EFiled: May 22 2026 02:14PM EDT
Filing ID 79534518
Case Number 83,2026

IN THE SUPREME COURT OF THE STATE OF DELAWARE

VORTEX MANAGEMENT AGGREGATOR, LP; VORTEX HOLDCO, LLC; and VORTEX COMPANIES, LLC, Plaintiffs-Below/ Appellants, v. NICHOLAS J. PATRICK, Defendant-Below/ Appellee.	No. 83,2026 **PUBLIC VERSION EFILED:** May 22, 2026 Court Below: Court of Chancery of the State of Delaware C.A. No. 2025-1305-NAC

APPELLANTS' REPLY BRIEF

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Dated: May 7, 2026

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PRELIMINARY STATEMENT

Nicholas Patrick is a sophisticated executive who accepted equity in a new partnership, watched that equity grow from [redacted] to [redacted] in under two years, then misled Vortex[1] into buying him out at full market value before immediately taking the helm of a direct competitor. He did so with open eyes, aware he was violating the Covenants and "waiting for the letter" from Vortex, yet confident it made no difference what he agreed to because he believed such covenants "don't stand up." The Covenants were reasonable in duration, geographic scope, and business coverage—and the court below never found otherwise. It struck them based solely on two definitional sub-clauses so obscure neither party had briefed what ultimately were the determinative issues. This result was at odds with the holistic reasonableness review Delaware law demands and the contract's plain language. The court also made final merits rulings at a stage that permitted only a probability assessment and dismissed a claim Patrick never contested.

Patrick's Answering Brief ("AB") does not answer those reversible legal errors. It does not defend—indeed, ignores—the trial court's failure to conduct the required holistic analysis, focusing on blue penciling rather than the underlying

[1] Capitalized terms have the meanings defined in Appellant's Opening Brief ("OB").

correctness of the court's analysis. It does not defend the importation of the PI Order conclusions into a Rule 12(b)(6) standard, instead arguing the court could have converted the motion to summary judgment, but conceding it did not. Nor does it seriously challenge Vortex's interpretation of the definitions the court found overbroad, only arguing (without any support or analysis) that even Plaintiffs' reading is overbroad. And it ignores Plaintiffs' showing that the Covenants' two-year duration, geographic scope, and business coverage are reasonable.

What remains is a factually discredited narrative attempting to portray Patrick as a powerless bystander yet ignoring that he voluntarily entered into a transaction from which he admittedly derived a "significant benefit." Virtually all factual statements on material issues in his Answering Brief are refuted by either contemporaneous documents or Patrick's own sworn testimony, or both. Patrick was represented by counsel, chose to exceed the minimum rollover threshold, and previously negotiated very similar covenants with Vortex (also while represented by counsel). He is not a sympathetic restricted party left with no viable employment options; he is President of a direct competitor (and before that was President of two other companies) who made a calculated bet against enforcement and lied to obtain a payoff to which he was not entitled. He now asks this Court to let him keep the winnings and continue to violate his agreement with impunity. Delaware's commitment to upholding contractual bargains does not permit that result.

REPLY ARGUMENT

I. PATRICK DISTORTS THE LOWER COURT'S DECISION AND IGNORES THE CORE ARGUMENTS ON APPEAL

A. The Court Made Legal Rulings, Not Factual Findings

Patrick's principal response on the procedural issues—that because expedited discovery occurred, the court was entitled to rule as it did—mischaracterizes the court's rulings. AB at 27–31. The court below did not weigh evidence, assess credibility, or make a single factual finding. *See* OB Exs. A, B. It did not find the Covenants unreasonable based on Patrick's actual role or conduct or the specific circumstances of the contract's formation. Nor did it make any evaluation of the record developed in discovery.

Instead, the court ruled as a matter of law—on the face of the contract—that the Covenants were unenforceable due to aspects of two definitional sub-provisions that theoretically could lead to overbroad enforcement. OB Ex. A. It then imported that legal finding of facial overbreadth from the PI Order into its Rule 12(b)(6) ruling without further analysis. OB at 23–25 & Ex. B. These are legal conclusions about contract language, subject to *de novo* review. *Lawson v. Meconi,* 897 A.2d 740, 743 (Del. 2006).

Patrick's "factual record" argument thus answers the wrong question: asking whether discovery occurred instead of what the court did (or did not do) with the discovery. *See* AB at 27–31. At the preliminary injunction stage, a court may not make "final conclusions regarding the merits of the parties' legal positions." *Sunder Energy, LLC v. Jackson*, 332 A.3d 472, 494–95 (Del. 2024). That prohibition is defined by the stage of the proceeding, not the existence or size of the record.[2] Patrick tries to distinguish cases primarily on the basis that a factual record existed here, *see* AB at 28–31, but he does not address the unprecedented nature of the court's rulings. *See* OB at 20–22.

To prevail on the MTD, Patrick had to show, and the court had to conclude, that Plaintiffs "could not recover under any reasonably conceivable set of circumstances." *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002). For a question of contract interpretation, that standard requires that the movant's reading be "the only reasonable construction as a matter of law." *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003). Accordingly, the court below erred by resolving the interpretation of the "Affiliate" and "Client" definitions against the non-movant, especially without addressing why Vortex's reading was unreasonable. *See id.*; *UtiliSave, LLC v. Miele,* 2015 WL 5458960, at *7 (Del. Ch.

[2] Patrick's characterization of the record as "fully developed" (AB at 29) is inaccurate. Indeed, there were just three depositions (one of which lasted 20 minutes) and fewer than 4,000 documents, assembled on a truncated schedule in response to limited discovery requests. *See* A1201.

Sept. 17, 2015) (contract "reasonably susceptible of two interpretations" was "incapable of reconciliation" at pleadings stage).

In any event, the court's adoption of the PI Order's ruling to decide the MTD was itself error. A preliminary injunction ruling cannot "dictate the outcome of a pleadings-stage motion" because "the pleadings stage test standard is lower than the merits-focused element of the preliminary injunction standard." *In re Comverge, Inc.*, 2014 WL 6686570, at *17 n.89 (Del. Ch. Nov. 25, 2014).

Patrick's suggestion that the court could have converted the MTD into a summary judgment motion is a red herring. *See* AB at 31. Patrick concedes the court did not convert the motion. *Id*. Doing so would have required at least ten days' notice and an opportunity to present Rule 56 materials. *Appriva S'holder Litig. Co., LLC v. EV3, Inc.*, 937 A.2d 1275, 1288 (Del. 2007); *see Furman v. Del. Dep't of Transp.*, 30 A.3d 771, 772–74 (Del. 2011) (failure to notify parties of conversion "was not harmless"). Vortex received neither.

B. Patrick Is Silent on Plaintiffs' Most Consequential Arguments

Also noteworthy is what Patrick's brief does not address. Patrick devotes nearly his entire "reasonableness" section to blue penciling—a remedy for confirmed overbreadth, not a substitute for holistic reasonableness review. *See* AB at 33–35. He offers virtually no defense on the framework the court failed to apply, the dimensions of the Covenants the court did not assess, or the record evidence

Plaintiffs assembled satisfying each preliminary injunction element. *Compare id. with* OB at 23–33.

Patrick's sole engagement with the holistic reasonableness framework is a single paragraph implying that the court conducted holistic review by finding the Covenants overbroad "as to whom they covered, when they applied, and where they operated geographically." AB at 33 (quoting *Sunder Energy*, 332 A.3d at 485). This assertion re-characterizes what the court found—conclusions about two definitional sub-clauses—and calls that holistic review. However, the Orders contain no findings on the Covenants' duration, their geographic scope relative to Vortex's business, Vortex's legitimate economic interests, the balance of equities, or the scope of Patrick's role and admitted conduct. *See* OB at 23–25.

Identifying two definitional sub-clauses as overbroad through *sua sponte* hypotheticals, without engaging on any of the Covenants' other dimensions, is precisely the "tick[ing] through individual features of a restriction in isolation" that Delaware law prohibits. *Cleveland Integrity Servs., LLC v. Byers*, 2025 WL 658369, at *8 (Del. Ch. Feb. 28, 2025); *see also Hub Grp., Inc. v. Knoll*, 2024 WL 3453863, at *8 (Del. Ch. July 18, 2024) (courts must consider "all of the dimensions of the restrictive covenant"). Patrick cites no authority for the proposition that this analysis satisfied Delaware's holistic review requirement. He cannot, because none exists.

Patrick's treatment of the definitional issues is even thinner. He does not engage at all with Plaintiffs' textual analysis showing that the "Affiliate" definition's clauses (i)–(iv) apply only to corporate covenantors, not natural persons, and that the court's contrary reading rested on a fundamental structural error. *See* OB at 33–35. In other words, he does not contest that a proper reading of the plain language shows that the court's sole stated concern with the non-compete—that it might extend to family members of Patrick's affiliates—is unfounded. His response that even Vortex's narrower reading is "still overbroad" silently concedes that the court's interpretation was wrong. *See* AB at 35.

On the "Client" definition, Patrick devotes a single sentence to suggesting Vortex's reading may make things more vague, but nowhere explains why the "Business" definition's limiting principle fails to cure the specific temporal overbreadth concern the court identified. *See* AB at 35-36.

II. IF OVERBREADTH IS UPHELD, ANY BLUE PENCILING WOULD BE MINIMAL AND SUPPORTED BY THE UNDERLYING POLICY CONSIDERATIONS

A. Should the Court Uphold Either Overbreadth Ruling, Blue Penciling Here Would Be Minimal and Appropriate

Patrick's primary rebuttal on blue penciling—that it would require "completely rewriting the Covenants" because the court found "multiple independent overbreadth problems"—is wrong. *See* AB at 4, 35. The trial court's overbreadth findings were confined to two discrete definitional sub-provisions. *See* OB Exs. A, B. In fact, it struck the non-compete based solely on one part of the "Affiliate" definition. *Id.* The court did not find overbroad core aspects of the Covenants—their duration, geographic scope, and scope of restricted business activity. *Id.*

Blue penciling to address the court's concerns thus would mean excising a mere handful of words housed within two limited definitional provisions and giving effect to the remainder of the Covenants exactly as written. *See id.* at 41–42. Indeed, doing so is consistent with the parties' intent as stated in LPA § 12.12, which calls for severance of provisions found unenforceable "to effect the original intent of the parties as closely as possible." *See id.* § 12.10(f) (calling for blue penciling or striking such provisions).

As to the "Affiliate" definition, a clear reading of the provision renders blue penciling unnecessary altogether. OB at 33–35. To the extent the Court nonetheless considers modification, it could either (1) excise sub-clause (iii) of that definition—removing 16 words—while leaving the core controlling-relationship definition undisturbed; or (2) add a single word to clarify that sub-clauses (i)-(iv) refer to a legal entity, making the relevant portion read: "provided, further, that an Affiliate of any *non-natural* Person shall also include . . . ." *See* LPA at A0128; OB at 33–35.

As to the "Client" definition, the court could either (1) excise the 42 words of subpart (c), preserving the non-solicit's protection of actual Vortex customers under subparts (a) and (b); or (2) move the designation of clause "(a)" so the lookback period comes before that designation and thus clearly applies to all three sub-clauses.[3] LPA at A0129; OB at 35–37.

Such minimal, targeted changes bear no resemblance to the wholesale reconstruction at issue in *Sunder Energy*, where the Court would have had to redefine from scratch both the covered persons and the restricted conduct. *See* 332 A.3d at 485–86.

[3] Alternatively, if the Court simply removes the "(a)," "(b)," and "(c)" designations, the 24-month lookback would apply equally to all three sub-clauses.

Patrick's contention that addressing these findings would "rewrite" the "core" terms that "drive" the Covenants' provisions is unjustified. *See* AB at 35. The sub-provisions at issue are not "key" operative terms but definitional sub-clauses that say nothing about the parties' agreement as to the restrictions' geographic breadth, temporal duration, or scope of prohibited business activity. The definitional refinements at issue are more peripheral, more mechanical, and more easily severable than any geographic or temporal trimming. And Patrick cites no case law for a different view—because there is none. As Plaintiffs have demonstrated, no Delaware court has ever invalidated a restrictive covenant based solely on definitional sub-provisions while making no adverse finding on geographic, temporal, or business scope. *See* OB at 21–22. Thus, it is unsurprising no authority exists pointing out the obvious: that a minor edit to a definition is less disruptive than blue penciling more frequently-negotiated terms such as duration or geography.

Nor do Patrick's repeated assertions of no bargaining power support refusing to blue pencil. *See* AB at 36–38. In *Sunder Energy*, the Court confronted restricted parties who were not aware of—let alone involved in—negotiations concerning the covenants, never had the covenants explained to them, were pressured to sign on New Year's Eve without advance review of the agreement's material changes, and received minimal-to-no separate compensation. 332 A.3d at 488–89.

Here, by contrast, Patrick was represented by counsel who negotiated the terms, and he received advance drafts. OB at 11–13. His participation in the rollover was entirely voluntary, and he elected to roll over more equity than the minimum required, receiving what he described as a "significant benefit." *Id*. And the rollover was a condition of becoming an equity holder—not a condition of employment, as Patrick implies. *See* AB at 35–37; OB at 11–12. In short, Patrick "voluntarily entered into the partnership and the Agreement" and then "elected to compete," thereby assuming the risk of the agreed consequences. *Cantor Fitzgerald, L.P. v. Ainslie*, 312 A.3d 674, 692 (Del. 2024).

B. Patrick Misconstrues the Controlling Framework for Blue Penciling

Patrick's response to Vortex's policy arguments attacks the facts of controlling precedent while ignoring its holdings. *See* AB at 38–39. To start, *Ainslie*'s significance is its framework stating Delaware courts will decline to uphold the parties' freely negotiated agreements only upon "a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract." *Ainslie*, 312 A.3d at 689. It directs courts to give "maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements." *Id*. at 688. Here, the parties' severability clause (LPA § 12.12) reflects the parties' intent to give maximum effect to their agreed-upon terms. *See also* LPA § 12.10(f). Patrick identifies no public policy stronger than freedom of contract that declining to blue pencil would vindicate.

Patrick likewise ignores *Labyrinth*'s governing standard. *See* AB at 37–38. *Labyrinth* holds that whether to blue pencil requires a "fact-intensive" equitable inquiry centered on bargaining power—and that covenants arising from a business sale are subject to a "less searching" inquiry precisely because such deals "typically [do] not involve disparate bargaining power." *Labyrinth, Inc. v. Urich*, 2024 WL 295996, at *23–24 (Del. Ch. Jan. 26, 2024). The trial court here never conducted that inquiry. *See* OB at 41–42.

Whatever Patrick's role in the LPA negotiations, this is exactly the "flipped" side of the "no-lose" scenario *Labyrinth* identifies. Patrick was a management equity holder who voluntarily entered a sophisticated rollover transaction, accepted substantial consideration, and then competed in deliberate violation of restrictions he knew he had assumed—leaving him with the transaction's upside and none of its burdens. *Labyrinth*, 2024 WL 295996, at *23–24; *but cf. Sunder Energy*, 332 A.3d at 488.

III. PATRICK'S FACTUAL ACCOUNT RUNS CONTRARY TO THE EVIDENCE AND CANNOT SUPPORT HIS ARGUMENTS ON THE APPLICABLE STANDARD

A. The Record Refutes Patrick's Factual Narrative

Despite full knowledge of the contrary record, Patrick doubles down on his attempts to recast himself as a narrowly-scoped, mid-level employee who acquired no meaningful Vortex-specific knowledge, had no meaningful involvement with MICROcure and its competitor products, solicited no Vortex customers, and is now subject to a covenant that leaves him with "nothing" to do. *See* AB at 6–26. He supports his factual narrative almost exclusively with a self-serving post-deposition affidavit and a carefully curated selection of his own deposition excerpts, omitting key testimony in which he recanted his positions when confronted with the documents. *See id*. As Plaintiffs have repeatedly shown, his account cannot be reconciled with the evidence. *See* OB at 8 n.4; A0414–A0417.

For instance, Patrick again claims the "only Vortex-specific knowledge" he acquired concerned two product lines. AB at 12. But the evidence shows that over his five years at Vortex, Patrick bore responsibility for R&D across *all* Vortex product lines; extensively tested, trained on, and cross-sold Vortex's products; and had the second-highest access level to Vortex's confidential information (including customer lists, pricing, financials, and competitive strategy across a range of products). OB at 6–10. Patrick also attended executive strategy and business development meetings (including some involving as few as seven of Vortex's top executives), regularly represented Vortex at international trade shows and on-site with customers, and traveled globally at Vortex's expense, interacting with "hundreds of customers" across "everywhere Vortex did business." OB at 9–10.

In turn, Polinvent hired him precisely because it sought a well-connected executive with deep customer relationships and insider product and strategy expertise. OB at 15. Patrick's own brief also contradicts his narrative, as it touts his roles as President of two companies before becoming President of Polinvent USA. *See* AB at 8.

Patrick also inaccurately frames his post-2022 position as narrow "technical support." AB at 11–12. He testified to the same effect at his deposition—until confronted with documents. Then, he admitted to receiving extensive confidential information in 2024 across virtually all of Vortex's products and business (including customers, pricing, competitive intelligence, and strategic planning). OB at 8 n.4; A0414–A0416. And contemporaneous documents show that in 2023, he oversaw and helped resolve MICROcure product issues for Vortex customers (A0703), and continued attending international industry conferences and interacting with countless customers on Vortex's products (*e.g.,* A0836 (key takeaways from 2023 Ro-Ka-Tech industry conference—including Patrick's own notes—relating to various Vortex customers, distributor partnerships, contract manufacturing, competitor notes, and other general matters)).

Then there is MICROcure—a product Patrick now directly competes against. He once more denies having conducted head-to-head testing of competing LED curing models and quotes his own deposition testimony to imply Vortex "didn't have the system." *See* AB at 12–13. But Patrick ignores that contemporaneous documents and his later testimony confirm his deep involvement in MICROcure training, testing, pricing, sales, and development, as well as Vortex's access to MICROcure, Sewerbot, and SpeedyLight systems for testing. *See* OB at 8–9; A0414–A0415.[4] Nor is his assertion that he "knew the advantages and differences of these systems before Vortex" (AB at 25) remotely plausible, when the technology was brand-new when Vortex acquired it in 2022—two years after Patrick joined the company—and Patrick ran tests on an updated Sewerbot throughout 2024. *See* OB at 8–9.

Patrick also tries to obfuscate his Covenant breaches by once again downplaying both the competitive overlap and his own conduct. *See* AB at 24–25.

[4] *Compare, e.g.,* A1221 at 273:14–275:7 (claiming he did no MICROcure testing and gained no additional technical knowledge) *with, e.g.*, *id*. at 294:8–308:15 (admitting, while reviewing documents, that he was "involved" with testing MICROcure and troubleshooting its errors for Vortex customer) *and* A0981 (emailing comparative testing results between MICROcure and Sewerbot).

Although he attempts to revive the notion that Polinvent USA and Vortex do not compete because Polinvent "views Vortex as its customer" (AB at 25), the trial court found that assertion "strongly against common sense." A0457 at 49:11–24, 51:12–52:11, 57:6–15. And Patrick himself admitted the companies sell competing products to the same end users. *See* OB at 15–16 & n.8; A0431–A0433. And though he categorically denies soliciting any Vortex customers (AB at 24), by his own admissions, he engaged at least three known Vortex customers about Polinvent products. OB at 8 n.4, 16; A0433–A0436.

Taken together, the record is irreconcilable with Patrick's litigation-constructed narrative: he was a senior executive with broad access to Vortex's most sensitive commercial and technical information, deep involvement across its product lines, meaningful equity in the merger, and multiple viable employment alternatives post-termination. *See* OB at 6–16; A1330 at 75:14–76:11 (discussing viable industry jobs available to Patrick without violating the non-compete).

B. The Sale-of-Business Standard Is Appropriate Despite Patrick's Factual Misrepresentations

Patrick relies on his debunked narrative to support each of his legal theories—including his challenge to the business-sale standard. *See* AB at 36–38. Yet Patrick was not a powerless "mid-level employee" with no meaningful representation who could not negotiate the Covenants and received nothing more than investment risk for signing them. *Cf. id*. And he does not provide a single document in support of his sale-of-business argument or cite a single authority other than to distinguish the *Derge* case Plaintiffs cited.

Patrick's lament that he lacked individual counsel during the merger and that counsel never "provide[d] Defendant with advice, much less discussion, on the Covenants" (AB at 30) misses the point. The inquiry is whether he was represented (he was), not whether he extracted maximal value from that representation or it met certain qualitative standards. His deposition testimony suggests he did not seek specific advice on the Covenants not because he lacked the chance, but because—as his contemporaneous communications show—he believed courts would not enforce them. OB at 16. Patrick also knew how to negotiate covenants when he wished: represented by counsel, he agreed to a five-year non-compete and non-solicit in the TPR acquisition. *Id.* at 6. He chose not to specifically negotiate here (though his counsel did so on his behalf). That is a business decision, not a basis to void the Covenants.

Nor is Patrick's claim that he received "no separate consideration" for the Covenants justifiable. *See* AB at 30, 36–38. Indeed, it defies both the record and black-letter contract law. The rollover gave Patrick rights he did not previously hold and to which he had no previous legal entitlement: equity in the Partnership, the right to distributions, and participation in any future upside. OB at 11–12 *but cf. Cigna Health & Life Ins. Co. v. Audax Health Solutions, Inc.*, 107 A.3d 1082, 1088 (Del. Ch. 2014) (finding transmittal letter lacked consideration because it required stockholders to release claims in exchange for payment they were already entitled to by law).

That the equity carried investment risk, as all equity does, does not render the consideration valueless. *N. Am. Fire Ultimate Holdings, LP v. Doorly*, 2026 WL 274647, at *3–4 & n.15 (Del. Feb. 3, 2026) ("somewhat contingent" value of incentive units was "not illusory at the time of formation" as the "diminished value of the economic benefit conferred, or even a complete lack of value, does not result in a failure of consideration"); *see also Moscowitz v. Theory Ent. LLC*, 2020 WL 6304899, at *16 (Del. Ch. Oct. 28, 2020) ("Absent fraud or unconscionability, the adequacy of consideration is not a proper subject for judicial scrutiny.").

Patrick's attempt to distinguish *Derge* is equally unavailing. *See* AB at 37 (citing *Derge v. D&H United Fueling Solutions, Inc.*, 2025 WL 3511065, at *6 (Del. Ch. Dec. 8, 2025)). He argues the COO there was a "top executive" who received "substantial consideration" in a merger conditioned on his agreement, whereas Patrick was "either in or out." *Id*. But the management limited partners' assent to the Covenants here was expressly stated as a material condition of the merger. OB at 11. And the *Derge* court rejected this very argument because the defendant, unable to block the merger based on his less than 1% ownership, "could have declined to sign the Agreement." 2025 WL 3511065, at *6. The court applied the less-searching inquiry precisely because those dynamics, standing alone, do not establish unequal bargaining power or a contract of adhesion. *Id*. Nor has this Court ever adopted a bright-line rule that restrictive covenants are only enforceable against C-suite employees and not against managers and equity holders at a slightly lower echelon.

IV. THE TRIAL COURT ERRED IN DISMISSING THE LEGALLY DISTINCT FORFEITURE CLAIM

A. Patrick Never Challenged the Forfeiture Claim, and the Court Should Not Have Dismissed It *Sua Sponte*

Because Patrick had the burden to articulate and brief all theories on which he based the MTD, the trial court erred in not separating Plaintiffs' unchallenged forfeiture claim from Plaintiffs' claim for injunctive relief and damages. Patrick argues that because his motion sought to dismiss the "entire Complaint," it also encompassed the forfeiture claim. AB at 40. But a blanket motion to dismiss is not a challenge to a specific, independently-pled theory. *See Mack v. Rev Worldwide, Inc.*, 2020 WL 7774604, at *16 (Del. Ch. Dec. 30, 2020) (defendant "bears the burden of asserting all grounds supporting the defense," at which point "substantive arguments not briefed are deemed waived").

Patrick bore the burden of articulating each basis for dismissal, including all theories he intended to challenge. *Jung v. El Tinieblo Int'l, Inc.*, 2022 WL 16557663, at *3 n.18 (Del. Ch. Oct. 31, 2022) (because defendant did not brief dismissal under certain rules, "any argument that the Complaint should be dismissed under those rules is deemed waived"); *Thor Merritt Square, LLC v. Bayview Malls LLC*, 2010 WL 972776, at *5 (Del. Ch. Mar. 5, 2010) (defendant waived futility arguments by not raising them in opening brief); *see Johnson v. Paterson Hous. Auth.*, 2019 WL 1439118, at *6 n.6 (D.N.J. Apr. 1, 2019) (even if plaintiff failed to establish certain *Monell* elements, dismissal on that ground was "inappropriate" where defendant neither identified those elements nor argued they were not pled).

Plaintiffs had no duty to argue against theories Defendant did not brief. *Thor Merritt Square*, 2010 WL 972776, at *5. Indeed, the trial court recognized that distinction when it preserved the confidentiality claim because neither party briefed it—the forfeiture claim should have received the same treatment for the same reason. *See* OB Ex. B (holding neither PI Motion nor MTD addressed the confidentiality provision and thus claims based on that provision survived). The forfeiture claim is no different.

And despite Patrick's contention to the contrary, Plaintiffs independently pled the forfeiture claim. Delaware does not require any formula to sufficiently state a claim; rather, claims are "well-pleaded" if they "put[] the opposing party on notice of the claim being brought against it." *VLIW Tech.*, 840 A.2d at 611; *see also Thomas v. Luzerne Cnty. Corr. Facility*, 310 F. Supp. 2d 718, 721 (M.D. Pa. 2004) (separate claims need not be stated in separate counts unless necessary for clarity). Here, Plaintiffs discussed the forfeiture provision in the body of the Complaint, then incorporated it into the breach of contract count. Compl. ¶¶87–88 & 92 (discussing forfeiture provision); *id.* ¶121 (incorporating prior discussion by reference). And, as Patrick acknowledges, Plaintiffs explicitly requested forfeiture of the equity buyout funds in the prayer for relief. AB at 40; Compl. at 39–40. Thus, the Complaint put Patrick "on notice" that Plaintiffs intended to pursue recovery under the LPA's forfeiture provision.

B. The Forfeiture Claim Is Legally Independent of the Covenants' Enforceability

Because Patrick waived any argument on the forfeiture claims, this Court need not reach the merits to reverse the dismissal. But to the extent this Court considers Defendant's post hoc effort to justify the ruling, this Court's precedent still mandates reversal, because forfeiture claims are legally separable from breach-of-covenant claims and not subject to the same reasonableness review.

Patrick argues that the LPA's forfeiture provision in Section 9.7(a) "expressly relies upon breach of the Covenants the Court of Chancery held were unenforceable" and that there is "no analogue" to the "Competitive Activity Condition" that this Court upheld in *Ainslie*. AB at 41. His argument conflates the *definition* of prohibited activity with the Covenants' *enforceability* as injunctive restrictions. The trial court's ruling on the Covenants' enforceability as standalone restrictions does not affect their use as the standard of prohibited activity to trigger the forfeiture provision. *See Ainslie*, 312 A.3d at 690–92 (holding non-compete could serve as condition precedent for retention of a benefit even without supporting injunctive relief). Because forfeiture provisions operate as conditions precedent to payment, not restraints on trade, they are not subject to reasonableness review. *Id.* at 686–88.

This Court recently confirmed in *LKQ Corp. v. Rutledge* that employee choice doctrine, not restrictive covenant reasonableness review, governs forfeiture provisions, as any public policy concern is “diminished—if it does not vanish” where only economic forfeiture is at issue. 337 A.3d 1215, 1222 (Del. 2024). The court’s finding of unreasonableness thus does not justify dismissal of the separate forfeiture claim.

V. PATRICK'S NON-CONTRACT ARGUMENTS FAIL

A. For Fraud, Plaintiffs Alleged False Statements of Present Intent, Not Future Promises

Patrick characterizes his pre-departure statements as "forward-looking expressions of intent and aspiration" and argues Plaintiffs did not allege facts showing he intended to compete "at the time of the March 2025 meeting[.]" AB at 43. Yet Patrick overlooks that statements of present intent, including the speaker's present intent about future actions, may underpin a fraud claim and may be averred generally, as with other allegations regarding a defendant's state of mind. *MicroStrategy Inc. v. Acacia Res. Corp.*, 2010 WL 5550455, at *15–16 (Del. Ch. Dec. 30, 2010).

In *MicroStrategy*, the defendant told the plaintiff it had no intention of pursuing further litigation against the plaintiff, while simultaneously acquiring another patent for that purpose. *Id.* at *2–3. The court held those assurances constituted false statements of present fact on intentions, confirming a defendant's state of mind need only be pleaded generally. *Id.* at *16. Here, Patrick also made a false statement of his present intent: he told Vortex he had no intention of competing while arranging to lead a direct competitor's U.S. operations. Thus, Plaintiffs need only aver generally as to Patrick's state of mind. *See* OB at 45–46; Compl. ¶142.

Moreover, despite Patrick's assertion that the "robust factual record" "belie[s]" Vortex's claim (AB at 44), subsequent discovery has borne out Plaintiffs' allegations. Discovery confirms that by January 2025—well before the March 2025 separation meeting—Patrick already was actively contacting Polinvent about leading its U.S. Sewerbot distribution. A1002. And, despite Patrick's argument that Plaintiffs alleged no "specific reliance" (AB at 44), he admitted he knew Vortex would not have bought out his equity if he had disclosed his competitive plans. *See* A1221 at 335:15–22, 337:4–23.

B. Patrick's Argument, and the Trial Court's Rulings, Effectively Eliminate Unjust Enrichment as Alternative Pleading

Once the court doubted the Covenants' validity, it should have permitted Plaintiffs' unjust enrichment claim to proceed, ensuring a remedy for the party performing under an ultimately unenforceable contract. OB at 47. Defendant relies on *WIA Holdings* to argue that unjust enrichment fails where a contract "comprehensively governs" the relationship. AB at 45. But *WIA Holdings* presupposes an enforceable contract. *See WIA Holdings LLC v. Scot. Am. Cap. LLC*, 2026 WL 1204494, at *3–4 (Del. Ch. Jan. 20, 2026) (discussing the parties' contentions, which do not include a dispute about the contract's validity). If the Covenants are unenforceable, they cannot simultaneously operate as the exclusive measure of the parties' rights. *Bakerman v. Sidney Frank Importing Co.*, 2006 WL

3927242 (Del. Ch. Oct. 10, 2006) ("[C]laims of unjust enrichment may survive a motion to dismiss when the validity of the contract is in doubt or uncertain."). Unjust enrichment exists precisely to fill this gap.

Patrick's argument that there is "nothing unjust about any enrichment to Mr. Patrick if the Covenants are not enforceable" (AB at 46) is circular reasoning that, at best, would effectively destroy unjust enrichment as a cause of action. It would immunize any party that invalidates a contract from returning benefits received for a promise the other party can no longer enforce. *See* Restatement (Third) of Restitution and Unjust Enrichment, § 31, cmt. b (2011).

Similarly, Patrick's assertion that Vortex "never [took] the position that the LPA was procured by fraud or is otherwise invalid" misses the mark. *See* AB at 46. Vortex is not required to doubt the Covenants' enforceability to plead alternate theories. *See, e.g., Indep. Enters. v. Pittsburgh Water & Sewer Auth.*, 103 F.3d 1165, 1175 (3d Cir. 1997) (plaintiffs may plead legally and factually inconsistent claims, and a court "may not construe" one claim as an admission against another). Rather, that is precisely why alternative theories like unjust enrichment exist—providing a remedy for a party that performed should the court ultimately strike down the contract's validity. Restatement (Third) of Restitution and Unjust Enrichment, § 31, cmt. b (2011).

CONCLUSION

For these reasons, and those set forth in Appellants' Opening Brief, this Court should reinstate the claims dismissed with prejudice and remand with instructions to enter preliminary injunctive relief enforcing the Covenants pending final adjudication.

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Dated: May 7, 2026