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IN THE

Supreme Court of the State of Delaware

NORTH AMERICAN FIRE ULTIMATE HOLDINGS, LP, Plaintiff-Below/Appellant, v. ALAN DOORLY, Defendant-Below/Appellee.	No. 142, 2025 Court Below: Court of Chancery of the State of Delaware C.A. No. 2024-0023-KSJM

[AMENDED] APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

Plaintiff-Below/Appellant North American Fire Ultimate Holdings, LP (the "Company") appeals from the March 7, 2025 Memorandum Opinion (Ex. A, "Op.") of the Court of Chancery granting Defendant-Below/Appellee Alan Doorly's motion to dismiss the Amended Complaint. A13-A38.

Doorly was the top executive of Cross Fire & Security, Inc. ("Cross Fire"), one of several businesses owned by the Company that installs and maintains building fire and life safety systems. In April 2023, while still at Cross Fire, Doorly and another Cross Fire employee surreptitiously formed a competing fire and life safety business called Empire Fire, which they then used to bid against Cross Fire on multiple projects. In the same timeframe, Doorly also stole sensitive proprietary information about Cross Fire customers and employees for Empire Fire to use going forward. In addition, Doorly and his partner repeatedly disparaged Cross Fire to customers and employees, encouraging them to move over to the nascent Empire Fire.

Doorly's conduct indisputably violated restrictive covenants Doorly agreed to with the Company as part of a February 1, 2022 Incentive Unit Grant Agreement (the "Agreement"). Among other things, the restrictive covenants prohibit the misuse of the Company's confidential information and soliciting Company customers and employees. Pursuant to the Agreement, the Company issued Doorly

300,000 Class B units of equity in the Company (the "Units"), the first tranche of which became time-vested effective February 1, 2023. The Agreement required the Company to pay Doorly the fair market value of his vested Units upon his separation from the Company unless he was terminated for cause, or breached the Agreement's restrictive covenants, in which case the Units were "automatically forfeited." The Agreement underscores repeatedly that all of the covenants survive Doorly's separation from the Company.

After the Company discovered Doorly's misconduct, it terminated Doorly for cause effective December 2023. Because he was fired for cause (and breached the restrictive covenants), Doorly's Units were automatically forfeited. Doorly has never challenged the basis for his termination. Since leaving the Company, Doorly has continued to violate the restrictive covenants, including using Cross Fire's stolen information and actively soliciting Cross Fire employees and customers to change over to Empire Fire.

Faced with Doorly's continuing misconduct post-separation, including the misuse of Cross Fire's confidential information and active solicitation of employees and customers, the Company commenced this action on January 10, 2024, seeking specific performance of the applicable restrictive covenants, injunctive relief, and declaratory judgment as well as damages suffered by the Company as a result of Doorly's misconduct. *See* A13-A38.

On March 7, 2025, the Court of Chancery granted Doorly's motion to dismiss, holding that "[t]he Agreement is unenforceable for lack of consideration." Op. at 10. Specifically, the Court of Chancery held that "the Units were the sole consideration" granted by the Company in exchange for the restrictive covenants and, once those Units automatically forfeited under the terms of the Agreement as a result of Doorly's misconduct, the Agreement, including the restrictive covenants, became unenforceable by the Company for lack of consideration. Op. at 6.

On April 4, 2025, the Company filed its notice of appeal seeking reversal. This is the Company's opening brief in support of that appeal.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred in holding that the restrictive covenants in the Agreement became unenforceable for lack of consideration once Doorly's Units were automatically forfeited as a result of Doorly's misconduct. *See* Op. at 6 ("Defendant's first argument that the Agreement lacks consideration is sufficient."); 10 ("Doorly did not retain the Units. The Agreement is unenforceable for lack of consideration."). It is axiomatic that the existence of consideration is measured at the time of contract formation, not the time of breach, and the fact that the principal consideration received by Doorly was automatically forfeited due to Doorly's own misconduct did not render the Agreement unenforceable by the Company. Any contrary rule would encourage business executives to breach restrictive covenants during their employment whenever the perceived benefits from breaching (*e.g.*, using their employer's stolen confidential information and hiring away their employer's key employees) outweigh the current value of the consideration received (*e.g.*, the Units). The Court of Chancery thus misapplied settled law regarding contract enforcement and raised significant policy concerns in incentivizing parties to breach their contracts. *See infra* at Section I.

2. The Court of Chancery erred in concluding, at the pleadings stage, that "[i]t is not reasonable to infer that there was any other consideration beyond the Units." Op. at 8. Plaintiff alleged in the Amended Complaint that Doorly breached

the Agreement, an arms-length contract in which Doorly expressly "acknowledged" the "receipt and sufficiency" of "good and valuable consideration." This was sufficient to plead the existence of consideration to support an enforceable contract. In so doing, the Court of Chancery misapplied the standard of review at the pleadings stage. *See infra* at Section II.

STATEMENT OF FACTS

A. The Company Acquires Cross Fire and Grants Longtime Top Executive Alan Doorly Equity Units

The Company is a Delaware limited partnership that owns a group of operating companies that are in the business of installing and maintaining fire and life safety systems in properties across seven states in the United States. A14-A15, A17 ¶¶ 4, 13. In May 2021, the Company acquired Cross Fire, which operates in the New York City area. Op. at 1-2. Cross Fire was founded by Doorly's brother, Brendan Doorly, and Kevin Maguire in 1993. A16 ¶ 10. Doorly worked for his brother at Cross Fire for over 20 years. *Id.* ¶ 11.

B. The Incentive Unit Grant Agreement

In January 2022, the Company offered Doorly an opportunity to participate in its equity incentive plan. *See* A40. On February 1, 2022, the Company and Doorly entered into the Agreement. A18 ¶ 16; *see generally* A40-A67. The parties agreed to the terms of the Agreement "in consideration of the mutual covenants contained [t]herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged." A40; *see* A22 ¶ 27. Pursuant to the Agreement, the Company granted Doorly 300,000 Class B Units of equity in the Company subject to time and performance vesting conditions. A18 ¶ 16; A40. The grant recognized that "the services to be rendered by [Doorly]" were "unique" such that

"it would be difficult or impossible to replace" those services should Doorly depart. A62 § 12.

In the Agreement, Doorly made numerous representations and warranties including that: (1) he was "sophisticated in financial matters and [was] able to evaluate the risks and benefits of receipt of the Incentive Units"; (2) he was an "accredited investor" within the meaning of Rule 501 of Securities and Exchange Commission Regulation D; and (3) he had the opportunity to "ask questions and receive answers concerning the terms and conditions [of the Agreement]." A40-A41 § 1(d). Doorly further acknowledged that "this Agreement and each of the other agreements contemplated hereby constitutes the legal, valid and binding obligation of [Doorly], enforceable in accordance with its terms." A41 § 1(d)(vi).

The Units Doorly received under the Agreement were divided into three tranches, each with specified vesting conditions. *See* A42-A43 § 2. As of February 1, 2023, 20% of Doorly's Tranche I Units—or 24,000 Units—were time-vested. A42 § 2(c).

The Agreement "survive[s]" any "Separation" between Doorly and the Company and "remain[s] in full force and effect after such Separation." A55 § 11(n). The Agreement provides that if Doorly ceased to be employed by the Company "for any or no reason (a 'Separation') the Incentive Units (whether vested or unvested and whether held by Executive or one or more of Executive's Permitted

Transferees, other than the Partnership and the Investors) will be subject to repurchase." A43 § 3(a). For each vested Unit, "the purchase price . . . will be the Fair Market Value of such Unit." A43 § 3(b). However, "(x) if such Separation results from termination of Executive's employment or provision of services for Cause or from Executive's resignation from employment or provision of services without the written consent of the President of the Partnership or the Board, or (y) in the event Executive breaches any of the covenants set forth in Section 6 hereof, each Vested Incentive Unit shall be *automatically forfeited* without further action on the part of the Partnership or Executive." *Id.* (emphasis added).

C. The Restrictive Covenants

Under the Agreement, Doorly agreed to several standard restrictive covenants set forth in Annex A to the Agreement. *See* A47 § 6(a). Doorly "acknowledge[d] that the Incentive Units being granted herein constitutes adequate and sufficient consideration in support of such covenants and agreements." *Id.* Doorly further agreed that the "obligations contained in this Section 6 (including Annex A)"—*i.e.*, the restrictive covenants—"shall survive the termination of Executive's separation and shall be fully enforceable thereafter." A48 § 6(e). Moreover, the Agreement includes Doorly's "acknowledge[ment] and agree[ment]" that "[i]n the event of any violation of the provisions of this Section 6 (including Annex A)," "the post-Separation restrictions contained in this Section 6 (including Annex A) shall be

extended by a period of time equal to the period of such violation, it being the intention of the parties hereto that the running of the applicable post-termination restriction period shall be tolled during any period of such violation." A48 § 6(d); *see* A21-A22 ¶ 26.

Under Annex A, Doorly agreed to the following specific covenants:

- During his employment or at any time thereafter, Doorly will not "*divulge, communicate, or use to the detriment of [the Company] and its Subsidiaries and affiliates . . . confidential information or trade secrets* relating to [the Company or its subsidiaries and affiliates]"; "disparage, defame or discredit" them; "interfere with or disrupt [their] business activities"; or "disclose or . . . use, except in connection with [Doorly]'s work for [the Company]" "confidential or proprietary information" "receive[d] from third parties"; and

- During his employment and for the one-year period thereafter, *Doorly will not "employ, engage, retain, solicit, recruit or enter into a business affiliation with" any employee; "solicit or otherwise attempt to take away any supplier, vendor, or customer"* with whom Doorly "did business" or "otherwise became acquainted [] as a result of [his] employment"; or "engage in . . . or in any manner, own, control, manage, operate, or otherwise participate, invest, or have any interest in, or be connected with, . . . any business competitive with [the Company] or its Subsidiaries."

A59-A61 §§ 1-5, 8, 10 ("Covenants") (emphasis added).

Under Section 6(c) of the Agreement, Doorly "acknowledge[d] and agree[d]" that the Covenants are "an integral part of this Agreement and but for the [Covenants], the Partnership would not enter into this Agreement and issue the

Incentive Units to [Doorly]." A47-A48 § 6(c); A21 ¶ 25. Doorly further expressly acknowledged and agreed that:

- "the [Covenants] do not preclude [him] from earning a livelihood, nor do they unreasonably impose limitations on [his] ability to earn a living";
- "the potential harm to the Affiliated Companies of the non-enforcement of any provision of the [Covenants] outweighs any potential harm to [him] of its enforcement by injunction or otherwise";
- "the terms of the [Covenants] are reasonable and narrowly tailored to protect the protectable interests of the Affiliated Companies in their confidential information and other protectable business relationships";
- he "has carefully read this Agreement (and each of the other agreements referred to herein) and consulted with legal counsel of [his] choosing regarding its contents, has given careful consideration to the restraints imposed upon [him] by this Agreement, including the [Covenants], and is in full accord as to their necessity for the reasonable and proper protection of confidential and proprietary information of the Affiliated Companies now existing or to be developed in the future"; and
- "each and every restraint imposed by the [Covenants] is reasonable with respect to subject matter, scope and time period."

A47-A48 § 6(c); *see* A21 ¶ 25. Doorly separately acknowledged and agreed that the Covenants "are reasonable and necessary for the protection of the Partnership and its Subsidiaries and are an essential inducement to the Partnership's grant of the Incentive Units." A61-A62 § 11.

Finally, the Agreement provides that, in addition to "any other rights and remedies available under this Contract or otherwise," the Company "shall be

entitled, without needing to post bond or other security, to an injunction to be issued or specific performance to be required restricting [him] from committing or continuing any such violation." A62 § 12.

D. Doorly Breaches the Covenants

In February 2023, Doorly was promoted to be the senior executive and business unit leader of Cross Fire, which made him Cross Fire's top executive and gave him management responsibility for several other affiliated operating companies. A22-A23 ¶ 28; *see* Op. at 1-2. In his new role, Doorly advocated for the promotion of his longtime colleague Chris Neil to become Cross Fire's Manager of Business Development. A22 ¶ 30. Within weeks of the promotions, Doorly engaged in misconduct that violated the Covenants under the Agreement. Specifically, in or around April 2023, Doorly (with Neil) embarked on a scheme to secretly form a copycat business called Empire Fire Alarm Specialist, Inc. ("Empire Fire"); solicit Cross Fire's key customers and employees (including Neil) to join Empire Fire; leverage Cross Fire's confidential information, including various customer lists; and endeavor to steal Cross Fire's business out from under the Company. A23-A25 ¶¶ 31, 34, 36.

For example, during the summer of 2023, while Doorly was still employed by the Company, Doorly and Neil were tasked with leading Cross Fire's efforts to secure a significant sub-contract with Tower Fire Protection, Inc. for the

maintenance of the fire alarm system at the newly constructed Amtrak New York Penn Station. A24-A25 ¶¶ 35-36. Rather than help secure the Penn Station project for Cross Fire, Doorly (and Neil) actively worked to undermine Cross Fire's bid, ultimately submitting a competing bid on behalf of Empire Fire. A25-A26 ¶¶ 36, 38. By way of further example, in December 2023, Doorly submitted a second bid on behalf of Empire Fire to Cross Fire's customer S&D Electric Company using Cross Fire's confidential information. A29-A30 ¶¶ 52-53.

The Company separately discovered that, in furtherance of his scheme, Doorly had been regularly disparaging the Company to Cross Fire customers and employees. A26 ¶ 41; A30 ¶ 54. Doorly also misused Cross Fire's trade secrets by forwarding sensitive Cross Fire documents for his personal use. A24 ¶¶ 33-34. In sum, while still employed by Cross Fire, Doorly breached all of the Covenants in Annex A to the Agreement: disclosure and misuse of Company confidential information; disclosure and misuse of third-party confidential information; non-competition; non-solicitation of customers; non-disparagement; and non-solicitation of employees.

On October 30, 2023, Doorly informed the Company that he planned to resign to pursue an unrelated opportunity while acknowledging that he remained bound by the Covenants. A26-A27 ¶¶ 43-44. During the subsequent negotiations with the Company about the terms of his release, Doorly asked that he be released from his

obligations under the Covenants. A27 ¶ 46. While discussing these terms with Doorly, the Company conducted a review of Doorly's emails and discovered Doorly's misconduct. A27-A28 ¶ 47. As a result, on December 27, 2023, the Company terminated Doorly for cause, which resulted in automatic forfeiture of Doorly's Class B Units pursuant to the Agreement. A28 ¶ 48; A43 § 3(b). Tellingly, Doorly has never challenged the basis for his for cause termination or the resulting automatic forfeiture of his Units.

Since his separation from the Company, Doorly has continued to misuse the confidential information he stole from Cross Fire to advance Empire Fire's interests and pursue Cross Fire's customers and employees. *See* A31-A32 ¶¶ 55-59. When this Amended Complaint was filed in March 2024, Cross Fire had learned that two longtime Cross Fire customers, the Belnord Hotel and City Boutique LLC, had also terminated their contracts with Cross Fire in favor of Empire Fire, and that a key Cross Fire sales employee had left the Company to join Empire Fire. *See id.* This pattern of conduct has only escalated since.

E. The Company Sues to Enforce the Covenants and the Court of Chancery Dismisses the Amended Complaint

On January 10, 2024, the Company commenced this action against Doorly. A11. As amended, the Company alleges four counts: (I) breach of the Agreement; (II) breach of the implied covenant of good faith and fair dealing; (III) a claim seeking a declaration that the period Doorly must comply with the Covenants had

been tolled due to his continuous misconduct; and (IV) tortious interference with prospective contractual relations. A33-A37 ¶¶ 69-88. The Amended Complaint cites to and attaches the Agreement, which, recites how the parties entered the Agreement "in consideration of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged." A40; *see* A22 ¶ 27.

On March 7, 2025, the Court of Chancery granted Doorly's motion to dismiss, holding that the Agreement became unenforceable for lack of consideration upon the automatic forfeiture of Doorly's Units. Op. at 7, 10-13. As a result, the Court of Chancery dismissed Counts I through III of the Amended Complaint under Rule 12(b)(6) for failure to state a claim, and dismissed Count IV under Rule 12(b)(2) for lack of personal jurisdiction over Doorly. *Id.*

On April 4, 2025, the Company timely filed its notice of appeal, appealing the dismissal of Counts I to III.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN FAILING TO EVALUATE THE AGREEMENT'S CONSIDERATION AT THE TIME OF CONTRACT FORMATION

A. Question Presented

Did the Court of Chancery err in holding that the automatic forfeiture of Doorly's Units upon his termination for cause rendered the Agreement unenforceable for lack of consideration? This question was raised below (A79-A87) and considered by the Court of Chancery (Op. at 5-11).

B. Scope Of Review

This Court reviews the Court of Chancery's granting of a motion to dismiss *de novo*. *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 438 (Del. 2005).

C. Merits Of Argument

The Court of Chancery erred in holding that, when Doorly's Units automatically forfeited, the Agreement was rendered unenforceable for lack of consideration. *See* Op. at 6-7. The existence of consideration must be evaluated as of the time the Agreement was formed, not when the Company, as the non-breaching party, sought to enforce its rights under the Agreement following Doorly's post-formation breaches. Here, at the time of contract formation, the Company and Doorly each gave and received consideration. Accordingly, the Agreement was and still is enforceable by the Company.

Agreements like the one at issue, which are common in the context of Delaware-law-governed private company incentive equity plans, grant senior executives equity interests but often provide that where, as here, the executive engages in wrongdoing during the term of employment, the executive automatically forfeits his or her equity interests. The paradigm created by the Court of Chancery's decision, in which forfeiture of equity frees the executive of his or her obligations under the restrictive covenants post-employment, perversely invites the executive to breach the covenants any time he or she believes the upside associated with breaching is greater than the value of the equity at the time of the breach, and leaves the damaged party without its bargained-for remedies. A rule like this would be antithetical to Delaware public policy.

1. The Court of Chancery Erred in Not Assessing the Existence of Consideration at the Time of Contract Formation

In accordance with hornbook contract principles, Delaware courts limit their "inquiry into consideration to its existence and 'not whether it is fair or adequate.'" *Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (quoting *Osborn v. Kemp*, 2009 WL 2586783, at *8 (Del. Ch. Aug. 20, 2009)). "Consideration requires that each party to a contract convey a benefit or incur a legal detriment, such that the exchange is bargained for. If this requirement is met, there is no additional requirement of equivalence in the values exchanged." *Cox Commc'ns, Inc. v. T-Mobile US, Inc.*,

273 A.3d 752, 764 (Del. 2022) (cleaned up). "[I]f the promisee parts with something at the promisor's request, it is immaterial whether the promisor receives anything." *First Mortg. Co. of Pa. v. Fed. Leasing Corp.*, 456 A.2d 794, 796 (Del. 1982) (citing 1 *Williston on Contracts* § 113 (3d ed. 1979)).

It is black letter law that consideration is measured as of the time of contracting. *See Eagle Force Hldgs., LLC v. Campbell*, 187 A.3d 1209, 1212 (Del. 2018); *Osborn*, 991 A.2d at 1158-59; *see also Newell Rubbermaid Inc. v. Storm*, 2014 WL 1266827, at *9 (Del. Ch. Mar. 27, 2014) (grant of contingent incentive award in exchange for restrictive covenants was sufficient consideration at time of contract formation and employee remained bound even though the incentive award was subsequently forfeited). Other states are in accord. *See, e.g.*, *Weinstein v. KLT Telecom, Inc.*, 225 S.W.3d 413, 415-16 (Mo. 2007) (recognizing that under the "general principles of contract law that consideration must be measured at the time the parties enter into their contract and that the diminished value of the economic benefit conferred, or even a complete lack of value, does not result in a failure of consideration"); *Western Fed. Sav. & Loan Assoc. of Denver v. Nat'l Homes Corp.*, 445 P.2d 892, 897-98 (Colo. 1968) ("Consideration is not to be measured in the light of the eventual success or failure under a contract but rather consideration is measured as of the time of making the contract." (citing *Casserleigh v. Wood*, 119 F. 308 (8th Cir. 1902))); *Strange v. State Tax Comm'n*, 7 So. 2d 542, 544 (Miss.

1942) ("The fairness and adequacy of the consideration must be measured as of the time the contract was executed . . . ."). Moreover, a conditional or contingent promise—*e.g.*, the Company's promise to repurchase Units for fair market value absent a "for cause" termination—constitutes consideration unless "the promisor knows *at the time of making the promise* that the condition cannot occur." Restatement (Second) of Contracts § 76 (Am. L. Inst. 1981) (emphasis added).

The Court of Chancery's decision in *Newell Rubbermaid Inc. v. Storm* is instructive.[1] There, the company (Newell) sought to enforce against a former sales director confidentiality and non-solicitation covenants in a restricted stock unit ("RSU") agreement. *Newell*, 2014 WL 1266827, at *1. The RSU agreement provided that if the sales director was "terminated from employment by Newell for any reason other than death, disability, or retirement, then the RSUs shall be forfeited and no portion shall vest." *Id.* at *2. The sales director voluntarily resigned less than a year after entering into the RSU agreement, her RSUs were forfeited, and she began working for a competitor in violation of the covenants. *Id.* at *2, *4. In response to Newell's subsequent motion for a temporary restraining order to enforce the restrictive covenants, the sales director argued that the restrictions were unenforceable for lack of consideration. Specifically, she contended that the

[1] *Newell* was first identified during briefing of this appeal and was not raised by the parties in the briefing before the Court of Chancery.

consideration she received under the RSU agreement—*i.e.*, RSUs that were forfeited upon her resignation from the company—was "illusory" because Newell could have terminated her at its sole discretion and without cause and thereby forfeited her RSUs. *Id.* at *8. The Court of Chancery rejected the sales director's argument, reasoning that, at the time of the RSU agreement, she was "granted a benefit that held actual value" even though "[t]hat value is somewhat contingent, based on certain factors such as the time period in which the units will vest and [the employee]'s likelihood of future employment." *Id.* at *9. In other words, the fact that, at the time of the sales director's breach, the RSUs had been forfeited was irrelevant for purposes of the Court's analysis of whether the contract lacked consideration.

Here too, the fact that Doorly, Cross Fire's former top executive, received Units that were subject to time and performance vesting conditions, including automatic forfeiture in the event of a for cause termination, did not change the fact that the Units had sufficient value to constitute consideration at the time of contract formation. That Doorly's Units were subsequently forfeited upon his termination for cause is irrelevant to whether consideration existed at the time of the Agreement. As in *Newell*, when Doorly and the Company entered into the Agreement in February 2022, Doorly was "granted a benefit that held actual value"—*i.e.*, he was granted 300,000 Units in the Company subject to time and performance vesting

conditions. *See id.* He was granted these Units to incentivize him to stay at Cross Fire; as the Agreement recognizes, Doorly's services were "unique" such that "it would be difficult or impossible to replace" those services should Doorly depart. A62 § 12. In exchange, Doorly acknowledged and agreed, among other things, that:

- He must abide by the Covenants in Annex A, including to not misuse the confidential information or trade secrets of the Company or its subsidiaries and affiliates and to not solicit any of their employees and customers;
- The Covenants in Annex A would be enforceable even if Doorly separated from the Company for cause and forfeited the Units;
- The provisions in the Agreement and Annex A are reasonable and necessary to protect the Company;
- If he violated the Covenants or was terminated for cause for any other reason, his vested Units would be forfeited;
- The Covenants survived his separation from the Company;
- The applicable post-separation restriction period of a Covenant is tolled during the period of any violation of that Covenant; and
- The Company would be entitled to an injunction or specific performance restricting Doorly from committing or continuing any such violation, in addition to any other rights and remedies available under Annex A or otherwise.

A43 § 3(b); A47-48 §§ 6(a)-(e); A55 § 11(n); A59 §§ 1-3; A61-A62 §§ 11-12. In short, there was a bargained-for-exchange at the time of contract formation.

The Court of Chancery nevertheless held that the Agreement was unenforceable because the Company, by "declar[ing]" that Doorly's Units were

forfeited, "eliminated the sole consideration for the restrictive covenants" and that "[n]o consideration means no enforceable contract." Op. at 6-7, 10 ("Doorly did not retain the Units. The Agreement is unenforceable for lack of consideration."). The Court of Chancery's decision did not cite any Delaware law (or any other state's law) in support of the notion that an enforceable contract will later become unenforceable for lack of consideration where, as here, one party forfeits the benefits it received pursuant to the provisions of the contract.

In reaching its decision, the Court of Chancery principally relied on a trial court decision from Suffolk County, New York that purported to apply Delaware law. Op. at 7, 9 & n.23 (quoting *NBTY v. Vigliante*, 2015 WL 7694865, at *3 (N.Y. Sup. Ct. Nov. 24, 2015)). The case is not in accord with Delaware law, and, in any event, is inapposite. In *NBTY*, the plaintiff employer and the defendant employees entered into option agreements granting the employees options to purchase shares of the employer's common stock that vested over time, at specified prices, subject to certain terms and conditions. 2015 WL 7694865, at *1. The stock-option agreements contained restrictive covenants. *Id.* All options expired 90 days after the employees separated from the employer. *Id.* at *2. Before exercising any options, the employees left and started working for a competitor. *Id.* at *1. The *NBTY* court held that, after expiration of the options, the restrictive covenants were unenforceable for lack of consideration:

> [The employer] seeks to enforce an agreement that has already expired and for which the individual defendants received no benefit that had any actual value. The stock-option agreements expired by their terms shortly after the individual defendants' employment ceased; and consistent with the advice they received from [the employer], the individual defendants made no attempt to exercise the options or obtain any benefits. [The employer] do[es] not allege, nor does the record reflect, that the individual defendants received any stock, dividends, or cash payments in exchange for the restrictive covenants found in the stock-option agreements.

Id. at * 3. Notably, the New York court's analysis of consideration did not cite to any Delaware precedent.

Respectfully, the Court of Chancery's reliance on *NBTY* below was misplaced. Its holding appears to rest on the *NBTY* court's erroneous conclusion that, *at the time of contract formation*, the individual employees "received no benefit that had any actual value." *Id.* at *3. No other court, in New York or elsewhere, has cited *NBTY* for the proposition that an option grant does not constitute valid consideration. In any event, the Court of Chancery here did not question whether Doorly received consideration at the time of contract formation. Rather, it held that the Agreement became unenforceable *after* formation when Doorly's Units were automatically forfeited. Op. at 8, 10. Moreover, in *NBTY*, at formation, the employees only received unvested options to purchase shares of the employer's stock in the future. 2015 WL 7694865, at *1. The *NBTY* court expressly distinguished that circumstance from cases like this one where an employee receives actual Units of equity in the Company. *Id.* at *3. In addition, in *NBTY*, the

employees were advised by the employer prior to their resignation that the restrictive covenants were no longer binding so long as the employees did not exercise the options. *Id.* at *2. Here, in contrast, the Agreement is explicit that the Covenants remained enforceable during Doorly's employment and after Doorly separated from the Company, which Doorly was keenly aware of given his request to be released from the Covenants as part of negotiating a severance package prior to his termination. A55 § 11(n); A27 ¶ 46.[2]

2. The Court of Chancery's Decision, if not Reversed, Would Incentivize Executives to Engage In Misconduct

In addition to being contrary to established law, the Court of Chancery's decision, if not reversed, would harm our State's public policy. Among other things, it would encourage executives participating in Delaware-law-governed equity incentive plans to willfully breach restrictive covenants (or engage in other misconduct) during their employment and thereby forfeit equity interests whenever

[2] To the extent the Court of Chancery conflated lack of consideration with a failure of consideration, there would still be no basis to dismiss the Company's claims. "Failure of consideration" is an affirmative defense that "does not challenge the formation of a contract, only subsequent performance by a party." *Baynard v. Jervey*, 1985 WL 21132, at *3 (Del. Ch. July 5, 1985). "What is sometimes referred to as 'failure of consideration' by courts and statutes . . . is referred to in this Restatement as 'failure of performance' *to avoid confusion with the absence of consideration*." Restatement (Second) of Contracts § 237 cmt. a (emphasis added). Here, there are no well-pled allegations that the Company failed to perform any obligation under the Agreement. *Cf.* A32 ¶ 62.

they believe the upside of avoiding their restrictive covenants post-employment outweighs the value of the underlying equity.

Equity incentive grant agreements similar to the Agreement are ubiquitous among private companies organized under Delaware law. They give senior executives an ownership stake in the company and thus incentivize growth and responsible stewardship of the business. These agreements regularly condition executives' retention of equity on compliance with restrictive covenants geared toward protecting the company from competitive harm. If executives breach the restrictive covenants or engage in other forms of misconduct, they automatically forfeit their equity. If automatic forfeiture of equity excused the executive's continued compliance with restrictive covenants, executives like Doorly would be perversely incentivized to breach covenants and/or engage in misconduct during the term of their employment—*e.g.*, steal trade secrets or steal customers and employees—when they perceive that the value derived from avoiding restrictive covenants going forward outweighs the value of their equity. This is contrary to public policy.

More broadly, the paradigm created by the Court of Chancery would inject meaningful uncertainty into the enforceability of commercial contracts under Delaware law. One party's forfeiture of consideration at any point in time post-formation would functionally rewrite the terms of the contract. Here, the Covenants

were deemed unenforceable for lack of consideration upon Doorly's termination for cause. But Section 6(e) of the Agreement unambiguously provides that the Covenants "shall survive the termination of Executive's Separation and shall be fully enforceable thereafter." *Accord* A55 § 11(n) ("This Agreement shall survive a Separation and shall remain in full force and effect after such Separation"). "Delaware is a contractarian state that holds parties' freedom of contract in high regard," such that "Delaware courts read the agreement as a whole and enforce the plain meaning of clear and unambiguous language." *Thompson St. Cap. P'rs IV, L.P. v. Sonova United States Hearing Instruments, LLC*, --- A.3d ---, 2025 WL 1213667, at *8 (Del. Apr. 28, 2025). The Court of Chancery effectively rewrote the Agreement to provide that the Covenants terminated upon Doorly's Separation in the event he was terminated for cause or violated restrictive covenants. This rendered Sections 6(e) and 11(n) of the Agreement illusory. *Osborn*, 991 A.2d at 1159 ("We will not read a contract to render a provision or term 'meaningless or illusory.'" (quoting *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992)).

Accordingly, this Court should reverse the Court of Chancery's holding that the Agreement became unenforceable for lack of consideration when Doorly's Units were automatically forfeited as a result of Doorly's undisputed misconduct. The

Agreement remains an enforceable contract and the Company, having fully complied with its obligations under the contract, is entitled to enforce it.

II. THE COURT OF CHANCERY ERRED IN FINDING AT THE PLEADINGS STAGE THAT THE UNITS WERE THE "SOLE CONSIDERATION" IN THE AGREEMENT

A. Question Presented

Did the Court of Chancery err in finding, at the pleadings stage, that "[i]t is not reasonable to infer that there was any other consideration beyond the Units" given that the Amended Complaint quoted and attached the Agreement, including the recitals thereto acknowledging the broader consideration? Op. at 8. This question was raised below (A79-A87) and considered by the Court of Chancery (Op. at 5-11).

B. Scope Of Review

This Court reviews the Court of Chancery's granting of a motion to dismiss *de novo*. *Thompson*, 2025 WL 1213667, at *7.

C. Merits Of Argument

The Court of Chancery erred in finding in the context of a Rule 12(b)(6) motion that the Units were the "sole consideration" granted by the Company in connection with the Agreement. The Amended Complaint quoted and attached the Agreement, which acknowledges both parties' receipt of consideration. *See* A22 ¶ 27; A40. Nothing alleged in the Amended Complaint or specified in the Agreement conceded that the Units granted by the Company were the "sole consideration." Accordingly, the Court of Chancery erred in accepting Doorly's

argument at the pleadings stage that "the Units were the sole consideration for the restrictive covenants." Op. at 6.

The Court of Chancery stated that, "[t]o determine the nature of consideration received, a court must look to the plain terms of the Agreement." Op. at 7. But the Amended Complaint quoted and attached the Agreement. And the recitals to the Agreement state: "*in consideration of the mutual covenants contained herein and other good and valuable consideration*, the receipt and sufficiency of which are hereby acknowledged, the parties to this Agreement hereby agree as follows." A40 (Recitals) (emphasis added); *see* A22 ¶ 27. This is sufficient for purposes of pleading an enforceable contract and overcoming a pleadings stage challenge based on lack of consideration. *See Moscowitz v. Theory Ent. LLC*, 2020 WL 6304899, at *12 (Del. Ch. Oct. 28, 2020) (denying Rule 12 motion for lack of consideration because "a recital in a written agreement that a stated consideration has been given facially supports a finding that the agreement is supported by consideration, absent facts suggesting that no such consideration was actually given or expected" (citing *TA Operating LLC v. Comdata, Inc.*, 2017 WL 3981138, at *23 (Del. Ch. Sept. 11, 2017); Restatement (Second) of Contracts §§ 87, 218)). And the Court of Chancery at the pleadings stage must draw all reasonable inferences in favor of the Company as the non-moving party. *See Windsor I, LLC v. CWCapital Asset Mgmt. LLC*, 238 A.3d 863, 871 (Del. 2020).

In ruling that the Units were the "sole consideration," the Court of Chancery read a "negative implication" into the Agreement that is not found in the text. Op. at 8. The Court of Chancery relied exclusively on Doorly's acknowledgement in Paragraph 6(a) of the Agreement—the section that addresses the Covenants—"that the Incentive Units being granted herein constitutes adequate and sufficient consideration in support of such covenants and agreements." A47 § 6(a). The Court of Chancery then found that, because this paragraph did not identify any other form of consideration, the Units must be the "sole consideration" for the restrictive covenants. Op. at 7.

First, the Court of Chancery erred in finding that the Company was required to plead other forms of consideration in addition to Doorly's receipt of the valuable Units. Op. at 7-8. Here, the Company pled a bargained for exchange in the Amended Complaint. A21-A22 ¶¶ 25, 27 ("Doorly expressly agreed, among other things, that he [r]eceived sufficient consideration for entering into the Restricted Award Agreement, including 'the mutual covenants contained [therein] and other good and valuable consideration.'"); *see also* A47 § 6(a) (the Units are "adequate and sufficient consideration"). Delaware law does not require the parties to a contract to "explicitly detail the precise consideration they are exchanging" within the body of the contract. *See Moscowitz*, 2020 WL 6304899, at *12. Here, discovery is needed to reveal the full breadth of consideration provided by the Company in

exchange for Doorly's promises in the Agreement. The Agreement which, as alleged, states that "other" consideration has been given "supports a finding that the agreement is supported by consideration, absent facts suggesting that no such consideration was actually given or expected." *Id*. And here, no such facts have been pled.

Second, the Court of Chancery erred in improperly weighing at the pleadings stage Section 6(a) and its supposed "negative implication" against the recitals, and in doing so rejected a reasonable alternative interpretation of the Agreement, which is that the consideration was "the mutual covenants contained herein *and other* good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged." *Terrell v. Kiromic Biopharma, Inc.*, --- A.3d ---, 2025 WL 249073, at *5 (Del. Jan. 21, 2025) ("Dismissal is proper only if the moving party's interpretation is the only reasonable construction as a matter of law."). The Court of Chancery determined it could ignore the recitals because they were "boilerplate" and "'recitals are not a necessary part of a contract' and they do not control where they conflict with other aspects of the agreement." Op. at 7 (quoting *Urdan v. WR Cap. P'rs, LLC*, 2019 WL 3891720, at *13 (Del. Ch. Aug. 19, 2019), *aff'd*, 244 A.3d 668 (Del. 2020)). Here, however, the recitals do not "conflict with" Section 6(a). The recitals broadly acknowledge each party's receipt of "other" consideration beyond the mutual covenants contained in the Agreement. Section 6(a) specifically

acknowledges that the Units were adequate consideration for the Covenants without indicating that the Units were the "sole" consideration. As the trial court in *Urdan* recognized, recitals "provide background and can offer insights into the intent of the parties." 2019 WL 38917820, at *15 (Del. Ch. Aug. 19, 2019).[3] Discovery is required to determine the full scope of "other consideration" the Company gave.

The Restatement (Second) of Contracts is instructive on the issue. In Section 218 of the Restatement, titled "Untrue Recitals; Evidence of Consideration," comment b provides that "[a] recital of fact in an integrated agreement is evidence of the fact, and its weight depends on the circumstances. Contrary facts may be proved." Restatement (Second) of Contracts § 218 cmt. b. Stated differently, the Restatement provides that to negate language in a recital, the court must *weigh* and *prove* the recital and "[c]ontrary facts." *Id.* Those are tasks a trial court is restricted from performing at the pleadings stage, prior to discovery. *See Windsor*, 238 A.3d at 871.

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[3] *Accord Citadel Hldg. Corp. v. Roven*, 603 A.2d 818, 822-23 (Del. 1992) ("The obvious source for gaining contractual intent is the recitals found at the beginning of the Agreement because it is there that the parties expressed their purposes for executing the Agreement." (citation omitted)); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 219 (2012) (stating that "[a] preamble, purpose clause, or recital is a permissible indicator of meaning" and defining the canon as the "prefatory-materials canon").

Accordingly, the Court of Chancery erred in finding, at the pleadings stage, that "[i]t is not reasonable to infer that there was any other consideration beyond the Units." Op. at 8.

CONCLUSION

For the reasons stated above, Appellant respectfully requests that the Court of Chancery's dismissal of this action be reversed.

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