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Case Number 142,2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

NORTH AMERICAN FIRE ULTIMATE HOLDINGS, LP,	)	No. 142, 2025
Plaintiff-Below/Appellant,	)	COURT BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE
v.	)	
ALAN DOORLY,	)	C.A. No. 2024-0023-KSJM
Defendant-Below/Appellee.	)	

APPELLEE'S ANSWERING BRIEF

Dated: June 20, 2025

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NATURE OF PROCEEDINGS

Plaintiff North American Fire Ultimate Holdings, LP ("NAF") appeals that portion of the Court of Chancery's Memorandum Opinion dismissing claims seeking enforcement of restrictive covenants against Defendant Alan Doorly ("Doorly").

Under an Incentive Unit Grant Agreement (the "Incentive Agreement"), Doorly agreed to restrictive covenants in exchange for units in NAF (the "Units") that vested over time. NAF alleges that it terminated Doorly's employment for cause, resulting in an automatic forfeiture of *all* Units, including those that had already vested. This forfeiture left Doorly empty-handed.

Following the forfeiture, NAF sought to enforce the restrictive covenants in their entirety and to recover monetary damages arising from Doorly's alleged violation of the covenants as well as attorneys' fees arising from NAF's litigation to enforce the covenants. Doorly moved to dismiss, arguing, among other things, that NAF could not enforce restrictive covenants after having seized the sole consideration issued in exchange for them.

In opposition, NAF wrongly argued that Doorly's defense rested upon the "employee-choice doctrine," which it said was inapplicable and unrecognized by Delaware courts. Second, NAF argued that certain specific provisions of the Incentive Agreement provided Doorly with additional consideration that rendered the restrictive covenants enforceable despite forfeiture of the Units.

The Court of Chancery rejected NAF's arguments. Examining the four corners of the Incentive Agreement, it found that the Units were the sole consideration for the restrictive covenants and that NAF's seizure of those Units rendered the restrictive covenants unenforceable for lack of consideration. The Court also reviewed the "additional" consideration NAF identified and found that it reflected consideration additionally granted *by* Doorly *to* NAF.

On appeal, NAF raises two new arguments. First, it argues that the Court of Chancery erred in looking beyond the contracting date when holding that an ex-post forfeiture of the Units rendered the restrictive covenants unenforceable. Second, NAF argues that the Court of Chancery erred by failing to permit discovery into the meaning of a recital in the Incentive Agreement that mentions "other good and valuable consideration." According to NAF, one cannot know what "other" means without conducting discovery.

SUMMARY OF ARGUMENT

I. Denied. The Court of Chancery correctly held that NAF's seizure of Doorly's Units rendered the restrictive covenants unenforceable for lack of consideration. NAF's argument to the contrary was not preserved and should not be considered here. In any event, that argument is wrong. NAF's authority stands for the unremarkable proposition that a contract does not fail for lack of consideration when the consideration is reduced or diminished in value. Here, Doorly's consideration was not merely diminished or devalued—it was taken from him by NAF. NAF cites no authority to support enforcement of the restrictive covenants under these circumstances. Nor does public policy support NAF. Consideration forms the core of every contract, and the absence of consideration renders a contract void.

II. Denied. The Court of Chancery correctly determined that the Units were the sole consideration for the restrictive covenants. Again, NAF's argument on appeal was not preserved, and, in any event, lacks merit. Before the Court of Chancery, NAF argued that the Incentive Agreement's reference in a recital to "other good and valuable consideration" alluded to consideration received by Doorly that was separate from the Units and further described in several provisions within the body of the Incentive Agreement. But the Court of Chancery correctly concluded that all provisions NAF identified reflect obligations and restrictions imposed upon

Doorly for NAF's benefit. On appeal, NAF cannot be heard to say the Incentive Agreement, once clear, is now so vague as to necessitate discovery into the meaning of "other" consideration. This is particularly so when the purported vagueness derives from boilerplate language regularly included within agreements. Public policy favors common sense interpretation of contracts, not sophistry.

STATEMENT OF FACTS

A. Doorly Works for Decades Without Any Restrictive Covenants

Doorly manages the installation and servicing of third-party life safety systems, primarily fire alarm systems.[1] A16 ¶¶ 10-11.[2] A New York resident, Doorly has worked in and around the New York metropolitan area for his entire career. A13-16 ¶¶ 1, 5, 11. For about 20 years, Doorly plied his trade with Cross Fire & Security, Inc. ("Cross Fire"). A16 ¶ 11.

NAF acquired Cross Fire in May 2021 as part of a portfolio of life safety systems companies doing business under the name Altus Fire & Life Safety ("Altus"). A16-17 ¶ 12. NAF and Altus operate in seven states spanning the mid-Atlantic and Northeastern United States. A17 ¶ 13. After NAF's acquisition, Doorly continued with Cross Fire.[3]

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[1] This Statement of Facts is derived from NAF's amended complaint and documents it incorporates by reference. *See In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995) (observing that courts may consider any documents "integral to a plaintiff's claim and incorporated in the complaint").

[2] In this brief, "Op." refers to the opinion of the Court of Chancery, attached as Exhibit A to NAF's Opening Brief, which is cited as "NAF Br." "A" refers to NAF's Appendix. "B" refers to Doorly's Supplemental Appendix.

[3] After the acquisition, NAF invited Doorly to become an NAF member, after which Doorly purchased 700,000 units of NAF. A17 ¶ 14. The units were in NAF's predecessor company but later converted to NAF units. A17-18 ¶¶ 14-16. These units are not at issue in this action.

B. Doorly Is Offered NAF Units in Exchange for Restrictive Covenants

On or about February 1, 2022, NAF and Doorly signed the Incentive Agreement (A18 ¶ 16; A39-64), which offered Doorly Units that vested over time in exchange for sweeping restrictive covenants set forth in an attached Annex A. *See* A47 § 6(a) (stating "Units being granted herein constitute[] adequate and sufficient consideration in support of such covenants and agreements").

The restrictive covenants in Annex A included:

- Confidentiality as to every piece of "non-public proprietary and confidential information relating to any member of the [NAF group]" (A59 ¶ 1);
- Non-Solicitation of any employee of the NAF group (*id.* at ¶ 2);
- Non-Solicitation of any third party that Doorly had done business with or become acquainted with through the NAF group (*id.* at ¶ 3); and
- Non-Competition barring Doorly from being "connected with" any third party "competitive with" business that the NAF group, during Doorly's employment, had conducted or planned to conduct "anywhere in the world" in which the NAF group had conducted business in the two years before Doorly's departure (*id.* at ¶ 4).
- Non-Defamation of any member of the NAF group and non-interference with any such member's business activities (A60 ¶ 5).

If Doorly breached any restrictive covenants, then his Units, whether vested or unvested, would be "automatically forfeited." A43 § 3(b).

Before signing the Incentive Agreement, Doorly was not subject to restrictive covenants. *See generally* A13-32.

C. The Incentive Agreement and Its Restrictive Covenants Did Not Alter Doorly's Employment

By its express terms, the Incentive Agreement did not create a right of employment. *See* A41 § 1(e) ("[N]either the issuance of Incentive Units to Executive nor any provision contained in this Agreement shall entitle Executive to remain in the employment of or provide services to the Partnership or its Subsidiaries or affect the right of the Partnership, or its Subsidiaries to terminate Executive's employment or provision of services at any time for any reason.").

The complaint does not allege that Doorly received a promotion, increased compensation, expanded responsibilities, or enhanced access to company information in exchange for signing the Incentive Agreement. *See generally* A13-32.

The only subsequent change in Doorly's employment status is a promotion that Doorly received in "early 2023"—a year after he executed the Incentive Agreement. A22-23 ¶ 28. Doorly signed an employment agreement with NAF in connection with this promotion. B071-077.[4] That agreement is dated August 3,

[4] NAF premises its complaint on the assertion that Doorly breached his duties as an employee. *See, e.g.*, A28 ¶ 48 (alleging NAF terminated Doorly's employment for cause). NAF cannot avoid consideration of Doorly's employment contract simply

2023—over 18 months after the Incentive Agreement. *Id.* It contains no restrictive covenants, and it expressly "supersedes any previous verbal/written agreements." *Id.*

D. NAF Fires Doorly, Declares His Units Forfeit, and Sues

On October 30, 2023, Doorly tendered his resignation to Cross Fire. A26 ¶ 43. Doorly and NAF then engaged in protracted negotiations concerning the terms and timing of Doorly's exit. A26-27 ¶¶ 43-46, 48. On December 27, 2023, after two months of discussions, NAF abruptly terminated Doorly's employment, claiming that Doorly had begun competing against the company. *See* A27-28 ¶¶ 47-48. That termination, purportedly for cause, resulted in the automatic forfeiture under the Incentive Agreement of all Doorly's Units, vested and unvested. A28 ¶ 48.

Two weeks later, on January 10, 2024, NAF brought this action, seeking an injunction, specific performance, damages, and a declaratory judgment, all based upon the Incentive Agreement's restrictive covenants. *See generally* A13-32. NAF moved for a preliminary injunction and to expedite the proceedings below. A11-12.

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by use of an artful pleading that neglects to mention the agreement by name. *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995); *Abbot v. N. Shores Bd. of Governors, Inc.*, 2020 WL 1490880, at *2-3 & nn.17, 32 (Del. Ch. Mar. 27, 2020).

E. Proceedings Below

1. The Court of Chancery Denies NAF's Request for a Preliminary Injunction and Expedition

On January 10, 2024, NAF filed this case together with motions for injunctive relief and to expedite the action. A11-12. On February 14, 2024, Doorly opposed NAF's motion to expedite. A7-8. On February 20, 2024, the Court of Chancery denied NAF's motion to expedite during a telephonic bench ruling. A6-7.

2. Doorly Moves to Dismiss

Simultaneously with his opposition to the motion to expedite, Doorly moved to dismiss NAF's complaint, arguing that the restrictive covenants were unenforceable as a matter of law. B001-024. Doorly principally argued that (1) having clawed back the Units, the only consideration for the restrictive covenants, NAF could not also assert a breach of those covenants, and (2) the sweeping restrictive covenants were overbroad and not connected to a legitimate economic interest. B005-024.

In response, NAF amended its complaint, carrying forward its prior causes of action and adding claims for breach of the implied covenant of good faith and fair dealing and for tortious interference. A13-32. Doorly moved to dismiss the amended complaint, renewing his prior arguments against the enforceability of the restrictive covenants and arguing that the newly-asserted claims should be dismissed

as duplicative (breach of implied covenant) and beyond the jurisdiction of the Delaware courts (tortious interference). B033-070, B078-111.

3. The Court of Chancery Dismisses NAF's Amended Complaint

At oral argument, NAF sought to anchor its opposition to Doorly's motion to a case not presented in its papers. *See* B133 at 19:14-18 (describing NAF's newly-presented authority, *Lyons Insurance*, as its counsel's "favorite" case). The Court of Chancery permitted Doorly to submit supplemental briefing addressing NAF's new authority. B144-160; Op. at 5 (acknowledging supplemental brief "addressing a case raised by [NAF] for the first time during oral argument").

On March 7, 2025, the Court of Chancery granted Doorly's motion to dismiss NAF's amended complaint in its entirety. As to the claims seeking to enforce the restrictive covenants, the Court of Chancery held that NAF had "eliminated the sole consideration for the restrictive covenants" when it clawed back the Units. *See* Op. at 7 ("No consideration means no enforceable contract.").

In opposing Doorly's motion to dismiss, NAF never argued that the Court of Chancery was barred from considering the sufficiency of consideration at the time of enforcement. A79-85. Instead, NAF chose to mischaracterize Doorly's position as an invocation of the "employee-choice doctrine", which NAF then insisted was

inapplicable under Delaware law. *See* A80-85 (reflecting Plaintiff's argument against "employee-choice doctrine").[5]

The Court of Chancery found that NAF had missed the point: the restrictive covenants were unenforceable because the sole consideration for them had been eliminated. *See* Op. at 9 ("Ignoring half of the *NBTY* court's reasoning—that the stock-option agreements lacked consideration—Plaintiff seeks to distinguish the case based on its discussion of employee-choice doctrine."). "[NAF] has no meaningful response to this point." Op. at 10.

NAF also "den[ied] the factual premise of [Doorly's] argument—that the Units comprised the *sole* consideration for the [Incentive] Agreement." Op. at 7 (emphasis added); A79-85. It argued that the Incentive Agreement provided other consideration to Doorly and cited a series of provisions in the Incentive Agreement that, according to NAF, set forth that additional consideration. A82-84. But the

[5] *Compare with* B049-050 ("Plaintiff has rescinded the consideration for Doorly's restrictive covenants. As such, it may not now enforce those covenants….It is hornbook law that contracts require consideration."); B050 ("Thus, when Plaintiff declared that Doorly forfeited his Units, it destroyed the sole consideration for the restrictive covenants."); B086 ("Having rescinded the lucrative partnership Units that served as the consideration for the restrictive covenants, Plaintiff obtained the benefit of its bargain; it cannot now also sue for breach and extend the covenants' duration."); B091-092 ("Doorly's essential point [is] that causing him to forfeit <u>*all*</u> his Units means that no consideration exists to enforce the restrictive covenants."); B092 ("Here, Plaintiff has rescinded the sole consideration Doorly received. It cannot also bar him from earning a living without paying him for the burden imposed by its restrictive covenants.").

Court of Chancery rejected NAF's argument because the referenced provisions plainly reflected consideration *Doorly granted to NAF*. Op. at 7-8.

Having disposed of NAF's central claims, the Court of Chancery dismissed as duplicative the claim for breach of the implied duty of good faith and fair dealing. Op. at 10-11. It also dismissed NAF's tortious inference claim for lack of personal jurisdiction, since that claim related to alleged actions occurring exclusively in New York. Op. at 11-13.

F. This Appeal

On April 4, 2025, NAF filed a notice of appeal. On May 20, 2025, it filed its opening brief and appellate record, seeking reinstatement of its claims to enforce the restrictive covenants (Counts I-III). NAF Br. at 14. NAF does not appeal the dismissal of its claim for tortious interference. *Id.*

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY DETERMINED THAT NAF'S CLAWBACK DEPRIVED DOORLY OF CONSIDERATION FOR THE RESTRICTIVE COVENANTS

A. Question Presented

Did the Court of Chancery err by evaluating the consideration for the Incentive Agreement's restrictive covenants as of the time of enforcement rather than as of the time of contracting? This question was not raised below. A68-119.

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). But "[o]nly questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented." Del. Sup. Ct. R. 8.

C. Merits of Argument

The Court of Chancery properly determined that NAF's clawback of Doorly's Units rendered the restrictive covenants unenforceable. The Units were the sole consideration for Doorly's entry into the restrictive covenants. When NAF clawed back those Units upon Doorly's termination, it left the Incentive Agreement bereft of consideration for the restrictive covenants.

On appeal, NAF argues that the Court of Chancery erred by applying a methodology for examining the sufficiency of consideration that is not supported by

Delaware law. But NAF did not assert this methodological argument before the Court of Chancery, and this Court should not consider it now. In any event, NAF's belated argument is incorrect.

1. Doorly Accepted the Restrictive Covenants in Exchange for the Units, and NAF's Decision to Claw Back Those Units Precludes Enforcement of the Restrictive Covenants

The Incentive Agreement established a quid pro quo: Units in exchange for restrictive covenants. Doorly expressly accepted the restrictive covenants in exchange for the Units. *See* A47 at § 6(a) (acknowledging Units to be sufficient consideration for the restrictive covenants in Annex A).

When NAF clawed back all the Units—vested and unvested—it left Doorly with *nothing* under the Incentive Agreement. That action deprived Doorly of consideration for the restrictive covenants just as surely as if NAF had never issued the Units to him. In the absence of consideration, those restrictive covenants may not be enforced. *See Shilling v. Shilling*, 2024 WL 4960326, at *5 (Del. Ch. Dec. 4, 2024) (holding that contracts require consideration).

In his motion to dismiss, Doorly argued that NAF was not entitled to enforce the restrictive covenants after it rescinded the sole consideration it provided for them. Doorly cited to *NBTY v. Vigliante*, a New York decision that applied Delaware law to find that restrictive covenants were not enforceable when the sole consideration for those covenants, stock options, had lapsed. 2015 WL 7694865, at

*3 (N.Y. Sup. Ct. Nov. 24, 2015). B050-051. NAF argued against the application of *NBTY* in sideways fashion, insisting that the "employee-choice" doctrine did not apply in Delaware. A80-85. The Court of Chancery correctly concluded that NAF had missed the point: the restrictive covenants in *NBTY* were unenforceable because the sole consideration for them had been eliminated. Op. at 9-10. "[NAF] has no meaningful response to this point." Op. at 10; *see also* Op. at 9 ("Ignoring half of the *NBTY* court's reasoning—that the stock-option agreements lacked consideration—Plaintiff seeks to distinguish the case based on its discussion of employee-choice doctrine.").

2. NAF's Argument on Appeal Was Not Preserved, and, in Any Event, Relies on Inapplicable Law

On appeal, NAF dispenses with its "employee-choice" argument and replaces it with an argument attempting to address the very point the Court of Chancery determined NAF had ignored. *Id.* NAF now argues that because sufficient consideration existed at the time of contracting to render the restrictive covenants enforceable, the subsequent clawback of that consideration cannot compromise the enforceability of those covenants. *See* NAF Br. § I.C.1. This argument is not permitted on appeal because it was never made before the Court of Chancery. *See generally* A1-119; *see also* B115-143.

This Court may consider an argument only if it was "fairly presented to the trial court." *Ravindran v. GLAS Trust Co. LLC*, 327 A.3d 1061, 1078 (Del. 2024);

Del. Sup. Ct. R. 8. Although a "very narrow" exception permits the Court to hear unpreserved arguments "when the interests of justice so require" (Del. Sup. Ct. R. 8), that exception is inapplicable here.

If in reply to the instant memorandum NAF points to some oblique reference in its prior briefing in an attempt to show its argument was preserved, any such passing reference would not suffice to preserve its argument for appeal. Del. Sup. Ct. R. 8; *see In re Oracle Corp. Deriv. Litig.*, 2025 WL 249066, at *10 & n.76 (Del. Jan. 21, 2025) (holding that general reference to issue "was not the same as directly raising an argument…so that the court understands it is an argument that must be considered and decided"); *see also Ravindran*, 327 A.3d at 1079 ("This cursory comment does not register as an argument that is fairly presented to the trial court for consideration as required by Rule 8.").

Here, NAF was represented by a nationally recognized law firm when it fully briefed Doorly's motion to dismiss. *See* Op. at 5 (recounting procedural history). At oral argument, while represented by the same law firm, it took a second bite at the apple when—without forewarning—it presented a case it had not cited in its brief and made that case the cornerstone of its argument. *See* B133 at 19:14-18 (describing newly-presented authority as counsel's "favorite"). To cure that prejudice the Court of Chancery granted Doorly's request to submit supplemental

briefing. *See* Op. at 5 (acknowledging supplemental brief "addressing a case raised by Plaintiff for the first time during oral argument"); B144-160.

The interests of judicial economy and finality of judgments do not favor permitting NAF what is, effectively, a third bite at the apple. No prejudice arises from barring NAF's unpreserved argument when it had ample opportunity to raise it before the lower court but elected not to do so. *See Ravindran*, 327 A.3d at 1081 (declining to consider new argument where record reflected no attempt to raise it before trial court); *Protech Mins., Inc. v. Dugout Team, LLC*, 284 A.3d 369, 379 (Del. 2022) (refusing to consider unpreserved argument regarding a contract despite State's "contractarian nature"). This is especially true here, where NAF is a deep-pocketed entity using the heft of its resources against a former employee in an attempt to bar him—*without payment*—from continuing to work within New York and neighboring states in an industry that has been his professional home for the last approximately 25 years. A17; B093.

In any event, NAF's new argument fails because it is premised upon inapplicable case law. In each of NAF's cases where the court did more than simply recite a legal principle, the party to be bound by the contract had *received and retained* at least some consideration for its contractual promises. NAF Br. at 17-19. That is simply not the case here.

In NAF's leading case, *Newell Rubbermaid Inc. v. Storm*, 2014 WL 1266827 (Del. Mar. 27, 2014), which NAF acknowledges it is citing for the first time on appeal (NAF Br. at 18 n.1), the court enforced restrictive covenants after the employer clawed back RSUs, but only after the employee had also received—and retained—cash dividends on the stock underlying her RSUs. *See* 2014 WL 1266827, at *9 (stating defendants' retention of cash equivalent of stock dividends reflected "independent consideration…which cannot be considered illusory"). This contractual right to payments permitted the employee not just to retain dividends already paid, but also to receive any dividends that had accrued prior to the clawback but had not yet been distributed. 2014 WL 1266827, at *2.

The decision in *Newell* is unique—so much so that the court expressly limited its decision to the facts before it, noting that different facts could yield different results. *Newell*, at *1 n.2. In contrast to the facts in *Newell*, the clawback at issue here dispossessed Doorly of *all* consideration he had received. *See* A47 § 6(a) (identifying Units as consideration for restrictive covenants); A43 § 3(b) (providing for forfeiture of *all* Units, vested and unvested). Also, whereas the RSUs in *Newell*, inclusive of the retained dividend payments, were the express consideration for the employee to enter into the *entire* agreement (B162, 166 §§ 1-2, 13), the Units were the express consideration for Doorly to enter into the restrictive covenants only (A47 § 6(a)).

Although NAF offers a variety of newly-cited decisions in support of *Newell* (NAF Br. at 15-17), it cites no authority to support the enforcement of restrictive covenants when all consideration has been forfeited. *See Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (holding rent-to-own real estate contract enforceable by lessee where lessor received rental income for twenty years and would receive lump-sum cash payment at closing); *Cox Commc'ns, Inc. v. T-Mobile US, Inc.*, 273 A.3d 752, 764 (Del. 2022) (enforcing settlement agreement that resolved two lawsuits where "neither party argue[d] that [agreement] lacked consideration"); *Weinstein v. KLT Telecom, Inc.*, 225 S.W.3d 413, 415 (Mo. 2007) (finding consideration for put option agreement because seller received benefit of bargain when holder tendered subject shares upon exercise); *W. Fed. Sav. & Loan Ass'n of Denver v. Nat'l Homes Corp.*, 167 Colo. 93, 103, 445 P.2d 892, 898 (1968) (finding consideration for lien waivers in construction finance agreements because supplier received benefit of continued opportunity to sell materials to homebuilder); *Strange v. State Tax Comm'n*, 192 Miss. 765, 7 So. 2d 542, 543–44 (1942) (finding sufficient consideration for option contract under which brothers used stock for mutual benefit during life and held irrevocable option to purchase stock upon other's death); *cf. First Mortg. Co. of Pa. v. Fed. Leasing Corp.*, 456 A2d 794, 796 (Del.

1982) (finding consideration for personal mortgage agreements where bank required mortgages as security for equipment lease to mortgagors' restaurant business).[6]

Since the promisors in those cases retained the benefit of their bargain, changes in the value of the consideration did not affect the enforceability of the underlying contract. *See Weinstein*, 225 S.W.3d at 415 (holding total collapse of share value due to bankruptcy did not cause failure of consideration, where agreement "was simply a gamble, a lawful wager made between sophisticated parties as part of an arms-length transaction"); *W. Fed. Sav. & Loan Ass'n of Denver*, 445 P.2d at 898 (holding fact that supplier had not been paid due to purchaser's foreseeable financial difficulties did not negate supplier's receipt of bargained-for consideration in form of continued opportunity to sell and actual completion of sales that otherwise would not have occurred); *see also Strange*, So. 2d at 543 (holding unexpected increase in value of shares underlying option agreement exercisable upon promisor's death did not convert option from irrevocable contract to revocable will).[7] Of course, a change in market value is a far cry from forfeiture.

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[6] *Moscowitz v. Theory Ent. LLC,* 2020 WL 6304899 (Del. Ch. Oct. 28, 2020), a case NAF cites elsewhere in its initial brief, is to similar effect. There, the employer exercised its right upon the employee's resignation to repurchase the employee's units, leaving the employee with the repurchase payment of nearly $300,000 as consideration. *Id.* at *9, *15-16.

[7] Another of NAF's cases did not address existence or sufficiency of consideration at all but rather the clarity of the parties' drafting. *See* Br. at 17 (citing *Eagle Force*

NAF's invocation of public policy in support of its new argument (NAF Br. at 23-26) is unavailing for two reasons. First, NAF failed to make this public policy argument before the Court of Chancery. A68-119. Second, public policy *supports* the Court of Chancery's decision because restrictive covenants require consideration. Op. at 6 and nn.20–21 (citing *Shilling v. Shilling*, 2024 WL 4960326, at *5 (Del. Dec. 4, 2024) (holding that a valid contract requires consideration); *Faw, Casson & Co. v. Cranston*, 375 A.2d 463, 466 (Del. Ch. 1977) (holding contract that imposes new restrictive covenants on existing employee requires fresh consideration)). Nothing prevents an employer from drafting an incentive agreement that leaves an employee with consideration sufficient to support restrictive covenants. *Newell*, 2014 WL 1266827. But here, NAF has sought to do something fundamentally different: to reclaim *all* consideration for the restrictive covenants *and* to enforce those restrictions anyway. This it cannot do.

Holdings, LLC v. Campbell, 187 A.3d 1209, 1233-34 (Del. 2018) (holding contract enforceable despite blanks in consideration section where agreement expressly required promisor to contribute "all his rights" in certain assets)).

II. THE COURT OF CHANCERY PROPERLY DETERMINED THAT THE UNITS WERE THE SOLE CONSIDERATION GRANTED TO DOORLY

A. Question Presented

Did the Court of Chancery err by determining as a matter of law the consideration supporting the Incentive Agreement's restrictive covenants when the Incentive Agreement explicitly articulates consideration exchanged and no party argued that the Incentive Agreement is ambiguous? This question was not raised below. A68-119.

B. Scope of Review

This Court reviews *de novo* the trial court's interpretation of written agreements. *Windsor I, LLC v. CWCapital Asset Mgmt. LLC*, 238 A.3d 863, 872 (Del. 2020). But "[o]nly questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented." Del. Sup. Ct. R. 8.

C. Merits of Argument

The Court of Chancery properly determined that the Units were the sole consideration for the Incentive Agreement's restrictive covenants.

NAF does not dispute that the lower court was permitted to interpret the Incentive Agreement on Doorly's motion to dismiss. Nor could it. The Incentive Agreement was attached as an exhibit to NAF's amended complaint (A39-67) and

formed the foundation for NAF's claims (*see, e.g.*, A14 ¶ 3). *See In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995) (observing that, on a motion to dismiss, courts may consider any documents "integral to a plaintiff's claim and incorporated in the complaint").

Instead, NAF contends that when evaluating the consideration supporting the Incentive Agreement's restrictive covenants, the Court was required to interpret a boilerplate recital in the Incentive Agreement referencing "other good and valuable consideration" as a vague term necessitating discovery. NAF Br. at 28. NAF is incorrect and its argument, once again, was not preserved for appeal. At the Court of Chancery, NAF identified specific provisions in the Incentive Agreement it contended formed the "other" consideration mentioned in the recital. A82-84. But those provisions imposed obligations on Doorly, reflecting consideration NAF obtained from him. NAF cannot argue on appeal that the same agreement which was once clear is now too vague to interpret.

1. The Court of Chancery Properly Interpreted the Express Terms of the Incentive Agreement and Gave NAF's Argument Invoking the Agreement's Boilerplate Reference to "Other" Consideration Its Fair Due

Section 6(a) of the Incentive Agreement identifies the Units as the consideration for the restrictive covenants. The *same* sentence that recognizes Doorly's acceptance of the restrictive covenants establishes the Units as the binding consideration for them. *See* A47 ("Executive agrees to abide by the covenants and

agreements set forth in Annex A…, and acknowledges that the Incentive Units being granted herein constitutes adequate and sufficient consideration in support of such covenants and agreements."). Neither Section 6(a) nor any other provision of the over 20-page Incentive Agreement identifies any consideration for the restrictive covenants apart from the Units. A40-67. Accordingly, the Court of Chancery properly concluded that "[i]t is not reasonable to infer that there was any other consideration beyond the Units." Op. at 8.

NAF nonetheless sought to establish the existence of independent consideration for the restrictive covenants by tying a recital in the Incentive Agreement referencing "other good and valuable consideration" to specific provisions in the Incentive Agreement. A82-84.[8] Yet, as the Court of Chancery rightly found, those provisions reflected not additional consideration to Doorly but rather additional obligations Doorly accepted as consideration to NAF "to receive the consideration in the form of the Units." Op. at 8.

Now, on appeal, NAF changes tack and argues in opposition to the position it asserted before the Court of Chancery. NAF now argues that the Incentive Agreement is too vague to ascertain the quantum of benefits Doorly received, but

[8] NAF cited to provisions of the Incentive Agreement requiring Doorly to execute a joinder to the NAF's limited partnership agreement, affirm that the Incentive Agreement did not create employment rights, and accept terms for vesting, repurchase, forfeiture, and post-separation. A82-84.

that it is reasonable for this Court to conclude NAF provided other consideration to Doorly and simply chose not to identify it in the Incentive Agreement, its operative pleading, or any of the prior proceedings. NAF Br. at 30-31.

It would be manifestly unjust for the Court to consider this argument, which reflects a 180-degree turn from NAF's prior position. *See supra* § I.C.2 (discussing failure to preserve arguments for appeal). And even if this Court considers NAF's new argument, the Court of Chancery's reasoning remains correct: the Incentive Agreement is clear on its face, and it identifies the sole consideration to Doorly in exchange for the restrictive covenants. A47 § 6(a). If the Incentive Agreement's boilerplate reference in a recital to "other good and valuable consideration" has meaning, it is to refer to the other consideration NAF obtained from Doorly. Op. at 8. In any event, "'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 n.26 (citing *Urdan v. WR Cap. P'rs, LLC*, 2019 WL 3891720, at *13 (Del. Ch. Aug. 19, 2019) (citing 17 Am. Jur. 2d *Contracts* § 373 (2019)), *aff'd*, 244 A.3d 668 (Del. 2020)).

NAF's authority is not to the contrary. NAF Br. at 28. NAF misstates *Moscowitz v. Theory Ent. LLC*, 2020 WL 6304899 (Del. Ch. Oct. 28, 2020), by suggesting that the court in that case deferred to a boilerplate recital on a motion to dismiss. NAF Br. 29-30. It did not. Rather, after observing that the boilerplate

recital indicated the existence of consideration, the court then engaged in an in-depth analysis of the existence and sufficiency of consideration based upon the remainder of the contract. *Id.* at *13-16. The case *Moscowitz* relies upon for its general statement of the law concerning recitals is even more explicit. *See TA Operating LLC v. Comdata, Inc.*, 2017 WL 3981138, at *23 (Del. Ch. Sept. 11, 2017) (noting that while a boilerplate clause "suggests that the parties' entry into the RFID Agreement was partial consideration for the Amendment[,] … I do not end the analysis here…."). Finally, NAF's invocation of the Restatement (Second) Contracts § 218 (A.L.I. 1981) is similarly unavailing. NAF Br. at 31. That provision addresses the appropriateness in certain circumstances of weighing recitals against evidence *outside* of a written agreement; it does not stand for the proposition that contracts that are clear on their face may not be interpreted on a motion to dismiss.

It is beyond cavil that the Court may interpret the unambiguous terms of a contract as a matter of law:

> Under Delaware law, the proper interpretation of language in a contract is a question of law. Accordingly, a motion to dismiss is a proper framework for determining the meaning of contract language. When the language of a contract is plain and unambiguous, binding effect should be given to its evident meaning.

Allied Capital Corp. v. GC-Sun Holdings, L.P., 910 A.2d 1020, 1030 (Del. Ch. 2006). Parol evidence is not admissible to interpret an agreement that is unambiguous on its face. *See SeaWorld Ent., Inc. v. Andrews*, 2023 WL 3563047,

at *6 (Del. Ch. May 19, 2023) (rejecting parties' "attempt to construct ambiguity out of extrinsic evidence"). The mere fact that the parties disagree as to the interpretation of a contract does not render the contract's language ambiguous as a matter of law. *See Exit Strategy, LLC v. Festival Retail Fund BH, L.P.*, 326 A.3d 356, 364 (Del. 2024) ("It is the sole province of the court to determine whether a contract is ambiguous, and the parties' disagreement over a contract's interpretation does not render it so.") (internal quotation marks omitted). Nor does a contract's boilerplate invocation of "other" consideration. *See Schron v. Troutman Sanders LP*, 20 N.Y.3d 430, 436-37 (2013) (affirming dismissal of complaint which sought to invalidate option agreement based on alleged failure of consideration not identified in the contract because "the commonplace recital of 'other good and valuable consideration' does not render the [contract] ambiguous or incomplete"); *see also In re Hertz Corp.*, 120 F.4th 1181, 1192 (3d Cir. 2024) (quoting *Schron*).

On appeal, NAF offers no plausible suggestion as to what "other" consideration *it gave to Doorly* but nonetheless urges this Court to hold that discovery is necessary to find out.[9] NAF may not impute subjective intentions of

[9] For the avoidance of doubt, to the extent NAF's passing reference to the Agreement's repurchase provisions (NAF Br. 18) is intended as an argument that those provisions constitute independent consideration for the restrictive covenants, that argument fails as well. First, those provisions created an *option* to be exercised at NAF's election, not a binding promise for Doorly's benefit. *Compare* A43 at § 3(c) (describing a "Repurchase Option" as to "all or any portion of the [Units]")

the parties to create ambiguity where the objective meaning of the Incentive Agreement is plain. "Because Delaware adheres to the objective theory of contracts, '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.'" *SeaWorld Ent., Inc.*, 2023 WL 3563047, at *6 n.66 (quoting and citing *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992)).

Underlying NAF's position is its insistence that a party can render the question of contractual consideration immune from challenge on a motion to dismiss by latching onto a boilerplate recital in an agreement and playing coy as to the plain meaning of that agreement. That is *not* the law. *Allied Capital*, 910 A.2d at 1030 (Del. Ch. 2006); *Urdan*, 2019 WL 3891720, at *13; *Schron*, 20 N.Y.3d at 437. Nor should it be.

Accordingly, the Court of Chancery properly held that the Units were the sole consideration for the restrictive covenants.

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with NAF Br. at 18 (characterizing the repurchase provision as "the Company's promise to repurchase"). Second, any benefit theoretically conveyed to Doorly by virtue of NAF's right to repurchase his Units did not constitute independent consideration but merely a dependent benefit contingent upon Doorly's possession of the Units—a contingent benefit that was clawed back together with the Units NAF seized. In any event, NAF did not preserve this argument for appeal. A68-119.

CONCLUSION

The Court should affirm the Court of Chancery's Order dismissing NAF's amended complaint. To the extent the Court is inclined to reverse any portion of that judgment, Doorly respectfully requests that this Court remand the case for resolution of Doorly's alternative arguments for dismissal, which were fairly presented but which the Court of Chancery elected not to address. *See* Op. 6 ("Because Defendant's first argument that the Incentive Agreement lacks consideration is sufficient, the court does not analyze whether the covenants are overbroad.").

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