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Case Number 232,2024D

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/PLAINTIFF BELOW RYAN WEST'S
SUPPLEMENTAL MEMORANDUM

At this Court's direction, Appellee/Plaintiff Below Ryan West ("West") submits this Supplemental Memorandum addressing this Court's decision in *LKQ Corporation v. Robert Rutledge*, 2024 WL 5152746 (Del. Dec. 18, 2024).

SUMMARY OF ARGUMENT

This Court's decision in *LKQ Corporation v. Robert Rutledge* reaffirms Delaware's long tradition of supporting freedom-of-contract principles. The decision explicitly stands for the proposition that a forfeiture-for-competition provision is enforceable under Delaware law, *according to its terms*, in a broad range of agreements and under a broad range of circumstances. As the Court of Chancery found below, the plain language of the forfeiture-for-competition provision at issue in this dispute does not extend to West's conduct as a former employee, and thus the

provision is not triggered. Pursuant to this Court's reasoning in the *LKQ* decision, the Court of Chancery's entry of judgment in favor of West should be affirmed.

ANALYSIS

The *LKQ* decision deals explicitly with the enforceability of a forfeiture-for-competition provision according to its terms, and answers in the negative the certified question of whether forfeiture-for-competition provisions are generally reviewed for reasonableness. *See generally, LKQ*, 2024 WL 5152746. In reaching its conclusion, this Court relied upon and reaffirmed well-established principles that guide the rule of law in Delaware and serve as a clear and consistent foundation for decision-making in interpreting and enforcing contracts. Those principles include the following:

- The principle of freedom of contract stands as a cornerstone of the legal environment under Delaware law and emphasizes that contractual obligations should be enforced as written;[1] and

- As a matter of fundamental public policy, voluntary agreements of sophisticated parties will be enforced pursuant to Delaware's common law tradition of supporting freedom of contract principles, unless a strong public policy interest dictates otherwise.[2]

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1 *LKQ*, 2024 WL 5152746, at *4, n. 24 (citing cases).

2 *See id*. at n. 25 ("Delaware law is strongly inclined to respect [the parties'] agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract.") (quoting *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 903 (Del. 2021) and *Libeau v. Fox*, 880 A.2d 1049, 1056-57 (Del. Ch. 2005), *aff'd in pertinent part*, 892 A.2d 1068 (Del. 2006)).

Drawing from these principles, this Court found that, absent an overriding public policy interest, Delaware courts will not review for reasonableness the scope of the various artifacts of forfeiture-for-competition provisions, such as duration or activity, as Delaware courts do in assessing the enforceability of traditional restraints on trade.[3]

While the instant dispute involves a forfeiture-for-competition provision, it does not directly involve a challenge to the enforceability of the provision. Rather, it is limited to the scope of the forfeiture-for-competition provision: specifically, whether the forfeiture-for-competition provision extends to post-employment activities. The Court of Chancery correctly determined it does not, and honored the freedom of contract at the heart of Delaware jurisprudence, as aptly recited by this Court in *LKQ*: "[W]hen parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract. Such public policy interests are not to be lightly found, as the wealth-creating and

[3] Notably, the *LKQ* decision does not deem all forfeiture-for-competition provisions enforceable; this Court left open the possibility that a forfeiture-for-competition provision could be so extreme in duration and financial hardship that it precludes application of the employee choice doctrine and should be reviewed for reasonableness. *See LKQ*, at *6. This is discussed briefly, *infra*.

peace-inducing effects of civil contracts are undercut if citizens cannot rely on the law to enforce their voluntarily- undertaken mutual obligations." *LKQ*, 2024 WL 5152746, at *4 (citing *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 903 (Del. 2021) and quoting *Libeau v. Fox*, 880 A.2d 1049, 1056-57 (Del. Ch. 2005), *aff'd in pertinent part*, 892 A.2d 1068 (Del. 2006)).

Because the Court of Chancery correctly applied Delaware law to respect the parties' agreement, the *LKQ* decision supports affirming the Court of Chancery's entry of judgment and award of attorneys' fees incurred in favor of West as set forth herein.

A. The Scope, Not Enforceability, Of The Forfeiture-For-Competition Provision Is Directly At Issue On Appeal

Unlike the underlying issue in *LKQ*, the Court of Chancery's decision under review here did not turn on whether the forfeiture-for-competition provision is enforceable, but rather on whether the scope of the provision extends to West's post-employment activities—a matter resolved by the plain language of the agreement itself. *See* Dkt. 1 (Notice of Appeal), Ex. B at 44-45 ("Before me is a matter of contractual interpretation…. This dispute hinges on the meaning on one word: -- 'participant' – and whether it includes former employees and consultants").

Delaware courts have long recognized that the freedom to contract and enforcement of civil contracts are fundamental public policies that promote commercial certainty and economic stability, producing what this Court aptly

described as "wealth-creating and peace-inducing effects." *See LKQ*, 2024 WL 5152746, *4. The Court of Chancery's decision faithfully adhered to these principles by enforcing the parties' agreement as written. In doing so, the Court of Chancery carefully examined the plain language of the forfeiture-for-competition provision, focusing on the explicitly defined terms "Participant" and "Employee." It then appropriately relied on the grammatical structure and verb tense of those definitions in correctly determining that the scope of the forfeiture-for-competition clause applies solely to current employees and consultants. Dkt. 1, Ex. B at 48-50 ("The express use of the defined term 'Participant' in this clause cabins the consequences of 'Detrimental Activity' to current employees and consultants."). The Court of Chancery noted that the "simple substitution of defined terms into Section 4(a) [the forfeiture-for-competition provision] puts to rest [VPM's] argument that that section did encompass detrimental activity by a former employee." *Id.* at 50.

In upholding the agreement between the parties, the Court of Chancery reinforced Delaware's commitment to enforcement of agreements as written and ultimately honored the parties' freedom to contract, in accord with the foundational principles of contract interpretation under Delaware law, including those set forth in *LKQ*. Under the plain language of the forfeiture-for-competition provision, and in line with *LKQ*, the forfeiture clause does not apply to West's conduct as a former employee.

B. Had West Violated The Forfeiture-For-Competition Provision While He Was Employed (He Did Not) Or As An Engaged Consultant (He Was Not), *LKQ* Leaves Open The Question Of Whether It Would Be Enforced

Here, the plain language of the forfeiture-for-competition provision does not extend to West's activities after his employment ended, and the Court of Chancery thus declined to decide whether the forfeiture-for-competition provision should be reviewed for reasonableness. Dkt. 1, Ex. B at 52-53. Since the forfeiture-for-competition provision governed West's entitlement to benefits only during his tenure as an employee, and not as a former employee, the Court of Chancery correctly concluded that the forfeiture-for-competition provision was not triggered. The *LKQ* decision validates this outcome by reaffirming that Delaware courts will uphold such provisions strictly according to their terms, and the Court of Chancery's entry of judgment in favor of West was appropriate and aligned with Delaware's well-established contract interpretation principles.

Had West's post-employment conduct been proscribed by the terms of the forfeiture-for-competition provision, the *LKQ* decision clarifies certain public policy considerations relating to enforceability, and leaves open the question of how Delaware courts might address different factual circumstances that could trigger a review for reasonableness.

1. *LKQ* Reinforces That Forfeiture Is Not A Penalty, But A Condition Of The Bargain

In *LKQ*, this Court reaffirmed its recent decision in *Cantor Fitzgerald* clarifying that forfeiture-for-competition provisions should be viewed as conditions precedent to paying future distributions, rather than liquidated damages. *See LKQ*, 2024 WL 5152746, at *5. In so holding, this Court relied upon previous cases, such as *W.R. Berkley Corp. v. Dunai*, and examined similar-in-concept provisions (claw-back provisions in stock grant agreements) to reinforce the principle that such provisions are not penalties but valid conditions precedent. *LKQ*, 2024 WL 5152746, at *5 ("[t]his is not a $200,000 penalty for working for a competitor; it is returning a supplemental benefit for breaching the terms of a bargain") (quoting *W.R. Berkley Corp. v. Dunai*, 2021 WL 1751347, at *2 (D. Del. May 4, 2021)). Thus, had West engaged in conduct constituting a "Detrimental Activity" while he was employed or while he was engaged as a consultant (which he did not), the forfeiture-for-competition provision would not be viewed as an unenforceable liquidated damages clause.

2. However, *LKQ* Reinforces That, Despite Delaware's Strong Support Of Freedom To Contract, Other Factual Circumstances May Preclude Application Of The Employee Choice Doctrine

In *LKQ*, this Court recognized that, under the rules governing certification requests from other courts, its review was limited to questions of law based on stipulated facts. *See LKQ*, 2024 WL 5152746, at *6. As a result, this Court expressly

did not categorically preclude the possibility that forfeiture-for-competition provisions could, in some circumstances, be subject to reasonableness review to determine their enforceability. *See id*. By way of example, this Court specifically recited that, despite Delaware's strong support for freedom of contract, "[i]t might be the case that a forfeiture-for-competition provision which requires a claw back is so extreme in duration and financial hardship that it precludes employee choice by an unsophisticated party and should be reviewed for reasonableness." *Id*. That factual circumstance, however, was beyond the scope of the certified question answered in *LKQ*. *See id*. It is also beyond the scope of the issues on appeal here.

Given the recent adoption of the employee choice doctrine in Delaware, Delaware courts have not yet had the opportunity to develop fully the scope of its application and limitations. While this Court identified in *LKQ* one specific scenario in which a forfeiture-for-competition provision might be subject to reasonableness review, other potential exceptions to the doctrine remain open questions.[4] The *LKQ* decision leaves open the potential for future cases to explore whether and when such forfeiture-for-competition provisions might warrant judicial scrutiny, and Delaware

[4] As recognized in *Murphy v. Gutfreund*, various circumstances can undermine the legitimacy of an employee's choice and these factors, among others, may necessitate judicial examination beyond a rigid application of the employee choice doctrine. 583 F. Supp. 957, 964–65 (S.D.N.Y. 1984) (discussing various circumstances undermining genuine choice that do not lead to application of the employee choice doctrine).

courts will continue to shape the contours of the employee choice doctrine in this evolving area of law. *See LKQ*, 2024 WL 5152746, at *6.

Although West did not violate the forfeiture-for-competition provision while he was an employee (or consultant), and thus the provision was not triggered, if he had, the *LKQ* decision supports the proposition that the provision would likely need to be reviewed for reasonableness. The forfeiture-for-competition provision at issue in this case lacks any defined temporal limitation extending beyond the employment relationship. Naturally, the absence of such a key structural element further supports the conclusion that the forfeiture-for-competition provision does not apply to West's conduct as a former employee. *See* discussion, *supra*.

All other forfeiture-for-competition provisions cited in the *LKQ* opinion, including the agreement at issue in the *LKQ* dispute itself, contain the customary structural elements typically found in such clauses, including a clearly defined time period during which the restricted conduct applies. Specifically, the stock incentive plan at issue in *Cantor Fitzgerald* included various restrictions, including on competition, for the "Restricted Period" (a term defining explicit periods for each restricted type of conduct). *Cantor Fitzgerald, L.P. v. Ainslie*, 312 A.3d 674, 679 (Del. 2024). The forfeiture provision at issue in *Dunai* was conditioned on non-competition for a year post-departure. *See LKQ*, 2024 WL 5152746, at *5 (discussing one-year limit on forfeiture provision evaluated by the District Court in

W.R. Berkley Corp. v. Dunai, 2021 WL 1751347, at *2 (D. Del. May 4, 2021)). Similarly, in *W.R. Berkley Corp. v. Hall*, the stock option plan at issue prohibited competition for 6 months following departure. *Id*. at *5-6. And the agreement in the *LKQ* case itself imposed forfeiture for conduct 9 months following termination of affiliation with the company. *Id.* at *2. To the extent the forfeiture-for-competition provision at issue in this case applies beyond the employment or consulting relationship (and it does not), it would impose a restriction that is "extreme in duration" (*i.e.*, indefinite), and it should be reviewed for reasonableness.[5]

A fundamental consideration that undermines the application of the employee choice doctrine is when a former employee is not given the opportunity to make a clear, informed decision about whether to compete with their former employee *within a defined time*—not indefinitely. *See id.* at*4 ("[I]f a former employee wishes to compete with the employer *during the relevant time* . . . the former employee…has agreed to forfeit that benefit upon engaging in competition.") (emphasis added); *see also* Dkt. 15 (Answering Brief), at 26 (discussing the specific, well-defined framework of time-periods following withdrawal in *Cantor Fitzgerald*, and the fact

[5] In addition to the extreme duration of the forfeiture-for-competition provision, the financial hardship imposed and the sophistication of the parties are also factors that may impact whether a forfeiture-for-competition provision should be reviewed for reasonableness. *LKQ*, 2024 WL 5152746, *6.

that VPM could have imposed post-employment restrictions upon West but did not do so). The logic behind the employee choice doctrine presupposes that an individual, at the time of their departure, understands the tradeoff: they may choose to engage in competitive activity within some certain prescribed time, but by doing so, they forfeit certain benefits. This choice is meaningful to an individual when the scope of the restriction is clearly defined, including a specific period during which the forfeiture provision is in effect. Without a time-bound restriction, a forfeiture-for-competition provision ceases to function as a legitimate condition precedent to clawing back restricted stock units (RSUs) and instead leans in favor of precluding application of the employee choice doctrine. Here, to the extent the forfeiture-for-competition provision extends beyond current employment—and it does not—it lacks any defined timeframe extending into West's post-employment period, and the provision would be reviewed for reasonableness.

Again, the Court of Chancery did not review the forfeiture-for-competition provision for reasonableness. *See* Dkt. 1, Ex. B, p. 52 ("If I were to evaluate the forfeitures for reasonableness as restrictive covenants, they would be unreasonable if 'Participant' included former employees. I do not go so far today…"). Instead, it found that the plain and unambiguous language of the forfeiture-for-competition provision was not triggered because it did not extend to West's post-employment conduct. *Id.* at pp. 48-52. The Court of Chancery's ruling correctly aligned with

LKQ's reaffirmation of Delaware's strong public policy favoring enforcement of contracts as written.

C. The Core Principles Of Freedom Of Contract Recited in *LKQ* Also Support Affirming The Award Of Attorneys' Fees

The Court of Chancery also ruled that West is entitled to recover his attorneys' fees pursuant to Section 12.13 of the Seventh Amended Operating Agreement, holding that VPM "validly asserted [a provision of the Operating Agreement] as a defense." Dkt. 1, Ex. D. The core principles set forth in *LKQ*, as outlined above, namely, the freedom to contract and enforcement of agreements between parties, support the Court of Chancery's order awarding West attorneys' fees. The Court's respect for contractual autonomy and enforcement of contracts as written fosters certainty and efficiency, and this Court should affirm the Court of Chancery's award of attorneys' fees.

CONCLUSION

This Court's decision in *LKQ* does not provide a basis for reversing the Court of Chancery's entry of judgment in favor of West. Delaware law requires courts to enforce contracts as written, and here, the plain and unambiguous language of the Equity Documents dictated the outcome: the Court of Chancery properly entered judgment on the pleadings in favor of West. *See Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 925 (Del. 2017), *as revised* (June 28, 2017) (judgment on the pleadings is a proper framework for enforcing

unambiguous contracts). Affirming the Court of Chancery's decision both upholds Delaware's public policy favoring freedom of contract, as discussed in the *LKQ* decision, and reinforces the predictability and reliability that parties expect when choosing Delaware law to govern their agreements. Accordingly, the judgment should be affirmed.

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