IN THE COURT OF APPEALS
STATE OF GEORGIA

WILLIAM T. MULLALLY, COMMUNITY LENDING PARTNERS LLC, and MULLALLY CAPITAL MANAGEMENT, LLC, PEACHTREE LOAN CONSULTANTS, LLC, and SOUTHERN COMFORT PARTNERS, LLC,	)	
Appellants,	)	
v.	)	APPEAL NO. A23A0369
CU CAPITAL MARKET SOLUTIONS, LLC, CAPITAL MARKETS MANAGEMENT GROUP, LLC, CU FUNDING COMPANY, LLC, CU FUNDING COMPANY MANAGER, LLC, LEWIS N. LESTER, SR., individually and d/b/a OFFICE OF SUPERVISORY JURISDICTION, ROBERT COLVIN, JEFFERSON FINANCIAL CREDIT UNION, and FREEDOM NORTHWEST CREDIT UNION,	)	
Appellees.	)	

BRIEF OF APPELLEES

S. Lawrence Polk
Georgia Bar No. 582959
EVERSHEDS SUTHERLAND (US) LLP
999 Peachtree Street NE
Atlanta, GA 30309
Phone: (404) 853-8000
Fax: (404) 853-8806
larrypolk@eversheds-sutherland.com

Attorney for Appellees

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INTRODUCTION

The Honorable Christopher S. Brasher, Fulton County Superior Court ("Trial Court") in in the Order on Dispositive Motions dated July 27, 2022 (the "Order") (V12-3428-3445), correctly determined that the restrictive covenants contained in the Operating Agreement of CU Capital Market Solutions, LLC dated May 9, 2016 ("CMS Operating Agreement")(V3-43-97), are valid and enforceable as modified and have been violated by William T. Mullally ('Mullally") and his various side businesses and affiliates. Mullally was a founding Member of CU Capital Market Solutions, LLC ("CMS") from its creation in 2016 until his resignation from the company in 2020. During that period of time he was a Member, Manager, Unitholder, Officer, Member of Board of Managers, and Employee of CMS, and held the offices of Secretary and Treasurer of the limited liability corporation. When CMS was formed, Mullally and two other founding members retained a law firm to draft an operating agreement that would govern the conduct of the members of the LLC and included restrictive covenants limiting the outside business activities of the members, managers, unitholders, officers, board of managers, and employees of CMS. Counsel drafted an operating agreement that contains noncompetition and non-solicitation restrictive covenants. Mullally executed the agreement in 2016. Beginning in 2018, Mullally implemented a secret

scheme to divert revenues away from CMS to several side businesses created by Mullally in violation of the aforesaid restrictive covenants. Mullally resigned from CMS after his scheme was discovered, and he then filed the present litigation.

STATEMENT OF THE CASE

This action began on February 10, 202, with the filing of a Complaint (V2-21-102) by Mullally, Mullally Capital Management, LLC, and Community Lending Partners, LLC, seeking, *inter alia*, a declaration that Mullally's undisclosed outside business activities while he was a Unitholder, Member, Manager, Officer, and Employee of CMS, and after he left the company, do not violate the restrictive covenants contained in the CMS Operating Agreement. By Order dated March 27, 2020, the Trial Court allowed Jefferson Financial Credit Union and Freedom Northwest Credit Union, Class CU Members of CMS, to intervene in the litigation as counterclaim plaintiffs (V3-303-304). By Order dated August 7, 2020, the Trial Court granted Appellants' motion to add Capital Markets Management Group, LLC, CU Funding Company LLC, CU Funding Company Manager LLC, Lewis N. Lester, Sr., and Robert Colvin as defendants (V3-434-435). On August 7, 2020, Appellants filed their Amended and Restated Complaint (V3-328-433). In Counts I and II of the Amended and Restated Complaint, Appellants sought declaratory relief arguing that the restrictive covenants contained the CMS Operating Agreement were not valid or enforceable under the

Georgia Restrictive Covenants Act ("RCA"), O.C.G.A. §13-8-50 et seq. (V3-346-353)[1]

On June 17, 2021, Appellees filed their Amended Answer and Counterclaims and Third Party Complaint for Damages and Injunctive Relief (the "Counterclaim"). (V5-1161-1260). In Count Two of the Counterclaim, Appellees assert a claim against Mullally for breach of the restrictive covenants in the CMS Operating Agreement (V5-1188-1189).

On July 16, 2021, Appellees filed their Motion for Partial Summary Judgment, seeking judgment in their favor on Count Two of the Counterclaim, along with their supporting brief and affidavit (V5-1265-133). On October 29, 2021, Appellants filed their Cross Motion for Partial Summary Judgment, seeking judgment on Counts I and II of the Amended and Restated Complaint and Counts One and Two of the Counterclaim. (V6-1520-1523). In their cross motion, Appellants argued, for the first time, that the RCA does not apply to the CMS Operating Agreement, notwithstanding the opposite position taken in their Amended and Restated Complaint. On April 4, 2022, Appellees filed their Renewed Motion for Partial Summary Judgment. (V11-3121-3187). On July 11, 2022, Appellants voluntarily dismissed Counts III, IV, V and VI of the Second

[1] While Community Lending Partners LLC and Mullally Capital Management, LLC are not partied to the CMS Operating Agreement they each fall with the definition of an "Affiliate" of Mullally as he is the sole owner of each entity (V3-405).

Amended and Restated Complaint. (V12-3421-3423). The aforementioned summary judgment motions were fully briefed by the parties, and oral argument was heard by the Trial Court on July 13, 2022.

On July 27, 2022, the Trial Court entered the Order where it denied all of the remaining claims asserted by Appellants and determined that the restrictive covenants contained in the CMS Operating Agreement are valid and enforceable, as modified by the Trial Court. (V12-3428-3445). In the Order, the Trial Court determined that Mullally is bound to restrictive covenants contained in the CMS Operating Agreement set forth in Article 13 of the agreement. (V3-397-398). The Court modified the restrictive covenants to apply to any attempt by Mullally to provide services in a manner prohibited by the CMS Operating Agreement, which prohibits providing services to "(A) any person who is or was a client of the Company within three years prior to the Unitholder ceasing to hold Units or (B) any prospective client with whom the Company is or was actively pursuing a relationship within three years prior to the Unitholder ceasing to hold Units." This restrictive covenant applies to Mullally and any "Affiliate" defined to include "any person …in which (Mullally) owns directly or indirectly more than 50% of the voting interests…" (V12-3436-3440). Mullally then filed the instant appeal.

STATEMENT OF FACTS

Appellees disagree with Appellants' statement of the case, and submits the following additional facts to be considered by the Court.

CU Capital Market Solutions, LLC ("CMS") is a limited liability company organized on May 5, 2016, under the Georgia Limited Liability Company Act. CMS is a Credit Union Service Organization, commonly known as a "CUSO." (V4-731-732).[2] CMS provides consulting services to federal and state chartered credit unions, including loan participation opportunities. (V4-727-728). On or about May 9, 2016, Colvin, Lester, and Mullally executed the CMS Operating Agreement and each purchased one-third of the Class A Units in the company. (V6-1578-1632).

Mr. Mullally was actively involved in discussions concerning the drafting of the CMS Operating Agreement and the provisions contained therein. (V5-1294). The CMS Operating Agreement was drafted by outside legal counsel at the Jones & Keller law firm (Id.). Mr. Mullally, a founding member of CMS, was involved

[2] A CUSO is an organization that is owned by credit unions in whole or in part that provides permitted financial services and/or operational services primarily to credit unions or members of credit unions. A CUSO must be a limited liability company, corporation, or limited partnership. CUSOs are typically run by boards appointed or elected by the owner credit unions and must have at least one credit union owner. https://www.nacuso.org/wp-content/uploads/2018/02/History-of-CUSOs-2-7-18.pdf. CUSOs are subject to certain rules and regulations of the National Credit Union Association ("NCUA"). https://www.ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/changes-ncua-regulations-related-credit-union-service-organizations

throughout the process of drafting the terms of the Operating Agreement and had input with respect to specific portions of the Operating Agreement (Id.). He was provided with drafts of the Operating Agreement and had the ability to request changes to the Operating Agreement. At the end of this drafting process, Mr. Mullally agreed with all of the provisions in the Operating Agreement including the restrictive covenants contained in Article 13 of the agreement and executed the CMS Operating Agreement without objection. (Id.)

The non-solicitation and noncompetition restrictive covenants contained in the CMS Operating Agreement were and are especially important because CMS established and built its unique brand on the foundation of its owners and officers of the company, with intimate knowledge of the preferences, needs, trends of the regulatory environment, and financial and secondary capital markets impacting credit unions (Id.). This comprehensive marketplace knowledge has taken years of hard work to develop, including years of experience working with community banks, bank regulators, and credit unions. CMS established and built its proprietary products with the specific knowledge and experience acquired which are not generally known in the public domain. CMS's marketplace knowledge took years to develop, and CMS cultivated exclusive and valuable relationships with a substantial number of credit unions. (Id.)

The founding members of CMS, including Mr. Mullally, agreed to the two and three year duration periods for the restrictive covenants set forth in Article 13 of the Operating Agreement. It was agreed among the founding members of CMS, including Mr. Mullally, that these duration periods were reasonable based upon the access that the founding members had to the products, customers, and proprietary information of CMS. Mr. Mullally had no objections to any of these provisions, but rather agreed to the duration periods that would be applied to all of the founding members. (Id.)

When CMS started in 2016, Mullally knew virtually nothing about the loan participation business, nor had he developed significant contacts with financial institutions engaged in that business. Mullally had limited contacts with financial institutions, and it is essential to develop personal relationships with management at these financial institutions. CMS paid tens of thousands of dollars to train Mr. Mullally about the loan participation business and paid for the expenses associated with developing relationships on behalf of CMS with management at financial institutions engaged in loan participations. For example, CMS paid for Mr. Mullally to personally visit with these clients or potential clients, paid for Mr. Mullally to entertain these clients, paid for Mullally to golf with management at financial institutions, and paid for Mr. Mullally to attend credit union sponsored events with them. (V11-3271).

In reliance on the provisions of the Operating Agreement, including the restrictions contained in Article 13, Mullally was provided unfettered access to a treasure trove of information, including, *inter alia*, customer information strategies, exclusive contacts, market reports, compensation and policies, revenues and operating figures, records, reports, confidential, specimen and specific Applications, specimen and specific Plans, and communications with actual and potential clients of CMS. Additionally, Mullally received access to the Customer Information Database of CMS, referred to as "Salesforce", which is a licensed and maintained database customized specifically for the Credit Union Industry by CMS. All of this information, data, and work product of CMS constitutes "Confidential Information" as defined in the Operating Agreement. (Id.)

Prior to his resignation January 2020, Mullally served as the Secretary and Treasurer of CMS. As Treasurer he had charge and custody of, and was responsible for, all funds and securities of CMS, was responsible for the company's financial records, received and gave receipt for all monies collected by the company, and performed all duties incident to the office of Treasurer. As Secretary Mullally was in charge of the company's books and records and performed all duties incident to the office of secretary. (VS-60-61). He was a member of the Board of Managers, along with Messrs. Colvin and Lester, and had the power and authority to conduct the business of the company. (V3-53-59). He

purchased and owned Class A Units in CMS, along with Mr. Lester and Mr. Colvin. (V3-333, 339, 344). Mullally repeatedly admitted since the filing of his first complaint that he was an employee of CMS. (V2-27; V4-570).

Mullally was responsible for the financial affairs at the company, and also to keep track of moneys due and payable to CMS from any source. (V5-1293-1294). He held himself out to the public as a Senior Managing Director at CMS. (V3-528; V4-715-716). Mullally resigned as a Manager, Officer, and Employee of CMS by notice dated January 24, 2020, but refused to relinquish his ownership interest in the company. (V3-418-419).

While at CMS, Mullally led all business development activities at the company and managed the company's loan participation desk, where CMS "provides services to client credit unions that want to purchase or sell loan participation interests." (V5-1259). CMS offers these loan participation services through a network of more than 400 credit unions and is a leader in USDA and SBA participation loans. It provides advice to the sellers of such on current market conditions, due diligence best practices, national marketing, and best execution. For buyers of the loans it provides services such as a summary report, loan tape review, assistance with negotiations, master participation review, and preparation of a letter of intent or participation letter. (V4-719-181).

In his capacities as Senior Managing Director, head of business development, and head of the loan participation desk, Mullally was provided unfettered access to confidential business information, including, *inter alia*, customer information strategies, exclusive contacts, market reports, compensation and policies, revenues and operating figures, records, reports, confidential, specimen and specific Applications, specimen and specific Plans, and communications with actual and potential clients of CMS. All of this information, data, and work product of CMS constitutes "Confidential Information" as defined in the Operating Agreement. (V2-78).

CMS is compensated by its clients in the form of fees for placement services; the amount of this fee was solely determined by Mullally while he headed the loan participation desk. (V4-219). Mullally was responsible for issuing invoices to CMS clients for loan participation fees. (V4-769). He was the only person at CMS who determined the amount of the placement fee to charge, which he arrived at after negotiations with the seller of the loan. (V4-759, 771-772, 775-777). This fee was paid to CMS as compensation for introducing participants who might want to acquire a part of a loan. (V4-763). The typical fee that should have been received by CMS for referring a loan participation is one percent to two percent of the loan amount. (V4-572-573). By 2018 loan participation revenues

comprised 51.4% of the total revenues of the company. In 2019 loan participations comprised 57.28% of the total revenue of the company. (Appellants' Brief at p. 11)

Greater Commercial Lending was the largest loan participation customer of CMS. (V4-575). Mullally, in his capacity as head of the loan participation desk at CMS, was primarily responsible for interfacing with Greater Commercial Lending. (V4-581). In early 2018 Mullally implemented a secret scheme to divert loan participation revenues from Greater Commercial Lending away from CMS and into a series of shell corporations established by Mullally. The scheme apparently began when Mullally Capital Management, a company wholly owned by Mullally, sent Greater Commercial Lending an invoice in the amount of $100,000 for "Consulting Services referral fee" for March 2018. (V4-883-884). Mullally then formed Peachtree Loan Consulting on March 26, 2018, to perform loan referral services, and Peachtree Loan billed Greater Commercial for loan services. (V4-610-611; March 25, 2021 hearing transcript at 18:23, 20:13–20:21, 26:7– 26:25, Defendants' Ex. 1, 29). Mullally hired a convicted felon to provide loan related services to Greater Commercial Lending through Peachtree Loan Consulting. (V4-617-620). Mullally hid all of these activities from CMS and the other Members of the company. (V4-768). Mullally was the sole owner of Peachtree Loan from March 2018 through September 2019 when he disbanded the company. (V4-616-617, 633, 642).

Mullally incorporated Southern Comfort Partners on March 26, 2018, the same day Peachtree Loan was incorporated. (V4-1024). Southern Comfort had no officers or employees; it has no bylaws or operating agreement. (V4-990). Subsequent to the creation of Peachtree Loan and Southern Comfort, Mullally would direct an employee of CMS to prepare one invoice to Greater Commercial Lending from CMS for loan participation fees (the amount of which he determined), and simultaneously prepare another invoice to that same customer from one of his undisclosed side businesses for "service fees" or "loan review fees." (March 25, 2021 hearing transcript at 35:2–35:19, 39:11–39:20, 41:25 – 41:42). Mullally never disclosed to CMS or the other Members that he was utilizing a CMS employee to implement this scheme. (V4-655-657). Approximately $2 million was paid to Mullally's side businesses by Greater Commercial Lending for loan related services. (March 25, 2021 hearing transcript at. at 46:23–46:25).

By 2019, after Mullally implemented his scheme, loan participation revenues at CMS dropped to $470,000. (V11-3168). As previously noted, Mullally decided how much CMS should charge for loan participation services; after he implemented his scheme, the amounts that he directed CMS to charge for loan participations dropped dramatically both in dollar amount and as a percentage of the referred loan. (V11-3169).

Immediately after resigning from CMS, Mullally incorporated Community Lending Partners, LLC on January 24, 2020, to provide loan participation services to CMS customers—exactly the same services Mullally provided as the head of the loan participation desk at CMS. (V4-128, 649). Mullally is the sole owner of Community Lending Partners, LLC and all revenues received by that company are for Mullally's benefit. (V4-649-650).

Mullally created or was the sole owner of Mullally Capital Management, LLC, Community Lending Partners, LLC, Peachtree Loan Consultants, LLC, and Southern Comfort Partners, LLC, all of which fall within the definition of an "Affiliate" under the CMS Operating Agreement. (V3-405). Each of these companies provided services to past or prospective customers of CMS at Mullally's direction and as part of his scheme. Each entity is a "Competitive Business" as defined in the CMS Operating Agreement. (V2-89). Mullally admits that since leaving CMS he or an Affiliate continues to provide loan related services to Greater Commercial Lending, Madison One Credit Union, US Eagle Federal Credit Union, Georgia's Own Credit Union, Prime Trust Credit Union, and Neighbor's Credit Union, all of which were clients of CMS prior to the time that he ceased to be a Unitholder, and Red River Credit Union, which qualifies as a prospective client of CMS. (V10-3051; V11-3170, 3172, 3272). Since leaving CMS, Mullally or his Affiliates collected at least $1,542,384.35 from past clients

or prospective clients of CMS. (V4-3474). He continues to advertise and actively solicit loan participation business from past or prospective credit union clients of CMS via a website he maintains on behalf of Community Lending Partners. (V12-3475-3491).

While he was at CMS, Mullally never disclosed to the company, or its other unitholders, that he was conducting a side business or receiving compensation from customers of CMS, such as Greater Commercial, nor did he ever disclose that he was using a CMS employee to provide services for his side businesses. (V4-657, 768). Mullally never shared any of this compensation from loan reviews with CMS. (March 25, 2021 hearing transcript at 72:5-8).

Mullally's scheme was discovered in late 2019, and Mullally then resigned as a Manager, Officer, and Employee of CMS by notice dated January 24, 2020. (V3-418-419). Section 9.1 of the CMS Operating Agreement allowed Mullally to sell or transfer his CMS Units after obtaining the consent of the non-transferring Members. Mullally never sought that consent. Rather, in his resignation letter, he attempted to hold his membership interests and indicated that he "would be willing to consider the proposed terms of such redemptions." (Id.) Finally, Mullally asked that he be provided notice if CMS considered his resignation "to constitute any sort of breach of any agreements or understandings…" (Id.)

On June 8, 2020, a special meeting of the CMS Board of Managers was convened, and by Resolution of the Board of Managers, Mr. Mullally was declared in breach of Articles 13.2 and 13.3 of the Operating Agreement and was deemed to have resigned his Membership in CMS pursuant to Article 16.1 of the Operating Agreement. The Board of Managers further determined that the fair market value of his Units in CMS was less than zero, thus Mr. Mullally was not entitled to payment for the Units. (V5-1325-1326). As requested, Mr. Mullally was notified of the action of the Board of Managers by letter sent to his attorney dated June 8, 2020. (V5-1328-1333). Mr. Mullally never responded to this action by the Board of Managers, nor has he challenged the valuation placed on his Units in the company. (V5-1296). Appellants concede that Mullally's Units in CMS were worthless when he left the company. (Appellants Brief at p. 25).

ARGUMENT

A. The Restrictive Covenants in the CMS Operating Agreement are Valid and Enforceable Under the Georgia Restrictive Covenants Act.

1. The Georgia Restrictive Covenants Act Governs This Dispute

Whether a restrictive covenant is reasonable is a question of law for the Court, considering the nature and extent of the trade or business, the situation of the parties, and other relevant circumstances. *E.g.*, *Northside Hosp., Inc. v. McCord*, 245 Ga. App. 245 (2000); *Smith Adcock & Co. v. Rosenbohm*, 238 Ga. App. 281 (1999); *W.R. Grace & Co., Dearborn Div. v. Mouyal*, 262 Ga. 464

(1992). Restrictive covenants entered into after May 11, 2011, including the Operating Agreement at issue here, are governed by the Georgia Restrictive Covenants Act ("RCA"), O.C.G.A. §18-3-50 et. seq. *Holton v. Physician Oncology Services, LP,* 292 Ga. 864, 870 (2013). Whether a restrictive covenant is subject to common law or the RCA is determined by the RCA's effective date. *Hot Shot Kids Inc. v. Pervis (In re Pervis)*, 512 B.R. 348, 373 (Bankr. N.D. Ga. 2014) (deciding whether restrictive covenants in "Shareholder Agreement" by whether parties entered into agreement before or after May 11, 2011).

In their Amended and Restated Complaint, Appellants sought relief under the RCA and argued that the restrictive covenants at issue are not valid or enforceable under the RCA. After Appellees filed their motion for partial summary judgment, Appellants reversed course and argued that the RCA did not apply to this dispute. Appellants are estopped from making this argument, as Appellants repeatedly cited, relied upon, and sought relief under the RCA. (V4-348-353). Appellants' eleventh-hour argument that the RCA does not apply is contradicted by both Georgia statutory authority and case law.

The RCA defines "restrictive covenants" and its own scope:

> **"Restrictive covenant" means an agreement between two or more parties that exists to protect the first party's or parties' interest in property, confidential information, customer good will, business relationships, employees, or any other economic advantages that the second party has obtained for the benefit of the first party or parties, to which the second party has gained access in the course**

> **of his or her relationship with the first party or parties**, or which the first party or parties has acquired from the second party or parties as the result of a sale. Such restrictive covenants **may** exist within or ancillary to contracts between or among **employers and employees**, distributors and manufacturers, lessors and lessees, partnerships and partners, employers and independent contractors, franchisors and franchisees, and sellers and purchasers of a business or commercial enterprise and any two or more employers. A restrictive covenant shall not include covenants appurtenant to real property.

O.C.G.A. §13-8-51 (15) (emphasis added). This definition clearly applies to Articles 13.2 and 13.3 of the CMS Operating Agreement, which exist to protect CMS's business relationships and economic advantages from Mullally's actions after he ended his involvement with CMS.

Moreover, as noted by the Trial Court, the RCA specifically applies to "a restrictive covenant sought to be enforced against the owner…of all or a material part of…a limited liability company membership…" and provides a statutory presumption that a restriction on such an owner is valid so long as the restraint is less than five years in duration. O.C.G.A. §13-8-57(d). In the present case, Mullally owned one-third of the Class A Units in CMS, and the duration of the restrictive covenants is two or three years, well within the statutory presumption.

This Court has explicitly interpreted the RCA to apply broadly. In *Belt Power, LLC v. Reed*, 354 Ga. App. 289, 293 (2020) this Court, in considering a restrictive covenant and the RCA's language, reasoned, "Taken together, the clear and plain language of [the RCA] compels a conclusion that any agreement that

meets the Act's definition of restrictive covenant, and is otherwise not excepted from the Act's provisions, is subject to the terms of the Act and must comply with the terms of the Act. Restricting the Act's scope to merely the provisions that are explicitly mentioned in O.C.G.A. §13-8-53 would render meaningless the majority of the broad definition of "restrictive covenant" located in O.C.G.A. §13-8-51 (15), which contains many more types of agreements." The RCA governs the restrictive covenants at issue in this case. Otherwise, why would Appellants rely on the RCA in Counts I and II of their Amended and Restated Complaint?

In the present case, Mullally agreed to the restrictive covenants as a founding member and director of CMS. Indeed, the CMS Operating Agreement and the restrictive covenants contained therein were an essential benefit of the bargain between Mullally and Messrs. Lester and Colvin, as well as the other Unitholders of the company. Mullally was an active participant in selecting the law firm to draft the Operating Agreement, he reviewed drafts of the Operating Agreement and had the opportunity to provide comments to the agreement, and signed the Operating Agreement without objection. As a founding member of CMS, Mullally had the economic power to insist on changes to the Operating Agreement, or to simply decline to execute the agreement as drafted. But he executed the agreement and became bound to the provisions contained in the agreement, including the restrictive covenants at issue.

Having executed the CMS Operating Agreement, Mullally is bound to the restrictive covenants on two separate grounds under O.C.G.A. §13-8-51 and §13-8-52 (a): 1) It is a contract between and Employer and Employee, and 2) it is a contract between purchasers of a business or commercial enterprise.

It is undisputed the Mullally was an "Employee" of CMS as defined on O.C.G.A. §13-8-51(5). Mullally repeatedly admitted to the Trial Court that he was an employee of CMS. *See* Amended and Restated Complaint at paragraphs 42, 60 ("….during Mullally's tenure as a Manager, Officer *and employee* of CMS Mullally closed all Loan Syndication transactions through CMS")("On January 24, 2020, Mullally resigned his positions as a Manager, Officer, *and employee* of CMS effective as of January 1, 2020" (emphasis added). (V3-337, 344). Mullally further admits that he was an employee of CMS at pages 8, 14, and 25 of Appellants' Brief. He also concedes "In the case of many closely held businesses all of the investors are also employees, and RCA would apply despite the title of the agreement" Appellants' Brief at p. 2, fn2. Mullally was the Secretary and Treasurer at CMS, and held himself out as a Senior Managing Director, head of business development, and head of the loan participation desk at CMS.[3] Mullally states as

[3] Mullally was an "Executive Employee" of CMS as defined in 13-8-51(8), as he "has gained a high level of notoriety, fame, reputation, or public persona as the employer's representative or spokesperson or has gained a high level of influence or credibility with the employer's customers, vendors, or other business relationships or is intimately involved in the planning for or direction of the business of the employer or a defined unit of the business of the employer."

an undisputed fact that he was an employee of CMS, along with Messrs. Lester and Colvin ("Lester, Colvin and Mullally executed a CMS operating agreement in May 2016, and became Managers, officers and employees of the company.") ("Mullally's tenure as a manager, officer or employee of CMS.") (" Mullally was the only employee of CMS that had any material knowledge or experience with respect to the government Guaranteed loan participation business.") (V11-3097-3099). CMS is an "Employer" as defined in §13-8-51(6) because it is a corporation or other business organization. The RCA thus applies to and governs this agreement between CMS and Mullally as Employer and Employee.

Next, Mullally is subject to the RCA as a purchaser or owner of a business. He owned one-third of the Class A Units in CMS. The CMS Operating Agreement is between Mullally and the other persons or entities who purchased and formed CU Capital Market Solutions, LLC. Appellants' argument that the RCA does not apply to covenants between shareholders or the holders of limited liability company interests in their capacities as such is blatantly contradicted by the language of O.C.G.A. §13-8-51. The only type of restrictive covenant explicitly omitted from the RCA's scope are those appurtenant to real property. If the RCA was not meant to apply to restrictive covenants governing shareholders or unitholders, then such restrictive covenants would have been explicitly listed here. But they are not, and Appellants cannot simply read such exceptions to a statute's

scope without reason or scope. To do so would violate a basic tenant of statutory interpretation. *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-17 (1980) (citing *Continental Casualty Co. v. United States*, 314 U.S. 527, 533 (1942) (where certain exceptions are specifically enumerated, additional exceptions are not to be implied), *Connell v. Hamon*, No. A21A0925, 2021 Ga. App. LEXIS 500, at *4 (Ct. App. Oct. 18, 2021) ("The express language of the Act will be followed literally and no exceptions to the requirements of the Act will be read into the statute by the courts."). *See also Dep't of Cmty. Health v. Emory Univ.*, 351 Ga. App. 257, 266, 830 S.E.2d 628, 635 (2019) ("[L]egislative exceptions in statutes are to be strictly construed and should be applied only so far as their language fairly warrants")) (citation and punctuation omitted). O.C.G.A. §13-8-57(d) explicitly discusses restrictive covenants sought to be enforced after the sale or disposition of both shares and part of limited liability company membership.

The Trial Court properly relied on this Court's opinion in *Belt Power, LLC v Reed*, 354 Ga. App. 289 (2020) to determine that the RCA applies to this case. There, this Court found that an agreement between an employer and two employees who sold their equity interests back to the company is governed by the RCA. This Court held that "any agreement that meets the Act's definition of restrictive covenant, and is otherwise not excepted from the Act's provisions, is subject to the terms of the Act and must comply with the terms of the Act.

Restricting the Act's scope to merely the provisions that are explicitly mentioned in O.C.G.A. §13-8-53 would render meaningless the majority of the broad definition of "restrictive covenant" located in O.C.G.A. §13-8-51 (15)" 354 Ga. App at 292. Mullally is subject to the provisions of the RCA which govern this dispute.[4]

2. The Duration of the Restrictive Covenants in the CMS Operating Agreement are Valid under the GRCA.

When addressing a restrictive covenant, "a court may consider the nature and extent of the business, the situation of the parties, and all other relevant circumstances." *Murphree v. Yancey Bros. Co.*, 311 Ga. App. 744, 747, 716 S.E.2d 824 (2011). In the present case, Mullally was a founding Member of CMS. As an Officer and Board Member, and the head of its loan participation desk, which was the largest revenue source at the company, Mullally had access to critical client information and CMS invested considerable resources to train Mullally. The intent of the parties to the CMS Operating Agreement was to prevent a high level executive such as Mullally from gutting the company by establishing a competitive business and soliciting the company's clients for that business.

Appellants do not challenge the restrictive covenants based upon their territorial scope or scope of prohibited activity. Nor do they challenge that CMS

[4] Appellants assert they are aware of no reported decisions where the RCA was applied to restrictive covenants in an agreement with a limited liability corporation such as CMS. This Court applied the RCA in *Belt Power, LLC v Reed*, *supra,* to an agreement between a limited liability corporation and two former employees.

has a legitimate business interest to protect. Neither Appellants' enumerations of error nor their brief addresses issues of legitimate business interest, geographical extent, or scope of prohibited activity. As such, Appellants bear "the burden of establishing that the contractually specified restraint does not comply with such requirements or that such covenant is unreasonable." O.C.G.A. §13-8-55. Thus the issues on appeal are limited to the duration of the restrictive covenants at issue. The CMS Operating Agreement provides in Article 13.2 that the Noncompetition covenant is in effect "while a Unitholder holds any Unit(s) and for a period of two years after a Unitholder ceases to hold any Unit…" and in 13.3 that the Nonsolicitation covenant is in effect "while a Unitholder holds Units and for a period of three years thereafter." Mullally's Units in CMS were redeemed by the company effective June 8, 2020, after he was declared in default of his obligations to the company. As such, the noncompetition covenant was in effect through June 8, 2022, and the nonsolicitation covenant remains in effect through June 8, 2023.

The post-termination duration of the restrictive covenants at issue must be decided under O.C.G.A. §13-8-57. As found by the Trial Court, Mullally was owner of a material part of CMS, a limited liability corporation. As such, O.C.G.A. §13-8-57(d) establishes a statutory presumption that a post-termination duration of five years is reasonable. The two and three year terms of the restrictive covenants

in the CMS Operating Agreement plainly are valid and enforceable under the GRCA.

Mullally attempts to circumvent this statutory presumption of reasonableness by arguing that the two or three year terms in the CMS Operating Agreement are of "an indefinite duration or a duration under the control of the protected parties." First of all, an express two or three year term is hardly "an indefinite duration." Rather, Mullally argues that the CMS Operating Agreement contains "inalienability provisions" that somehow prevent Mullally from disposing of his Units and thus make the provisions indefinite. The Trial Court properly considered and rejected Appellants' arguments. As noted by the Trial Court, "unlike an employment contract, this provision was entered into as part of the formation of a company, and all of the principals agreed to be equally bound…. these provisions are the mechanism intended to protect the business itself, and thus the subject matter of the agreement." (V12-3437).

Appellants' arguments miss the mark. Article 9 of the CMS Operating Agreement permits a Unitholder to sell or transfer that person's Units with the consent of the other Unitholders. *Mullally never asked for that consent.* Rather, in his resignation letter, he attempted to hold his membership interests and indicated that he "would be willing to consider the proposed terms of such redemptions." Despite making this decision, Mullally now argues that he had "involuntary

ownership" of his Units and the restrictive covenants thus have an "indefinite" duration. CMS, however, dispelled this notion when it redeemed Mullally's interests effective June 8, 2020, an action that Mullally has never challenged. Thus the restrictive covenants in Article 13 are of a definite duration that is presumptively reasonable under the GRCA.

Moreover, as noted by the Trial Court, the restrictive covenants at issue cover Mullally's activities while he was associated with CMS and post-termination. Appellants do not challenge the Trial Court's findings that Mullally is properly subject to post-termination restrictions, as he performed all of the duties set forth in O.C.G.A. §13-8-53(a).

That certain conditions apply to the disposal or relinquishing of Mullally's Units is neither here nor there. Many limited liability companies impose conditions on members' and Unitholders' exit from the organization—such conditions do not violate Georgia's public policy. *Colquitt v. Buckhead Surgical Associates, LLC*, 351 Ga. App. 525, 530 (2019) (holding that an LLC's operating agreement without a mandatory buyout provision for members exiting the organization was valid). *See Davis v. VCP South, LLC*, 321 Ga. App. 503, 504 (2013) (stating that the policy of the Georgia Limited Liability Company Act is to give maximum effect to the principle of freedom of contract and of the enforceability of operating agreements). A person ceases to be a member of a limited liability company when that person is

removed in accordance with a written operating agreement of the company redeems that person's entire interest. O.C.G.A. §14-11-601.1(b). If Mullally disagreed with these provisions he could have insisted that the provisions be modified at the time the CMS Operating Agreement was drafted or refused to sign the contract. Instead he executed the agreement and agreed to be bound with the other founding members of the business.

Finally, Appellants' reliance on *Hot Shot Kids Inc. v. Pervis (In re Pervis)*, 512 B.R. 348 (Bankr. N.D. Ga. 2014), *Kuehn v. Selton & Associates*, 242 Ga. App. 662 (2000), and *Gynecologic Oncology, P.C. v. Weiser*, 212 Ga. App. 858 (1994) is misplaced. All three opinions predate the RCA, which expressly permits a court to "blue pencil" or rewrite a covenant in order to make is enforceable, O.C.G.A. §13-8-53(d), as the Trial Court did in this case.[5] Indeed, the *Kuehn* court refused to "apply the blue pencil theory of severability to restrictive covenants in employment contracts." 242 Ga. App. 664. *Hot Shot Kids* is an opinion from a bankruptcy court that has never been cited as precedent by any Georgia state court.

[5] By enacting the RCA, the General Assembly expressed it legislative intent that "reasonable restrictive covenants contained in employment and commercial contracts serve the legitimate purpose of protecting legitimate business interests and creating an environment that is favorable to attracting commercial enterprises to Georgia and keeping existing businesses within the state. Further, the General Assembly desires to provide statutory guidance so that all parties to such agreements may be certain of the validity and enforceability of such provisions and may know their rights and duties according to such provisions." O.C.G.A. §13-8-50

Moreover, the *Hot Shot* agreement did not contain any provision for a party to terminate the restrictions.

Here, Mullally had the ability to sell or transfer his Units, but simply failed to ask for consent to do so. Mullally could have relinquished his Units, tendered them back to the company, or asked for consent to transfer the Units, when he resigned from CMS. Instead, he sought to "have his cake and eat it too" by resigning from the company but electing to maintain ownership of his Units. Moreover, any doubt as the duration of the restrictive covenants ended when CMS purchased his shares effective June 8, 2020, an action never challenged by Mullally. The restrictive covenants are valid and enforceable under the RCA.

3. The Trial Court Properly Exercised its Discretion in Modifying the Restrictive Covenants

The RCA changed the existing common law governing restrictive covenants and provided the court of this state with the power to "blue pencil" or modify a contractual provision so long as the modification does not render the covenant more restrictive with the employee as originally drafted. O.C.G.A. §13-8-53(d). In so doing, a court may modify the restriction as reasonably necessary to protect the interests of and to achieve the original intent of the contracting parties. O.C.G.A. §13-8-54. The parties to the CMS Operating Agreement, including Mullally, expressly stated their intent and incorporated a "blue pencil" provision in Article 13.4 of the agreement:

> If any court determines that the duration, geographic limitations, subject or scope of any restriction contained in Sections 13.2 or 13.3 is unenforceable, it is the intention of the Company, the Unitholders and the Managers that Sections 13.2 or 13.3, as applicable, shall not be terminated but shall be deemed amended to the extent required to make it valid and enforceable, such amendment to apply only with respect to the operation of Sections 13.2 or 13.3, as applicable, in the jurisdiction of the court that has made the adjudication.

(V3-398). Mullally of course is bound to this provision as a founding Member of CMS and a signatory of the CMS Operating Agreement.

After reviewing a fully developed record, the Trial Court exercised its discretion as allowed by the RCA and the contract between the parties, and modified the noncompetition provision set forth in Article 13.2 of the CMS Operating Agreement by limiting its scope to "to consulting and/or advisory services offered by CMS." (V12-3438). It likewise modified the nonsolicitation covenant by striking the phrase "provide services" but not "attempt to provide services" from the contract. (V12-3439) In so doing, the Trial Court followed the contractual and statutory authority to make these covenants less restrictive upon Mullally and his affiliated businesses.

In *Belt Power, LLC v. Reed, supra,* this Court held that "it is within a trial court's discretion whether or not to apply the (RCA's) blue pencil provisions." Accordingly, the Trial Court's decision to blue pencil the restrictive covenants in question may be reversed only when "the exercise of discretion was infected by a significant legal error or a clear error as to a material factual finding." 354 Ga.

App. at 295. Under an abuse of discretion standard of review, this Court must "review the trial court's legal holdings de novo, and we uphold the trial court's factual findings as long as they are not clearly erroneous, which means there is some evidence in the record to support them." *Cohen v. Rogers*, 341 Ga. App. 146, 148 (2017). "A proper application of the abuse of discretion standard demands that (this Court) affirm the holdings of the trial court if there is some evidence in the record to support them, regardless of whether judges on this Court would have made those same findings. Id. at 151.

Appellants do not argue that the Trial Court's Opinion was "infected by a legal error or a clear error as to a material factual finding." Indeed, they do not challenge or dispute any of the Trial Court's factual findings upon which it exercised its discretion to "blue pencil" the contract, including 1) Mullally was the head of the loan participation desk at CMS; 2) the covenants apply to Mullally's status as a Unitholder; 3) the restrictions on disposition of units "was entered into as part of the formation of a company, and all of the principals agreed to be equally bound" and "are the mechanism intended to protect the business itself, and thus the subject matter of the agreement;" 4) When Mullally "left CMS's employment, he had personal knowledge of every aspect of the loan participation business, and was able to reconstruct a list of pending and prospective loan participation matters from memory;" 5) Mullally failed to prove that CMS did not have a legitimate business

purpose to enforce the covenants; and 6) the intent of the parties to the CMS Operating Agreement is to allow modifications to the restrictive covenants in order to make them enforceable. (V12-3428-3445).

Appellants fail to carry their burden of showing that the Trial Court abused its discretion. Instead, they rely upon *LifeBrite Labs., LLC v. Cooksey*, 2016 WL7840217 (N.D. Ga. Dec. 9, 2016), *Wind Logistics Professional v. Universal Truckload*, No. 1:16-cv-00068 (ND Ga Sept 23, 2019), and *Chef Merito v. Javier Gonzalez*, 2020 U.S. Dist. LEXIS 171934 (N.D. GA 2020), three opinions from federal courts that were decided on the particular facts of each case. Moreover, the *LifeBrite Labs* and *Chef Merito* courts found noncompetition clauses to be unenforceable because both lacked geographic limitations; in the present case, Appellants did not raise a geographic challenge to the noncompetition clause. Finally, contrary to Appellants' argument, the district court in *Wind Logistics* exercised its discretion to modify a restrictive covenant under O.C.G.A. §13-8-53(d). 2019 U.S. Dist. LEXIS 161720 at *28. The Trial Court did not abuse its discretion by modifying the restrictive covenants at issue.

B. Assuming Arguendo that the RCA Does Not Apply, The Restrictive Covenants are Valid under Common Law

While Georgia law is clear that the RCA governs all restrictive covenants, the terms of Article 13 are valid under Georgia common law as well. Appellants

fail to mention that Georgia courts, under the common law, did not apply the same level of scrutiny to all restrictive covenants. While restrictive covenants in employment contracts receive strict scrutiny, restrictive covenants in professional partnership agreements (such as the CMS Operating Agreement) receive lesser or middle scrutiny, and restrictive covenants related to the sale of business interests receive the least scrutiny of the three. *Am. Control Sys. v. Boyce*, 303 Ga. App. 664, 667, 694 S.E.2d 141, 144 (2010). Further, under Georgia common law, when a portion of a restrictive covenant part of a sale of a business interest is found to be unreasonable, courts tend to uphold the remaining portions by "blue penciling" or severing the overly broad restrictions. *Id.* As Plaintiff argues, Article 13 is not found in an employment contract. Article 13 relates to Mullally's relinquishing of his units. Article 13 thus receives the lowest level of scrutiny.

Courts applying Georgia common law to restrictive covenants apply the same three elements examined under the RCA—duration, territorial coverage, and the scope of activity. *Beacon Sec. Tech., Inc. v. Beasley*, 286 Ga. App. 11, 12, 648 S.E.2d 440 (2007). Courts must focus on the interplay between the territorial limitation and the scope of the prohibition; a broad territorial limitation may be reasonable if the scope of prohibited behavior is sufficiently narrow." *Chaichimansour v. Pets Are People Too*, 226 Ga. App. 69, 71, 485 S.E.2d 248, 250 (1997) (enforcing a restrictive covenant under Georgia common law).

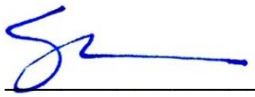
The reach, scope, and duration of Article 13's restrictive covenants are already stated above and are reasonable under common law. Nothing about a two or three year duration is unreasonable under pre-RCA case law. *Puritan/Churchill Chem. Co. v. McDaniel*, 248 Ga. 850, 851, 286 S.E.2d 297, 299 (1982) (upholding a restrictive covenant under strict scrutiny). Further, the restrictive covenant's reach is limited to the geographic area where CMS, and Mullally on CMS's behalf, did business. This reach is perfectly reasonable given the interplay of that geographic reach with the specific activities limited. Georgia courts have upheld such restrictive covenants before under common law. *See W. R. Grace & Co., Dearborn Div. v. Mouyal*, 262 Ga. 464, 467-68, 422 S.E.2d 529, 533 (1992) (upholding a restrictive covenant under strict scrutiny with no geographic reach stated because scope of activities was clearly defined and reasonable). "A restriction relating to the area where the employee did business on behalf of the employer has been enforced as a legitimate protection of the employer's interest." *Puritan/Churchill Chem. Co.*, 248 Ga. at 851, 286 S.E.2d at 299.

CONCLUSION

The Trial Court's Order should be affirmed in all respects, and this case remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted this 31st day of October 2022.

Certification: This submission does not exceed the word count limit imposed by Rule 24.



EVERSHEDS SUTHERLAND (US) LLP
S. Lawrence Polk
999 Peachtree Street NE
Atlanta, GA 30309
Phone: (404) 853-8000
Fax: (404) 853-8806
larrypolk@eversheds-sutherland.com

Attorney for Appellees.

CERTIFICATE OF SERVICE

This is to certify that I have this 31st day of October 2022, I served all parties in this matter with a copy of the foregoing **APPELLEES' BRIEF** via electronic mail to the below recipient. I certify that there is a prior agreement with Davis Gillett Mottern & Sims LLC to allow documents in a .pdf format sent via email to suffice for service.

Jerry L. Sims
Davis Gillett Mottern & Sims LLC
545 Dutch Valley Road NE Suite A
Atlanta, GA 30324
jlsims@ilglaw.com

S. Lawrence Polk
Georgia Bar No. 582959