hold that "West was not a 'Participant' under the Equity Documents …." (Appellant's Opening Brief at 7). Rather, the Court properly found 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 Class B Units based on a former employee's engaging in Detrimental Activity after leaving VPM's employ. The Court correctly held that VPM's exacting a forfeiture of West's vested equity interests was contrary to the express terms of the Equity Documents.

2. West denies the second paragraph of Appellant's Summary of Argument. VPM's interpretation of the Equity Documents is not reasonable, and the Court of Chancery properly granted West's motion for judgment on the pleadings. Based on the plain language of the Equity Documents, a reasonable person would not understand that he would forfeit vested equity interests if, after his "Termination of Service for other than Cause," he began work for a company that VPM alleged was a competitor.

3. West denies the third paragraph of Appellant's Summary of Argument. The Court of Chancery did not abuse its discretion in denying a stay of proceedings based on Section 4(d) of the Plan. Unlike the provision at issue in

Terrell v. Kiromic Biopharma, Inc., 297 A.3d 610 (Del. 2023), Section 4(d) of the Plan is not a dispute resolution provision. Furthermore, as VPM had already declared a forfeiture of West's vested Class B Units, there was no need to issue a stay so that VPM could make any determination with respect to the units. As this Court declared in *Terrell*, the Court of Chancery could not defer to VPM's Board or Committee determination and would have to decide the issues in any event.

4. West denies the fourth paragraph of Appellant's Summary of Argument. The Court of Chancery properly awarded West's attorneys' fees and expenses as the prevailing party pursuant to VPM's Operating Agreement. VPM itself validly, albeit unsuccessfully, raised the Operating Agreement as a defense to entry of judgment and thereby triggered Section 12.13 of the Operating Agreement. West prevailed in the lawsuit and thus the Court of Chancery properly granted West's motion for attorneys' fees and expenses, in accordance with the Operating Agreement.

STATEMENT OF FACTS

A. West's Employment and Award of Class B Units in VPM

VPM adopted a management incentive plan, titled "Village Practice Management Company, LLC Management Incentive Plan" (the Plan, A42-A54), as a means of rewarding VPM's employees and consultants for outstanding services to, or for the benefit of, VPM. A88. The Plan and the awards issued thereunder are governed by the laws of Delaware. A54.

On or about July 29, 2019, West joined VPM as its Vice President ("VP") of Practice Management and was quickly promoted to Senior VP, Practice Management. A88. During his employment, West was awarded equity interests in VPM (Class B Units), in recognition of his outstanding service to VPM. A86, A88. West's Class B Unit awards were each (a) issued pursuant to "Notice of Grant" documents (A56; A71); (b) governed by the terms of West's "Class B Units Award Agreements" (A57-A69; A72-A84); and (c) subject to the Plan (collectively, the Equity Documents). A89. Specifically, West was granted 10,282 Class B Units in VPM on March 15, 2020, and an additional 3,000 Class B Units on May 28, 2020. A89. The Class B Units vested according to schedules attached to the Notices of Grants. A56, A71. The Notices of Grant conditioned the vesting of tranches of Class B Units on West's continued employment at VPM. A56, A71.

B. The Plan

Paragraph 1 of the Plan expressly provides that the purpose of the Plan is to, *inter alia*, reward outstanding service by "Employees" and "Consultants":

> The purpose of the Village Practice Management Company, LLC Management Incentive Plan is (A) to further the growth and success of Village Practice Management Company, LLC, a Delaware limited liability company, and any successor thereto (the "Company"), by enabling Employees (as defined below) and Consultants (as defined below) of the Company and its Affiliates to acquire Class B Units of the Company, thereby increasing their personal interest in such growth and success, and (B) to provide a means of rewarding outstanding service by such persons to or for the benefit of the Company. A44.

The Plan defines "Employee" in the present tense:

> "Employee" means any person who is employed (within the meaning of the Code and regulations and interpretive guidance issued thereunder) by the Company or any of Subsidiary and provides services to or for the benefit of the Company. A45.

Likewise, the Plan defines "Consultant" in the present tense:

> "Consultant" means any individual who is engaged by the Company or a Subsidiary of the Company to render consulting or advisory services to or for the benefit of the Company and who is not an Employee. A45.

Finally, the Plan states that: "'Participant' shall mean any Employee or Consultant designated by the Committee to participate in the Plan." A46.

Paragraph 6(a) of the Plan provides:

> Awards of Class B Units may be granted to Participants at such time or times upon or following the effective date of the Plan as shall be determined by the Committee. Each Award of Class B Units shall be evidenced by an Award Agreement that shall specify the consideration paid, if any, for the Class B Units, the Distribution Threshold of the Class B Units, the vesting provisions of the Class B Units and such other terms consistent with the Plan as the Committee shall determine, including customary representations, warranties and covenants with respect to securities law matters. A48.

C. The Award Agreements

Both Award Agreements govern the treatment of an Employee's Class B Units upon a "Termination of Service" from VPM:

> (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.
>
> (b) **Other Termination of Service.** In the event of the Participant's Termination of Service for any reason other than for Cause, all unvested Class B Units shall immediately terminate and be forfeited without payment therefore and all vested Class B Units shall be subject to the repurchase rights of the Company or its designee as set forth in Section 9 of the Plan. A57, A72.

Thus, pursuant to West's Class B Units Award Agreements (the terms of which are identical, except for the date and number of Class B Units awarded), if West's employment with VPM terminated for any reason other than for "Cause," whether voluntary or involuntary, West's **unvested** Class B units would be forfeited, and

his **vested** Class B Units would be subject to the right of VPM to repurchase those units. A89.

D. West Voluntarily Resigns from VPM

West voluntarily resigned from employment with VPM and, by mutual agreement, his employment with VPM terminated effective June 1, 2021. A90. At the time of his Termination of Service from VPM, West was vested in 3,748.91667 Class B Units. A89. West thereafter became employed by another entity, Midwest Physician Administrative Services, LLC, which VPM now contends is a Competitor. A90.

E. VPM Contends that West Forfeited his Vested Class B Units After his Employment Terminated in Contravention of the Equity Documents.

VPM contended that West's vested Class B Units are subject to forfeiture under the terms of the Equity Documents. A90. VPM contended that West forfeited his vested Class B Units by allegedly committing a "Detrimental Activity" (specifically, by rendering services for a Competitor) *after* his employment with VPM ended. A90. VPM does not contend that West breached a Restrictive Covenant. A94.

F. The Proceedings Below

1. The Verified Complaint and Answer

On June 28, 2022, West filed his Verified Complaint. A19-A84. Count I sought a declaratory judgment that VPM wrongfully declared forfeiture of West's vested Class B Units in contravention of the Equity Documents. On August 26, 2022, VPM filed its Answer to the Verified Complaint. A85-A118.

2. The Briefing on the Motion for Judgment on the Pleadings

On September 2, 2022, West filed his MJOP, on, *inter alia*, Count I, and on October 14, 2022, filed his opening brief in support thereof. A119-A145. West asserted that, under the plain and unambiguous terms of the Equity Documents, the right to declare a forfeiture of vested Class B Units extended only to the Class B Units of "Participants"—which are defined as current "Employees" and "Consultants"—and not to former employees. A128. West further asserted that VPM had no right to declare a forfeiture of vested Class B Units for actions taken after termination of service. A128-A129.

On November 30, 2022, VPM filed its answering brief in opposition to the MJOP. A146-A170. VPM filed therewith VPM's Seventh and Restated Limited Liability Company Agreement (the "Operating Agreement"). A189-290. On December 21, 2022, West filed his reply brief in support of the MJOP. A292-A311.

3. VPM's request for dismissal or a stay under *Terrell*

On March 31, 2024, VPM filed a supplemental brief in opposition to the MJOP. A312-A322. Citing *Terrell v. Kiromic Biopharma, Inc.*, 2022 WL 175858 (Del. Ch. Jan. 20, 2022), VPM argued that West's claim should be dismissed under Section 4(d) of the Plan, asserting that only the Committee of the Board could resolve the parties' dispute.

On May 4, 2023, this Court issued its opinion in *Terrell v. Kiromic Biopharma, Inc*., 297 A.3d 610, 2023 WL 3237142 (Del. 2023) (Table). On May 19, 2023, VPM filed a second supplemental brief in opposition to the MJOP, requesting a stay of the proceedings based upon this Court's decision in *Terrell.* A343-A352. West filed a supplemental sur-reply brief opposing any stay. A353-367.

On August 24, 2023, the Court of Chancery issued a letter decision in effect denying VPM's request for a stay. (Notice of Appeal, Ex. A). The Court stated:

> I write to address whether, under *Terrell I* and *Terrell II,* proceedings on plaintiff Ryan West's Motion for Judgment on the Pleadings (the "Motion") should be stayed in order to compel West to submit his legal claims to the Committee, mentioned in Section 4(d) of the Management Incentive Plan (the "Plan"), for an expert determination as to (1) whether defendant Village Practice Management Company, LLC (the "Company") breached the terms of the Plan and (2) whether the forfeiture provision in that Plan is enforceable. … The Plan does not contain a dispute resolution procedure that would divest this Court of jurisdiction to hear West's

declaratory judgment claim. It does not contain a dispute resolution procedure at all. …

The Company "requests that the Court enter an order staying these proceedings pending a decision by [the Company's] Compensation Committee (or the Board where no such committee is appointed)." An order compelling an expert determination "is in fact an order compelling specific performance" of an alleged duty arising from and, indeed, governed by the contractual term creating it. In requesting to compel specific performance, the Company bears the burden of showing that the Agreement clearly and convincingly creates such a duty.

***

Section 4(d) reads as follows:

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.

Unlike the dispute resolution provision in *Terrell I* and *II,* nothing in Section 4(d) states that disputes over the Plan shall be submitted to the Committee. The provision does not refer to "disputes." Reserving for the Committee "powers with respect to the administration of the plan" does not clearly and convincingly remove dispute resolution from the courts. Nothing in Section 4(d) expressly indicates that the Committee's "powers with respect to the administration of the plan" should be broadly construed to include the authority to resolve legal disputes. Reserving legal determinations, such as liability, to an expert's determination would be highly

> unusual. Section 4(d) did not put West on notice that the Company intended to submit all disputes to the Committee. (Notice of Appeal, Ex. A at 1-5) (footnotes omitted).

The Court further noted that construing the parties' entire agreement as a whole clearly indicated that the parties intended to submit disputes to the courts of Delaware. (*See id*.).

4. The Court's Ruling on the Motion for Judgment on the Pleadings

On December 5, 2023, the Court held a hearing and ruled on West's MJOP. After hearing further arguments by the parties, the Court ruled:

> Before me is a matter of contractual interpretation. West maintains that by the plain words of the Equity Agreements, he is entitled to a certain number of vested Class B units. VPM points to the same Equity Agreements and maintains that after West resigned from VPM, he violated a restrictive covenant and therefore forfeited those Class B units the day he began his employment with a competitor. And so, according to VPM, since West engaged in "detrimental activity" even after his resignation, these Equity Agreements authorize VPM's board to cancel West's vested Class B units.
>
> This dispute hinges on the meaning of one word: -- "participant" -- and whether it includes former employees and consultants. If "participant" only pertains to current employees or consultants, VPM did not have a contractual right to cancel West's vested Class B units. This is a question of contractual interpretation and it is a legal inquiry. My analysis begins and ends with the meaning of this word.

> For the reasons that follow, I hold that the contractually defined word "participant" does not include former employees, and nothing in the Equity Agreements otherwise gave VPM the right to cancel vested shares based on engaging in detrimental activity after an employee left VPM. The Equity Agreements did not authorize VPM to cancel West's vested units. For the reasons that follow, judgment will be entered in West's favor.
> (Notice of Appeal, Ex. B at 44-45).

The Court decided:

> Section 2(u) of the Plan defines "Participant" to mean "any Employee or Consultant designated by the Committee to participate in the Plan." The Plan further defines "Employee" to mean "any person who is employed (within the meaning of the Code and regulations and interpretive guidance issued thereunder) by the Company or any of its Subsidiaries and provides services to or for the benefit of the Company." And it defines "Consultant" to mean "any individual who is engaged by the Company or Subsidiary ... to render consulting or advisory services."
>
> The grammatical structure limits these definitions to current consultants or employees of VPM. For that canon, I rely on *Doe v. Cedars*, which quotes 11 Williston on Contracts, Section 32 .9. The verb tense for being an "employee" and "consultant," the two terms comprising "participant," is the present tense. Neither term provides for past tense, or former, employees or consultants.
>
> The Term "Participant" cabins the consequences for performing detrimental activity to current

> consultants and employees. The Plan's Section 2(n) defines "Detrimental Activity" to include "the rendering of services for any Competitor." Section 8(b) of the Plan provides that "an Award shall terminate and be canceled for no consideration on the date on which the Participant engages in Detrimental Activity." And Section 4(a) of the UAA terminates vested and unvested units "upon the Participant' commission of a Detrimental Activity." Only "Participants" are subject to forfeiture for "Detrimental Activity" -- that is, only current employees and consultants. The express use of the defined term "Participant" in this clause cabins the consequences of "Detrimental Activity" to current employees and consultants.
>
> This simple substitution of defined terms into Section 4(a) puts to rest defendant's argument that that section did encompass detrimental activity by a former employee. Nothing in Sections 2(n), 8(b), or 4(a) imposes post-separation prohibitions or consequences for engaging in detrimental activity on any participant. (Notice of Appeal, Ex. B at 48-50).

On December 5, 2023, the Court entered its order granting West's MJOP on Count I of the Verified Complaint. (Notice of Appeal, Ex. C).

5. West's Motion for Attorneys' Fees and Expenses

On January 3, 2024, West filed his Motion for Attorneys' Fees and Expenses. A427-A439. West maintained that he was entitled to attorneys' fees under Section 12.13 of the VPM Operating Agreement, which VPM had introduced as a defense to West's claims. On March 21, 2024, VPM filed its

opposition to West's fee request. A445-455. On May 2, 2024, West filed his reply in support of his fees request. A456-A466. On May 13, 2024, the Court of Chancery granted West's Motion for Attorneys' Fees. (Notice of Appeal, Ex. D).

On June 12, 2024, VPM filed its notice of appeal.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY GRANTED PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS.

A. Question Presented

Whether VPM could declare a forfeiture of West's vested Class B Units on the ground that he allegedly began work at a Competitor after his employment with VPM terminated.

B. Scope of Review

The standard of review of the grant of a motion for judgment on the pleadings "is to determine whether the court committed legal error in formulating or applying legal precepts." *Weinberg v. Waystar, Inc.*, 294 A.3d 1039, 1043 (Del. 2023) (quoting *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993)). This Court reviews "the grant of a motion for judgment on the pleadings *de novo*." *Id.* "The scope of [the Court's] review is limited to the contents of the pleadings." *Id*.

"Under Delaware law, the proper interpretation of language in a contract is a question of law." *Allied Cap. Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006). Interpretation of contract language involves "questions of law that this Court reviews *de novo* for legal error." *Honeywell Int'l Inc. v. Air Prods. & Chems., Inc.*, 872 A.2d 944, 950 (Del. 2005). "[J]udgment on the pleadings ... is a proper framework for enforcing unambiguous contracts because

there is no need to resolve material disputes of fact." *Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 925 (Del. 2017), *as revised* (June 28, 2017) (quoting *NBC Universal v. Paxson Commc'ns Corp.*, 2005 WL 1038997, at *5 (Del. Ch. Apr. 29, 2005)).

C. Merits of Argument

1. The Equity Documents Apply Only to a Current "Participant" (a Current "Employee" or "Consultant"), Not to a Former "Employee."

The central question presented to the Court is whether West agreed, by virtue of receiving equity in the Company, to forego certain employment opportunities after his Termination of Service, in exchange for retaining vested equity rights in the Company. The plain and unambiguous language in the Equity Documents answers that question with a clear "no." VPM's purported post-Termination of Service forfeiture of West's **vested** Class B Units was invalid because the Equity Documents do not provide for forfeiture of a **former** employee's vested Class B Units.

"Delaware adheres to the 'objective' theory of contracts, *i.e.* a contract's construction should be that which would be understood by an objective, reasonable third party." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (quoting *NBC Universal*, 2005 WL 1038997, at *5). "When interpreting a contract, the Court will give priority to the parties' intentions as reflected in the

four corners of the agreement." *GMG Cap. Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012). "In upholding the intentions of the parties, a court must construe the agreement as a whole, giving effect to all provisions therein." *Id*. (quoting *E.I. du Pont de Nemours and Co., Inc. v. Shell Oil Co.,* 498 A.2d 1108, 1113 (1985)). "The true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant." *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006) (quoting *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195-96 (Del. 1992)).

No reasonable person construing the Equity Documents as a whole would understand that West agreed to forfeit vested Class B Units after his employment with VPM ended. The Equity Documents make clear what happens to unvested and vested Class B Units upon a Termination of Service that is not for Cause: the former are forfeited and the latter are subject to VPM's right of repurchase. A89. As the Court of Chancery found, a forfeiture of vested Class B Units for commission of a Detrimental Activity (as defined in Section 2(n)(i) of the Plan) is limited to a "Participant," which is defined to include a current "Employee" or a current "Consultant." Nowhere do the Equity Documents refer to a former "Employee" or former "Consultant."

VPM misconstrues the Award Agreements by asserting that they "define 'Participant' – *i.e.*, West – with no caveat or contingency related to his employment status." (Appellant's Opening Brief at 10). The Award Agreements specifically incorporate the Plan and expressly provide that: "Capitalized terms not defined herein shall have the meanings ascribed to such terms in the Plan …." A57, A72. "Participant" is a capitalized term throughout the Award Agreements. VPM ignores that it drafted the Plan and defined "Participant" as "any Employee or Consultant." A46. VPM also defined "Employee" in the present tense only, as "any person who *is employed* … by the Company…" and likewise defined "Consultant" in the present tense only, as "any individual who *is engaged* by the Company ... to render consulting or advisory services…." A45 (emphasis added). VPM cannot ignore these definitions, which it drafted.

Not only does the Plan define "Employee" in the present tense, but the ordinary meaning of the word does not, as VPM construes it, include a former employee. An "employee" is "[s]omeone who works in the service of another person." EMPLOYEE, Black's Law Dictionary (12th ed. 2024). The "term 'employees' is most naturally read to mean those having an existing employment relationship with the agency in question—*i.e.*, *current* employee." *Koopmann v. U.S. Dep't of Transp.*, 335 F. Supp. 3d 556, 560–61 (S.D.N.Y. 2018). The term

"employee" does not refer to a former employee. *See e.g.*, *Cortez, Inc. v. Doheny Enters., Inc.*, 2017 WL 2958071, at *7 (N.D. Ill. July 11, 2017).

VPM asks this Court to rewrite the Plan to include a past or former "Employee" as a "Participant." That is improper. A Court will "not rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal [because] [p]arties have a right to enter into good and bad contracts; the law enforces both." *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010). "[I]t is axiomatic that courts cannot rewrite contracts or supply omitted provisions [for] [d]oing so does not respect the parties' freedom of contract." *Murfey v. WHC Ventures, LLC*, 236 A.3d 337, 355 (Del. 2020).

VPM argues that "[i]t 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." (Appellant's Opening Brief, p. 23). As stated above, this Court cannot rewrite the parties' agreement to include terms that VPM now insists are logical and practical. More importantly, VPM is already afforded a method to terminate a former employee's interest in VPM through repurchase of vested Class B Units. And, VPM is afforded protection under Delaware law because to "inspect books and records, a member of a Delaware LLC … must first establish by a

preponderance of the evidence the existence of a proper purpose for inspection." *Sanders v. Ohmite Hldgs., LLC*, 17 A.3d 1186, 1193 (Del. Ch. 2011).

2. The Equity Documents Do Not Provide for Forfeiture of Vested Class B Units by a Former Employee Who Allegedly Joins a Competitor.

The forfeiture provisions of the Award Agreements provide:

> (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.
>
> (b) **Other Termination of Service.** In the event of the Participant's Termination of Service for any reason other than for Cause, all unvested Class B Units shall immediately terminate and be forfeited without payment therefore and all vested Class B Units shall be subject to the repurchase rights of the Company or its designee as set forth in Section 9 of the Plan. A57, A72.

When West resigned from his employment with VPM, his resignation triggered Section 4(b) of the Award Agreements, which governs "Termination of Service for any reason other than for Cause." VPM's failure to addresses Section 4(b) is glaring. Where a Participant's Termination of Service is "*for any reason other than for Cause*," then *unvested* Class B Units are forfeited, but *vested* Class B Units are not. In those circumstances, vested Class B Units are merely subject to the right of VPM to repurchase such units.

VPM relies solely on Section 4(a) of the Award Agreements and contends that a Participant's vested Class B Units could be forfeited for a "Detrimental Activity" that occurs after any Termination of Service, despite that provision's explicit reference to a Termination of Service for Cause. But Section 4(a) and Section 4(b) must be read and construed together. Had the parties intended for a Participant to forfeit his vested Class B Units for engaging in Detrimental Activity post-employment, then the parties could have easily included the term "Detrimental Activity" in Section 4(b) to govern the disposition of vested and unvested Class B Units following a "Termination of Service for any reason other than for Cause." It does not appear there. "[C]ourts should be most chary about implying a contractual protection when the contract could easily have been drafted to expressly provide for it." *Allied Cap. Corp.*, 910 A.2d at 1035 (citing *Harris Trust and Savings Bank v. E–II Holdings, Inc.,* 926 F.2d 636, 644 (7th Cir.1991) ("Implying the covenant requested by the Trustees would also be 'troublesome' in view of the fact that the Indentures could easily have been drafted to incorporate expressly the terms the Trustees now urge this court to imply.") (internal quotations omitted)).

VPM incorrectly contends that West's vested interests are subject to forfeiture after West's resignation and upon West's post-employment commission of a "Detrimental Activity" (specifically, by rendering services for a Competitor).

Nothing in the Equity Documents mandates or even suggests that vested Class B Units—all of which were earned during, and were tied to, the receiving Participant's then-current relationship with VPM—will be forfeited if an employee or consultant terminates service with VPM and later goes to work for a competitor.

"Detrimental Activity" is defined in Section 2(n) of the Plan as follows:

> "Detrimental Activity" means (i) the rendering of services for any Competitor; (ii) any attempt to directly or indirectly solicit or induce any employee or consultant of the Company and/or its affiliates (or any person who was an employee or consultant during the six-month period preceding such solicitation or inducement) to be employed or perform services elsewhere; (iii) any attempt directly or indirectly to solicit the trade or business of any current customer of the Company and/or its Affiliates (or person that was a customer during the six-month period preceding such solicitation) for services similar to those provided by the Company or its Affiliates; and (iv) the breach of any Restrictive Covenant by such Participant, in each case as determined by the Board in its sole discretion. A45.

Nowhere does the above definition or any other provision of the Equity Documents provide that the "rendering of services for any Competitor" **after** termination of the Employee's service constitutes a "Detrimental Activity." Again, the Plan and the forfeiture provisions in Sections 4(a) and 4(b) the Award Agreements apply only to a "Participant" – a current "Employee" or "Consultant" of VPM. Former "Employees" are simply not addressed.

VPM incorrectly argues that the Court of Chancery's interpretation of the Award Agreements somehow renders the definition of "Detrimental Activity" illusory or meaningless. (Appellant's Opening Brief at 23-24). The Court of Chancery correctly interpreted and gave effect to the prohibition of competition (in the absence of a restrictive covenant) as applying to a "Participant," i.e., a current "Employee" or current "Consultant."

A Participant could certainly agree to a post-employment non-compete. Indeed, the definition of Detrimental Activity contemplates post-employment restrictions: "a breach of any Restrictive Covenant" is also a Detrimental Activity. In that circumstance, however, a non-compete would have to be "positively expressed" in order to be enforceable and would be narrowly construed. *See Kellam Energy, Inc. v. Duncan*, 668 F. Supp. 861, 876 (D. Del. 1987). Here, VPM did not contend West breached any Restrictive Covenant, and the prohibition on rendering services for a Competitor does not by its plain language extend beyond the employment relationship.

VPM cannot show that both parties intended a post-employment restriction on competition and that West would have assented to the provision had it come up. *See id*. Reading the Equity Documents as a whole, no reasonable person would understand that a Participant would forfeit his vested Class B Units by working for a competitor following the Participant's voluntary Termination of Service.

VPM also ignores that "[f]orfeitures are not favored and contracts will be construed to avoid such a result." *Garrett v. Brown*, 1986 WL 6708, at *8 (Del. Ch. June 13, 1986), *aff'd*, 511 A.2d 1044 (Del. 1986). "Delaware law does not favor interpretations that result in forfeitures." *Domain Assocs., L.L.C. v. Shah*, 2018 WL 3853531, at *15 (Del. Ch. Aug. 13, 2018) (quoting *Milford Power Co., LLC v. PDC Milford Power, LLC*, 866 A.2d 738, 762 (Del. Ch. 2004)).

3. *Ainslie* Does Not Apply.

While VPM relies heavily upon *Cantor Fitzgerald, L.P. v. Ainslie*, 312 A.3d 674 (Del. 2024), this Court's opinion in *Ainslie* actually undermines VPM's argument. The forfeiture provisions involved in *Ainslie* and the one VPM relies upon here are diametrically opposed. In *Ainslie*, the forfeiture provisions in the agreement there plainly and expressly applied to post-employment competition with a specific, well-defined framework and time-period. 312 A.3d at 679. The Equity Documents here never even mention post-employment competition, much less set out express terms of the restrictions as the provisions did in *Ainslie.* The partnership agreement in *Ainslie* expressly required former partners to refrain from "Competitive Activity" for two years following a partner's withdrawal from the partnership or forfeit "Conditioned Amounts," which would otherwise be due to the withdrawing partner. *Id.* Unlike here, in *Ainslie*, "[t]here [was] no dispute that, if the Conditioned Payment Device is enforced according to its terms, Cantor

Fitzgerald [was] not required to pay the Conditioned Amounts to the plaintiffs." *Id.* at 685.

Thus, *Ainslie* was not a case involving interpretation of the partnership agreement, but whether the express terms thereof were enforceable. This Court held that, given Delaware's strong policy in favor of freedom of contract, forfeiture for competition provisions in the limited partnership agreement which relieved the limited partnership of an obligation to make payments to former partners engaged in competition with the partnership were not a restraint of trade subject to review for reasonableness, but had to be enforced according to their express terms. While this Court held in *Ainslie* that the common law's disfavoring of forfeitures does not extend to enforcement of express terms of limited partnership agreements, 312 A.3d at 692, the question here involves interpretation, not enforcement, of an agreement.

Unlike in *Ainslie*, where the subject contract contained express and detailed provisions for forfeiture, the Equity Documents do not provide a Participant with express notice that post-employment competition could result in forfeiture of vested compensation. VPM simply asks this Court to infer into the Equity Documents a post-employment prohibition on competition. "A contractual obligation not expressly specified in a contract will not be inferred unless the Court, by reference to the express terms of the contract, can conclude that the

parties to the contract, at the time of its drafting, would have agreed to be bound by the implied obligation." *Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 1997 WL 525873, at *5 (Del. Ch. Aug. 13, 1997), *aff'd*, 708 A.2d 989 (Del. 1998). In light of the express provision for repurchase of vested Class B Units upon a Termination of Service other than for Cause, and because West was not subject to any post-employment Restrictive Covenant, no reasonable person could conclude from reference to the express terms of the Equity Documents that West would have agreed to forfeit his vested Class B Units upon engaging in post-employment competition.

If VPM had wanted to condition the vested Class B Units on a former employee's agreement not to compete post-employment for a period of time, then VPM should have explicitly done so in the Equity Documents, as was done in the agreement in *Ainslie*. Had VPM had expressly provided for a two-year post-employment prohibition on competition in order to retain vested Class B Units, then the *Ainslie* decision would apply. VPM did not. Instead, VPM drafted the Equity Documents to apply to a "Participant" – i.e., a current "Employee" or current "Consultant." The Equity Documents do not even mention any restriction on post-employment competition (other than by including it in the definition of Restrictive Covenant, to which West was not subject).

Additionally, VPM incorrectly suggests that the Court of Chancery relied upon the unreasonableness of the forfeiture provisions of the Award Agreements in reaching its decision. (Appellant's Opening Brief at 28, 32-33). In fact, the Court of Chancery expressly stated that it was *not* ruling on the reasonableness of the provisions because review of its decision in *Ainslie* was at the time already pending on appeal. Notice of Appeal, Ex. B at 52-53.

4. VPM's Interpretation Is Not Reasonable.

VPM argues that its interpretation is "at least reasonable, which makes judgment on the pleadings improper." (Appellant's Opening Brief at 30). As this Court has explained:

> A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction. Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings. Ambiguity does not exist where a court can determine the meaning of a contract without any other guide than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends. Courts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty. The true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.

Lorillard Tobacco, 903 A.2d at 739 (quoting *Rhone-Poulenc Basic Chems.*, 616 A.2d at 1195-96).

VPM stretches the contractual language too far in asserting that it is reasonable to conclude that the Equity Documents provide for forfeiture of a Participant's vested Class B Units for post-employment competition. VPM repeatedly notes that Paragraph 9 of the Plan, which addresses repurchase of vested Class B Units, includes the phrase "if the Participant engages in a Detrimental Activity at any time." A51. VPM incorrectly asserts that this phrase clearly indicates that Detrimental Activity would include post-termination competition even in absence of a "Restrictive Covenant" agreed to between the parties. But, it merely states that the consequence of a Participant (that is, a *current* Employee or Consultant) engaging in a Detrimental Activity at any time (that is, during their employment with the Company) is that VPM can repurchase vested interests for a potentially lower price than fair market value.

"In giving sensible life to a real-world contract, courts must read the specific provisions of the contract in light of the entire contract. *Chicago Bridge & Iron*, 166 A.3d at 913–14. A phrase cannot be read in strict isolation, but must be read within the context of the entire agreement. *ITG Brands, LLC v. Reynolds Am., Inc.*, 2023 WL 6383240, at *10 (Del. Ch. Oct. 2, 2023); *D GYMS, L.L.C. v. Robino-Bay Ct. Plaza, LLC*, 2009 WL 196299, at *3 (Del. Ch. Jan. 15, 2009), *as revised* (Feb. 12, 2009); *Hudson v. D & V Mason Contractors, Inc.*, 252 A.2d 166, 169 (Del. Super. Ct. 1969).

The Equity Documents plainly apply to a "Participant" – a current "Employee" or "Consultant." The Equity Documents do not refer to a former employee or any post-employment competition. No reasonable person could understand from the Equity Documents that West had agreed to forfeit his vested Class B Units if he went to work for an alleged competitor *after* he voluntarily terminated his employment with VPM.

VPM ignores the definitions of "Participant," "Employee," and "Consultant," which it drafted. Instead, VPM offers a strained interpretation of the Equity Documents to render "Participant" as applying to former employees, despite its express definition. By way of example, VPM contends that Section 9 of the Plan (relating to repurchase rights) demonstrates that the term Participant applies to a former employee. (Appellant's Opening Brief at 26). But Section 9 of the Plan refers to the right of the Company "to repurchase all of any portion of the vested Class B Units *acquired by a Participant*…." A51 (emphasis added). Participant in that context is again a current Employee or Consultant who has acquired vested Class B Units.

VPM also cited Section 5 of the Award Agreements, which provides: "In the event of…repurchase…the Participant shall deliver…certificates, and will take all other steps…." A57, A72. The Company's right to repurchase interests from an individual who acquired Class B Units (*i.e.*, a Participant) is entirely consistent

with the definition of a Participant being a current Employee – only current Employees or Consultants are awarded Class B Units. (*See generally* A42-A54). Further, that a Participant agrees, including after the Participant's Termination of Service from the Company, to cooperate and to facilitate the repurchase in the future is also consistent with a Participant being a current Employee, rather than a former Employee: the Participant (as current Employee) thereby agrees to take certain action *after* they cease to be a Participant (*i.e.*, when they will be a former employee).

Each of the other provisions cited by VPM (Appellant's Opening Brief at 26-27) are also consistent with the definition of "Participant" as a current "Employee" or "Consultant":

- VPM notes the Equity documents provide: "Nothing…shall confer upon any Participant any right…to the continuation of…employment, [or the Company's right] to terminate such employment." A53, A176. These provisions simply mean that an award of equity does not guarantee continued employment, and that is consistent with the definition of "Participant" as a current "Employee."
- VPM notes that the definition of "Termination of Service" refers to "termination of a Participant's employment…" A46. That definition specifically includes the term "Participant," which is expressly defined as a

current Employee. Likewise, Section 4(e) of the Plan addressing "Participant's Rights" also specifically incorporates the defined term "Participant."

- VPM reads Section 5(b)(ii) out of context. Section 5(b) addresses "Terms and Conditions," including distributions of awards. Section 5(b)(iii), which VPM ignores, states: "Distributions in respect of Awards of Class B Units shall be made to a Participant in accordance with the provisions of the Operating Agreement." A48.
- VPM also refers to Section 8(b) of the Plan, which addresses "Commission of Detrimental Activity by Participant." A51. Each of these provisions specifically includes the defined term "Participant."

As VPM and the Plan clearly defined "Participant" to mean a current "Employee," VPM's interpretation that the Equity Documents apply to a former employee is unreasonable.

Moreover, the Plan is a means of rewarding VPM's Employees and Consultants—not former employees or consultants—for outstanding services to, or for the benefit, of VPM. As is clear from the plain language of the Equity Documents cited above, a Participant, while a current Employee, agrees to be bound by the terms of the Equity Documents and to take certain actions or be bound by obligations in the future, including actions after his Termination of

Service. West did not agree to refrain from any post-employment competition, and a Participant's agreeing to undertake or be bound by certain other obligations after leaving the employ of the Company does not expand or redefine the definition of a Participant to include former employees.

No reasonable person would understand from the plain language of the Equity Documents that VPM could declare a forfeiture of a Participant's vested Class B Units if the Participant renders services for an alleged Competitor after the Participant's Termination of Service from VPM "for any reason other than for Cause." VPM has not, and cannot, point to a single reference to a former employee being recognized as a Participant in any of the Equity Documents. Nothing in the Equity Documents provide or even suggest that a Participant agrees to forego other employment opportunities after his Termination of Service in exchange for retaining vested Class B Units. The Court of Chancery properly granted West judgment on the pleadings.

II. THE COURT OF CHANCERY DID NOT CONSTRUE THE FORFEITURE PROVISION FOR REASONABLENESS.

A. Questions Presented

Whether the Court of Chancery construed the Detrimental Activity provision as a restrictive covenant subject to scrutiny under standards applicable to non-competition provisions.

B. Scope of Review

This issue was not decided by the Court of Chancery and is thus not properly subject to appeal. If it were decided in connection with the motion for judgment on the pleadings—and it was not—it would be subject to *de novo* review. *See Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993).

C. Merits of Argument

The Court of Chancery declined to rule on the issue of whether the forfeiture for competition provision would be subject to scrutiny under reasonableness standards applicable to traditional restrictive covenants and did not rely on any such determination in granting West's MJOP. In fact, the Court expressly stated that it was not ruling on the reasonableness (or unreasonableness) of the provisions because review of its decision in *Ainslie* was at the time already pending on appeal. (Notice of Appeal, Ex. B at 52-53) ("*If* I were to evaluate the forfeitures for reasonableness as restrictive covenants" and "I do not go so far today") (emphasis

added). There is therefore no error here. *See Cirillo Fam. Tr. v. Moezinia*, 220 A.3d 912, 2019 WL 5107461, at *2 (Del. 2019) (Table) (finding no error in the trial court's declining to rule and not rendering an advisory opinion).

III. THE COURT OF CHANCERY DID NOT ABUSE ITS DISCRETION IN DENYING VPM'S REQUEST FOR A STAY.

A. Questions Presented

Whether the Court of Chancery abused its discretion in denying VPM's motion to stay.

B. Scope of Review

This Court reviews the Court of Chancery's denial of a motion to stay for an abuse of discretion. *Matter of Marta*, 672 A.2d 984, 987 (Del. 1996); *Coaxial Commc'ns, Inc. v. CNA Financial Corp,* 367 A.2d 994, 997–98 (Del. 1979). "To find an abuse of discretion, there must be a showing that the trial court acted in an arbitrary and capricious manner." *Spencer v. Wal-Mart Stores E., LP*, 930 A.2d 881, 887 (Del. 2007).

C. Merits of Argument

VPM contends that the Court of Chancery's refusal of its request to stay this action, which was first made almost 2 years after this lawsuit was filed and approximately 1.5 years after West moved for judgment on the pleadings, was an error. In seeking a stay, VPM relied upon Section 4(d) of the Plan, which provides as follows:

> 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. A47.

VPM first raised Section 4(d) on March 31, 2024 (more than 17 months after West moved for judgment on the pleadings) in requesting dismissal of this action. After this Court's decision in *Terrell v. Kiromic Biopharma, Inc.*, 297 A.3d 610 (Del. 2023), VPM first requested a stay of these proceedings to allow its Board Committee to weigh in on the dispute. But VPM had already (even prior to the initiation of this lawsuit) decided that West had forfeited his vested Class B Units, and it maintained that position throughout the litigation.

VPM relies upon this Court's decision in *Terrell*, but that case involved a very different set of facts. In *Terrell*, the applicable contract provision stated:

> 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.

Id. at 615. In *Terrell*, the Court of Chancery initially stayed the matter pending the Committee's determination first. When the Committee returned its decision denying the plaintiff stock options, the Court of Chancery dismissed the action without asking the Committee to explain its reasoning, requesting supplemental briefs from the parties or offering further rationale for dismissal. *Id*. at 616.

On appeal, this Court held that while the Court of Chancery had properly stayed the action initially, it had erred in dismissing the action. This Court held that the Committee's decision was subject to judicial review, otherwise "it would permit the Committee, a conflicted party made up of three directors owing fiduciary duties to the company, to unfairly—even in bad faith—skew its determinations in the company's favor with impunity." *Id*. at 620. This Court held that the "Court of Chancery is not required to defer to the Committee's conclusion." *Id.* at 623.

The Court of Chancery was fully aware of this Court's decision in *Terrell* when it exercised its discretion to deny a stay. As the Court of Chancery held:

> The Company "requests that the Court enter an order staying these proceedings pending a decision by [the Company's] Compensation Committee (or the Board where no such committee is appointed)." An order compelling an expert determination "is in fact an order compelling specific performance" of an alleged duty arising from and, indeed, governed by the contractual term creating it. In requesting to compel specific performance, the *Company bears the burden of showing that the Agreement clearly and convincingly creates such a duty*.

Notice of Appeal, Ex. A at 2-3 (footnotes omitted) (emphasis added). The Court further held:

> Standard rules of contract interpretation require a court to "determine the intent of the parties from the language of the contract." Under Delaware law, the language of the contract will be construed objectively, "meaning that a

> 'contract's construction should be that which would be understood by an objective, reasonable third party."

Id. at 3-4 (footnotes omitted).

The Court held that, unlike the provision in *Terrell*, Section 4(d) was *not* a dispute resolution provision:

> Unlike the dispute resolution provision in *Terrell I* and *II*, nothing in Section 4(d) states that disputes over the Plan shall be submitted to the Committee. The provision does not refer to "disputes." Reserving for the Committee "powers with respect to the administration of the plan" does not clearly and convincingly remove dispute resolution from the courts. *Nothing in Section 4(d) expressly indicates that the Committee's "powers with respect to the administration of the plan" should be broadly construed to include the authority to resolve legal disputes. Reserving legal determinations*, such as liability, to an expert's determination would be highly unusual. *Section 4(d) did not put West on notice that the Company intended to submit all disputes to the Committee*.
>
> Courts interpreting contractual provisions also "read the specific provisions of the contract in light of the entire contract." The "[Class B Units Award Agreement] (including the Notice of Grant, Schedule A and the Investment Representation Statement), the Plan and the Operating Agreement constitute the entire agreement between the parties ...." Reading the entire agreement reveals the parties acknowledged the possibility of litigation about the Plan in court.

Id. at 4-6 (footnotes omitted) (emphasis added). The Court of Chancery's decision was well-informed and well-reasoned. The denial of a stay was not an abuse of discretion.

Recognizing that *Terrell* itself lends VPM no support, VPM relies heavily upon *Page v. Vill. Prac. Mgmt. Grp., LLC*, 2023 WL 3563049 (Del. Ch. May 19, 2023). When the Court of Chancery denied the stay in this case three months after *Page*, the Court was fully aware of *Page*. Indeed, the same judicial officer issued both decisions. Unlike in *Page*, where the Court acknowledged that the parties had not had an opportunity to brief this Court's opinion in *Terrell*, *id*. at *1, in this case, the parties had submitted briefing regarding both *Terrell* and *Page* before the Court issued its decision. B1-B10. Unlike the plaintiff in *Page*, West was given the opportunity to highlight the differences between the dispute resolution provision at issue in *Terrell* and Section 4(d) of the Plan. Moreover, as VPM acknowledges (Appellant's Opening Brief at 38), *Page* and this case were procedurally different. Unlike here, VPM never notified the plaintiff in *Page* that her equity had been forfeited. *See* B1-B10; *see also* A358-A366, A419-A426. Thus, it made sense to stay the *Page* case for VPM or its Committee to make a final determination as to whether the equity was forfeited first. Here, VPM had already interpreted the Plan to exact forfeiture of West's vested equity interests and made a final determination by rejecting West's claims. *Id*. There was nothing more for VPM or its Committee to decide.

The denial of a stay was not arbitrary and capricious. The Plan did not require disputes to be submitted to the Committee. In over a year and a half of

litigation, VPM never submitted any "question" to the Committee. VPM had already made a final decision to declare West's vested Class B Units to be forfeited. Even if a stay had been issued, the Court of Chancery would still have to determine *de novo* whether the Equity Documetns allowed the forfeiture. A stay would only have delayed this litigation further for no reason. The Court carefully reached a decision after full briefing by the parties and consistent with *Terrell* and *Page*.

IV. THE COURT OF CHANCERY PROPERLY AWARDED WEST ATTORNEYS' FEES AND EXPENSES.

A. Questions Presented

Whether the Court of Chancery properly awarded West attorneys' fees and expenses under the VPM Operating Agreement.

B. Scope of Review

This Court reviews an award of attorneys' fees for abuse of discretion but will "review the [trial court's] interpretation of a contractual fee-shifting provision *de novo*." *Bako Pathology LP v. Bakotic*, 288 A.3d 252, 266–67 (Del. 2022) (quoting *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 675 (Del. 2013)).

C. Merits of Argument

The Court of Chancery granted West's request for attorneys' fees under the VPM Operating Agreement, which VPM itself raised in defense to West's claims. The Court granted fees and expenses under Section 12.13 of the Operating Agreement, which 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 (emphasis added).

VPM incorrectly argues that it "did not assert the Operating Agreement as a

'defense' to West's claims." (Appellant's Opening Brief at 42). First, VPM stated in its Answer to the Verified Complaint that: "Plaintiff's Class B Unit awards are also subject to the terms and conditions of Defendant's operating agreement." *See e.g.*, A89-A90. VPM then specifically asserted the Operating Agreement as a defense and in opposition to West's MJOP (indeed, VPM attached the Operating Agreement to its answering brief in opposition to the MJOP). A152, A189.

VPM explicitly and repeatedly asserted the Operating Agreement's provisions as a defense to West's claim for declaratory judgment and in opposition to West's Motion for Judgment on the Pleadings. For example, VPM argued that the "entire agreement," which VPM argued included the Operating Agreement, indicated that an individual's status as a 'Participant' is tied to his or her possession of VPM equity, rather than to his employment status. A152-53. VPM specifically argued that the Operating Agreement was part of the "Entire Agreement" under the Awards. *Id*. VPM quoted numerous provisions of the Plan which referred to the Operating Agreement as grounds to deny West's MJOP. A156-A157. VPM argued:

> The language of the Plan Documents makes clear that West's role as a "Participant," with all the privileges and responsibilities attached thereto, continues as long as he holds equity in the company. This interpretation is amplified by a simple reading of the parties' *entire* agreement, which includes the Plan, the Award Agreements, and the Operating Agreement. A (Ex. 1 at ¶ 14(e).) When read in its entirety, the parties' agreement

> (*i.e.,* the totality of the Plan Documents) is replete with terms indicating that an individual's status as a "Participant" is tied to his or her possession of equity in VPM rather than to his or her employment status. A161.

VPM argued that West was required to become a party to the Operating Agreement and that his rights as an equityholder were limited by, and subject to, the terms of the Operating Agreement. A156, A157. VPM explicitly wielded the Operating Agreement as a contractual defense to West's claim that he remains an equityholder.

VPM ignores the plain language of Section 12.13 of the Operating Agreement in arguing that West is not entitled to fees because West did not prevail on a claim or defense under the Operating Agreement. (Appellant's Opening Brief at 43). Section 12.13 does not require a party to "prevail" on a defense under the Operating Agreement. Instead, Section 12.13 awards attorneys' fees to any party who prevails *in any action or proceeding where the Operating Agreement is validly raised as a defense*.

VPM argues that because it did not prevail in its defense, the Operating Agreement was not "validly" raised. (Appellant's Opening Brief at 44). VPM improperly equivocates the words "validly" and "prevail." But the word "valid" does not mean successful. The dictionary definition of valid is "well-grounded or justifiable: being at once relevant and meaningful." www.merriam-

webster.com/dictionary/valid.[1] If Section 12.13 had been intended to award fees only when a defense under the Operating Agreement was successful, then VPM would have again used the term "prevailing." Instead, VPM chose the word "validly." Moreover, VPM's argument would render the term "validly" meaningless, as Section 12.13 is already conditioned on a party prevailing. *Osborn*, 991 A.2d at 1159 (Delaware courts "give each provision and term effect, so as not to render any part of the contract mere surplusage"). VPM should not now be heard to claim that it did not validly raise the Operating Agreement as a defense because its argument was not successful.

VPM also asserts that "it would have been plainly erroneous" for the Court to award West attorneys' fees and expenses based on Section 12.5 of the Operating Agreement. (Appellant's Opening Brief at 45-47). The Court did not decide one way or the other whether West was entitled to attorneys' fees under Section 12.5, having already decided West was entitled to attorneys' fees and expenses under Section 12.13. (Notice of Appeal, Ex. D).

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[1] Under well-settled case law, Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract. *Lorillard Tobacco*, 903 A.2d at 738.

CONCLUSION

For the foregoing reasons, West respectfully requests this Court affirm the Court of Chancery's judgment and the award of West's attorneys' fees and expenses.

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