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Case Number 110,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LKQ CORPORATION, Plaintiff/Counter-Defendant – Appellant, v. ROBERT RUTLEDGE, Defendant/Counter-Claimant – Appellee.	No. 110, 2024 Certification of Questions of Law from the United States Court of Appeals for the Seventh Circuit (No. 23-2330) There on appeal from the United States District Court for the Northern District of Illinois, Eastern Division (No. 1:21-cv-03022)

MOTION OF MANAGED FUNDS ASSOCIATION AND SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

Pursuant to Rule 28 of the Supreme Court of Delaware, Managed Funds Association ("MFA") and Securities Industry and Financial Markets Association ("SIFMA") respectfully move for leave to file the accompanying *amici curiae* brief in support of Plaintiff-Appellant LQK Corporation. MFA and SIFMA have consulted with counsel for the parties to this appeal to confirm their positions with respect to the instant motion. Neither Plaintiff-Appellant nor Defendant-Appellee oppose this motion.

INTEREST OF *AMICI CURIAE*

Here, on behalf of the business communities they represent, MFA and SIFMA

have an interest in ensuring that Delaware remains a leader of sensible business practices and policies that are predictably upheld by its courts. Businesses regularly rely upon forfeiture-for-competition agreements because of their many pro-competitive benefits. Given that "[m]ore than 1,000,000 business entities have made Delaware their legal home" and "[m]ore than 66% of the Fortune 500 have chosen Delaware as their legal home,"[1] amici have a strong interest in ensuring that Delaware courts properly recognize those benefits and consistently enforce forfeiture-for-competition agreements.

Managed Funds Association ("MFA"), based in Washington, D.C., New York, Brussels, and London, represents the global alternative asset management industry. MFA's mission is to advance the ability of alternative asset managers to raise capital, invest, and generate returns for their beneficiaries. MFA advocates on behalf of its membership and convenes stakeholders to address global regulatory, operational, and business issues. MFA has more than 180 member fund managers, including traditional hedge funds, credit funds, and crossover funds, that collectively manage over $3.2 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate

[1] *See* Delaware Division of Corporations, *About the Division of Corporations*, *available at* https://corp.delaware.gov/aboutagency/.

attractive returns over time.

Securities Industry and Financial Markets Association ("SIFMA") is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. SIFMA advocates on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. SIFMA serves as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. SIFMA also provides a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association.

REASONS WHY AN *AMICI CURIAE* BRIEF IS DESIRABLE AND RELEVANCE OF THE MATTERS DISCUSSED

As set forth in greater detail in the *amici curiae* brief, forfeiture-for-competition agreements are especially beneficial in the financial services industry as they provide clear, voluntary options for increased compensation to employees, promote the protection of trade secrets and workforce stability (and associated client interests), and enhance incentives for rigorous compliance efforts and associated employee discipline in the rare instances when needed.

Both MFA and SIFMA have considerable experience representing the interests of legal entities, including many that are organized in Delaware. They

submit *amicus curiae* briefs to state and federal courts on legal issues important to their members They are accordingly well-positioned to espouse the benefits of the employee doctrine and highlight the negative consequences of applying a reasonableness test requirement to forfeiture-for-competition agreements. MFA and SIFMA therefore respectfully submit that its *amici curiae* brief will be helpful to the Court.

CONCLUSION

For the foregoing reasons, the Court should permit MFA and SIFMA to file the accompanying *amici curiae* brief.

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Dated: May 10, 2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LKQ CORPORATION, Plaintiff/Counter-Defendant – Appellant, v. ROBERT RUTLEDGE, Defendant/Counter-Claimant – Appellee.	)	No. 110, 2024 Certification of Questions of Law from the United States Court of Appeals for the Seventh Circuit (No. 23-2330) There on appeal from the United States District Court for the Northern District of Illinois, Eastern Division (No. 1:21-cv-03022)

CERTIFICATE OF COMPLIANCE WITH
TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

I hereby certify that:

1. This motion complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word.

2. This motion complies with the type-volume limitation of Rule 14(d)(i) because it contains 596 words, which were counted by Microsoft Word.

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[PROPOSED] ORDER

UPON CONSIDERATION of the Motion of Managed Funds Association and Securities Industry and Financial Markets Association for Leave to File Brief as *Amici Curiae* in Support of Plaintiff-Appellant, it is hereby ORDERED AND DECREED that the Motion is GRANTED.

Dated:_____, 2024

_____
J.

EXHIBIT A

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LKQ CORPORATION, Plaintiff/Counter-Defendant – Appellant, v. ROBERT RUTLEDGE, Defendant/Counter-Claimant – Appellee.	No. 110, 2024 Certification of Questions of Law from the United States Court of Appeals for the Seventh Circuit (No. 23-2330) There on appeal from the United States District Court for the Northern District of Illinois, Eastern Division (No. 1:21-cv-03022)

BRIEF OF MANAGED FUNDS ASSOCIATION AND SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICI CURIAE* SUPPORTING APPELLANT AND REVERSAL

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Dated: May 10, 2024

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Managed Funds Association ("MFA"), based in Washington, D.C., New York, Brussels, and London, represents the global alternative asset management industry. MFA's mission is to advance the ability of alternative asset managers to raise capital, invest, and generate returns for their beneficiaries. MFA advocates on behalf of its membership and convenes stakeholders to address global regulatory, operational, and business issues. MFA has more than 180 member fund managers, including traditional hedge funds, credit funds, and crossover funds, that collectively manage over $3.2 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time.

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New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association.

Both MFA and SIFMA submit *amicus curiae* briefs to state and federal courts on legal issues important to their members. Here, on behalf of the business communities they represent, MFA and SIFMA have an interest in ensuring that Delaware remains a leader of sensible business practices and policies that are predictably upheld by its courts. Businesses regularly rely upon forfeiture-for-competition agreements because of their many pro-competitive benefits. Given that "[m]ore than 1,000,000 business entities have made Delaware their legal home" and "[m]ore than 66% of the Fortune 500 have chosen Delaware as their legal home",[1] amici have a strong interest in ensuring that Delaware courts properly recognize those benefits and consistently enforce forfeiture-for-competition agreements. As set forth in greater detail below, forfeiture-for-competition agreements are especially beneficial in the financial services industry as they provide clear, voluntary options for increased compensation to employees, promote the protection of trade secrets and workforce stability (and associated client interests), and enhance incentives for rigorous compliance efforts and associated employee discipline in the rare instances when needed.

[1] *See* Delaware Division of Corporations, *About the Division of Corporations*, *available at* https://corp.delaware.gov/aboutagency/.

SUMMARY OF ARGUMENT

1. Delaware law is fundamentally contractarian, enforcing contracts as written without judicial second-guessing of bargained for terms. There is a limited deviation from this approach in which Delaware courts apply a reasonableness review to affirmative non-compete agreements because such agreements (a) affirmatively forbid an employee's post-employment competition; and (b) require courts to exercise their equitable powers to enforce such agreements (via injunction or specific performance). But forfeiture-for-competition agreements are different: they do not bar an employee from working for a competitor post-termination nor do they require courts to invoke their equitable powers to enforce them. This dynamic is the same for forfeiture-for-competition provisions in partnership and employment agreements, and for the reasons set forth in *Cantor Fitzgerald, L.P. v. Ainslie*, -- A.3d --, 2024 WL 315193 (Del. Jan. 29, 2024), there is no basis to require a reasonableness review for forfeiture-for-competition agreements in either. Instead, it is appropriate under Delaware law to enforce employee forfeiture-for-competition agreements in accordance with their terms.

2. Even if Delaware "common law's disfavor of forfeitures," which does not extend to partnership agreements as a matter of statute, applies to employment agreements, this principle of contract *interpretation* is inapplicable here. *Id*. at *13. This principle does not operate to preclude enforcement of a forfeiture agreement

where, as here, "the language of a contract is plain and unambiguous"; in such a situation, "a court should construe the contract according to its terms." *Larian as Trustee of Larian Living Trust v. Momentus, Inc.,* 2024 WL 386964 *9 (Del. Super. Jan. 31, 2024). Forfeiture-for-competition agreements like the one here, as their very moniker confirms, are unambiguous: if the employee chooses to compete, he or she forfeits the additional benefits provided as part of the agreement.

3. The vast majority of courts that have confronted the issue presented here have embraced the "employee choice doctrine," holding that because forfeiture-for-competition agreements do not prevent an employee from working for a competitor (or any other entity) post-termination, such agreements are enforced by their terms without a reasonableness review. As stated by the New York Court of Appeals, the doctrine "rests on the premise that if the employee is given the choice of preserving his rights under his contract by refraining from competition or risking forfeiture of such rights by exercising his right to compete, there is no unreasonable restraint upon an employee's liberty to earn a living." *See, e.g., Morris v. Schroder Cap. Mgmt. Int'l*, 859 N.E.2d 503, 506 (N.Y. 2006) (following *Post v. Merrill Lynch, Pierce, Fenner & Smith*, 397 N.E.2d 358, 360 (1979) (same)). True to its name, this doctrine extends to employment agreements, not just partnership agreements. Rejecting the employee choice doctrine would not only run afoul of this Court's logic in *Cantor Fitzgerald* (and its rejection of *Pollard v. Autotote, Ltd.*, 852 F.2d

67, 72 (3d. Cir. 1988) (wrongly suggesting Delaware would not adopt the employee choice doctrine)), but it would also place Delaware out of step with other states with similar legal schemes, likely affecting the choices of employers concerning where to incorporate or direct their legal disputes.

4. Forfeiture-for-competition agreements provide benefits to employers *and* employees. Instead of preventing workers from accepting employment with competitors, forfeiture-for-competition agreements give employees choices: first, employees have the initial choice to accept additional benefits that accrue if they do not join a competitor post-termination, and then second, employees later have the choice to forego competition and obtain the additional benefits or compete and forfeit them. Forfeiture-for-competition agreements also promote trade secret protection and workforce stability, and they provide a clear understanding of the consequences of competition, which results in more efficient enforcement and allows employees to negotiate with new, competitive employers to backfill the forfeited unvested benefits.

5. Because the employee choice doctrine precludes reasonableness review of forfeiture-for-competition agreements, the second question certified by the Seventh Circuit is moot.

ARGUMENT

Employee forfeiture-for-competition provisions are not uncommon, especially in the financial services industry represented by Amici here. In these provisions, employees voluntarily agree that in exchange for receiving additional benefits (usually deferred cash payments or a financial instrument akin to equity), they will forfeit that benefit if they choose to join a competitor before the expiration of the defined period. As such, these agreements give employees multiple choices: (1) they can chose whether to accept the agreement in the first place; and if they do, then (2) they can then choose whether to refrain from competing and receive additional (often handsome) financial benefit, or they can choose to compete and forego that benefit.

The primary question certified to this Court by the Seventh Circuit is whether, under Delaware law, "*Cantor Fitzgerald* precludes [courts from] reviewing forfeiture-for-competition provisions for reasonableness in circumstances outside the limited partnership context?"[2] *LKQ Corp. v. Rutledge*, 96 F.4th 977, 987 (7th Cir. 2024). The answer is yes.

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[2] The two questions certified are: "(1) Whether *Cantor Fitzgerald* precludes reviewing forfeiture-for-competition provisions for reasonableness in circumstances outside the limited partnership context?"; and "(2) If *Cantor Fitzgerald* does not apply in all other circumstances, what factors inform its application? For example, does it matter what type of agreement the forfeiture provision appears in, how sophisticated the parties are, whether the parties retained counsel to review the provision, whether the forfeiture involves a contingent payment or claw back, how

In *Cantor Fitzgerald, L.P. v. Ainslie*, -- A.3d --, 2024 WL 315193 (Del. Jan. 29, 2024), this Court enforced a forfeiture-for-competition provision against the limited partners at issue, holding that Delaware law precluded reasonableness review of the contractually agreed upon terms because they did "not restrict competition or a former partner's ability to work; nor . . . support injunctive relief." (*Id.* at *11.) This analysis in *Cantor Fitzgerald* as well as general Delaware law compel the same conclusion in the context of employees, *i.e.*, that Delaware will enforce forfeiture-for-competition provisions without a reasonableness review and thus follow the employee choice doctrine. After all, whether applied to a partner or employee, (a) the individual subject to the provision has the choice whether to compete and forego the promised benefit; and (b) the party seeking to enforce the provision does so through an action in law for breach (or the defense thereof), and does not need to invoke the equitable powers of the court by seeking injunctive relief or specific performance.

For these reasons, Amici therefore respectfully request that this Court answer the first question certified by the Seventh Circuit in the affirmative and confirm that Delaware follows the "employee choice doctrine" adopted by the majority of other

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far backward a claw back reaches, whether the employee quit or was involuntarily terminated, or whether the provision also entitled the company to injunctive relief?" *LKQ Corp.*, 96 F.4th at 987.

states to consider the issue. Doing so will appropriately render the second question certified by the Seventh Circuit moot.

I. Forfeiture-For-Competition Provisions Are Not Non-Competes And Thus Not Subject to the Same, Unique Reasonableness Review.

"The courts of this State hold freedom of contract in high – some might say, reverential – regard. Only a strong showing that dishonoring a contract is required to vindicate a public policy interest even stronger than freedom of contract will induce our courts to ignore unambiguous contractual undertakings." *Cantor Fitzgerald,* 2024 WL 315193, at *1 (internal quotation marks and citation omitted). Consistent with this contractarian approach that facilitates predictable results and has bolstered the state's position as home to many legal entities, Delaware courts enforce this principle in the context of all civil contracts. "When parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract. Such public policy interests are not to be lightly found, as the wealth-creating and peace-inducing effects of civil contracts are undercut if citizens cannot rely on the law to enforce their voluntarily-undertaken mutual obligations." *Libeau v. Fox*, 880 A.2d 1049, 1056-57 (Del. Ch. 2005), *aff'd in pertinent part,* 892 A.2d 1068 (Del. 2006).

A limited exception to this strong policy arises in the context of non-compete agreements, *i.e.*, agreements that affirmatively preclude an employee from competing with his or her employer for a period of time following the termination

of employment. As Vice Chancellor Noble explained in *Delaware Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *11 & n.53 (Del. Ch. Oct. 23, 2002) (citing *McCann Surveyors, Inc. v. Evans*, 611 A.2d 1, 3 (Del. Ch. 1987)), non-compete agreements fall outside of the normal approach and are subject to reasonableness review because (a) they implicate the ability of individuals "to support themselves and their families financially" and thus are not a situation where the employee is "faced with a choice" where to work; and (b) the enforcement of such agreements calls upon the court "to exercise its distinctively equitable powers" in the form of an injunction or specific performance order.

The same is simply not true of forfeiture-for-competition agreements. As this Court in *Cantor Fitzgerald* confirmed, there is a "significant" difference between non-compete provisions and forfeiture-for-competition provisions.[3] 2024 WL 315193, at *13. Specifically, this Court held:

> The distinction between a restrictive non-competition covenant that precludes a former employee from earning a living in his chosen field and an agreement that allows a former partner to compete but at the cost of relinquishing a contingent benefit is, in our observation, significant.

[3] Amici respectfully submit the Federal Trade Commission has issued a rule that would bar many restrictive covenants, potentially including forfeiture-for-competition agreements. *See* https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes. Because the validity of this rule is now being litigated, and there is, in Amici's view, a very significant likelihood that this rule will be stayed and then invalidated, Amici respectfully request that this Court rule on the issue presented. Indeed, the courts in these cases have suggested that they will address the ongoing validity of the rule by July 2024.

> In the restrictive-covenant context, the former employee is effectively deprived of his livelihood and, correspondingly, exposed to the risk of serious financial hardship. This gives rise to the strong policy interest that justifies the review of unambiguous contract provisions for reasonableness and a balancing of the equities, two exercises typically foreign to judicial review in contract actions. By contrast, however, forfeiture-for-competition provisions, which, unlike restrictive covenants, are not enforceable through injunctive relief, do not prohibit employees from competing and remaining in their chosen profession, and do not deprive the public of the employee's services, present no such concern.

Cantor Fitzgerald, 2024 WL 315193, at *13.

Put differently, reasonableness review is not standard for employment agreements, as employees (like all parties to a contract) are generally required to honor the promises they make. To the contrary, the reasonableness review specially applied to non-compete agreements is a limited exception to Delaware's usual contractarian approach because of two rare (if not unique) aspects of such agreements. Specifically, while non-compete agreements have many benefits (including trade secret protection and employee stability/investment), they can limit employee choice over where and when to work, and they require invocation of the court's equitable powers for enforcement given that they are typically enforced through requests for injunction or specific performance.

Forfeiture-for-competition provisions do not involve either scenario and are thus subject to standard review. Specifically, with forfeiture-for-competition provisions, (a) the employee has an initial choice whether to accept an agreement

whereby he or she can later choose to: remain employed and obtain the contingent benefit(s); or, no matter the reason for termination, either go to a non-competitor and keep the benefit(s) or go to a competitor and forfeit them (and even then, the employee can negotiate to have the new employer make up for what is forfeited) – *i.e.*, even after termination for whatever reason, the employee still has a choice; and (b) the plaintiff in any resulting dispute does not need to invoke the court's equitable powers. Instead, a legal action for breach can enforce the expectations of the parties, and by the same token, neither party should be allowed to effectuate through litigation an after-the-fact change in the agreement.

Recent case law confirms the straightforward point that forfeiture-for-competition provisions can be and are enforced through actions at law without invoking a court's equitable powers. For example, in *W.R. Berkley Corp. v. Dunai*, 2021 WL 1751347 (D. Del. May 4, 2021) and *W.R. Berkley Corp. v. Dunai*, 2022 WL 4535659 (D. Del. Sept. 28, 2022), *affirmed* 2024 WL 511040 (3d. Cir. Feb. 9, 2024), the employee refused to honor the terms of her forfeiture-for-competition agreement, and the employer brought a contract action to enforce the clawback provision. Denying the employee's motion to dismiss, the court held that "Delaware law often *favors* this type of clawback provision." *Id*. at 2021 WL 1751347, at *2 (emphasis original). Then, the court granted summary judgment for the employer. *Id*. at 2022 WL 4535659, at *3.

Similarly, in *Xu v. Castleton Commodities Int'l LLC,* 225 A.D.3d 412, 412-13 (N.Y. App. Div. 2024), the employee was the plaintiff and sued for breach of contract claiming that the defendant employer breached by not providing the equity units at issue in the relevant forfeiture-for competition provision. The Appellate Division of the New York Supreme Court affirmed summary judgment for the defendant employer validating the forfeiture of equity units under Delaware law, once again resolving the case as a matter of law and without invoking its equitable powers.

For these reasons, it is clear that forfeiture-for competition provisions are materially different from non-compete provisions, and thus forfeiture-for-competition provisions are subject to standard contract review and not the exceptional reasonableness review applied to non-competes. *See Cantor Fitzgerald*, 2024 WL 315193, at *9 ("[i]t does not follow that, because courts review restrictive non-competition covenants and liquidated damages provisions enforcing them in a particular manner – subjecting them to review for reasonableness – we should review forfeiture-for-competition provisions in the same way.")

II. Clear Forfeiture Terms Are Enforceable Against Employees.

In its certification order, the Seventh Circuit suggested that while a broad application of *Cantor Fitzgerald* may indeed be the "better reading" of the opinion, it nevertheless certified the questions presented to seek complete clarity in part because, in *Cantor Fitzgerald*, this Court stated that it was not applying Delaware "common law's disfavor of forfeitures" as it does not extend to partnership agreements as a matter of statute. *Cantor Fitzgerald,* 2024 WL 315193, at *13. But, even if this common law interpretative guide applies here, it is limited and eventually inconsequential. This general rule of contract interpretation operates only to disfavor forfeitures in the narrow circumstances in which contract terms are ambiguous. "If the language [of the contract] does not clearly provide for a forfeiture, then a court will construe the agreement to avoid causing one." *QC Holdings, Inc. v. Allconnect, Inc.*, 2018 WL 4091721, at *7 (Del. Ch. Aug. 28, 2018). By the same token, "[i]f the language of a contract is plain and unambiguous, a court should construe the contract according to its terms. There are no particular words that must be used in order to create a condition precedent [and] any phrase that conditions performance suffices." *Larian as Trustee of Larian Living Trust v. Momentus, Inc.,* 2024 WL 386964, at *9 (Del. Ch. Jan. 31, 2024).

Forfeiture-for-competition provisions are clear: the employee can voluntarily choose to compete, but if he or she does so, then he or she forfeits the additional

benefit at issue. Consistent with this, in the few months since this Court issued *Cantor Fitzgerald*, other courts have enforced such provisions against employees under Delaware law, and there does not appear to be any instance in Delaware precedent in which courts have used this interpretative guide to invalidate a forfeiture-for-competition provision.

As noted above, in *W.R. Berkley Corp. v. Dunai*, 2024 WL 511040 (3d. Cir. Feb. 9, 2024), the Third Circuit affirmed the district court's ruling enforcing of a forfeiture-for-competition provision operating to "clawback" stock provided to an insurance company employee, holding that under the reasoning of this Court's opinion of in *Cantor Fitzgerald v. Ainslie*, "the stock clawback provision at issue here is *not* subject to the reasonableness review applicable to restraints of trade [*i.e.,* non-compete agreements]." *Id*. 2024 WL 511040 *3. In doing so, the appellate court specifically addressed the question certified by the Seventh Circuit here, stating "[w]hile [the plaintiff employee] contends that *Ainslie* is distinguishable because there the forfeiture-for-competition provision featured in a limited partnership agreement, which is not the case here, she offers no persuasive argument why its reasoning does not apply with equal effect to her stock clawback provision." *Id*. at *3 n.3 (emphasizing Delaware's "common law tradition of supporting freedom of contract" and the associated "tradition of contractarian deference." (internal quotation marks omitted))

As also noted above, in *Xu v. Castleton Commodities International LLC,* 225 A.D.3d 412, 412-13 (N.Y. App. Div. 2024), the Appellate Division of the New York Supreme Court affirmed summary judgment for the defendant employer enforcing a forfeiture-for-competition agreement forfeiting equity units under Delaware law. The court followed the lower court holding in *W.R. Berkley Corp.*, holding that in light of this Court's opinion in *Cantor Fitzgerald*, it was not "violative of fundamental public policy to enforce the equity-forfeiture-for-competition agreement." *Id*. at 413.

III. The Majority of Other States Embrace the Employee Choice Doctrine.

The employee choice doctrine is based on the simple and compelling principle that if an individual (voluntarily) chooses to enter such an agreement and then (again, voluntarily) chooses to compete, then courts should enforce, without further scrutiny, the terms of the agreement and the associated forfeiture of the benefit at issue. As stated by the New York Court of Appeals, the doctrine "rests on the premise that if the employee is given the choice of preserving his rights under his contract by refraining from competition or risking forfeiture of such rights by exercising his right to compete, there is no unreasonable restraint upon an employee's liberty to earn a living." *Morris*, 859 N.E.2d at 506 (following Post, 397 N.E.2d at 360 (same)).

For this reason, courts in New York and numerous states that have had occasion to analyze this issue have long embraced this commonsense doctrine. *See Courington v. Birmingham Trust Nat'l Bank,* 347 So.2d 377, 382-83 (Ala. 1977) (Alabama)*; Trumble v. Farm Bureau Mut. Ins. Co.*, 456 P.3d 201, 202-13 (Idaho 2019) (Idaho); *Van Pelt v. Berefco, Inc.,* 208 N.E.2d 858, 865 (Ill. 1965) (Illinois); *Alco-Columbia Paper Serv., Inc. v. Nash,* 273 So.2d 630, 634 (La. Ct. App. 1973) (Louisiana)*; Woodward v. Cadillac Overall Supply Co.,* 240 N.W.2d 710, 711 (Mich. 1976) (Michigan); *Alldredge v. City National Bank & Trust Co. of Kansas City,* 468 S.W.2d 1, 4 (Mo. 1971) (Missouri)*; Swift v. Shop Rite Food Stores, Inc.,*

489 P.2d 881, 882 (N.M. 1971) (New Mexico); *Morris,* 859 N.E.2d at 506-07 (New York); *James H. Washington Ins. Agency v. Nationwide Mut. Ins. Co.,* 643 N.E.2d 143, 150 (Ohio 1993) (Ohio); *Fraser v. Nationwide Mut. Ins. Co.,* 334 F. Supp. 2d 755, 759-60 (E.D. Pa. 2004) (following *Garner v. Girard Trust Bank,* 275 A.2d 359 (Pa. 1971)) (Pennsylvania); *Dollgener v. Robertson Fleet Services, Inc.,* 527 S.W.2d 277 (Tex. App. 1975) (Texas); *Rochester Corporation v. W.L. Rochester,* 450 F.2d 118 (4th Cir. 1971) (Virginia).

In *Cantor Fitzgerald*, this Court surveyed the law of other states and cited precedent concluding that, in the context of employees (not just partners), enforcing forfeiture-for-competition agreements in accordance with their terms is indeed the "majority view in this country." *Cantor Fitzgerald,* 2024 WL 315193, at *12 n.104. Similarly, this Court cited precedent stating that reviewing forfeiture-for-competition agreements for reasonableness is "not the majority approach." *Id.,* 2024 WL 315193, at *11 n.102.

Indeed, closer analysis of the precedent listed in *Cantor Fitzgerald*'s footnote 102 reveals that several of the states that reject forfeiture-for-competition agreements do so based upon statutory mandate. Specifically, California altogether bars forfeiture-for-competition agreements; its courts do not apply a judicially-created reasonableness analysis but instead apply California's broad statutory bar on restrictive covenants of any nature. *See* Cal. Bus. & Prof. Code § 16600 *et seq.*;

Muggill v. Reuben H. Donnelley Corp., 398 P.2d 147, 149 (Cal. 1965) (invalidating the forfeiture-for-competition provision at issue as violative of section 16600). Other states with similar statutory bars on restrictive covenants have reached the same conclusion, again not creating and applying a reasonableness analysis but instead applying their states' versions of California's section 16600. *See Graham v. Hudgins, Thompson, Ball & Associates, Inc.*, 540 P.2d 1161, 1163 (Okla. 1975) (applying Oklahoma's broad statutory bar on restrictive covenants to preclude a forfeiture-for-competition agreement); *Werlinger v. Mutual Service Cas. Ins. Co.*, 496 N.W.2d 26, 30 (N.D. 1993) (same under North Dakota law); *Harris v. Bolin*, 247 N.W.2d 600, 602 (Minn. 1976) (applying Minnesota statutes to invalidate agreement); *Mungas v. Great Falls Clinic, LLP*, 221 P.3d 1230, 1237-38 (Mont. 2009) (applying reasonableness analysis set forth in statute).

In *Alldredge v. City National Bank & Trust Co. of Kansas City,* 468 S.W.2d 1, 4 (Mo. 1971), the Missouri Supreme Court explained this important dynamic: "[e]xcept where by statute noncompetition agreements such as that involved in this case are invalidated, [noting California law], it is the general rule that the employer may provide as a part of a noncontributory profit sharing plan that a former employe[e]'s interest may be declared forfeited in the event of competitive activities. Such a provision is not invalid because it is unrestricted either as to time or area. The

reasoning is that the former employe[e] is not prohibited from engaging in such employment or activity, but may do so if he wishes."

Here, of course, Delaware has adopted no statute akin to those in California, Oklahoma, and other states. Delaware statute does not generally bar non-compete agreements let alone far less restrictive agreements like forfeiture-for-competition agreements.[4] If the law of Delaware is going to change, such change should come legislatively (just as California and a few other states adopted their policies through legislative enactment) and not through judicial action that is directly contrary to Delaware's longstanding and general contractarian approach. Moreover, if Delaware were to go against this weight of authority from other states and deviate from the logic embraced by this Court in *Cantor Fitzgerald*, it would contravene its general and well-established approach of enforcing contractual provisions on their terms (an approach which, again, is not limited to partnership agreements), and it would also incentivize companies to form in, or otherwise subject their agreements to the law of, other states.

Indeed, Amici respectfully submit that this Court has already answered the first question certified from the Seventh Circuit in its discussion of laws from other

[4] Delaware has adopted a ban on non-competes specific to physicians. *See* 6 *Del. C.* § 2707. But, this is obviously not applicable here, and confirms that the Delaware Legislature can restrict such agreements when it wishes to do so.

jurisdictions. In *Pollard v. Autotote, Ltd.*, 852 F.2d 67, 72 (3d. Cir. 1988), the Third Circuit addressed a question similar to the one presented. That court *predicted* that Delaware courts would apply a reasonableness review to forfeiture-for-competition agreements: "Because of the similarity between the enforceability of a forfeiture-for-competition provision in a management incentive compensation plan and a covenant not to compete in an employment contract … we believe that the Delaware courts would apply the same test of reasonableness in both contexts." *Id*. In *Cantor Fitzgerald*, however, this Court unmistakably stated this prediction was wrong: "the Third Circuit surmised that we would follow this approach. By our decision today, we respectfully confute that prediction." *Cantor Fitzgerald,* 2024 WL 315193, at *11 n.102. *Pollard* was not a partnership case – it involved a forfeiture-for-competition for an employee, specifically the general manager of a gambling machine company. Of course, while Amici appreciate the efforts of the Seventh Circuit to be "prudent" by certifying these questions to this Court, this Court's overall logic in *Cantor Fitzgerald,* and its very specific confutation of *Pollard* in particular, is inherently not limited to partnership situations and already resolves the issue presented in the way suggested by Amici here.

IV. Forfeiture-For-Competition Provisions Serve Valid Interests.

As its names aptly confirms, the employee choice doctrine applies to employees: states adopting the doctrine do not limit it to partners, and there is no apt reason to do so. The fundamental basis for the doctrine is the choice of the individual: that choice is the same whether the individual is an employee or a partner. If anything, the rationale for the doctrine is stronger in the case of employees. Employees have separate wages/salaries and are usually at-will such that they can move to new employment with greater ease and less residual entanglement. Indeed, because forfeiture-for-competition provide for additional compensation for the associated agreement, as a practical matter, they almost always involve more highly compensated individuals who not only make the choice to enter these agreements voluntarily in the first place, but they also later can negotiate with new, competitive employers to compensate them for any amount forfeited as a result of accepting the competitive employment.

Forfeiture-for-competition agreements serve additional legitimate employment interests. Not only do they create vehicles through which employees can obtain (often significant) additional compensation, but they also serve to help protect valuable trade secrets, promote workforce stability and the associated

benefits to customers, promote compliance and associated disciplinary efforts, and encourage investment in existing employees who have incentives not to compete.[5]

[5] Adopting the employee choice doctrine will preserve judicial resources. In *Sunder Energy, LLC v. Jackson*, 305 A.3d 723, 730-31 (Del. Ch. 2023), Vice Chancellor Laster explained the burden that handling non-compete disputes (and their more burdensome reasonableness review) imposes on Delaware courts. Applying a reasonableness review for forfeiture-for-competition agreements would likely exacerbate this issue.

V. The Second Question Certified to this Court is Moot.

Because adoption of the employee choice doctrine is appropriate, there is no basis for reasonableness review, and so the second question asked by the Seventh Circuit is moot. But, even if the second question is entertained and this Court were to adopt some form of extra-contractual review for forfeiture-for-competition agreements (as it should not), the review standard should be limited to the basic premises of the employee choice doctrine: whether the agreement is formally voluntary, and thus the employee has the choice not to accept the agreement in the first place, and whether the employee earns a base wage or salary that is not the subject of the forfeiture-for-competition, such that the agreement is also practically voluntary and not *de facto* required to earn a living. But, if the employee can continue working for the employer and continue earning a living without executing the forfeiture-for-competition, then the employee has a true choice at the time of entering the contract. And, of course, the employee later has a true choice when deciding whether to compete, and that employee should be held to his or her agreement upon breach. A ruling to the contrary would not only disable a common and legitimate compensation device, but it would lead to unjust windfalls for employees and significant disruption of validly bargained employment relationships all in contravention of core Delaware policy.

CONCLUSION

For the foregoing reasons, Amici MFA and SIFMA respectfully request that the Court (1) answer the first question certified by the Seventh Circuit in the affirmative and hold that under Delaware law, the employee choice doctrine applies and courts should not apply a reasonableness review for forfeiture for competition provisions; and (2) deem the second question certified as moot.

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

LKQ CORPORATION, Plaintiff/Counter-Defendant – Appellant, v. ROBERT RUTLEDGE, Defendant/Counter-Claimant – Appellee.	)	No. 110, 2024 Certification of Questions of Law from the United States Court of Appeals for the Seventh Circuit (No. 23-2330) There on appeal from the United States District Court for the Northern District of Illinois, Eastern Division (No. 1:21-cv-03022)

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CERTIFICATE OF SERVICE

I, Kaan Ekiner, hereby certify that on May 10, 2024, I caused true and correct copies of the foregoing (i) Motion of Managed Funds Association and Securities Industry and Financial Markets Association for Leave to File Brief as *Amici Curiae* in Support of Plaintiff-Appellant; (ii) Brief of Managed Funds Association and Securities Industry and Financial Markets Association as *Amici Curiae* Supporting Appellant and Reversal; a (iii) *[Proposed]* Order; and (iv) this Certificate of Service, to be served through File & Serve*Xpress* on the following counsel of record:

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