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IN THE SUPREME COURT OF THE STATE OF DELAWARE

SUNDER ENERGY, LLC, Plaintiff-Below/Appellant, v. TYLER JACKSON, FREEDOM FOREVER LLC, BRETT BOUCHY, CHAD TOWNER, and FREEDOM SOLAR PROS, LLC, Defendants-Below/Appellees.	No. 455, 2023 On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 2023-0988-JTL

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

Sunder Energy, LLC ("Sunder") takes this interlocutory appeal from an Opinion Denying Preliminary Injunction (the "Opinion," Ex. A) in which the Court of Chancery erroneously determined that the non-compete and non-solicit provisions (the "Covenants") of Sunder's LLC Agreement (the "Operating Agreement") could not be enforced as a matter of law.

Sunder initiated this action after Defendant Tyler Jackson, Sunder's former Vice President of Sales, abruptly resigned, joined a direct competitor called Solar Pros—as its president—and actively recruited hundreds of Sunder's talented sales representatives to leave Sunder and work under his command. In short, Sunder sued Jackson for breaching his Covenants in the most egregious way possible. It also sued Defendants Freedom Forever LLC ("FF"), Brett Bouchy (FF's CEO), Chad Towner (FF's Chief Revenue Officer), and Freedom Solar Pros, LLC and Solar Pros LLC (together, "Solar Pros," and with FF, Mr. Bouchy, and Mr. Towner the "FF Defendants") for tortiously interfering with Sunder's Operating Agreement by inducing Jackson to commit these breaches and making his faithless conduct possible.

The evidence Sunder developed in support of its case during expedited discovery was overwhelming. Indeed, at the preliminary injunction hearing, there was no dispute that:

- Jackson signed a consulting agreement to become Solar Pros's president before he resigned from Sunder.
- In that agreement, Jackson promised to recruit new sales representatives for Solar Pros.
- In return, Solar Pros expressly agreed to indemnify Jackson for any claims Sunder may have brought against him, including specifically for violating his Covenants to Sunder. (In other words, there was no question that the FF Defendants had studied Jackson's Covenants prior to hiring him for the stated purpose of poaching Sunder's sales force.)

Expedited discovery further proved that, behind Sunder's back, Jackson and his senior-most sales managers at Sunder planned a coordinated resignation and that they were concerned about "leaks" while their plans remained a secret.

Jackson's disloyalty to Sunder was and remains undeniable. Documents and audio recordings showed that he spent entire days recruiting Sunder's sales representatives to leave Sunder and join Solar Pros, both before and after he left Sunder. And, although the trial court made a number of factual and legal findings that Sunder disagrees with, the court saw Jackson's conduct for what it was, finding it "clear that Jackson did engage in extensive solicitation efforts, both before and after leaving Sunder, and that Jackson thought in real-time that his involvement had an effect. His senior managers thought so too." Opinion 36 n.41; *see also id.* at 28-

29 (finding that "the stronger interpretation of the contemporaneous evidence favors Sunder's position" that "Jackson was soliciting Sunder personnel in violation of the Covenants" and that "Jackson committed to provide [the FF Defendants] with services that would compete with Sunder's business"). At bottom, over two hundred sales representatives left Sunder in the Fall of 2023 to go work for Jackson at Solar Pros because Jackson recruited them—a devastating injury that irreparably harmed Sunder's business.

Despite these undisputed facts and judicial findings, the trial court ultimately ruled against Sunder, finding that Sunder's Covenants were overbroad and unenforceable. Despite Jackson having agreed to blue penciling in the Operating Agreement, the court refused to enforce the provisions so they would, at minimum, prohibit the egregious conduct at issue in this case. The court also addressed and ruled as a matter of law on an unpled affirmative defense that Jackson asserted in the middle of the preliminary injunction briefing schedule—*i.e.*, that Sunder's CEO and President breached their fiduciary duties by not sufficiently explaining Sunder's Operating Agreement to Jackson before he voluntarily signed it. As a result, the trial court held—on the limited preliminary injunction record, based on necessarily inconclusive and incomplete factual findings, and with no affirmative claims asserted against Sunder—that Sunder could not enforce the Covenants against Jackson and, moreover, that the Operating Agreement was "***never validly***

approved." Opinion 40 (emphasis added). Finally, the trial court refused to apply Delaware law as to Sunder's tortious interference claim and effectively dismissed that claim based on Utah law, finding that the FF Defendants' interference was not accomplished using "improper means."

Given the interlocutory nature of this appeal, Sunder does not challenge every aspect of the trial court's decision that it believes was wrongfully decided.[1] Instead, Sunder asks this Court to vacate and/or remand the trial court's decision as to its (I) refusal to enforce the Covenants in a modified form, to the extent they were overbroad, notwithstanding decades of Delaware law supporting reasonable blue penciling and this State's commitment to freedom of contract, (II) final rulings on an unpled defense sprung on Sunder at the eleventh-hour on a limited, preliminary injunction record, and (III) effective dismissal of Sunder's tortious interference claim by finding that Delaware did not apply, despite being the core situs in common among all parties.

For all these reasons, this Court should vacate the trial court's decision and remand this case for further proceedings.

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[1] For instance, while Sunder disagrees with the trial court's findings that the Covenants are unenforceable as written, Sunder focuses this appeal on the blue pencil issue as it relates to the Covenants (§I) and reserves its right to appeal the remainder of the lower court's decision at an appropriate time, if necessary.

SUMMARY OF ARGUMENT

In accordance with Supreme Court Rule 14(b)(iv), Appellant states as follows:

1. The Court of Chancery erred in declining to blue pencil the Covenants and allow Sunder to prevent Jackson—one of Sunder's original founders—from directly competing against Sunder in the same industry and poaching hundreds Sunder's sales force to join him at a direct competitor. Moreover, Jackson specifically agreed that the Court of Chancery was empowered to blue pencil the Covenants if necessary. The court's refusal to do so was reversible error and should be reversed or remanded with instructions for the Court of Chancery to blue pencil the Covenants with appropriate guidance.

2. The Court of Chancery erred in even addressing, much less ruling on, Jackson's fiduciary duty "defense."

   a. *First*, the "defense" was not properly before the Court of Chancery. It was never raised in Jackson's pleadings, interrogatory responses, or otherwise. In fact, it was not even hinted at until a motion to compel filed shortly before the close of fact discovery. Sunder first learned of the defense in earnest after Sunder filed its opening brief in support of a preliminary injunction—leaving it no opportunity to seek discovery to

contest the defense and less than 24 hours to address it for the first time. The court should have declined to address the late-raised "defense" and not entertained it with factual findings and preclusive rulings as a matter of law on a preliminary injunction record. Remand should result with instructions now to reconsider the preliminary injunction without reference to this defense.

b. *Second*, even if the defense was properly before the court, there was not a sufficient basis to rule on the limited record before it—and on a preliminary injunction standard—that Sunder's CEO and President breached their fiduciary duties as a matter of law. This aspect of the decision should be either reversed in favor of Sunder or remanded with instructions to rule on the fiduciary duty defense only as to what the court believed would be the likelihood of success at trial.

3. The Court of Chancery erred in applying Utah and not Delaware law as to Sunder's tortious interference claim against the FF Defendants and further erred by effectively dismissing this claim altogether at the preliminary injunction phase.

STATEMENT OF FACTS

A. Sunder's Formation

In the summer of 2019, seven founders formed Sunder: CEO Max Britton, President Eric Nielsen, and five minority members: Jed Sewell, Michael Gutschmidt, Max Ganley, Steven Cohen, and Tyler Jackson. Although the sales company had modest beginnings, it quickly experienced explosive growth. A338-42.

On August 14, 2019, before it had even filed its Certificate of Formation, Sunder entered into a dealer agreement (the "Dealer Agreement") with FF—a large solar installation company—under which Sunder agreed to exclusively market and sell FF's solar installation services. Two days later, Sunder filed its Certificate of Formation in Delaware. A096. At that time, Sunder's founders were still discussing the details of their new company and committed to memorializing their full agreement at a later date in writing. *See, e.g.*, A1586 at 103 (Ganley testifying that conversations around drafting the Operating Agreement started around "beginning of September, end of August").

That said, Sunder's founders understood and agreed from the very beginning that not all members had equal rights in the new company. One reason for this had to do with their respective "skin in the game." Under Sunder's Dealer Agreement with FF, Sunder had the opportunity to borrow up to $10 million from FF, subject

to the execution of a personal guarantee. Nielsen (Sunder's President) and Britton (Sunder's CEO) were the only ones to accept that risk, and the personal guarantees they executed allowed Sunder to borrow vital capital in the company's early days. As Nielsen explained:

> I remember telling the junior partners . . . that Max [Britton] and I would sign the personal guarantee . . . . And I remember Tyler [Jackson] stood up, and he put his two fingers down like this, and he said, "Done." And I think he was excited that he wouldn't have to sign the personal guarantee . . . .

A1335 at 243; *see also* A1650 at 40-41 ("Max and Eric . . . had to pretty much sign their homes and, like, their portfolios as collateral for a loan we took out with Freedom."); A1582-83 at 89-90 (Ganley); A1864 at 34 (Cohen); A1422 at 34 (Sewell).

Before finalizing the Operating Agreement, Sunder's founders discussed these realities and how Nielsen and Britton would, accordingly, have different amounts and types of equity in the company. For instance:

- A1334-35 at 241-42 (Nielsen testifying that Sunder's founders did not "all have equal equity" at the outset and that this was "discussed among the partners");
- A1654 at 57 (Gutschmidt testifying that not all members had equal rights because Nielsen and Britton were "the senior partners" and "the majority owners");

- A1657-58 (Gutschmidt 68-71: testifying that when "Sunder was formed and [the Operating Agreement] was signed," equity stakes were "brought up multiple times" and that he understood that Nielsen and Britton "were on a different . . . level than . . . the other cofounders");
- A1862 (Cohen testifying that Sunder's founders "understood [their] equity going into it" and that Nielsen and Britton would have more);
- A1420-22 at 27-29, 34 (Sewell testifying that he understood Britton and Nielsen to have a "different type" of equity, in part, because they had signed personal guarantees).

Similarly, Sunder's founders discussed that Nielsen and Britton would have voting rights that the other co-founders did not. *See* A1664 at 94 (Gutschmidt testifying that he did not believe that there was "equal footing with Max and Eric and the other co-founders with respect to voting rights"); A1588 at 112-13 (Ganley testifying similarly).

Sunder's founders also discussed and agreed that they would be bound by non-compete and non-solicit restrictions. *See* A1335 at 242-43 (Nielsen testifying, "I remember discussing that we would have restrictive covenants . . . . that was known amongst the group."); A1791 at 187 (Britton testifying similarly); A1660-62 (Gutschmidt testifying that he remembered being "in favor of including a noncompete/nonsolicit" restrictions); A1585-87 at 100-01, 106-07 (Ganley

testifying that he understood that the founders would be subject to restrictive covenants).

Britton and Nielsen retained a law firm to memorialize the founder's discussions and agreement. A1790-1791 at 185-87 (Britton); A1337 at 251 (Nielsen). The agreement provided Britton with a 27% interest in Common Units, Nielsen with a 25% interest in Common Units, and the remaining founders with an 8% interest in Incentive Units. A160-61. The minority members understood that their equity was an incentive to continue providing value to the business. A1679 at 156 (Gutschmidt); A1425 at 49 (Sewell).

In addition, the Operating Agreement expressly disavowed general fiduciary duties among the founders and instead, consistent with the founders' discussions, bound them to the specifically prescribed Covenants that would apply for two years after a founder ceased owning equity in Sunder. A128 at § 8.1(c)(i). As relevant for this appeal, the non-compete covenant prohibited Sunder's founders from competing against Sunder in a door-to-door sales business in the markets in which Sunder operated or reasonably anticipated to conduct business. A110. The non-solicit provision prohibited the founders from recruiting from or "encourag[ing] to leave" Sunder any individual who Sunder employed, received services from, or had a business relationship with. A145. Recognizing the importance of these Covenants to the success of their business, Sunder's founders agreed that any violation "will

cause irreparable harm" and entitle Sunder to injunctive relief. A146 at § 13.4. The Covenants were no secret. A1013 at 66:3-4 (Jackson testifying that he "understood that [he had] a non-compete with Sunder").

On December 31, 2019, Nielsen sent a copy of the Operating Agreement to his co-founders and told them that he would separately send a joinder agreement for them to sign. In full, Nielsen wrote:

> Max [Britton] and I have executed our portion of the Sunder Operating Agreement today and a copy for your review is attached. I will be sending each of you a couple of documents via docusign momentarily. The first one contains your grant of shares and the second one is a joinder agreement that will formally add each of you to the Operating Agreement. If you are married, your spouse will also be sent a spousal consent form. ***Please let Max or me know if you have any questions***.
>
> Lastly, the attorney's highly recommend completing these documents by the end of tonight, but ***we don't expect any of you to sign something if you are uncomfortable with it*** or if you need more clarification from the attorney's [sic] on something. ***Please let me know if you have any questions***.

A098 (emphasis added).

The Operating Agreement did not come out of the blue, and the minority members testified that they were advised to review it with their own attorneys. A1662 (Gutschmidt testifying that Nielsen suggested he review it "possibly with our own legal or by ourselves."). Nor did Nielsen seek to extract quick signatures without giving his co-founders time to review if they wanted it. A1751 (Britton

testifying that had Jackson told him he "needed more time to review the agreement," he would have "[g]ranted it to him . . . no problem.").

Every one of Sunder's founders signed the Operating Agreement. A163. In so doing, they bound themselves to the entire agreement and agreed that they "had the opportunity to review [it] with independent legal counsel" and that Snell & Wilmer LLP, who drafted the Operating Agreement, represented only Sunder. A152.

With the exception of Jackson, none of Sunder's founders has questioned the legitimacy of the Operating Agreement. To the contrary, Sunder's founders have honored their agreement and acknowledged its importance. *See, e.g.*, 1660 A1666, A1681 at 81, 105, 162-63 (Gutschmidt testifying that "nobody" among the cofounders "voic[ed] pushback as to including a noncompete"); A1589, A1598, A1600-1601 at 117, 153, 161-63. (Ganley testifying that he understood the Covenants and did not believe they were overbroad); A1872 (Cohen testifying similarly). Also with the exception of Jackson, none of Sunder's founders has accused Britton or Nielsen of acting against their or the company's interest. *See, e.g.*, A1681 at 163 (Gutschmidt testifying that he did not agree that provisions in the Operating Agreement were "against [his] interests.")).

Sunder amended the Operating Agreement in 2021 to grant equity to additional individuals and update the definition of "Territory" to reflect that Sunder

had expanded its operations in more states. A181. The Covenants remained unchanged.

B. Sunder's Investment in Jackson

Jackson experienced massive success as a sales manager based on Sunder's investment in him. A1657 (Gutschmidt testifying, "[Jackson] was the lowest earner when he first came on by a long shot, and now he's . . . the top earner."). Indeed, by 2023, Sunder had given Jackson direct authority over approximately half of the company, including many of its key markets like Texas, Florida, Arkansas, California, and South Carolina. A999, A1027 at 10, 125 (Jackson acknowledging that he was "the most senior sales leader" at Sunder and oversaw "roughly half" of Sunder's volume); A841-44 at 42:21-23, 54:7-12 (Wilson); A694 at 24:15-17 (Armstrong); A1210 at 55:17-22 (Tisdale). In exchange for his efforts, Jackson became the highest paid executive at Sunder, earning approximately $6,000,000 over the past four years, including approximately $1,200,000 in equity distributions. A279; A1023-24 at 109:12-110:17 (Jackson's testimony).

C. FF Creates and Invests in Solar Pros to Directly Compete Against Sunder

Starting in 2023, FF invested heavily in a new solar sales entity called "Solar Pros," which FF either owns or plans to own. Opinion 21. FF invested in Solar Pros around the same time it stopped paying Sunder its full commissions under the Dealer Agreement, which is currently being arbitrated in a separate action. There is no

dispute that Solar Pros is a direct competitor to Sunder and that it experienced tremendous growth in 2023 at Sunder's expense. *E.g.*, Opinion 21, 27-29.

D. FF Offers Sunder $10,000,000 for Jackson

Jackson admitted that he began discussing a role with Solar Pros in the summer of 2023. A589. Nevertheless, the FF Defendants appreciated that Jackson was not a free agent, given that they had reviewed Sunder's Operating Agreement and were fully aware of Jackson's Covenants.

Ultimately, FF proposed a deal to retain Jackson on September 13 and 14, 2023, when the companies' principals met in Las Vegas to discuss FF's ongoing breaches of the parties' Dealer Agreement. A1321-22 at 189:10-190:7 (Nielsen); *see also* A1483 at 25:4-11 (Towner). During those meetings, Bouchy offered Sunder $10,000,000 to release Jackson from his Covenants and allow Jackson to bring some of his Sunder sales force with him to Solar Pros. A1919-20 at 75:14-77:1 (Powell); *see also* A1483 at 26:11-15 (Towner).

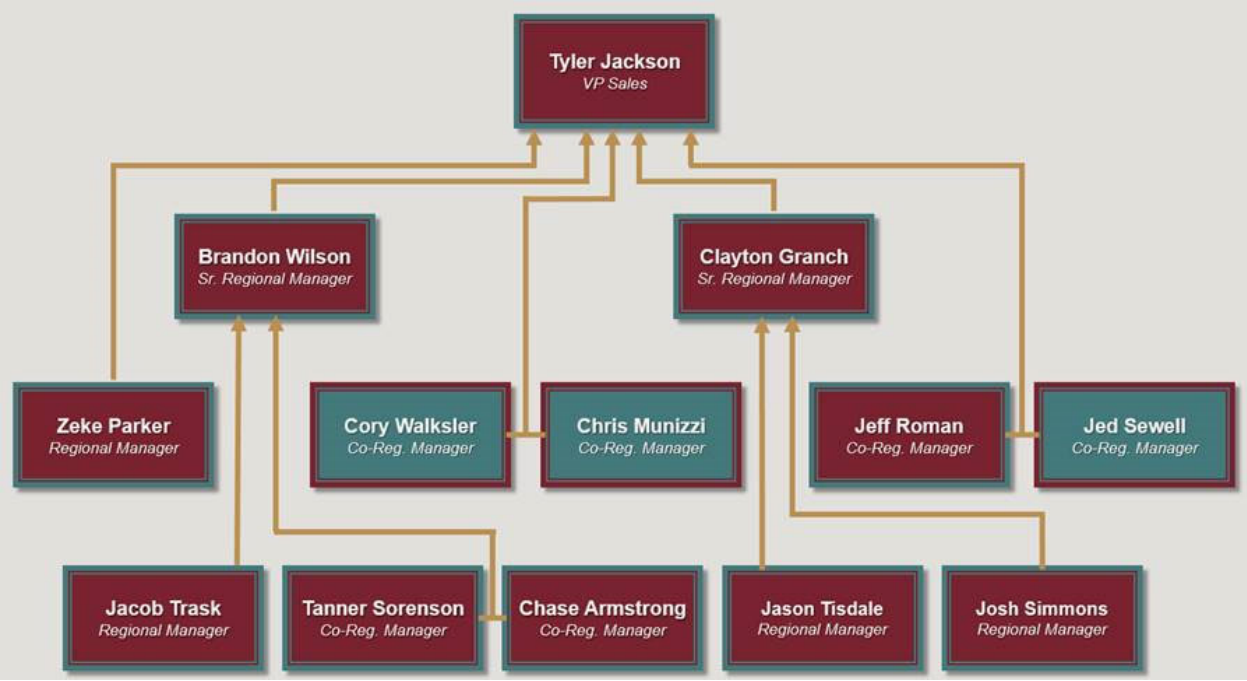
The parties never reached an agreement to release Jackson from his Covenants.

E. FF and Jackson Recruit Sunder's Sales Force While Sunder Considers FF's Offer

While Sunder considered the $10,000,000 offer in good faith, and while it was under the mistaken impression (from FF) that the parties were at a standstill, Jackson worked hard to recruit his Sunder team to join Solar Pros. In fact, by early

September, the FF Defendants had already arranged for many of Sunder's sales representatives to join Solar Pros. See A244-47. As the Court of Chancery observed, "[w]ithin days after the Las Vegas meeting, the dominos began to fall," and by September 20, "[a]ll of [Jackson's] teams were transferred to the Pros portal . . . ." Opinion 28-29.

During the proceedings below, the parties agreed that the following graphic accurately depicted Jackson's direct reports at Sunder, with those in red representing the individuals who followed him to Solar Pros:



See A999 at 12:6-14:16; A1069 at 291:13-21.

Jackson's recruitment of these individuals (and many more) was well documented and established during the preliminary injunction phase. Opinion 25-29. For instance, the Court of Chancery found that, on September 21, 2023—before

he had even resigned from Sunder—Jackson sent an audio file" to four of his direct reports in which he explained that "he had finished about nine hours of meetings with three Sunder sales representatives and thought he had "all three of them locked down" to join Solar Pros. Opinion 27. Sunder played this audio recording during the preliminary injunction hearing, and it alone is dispositive as to Sunder's breach of contract claim.

F. Jackson and His Followers Leave Sunder and Join Solar Pros at Jackson's Behest and Sunder Files For Injunctive Relief

As the Court of Chancery found: "On September 22, 2023, four hours *before* he resigned from Sunder," Jackson signed a consulting agreement with Solar Pros under which he committed to provide services "that would compete" against Sunder and include recruitment of sales representatives in violation of his Covenants. Opinion 27-29. Three days later, Solar Pros announced that Jackson had joined as its new President, which Sunder learned about on Instagram. *See* Opinion 30.

During the three days between Jackson's resignation from Sunder and the public announcement of his new role at Solar Pros, Jackson recruited Sunder personnel from Tampa to Los Angeles. Opinion 30.

After learning about Jackson's new role, Sunder asked Jackson to stand down so the parties could discuss his separation in an orderly way. A300. Jackson ignored this request and kept recruiting Sunder's sales force (in Alaska, Las Vegas, and beyond) to join him at Solar Pros. Opinion 30-31.

Jackson was the reason so many people left Sunder. For example, one of his top deputies at Sunder testified that Jackson's advice was "a sign" and *the deciding factor* for why he left Sunder and joined Solar Pros. Opinion 24-25; *see also id.* at 29 (citing FF communications describing how "[a]ll of Tyler's teams were transferred" to Solar Pros and were "coming with Tyler"). According to the FF

Defendants' interrogatory responses, at least 363 individuals left Sunder and joined Solar Pros since September 13 (when the parties met in Las Vegas). A599-609.

Ultimately, following a complete breakdown in settlement discussions, Sunder promptly initiated this action on September 29, seeking injunctive relief to prevent Jackson from continuing to compete against Sunder and recruit even more of its sales representatives.

Sunder's lawsuit, however, did not deter Jackson or the FF Defendants, as they continued to aggressively recruit from Sunder until the Court of Chancery issued an ex parte temporary restraining order on October 4. A305-18. Indeed, Jackson and Defendant Towner offered one of Sunder's regional managers $200,000 if he would agree to join Jackson at Solar Pros. A592; *see also* Opinion 31 (detailing how Jackson circulated a list of "Sunder sales professionals to recruit" and how, after the TRO had issued, Jackson instructed his team to "continue his work," which they did).

G. The Trial Court's Decision

On October 11, the Court of Chancery issued a Renewed TRO (the "Renewed TRO"). A496.

On October 23, the court scheduled a preliminary injunction hearing for November 17, 2023 and ordered an expedited discovery schedule. A571. During

that period, the parties collectively served and answered interrogatories, produced over 22,000 documents (totaling over 88,000 pages), and took eighteen depositions.

On November 13 at 11:04 p.m., less than 24 hours before Jackson's and the FF Defendants' opposition briefs to the preliminary injunction motion were due, Jackson moved for leave to file a verified third-party complaint and amended counterclaims (the "Motion for Leave"). A2088. In the Motion for Leave, Jackson asserted—for the first time other than oblique references in a prior motion to compel—a claim that certain of Sunder's principals engaged in fraud and breached their fiduciary duties by not explaining the Operating Agreement to him before he signed it. The Motion for Leave has not yet been decided.

On November 22, 2023, the trial court denied Sunder's motion for preliminary injunction. The Opinion found that "the stronger interpretation of the contemporaneous evidence favors Sunder's position" that "Jackson was soliciting Sunder personnel in violation of the Covenants" before he even resigned from Sunder. Opinion 28; *see also id.* at 36 n.41 ("It is also clear that Jackson did engage in extensive solicitation efforts, both before and after leaving Sunder"). The Opinion further found that Jackson's contract with Solar Pros required him to "compete with Sunder's business . . . ." Opinion 29.

Nevertheless, the court found that the Covenants were unenforceable (1) because Nielsen and Britton violated their fiduciary duties by purportedly not

explaining certain aspects of the Operating Agreement to Jackson and (2) because the Covenants were overbroad. Opinion 39-60. The trial court also effectively dismissed Sunder's tortious interference claim against the FF Defendants, finding, *inter alia*, that Utah law governed that claim and that FF did not interfere with Sunder's Operating Agreement by "improper means." Opinion 61-67.

On December 4, 2023, Sunder applied for certification of an interlocutory appeal. D.I. 1. On December 22, 2023, the Court of Chancery issued an opinion certifying this appeal. A2488. On January 25, 2024, this Court accepted the appeal. D.I. 7.

ARGUMENT

I. TO THE EXTENT THE COVENANTS ARE UNREASONABLY BROAD, THE COURT OF CHANCERY ERRED IN NOT BLUE PENCILING THEM TO MATCH THE EGREGIOUS FACTS OF JACKSON'S BREACH

A. Question Presented

Did the Court of Chancery err in declining to blue pencil the Covenants notwithstanding conduct that would have breached a more conservative set of covenants? This question was raised below (A2155-57, A2188) and considered by the Court of Chancery (Opinion 50-51).

B. Standard of Review

This Court reviews generally "the grant or denial of a preliminary injunction for abuse of discretion." *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998). "Nevertheless, this Court reviews the grant of a preliminary injunction without deference to the embedded legal conclusions of the trial court." *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996). Moreover, "the Court of Chancery's legal conclusions are subject to *de novo* review." *Lawson v. Meconi*, 897 A.2d 740, 743 (Del. 2006). Additionally, where "questions . . . hinge on public policy grounds," they are reviewed *de novo*. *Cantor Fitzgerald, L.P. v. Ainslie*, 2024 WL 315193, at *8 (Del. Jan. 29, 2024).

C. Merits of Argument

The Court of Chancery declined to blue pencil the Covenants after determining that they were overbroad. Despite acknowledging that courts may blue pencil under Delaware law, the Court of Chancery relied on a policy decision to "resist" blue penciling. Opinion 50-51. The court should have instead recognized Delaware's history of allowing blue penciling and done so here.

Sunder, like many companies, deliberately chose to organize under Delaware law and included a Delaware choice-of-law provision in its Operating Agreement. A150. Companies may do that for many reasons, but high among them is the expectation that "[t]he courts of this State hold freedom of contract in high—some might say, reverential—regard." *Ainslie*, 2024 WL 315193, at *1. And, unlike some Delaware companies, Sunder does business in this state.

Companies expect, and should be able to rely on, Delaware courts to enforce contractual provisions in Delaware LLC agreements. Thus, when the facts demand relief, Delaware courts must be willing to enforce blue pencil agreements and bring restrictive covenants within the realm of enforceability. By doing so to address clear breaches, courts give life to parties' contractual intent and provide precedent of what provisions are acceptable under Delaware law. Without that guidance, drafters are left in the dark to guess at the outer bounds of acceptable scope for these types of provisions. Worse, if Delaware develops a reputation against blue penciling

covenants to capture even the most egregious facts, as here, it risks losing confidence in the courts' "reverential" regard for upholding parties' contractual intent. *Id.*

Historically, blue penciling overbroad restrictive covenants to bring them into reasonable line was commonplace under Delaware law. *See, e.g.*, *Del. Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *11-14 (Del. Ch. Oct. 23, 2002) (writing in reasonable geographical limit to restrictive covenant that lacked one and revising temporal restriction in covenant); *RHIS, Inc. v. Boyce*, 2001 WL 1192203, at *1 (Del. Ch. Sept. 26, 2001) (concluding two year restriction was unreasonable in the particular field, but issuing injunction precluding solicitation for a period of one year from termination); *Norton Petroleum Corp. v. Cameron*, 1998 WL 118198, at *3 (Del. Ch. Mar. 5, 1998) (blue penciling geographic scope from 100-mile radius to 20-mile radius); *Knowles-Zeswitz Music, Inc. v. Cara*, 260 A.2d 171, 175 (Del. Ch. 1969) (blue penciling overbroad geographic scope in restrictive covenants to make the covenants reasonable to enforce).

Unsurprisingly, litigants and other courts have thus interpreted Delaware law as allowing blue penciling of restrictive covenants. *See, e.g.*, *Cynosure LLC v. Reveal Lasers LLC*, 2022 WL 18033055, at *10-11 (D. Mass. Nov. 9, 2022) (applying Delaware law and blue penciling restrictive covenants that were overbroad in geographic scope to make them reasonable); *United HealthCare Servs., Inc. v. Corzine*, 2021 WL 961217, at *10-12 (S.D. Ohio Mar. 15, 2021) (applying Delaware

law and blue penciling duration of the covenants); *WebMD Health Corp. v. Dale*, 2012 WL 3263582, at *9 (E.D. Pa. Aug. 10, 2012) (applying Delaware law and blue penciling overbroad definition of "competitive business").

Certain recent Delaware decisions, like the Opinion, have questioned the appropriateness of blue penciling restrictive covenants. But this Court has never had an opportunity to provide guidance on whether Delaware's courts should blue pencil restrictive covenants to the extent they may be facially overbroad but could reasonably address a particular breach. There is no reason that Delaware should deviate from the long line of precedent establishing it as a blue pencil state and, under appropriate circumstances, courts applying Delaware law should continue to blue pencil restrictive covenants to make them reasonable and enforceable.

This is one such case. The lower court raised only academic concerns with blue penciling, not practical ones. It held that "[t]o blue-pencil the provision creates a no-lose situation for employers, because the business can draft the covenant as broadly as possible, confident that the scope of the restriction will chill some individuals from departing" and can "enable[] employers to extract benefits at the expense of employees by including unenforceable restrictions in their agreements." Opinion 50. For these concerns, the lower court cited only academic work. Opinion 51. But affirming the blue pencil rule as the official policy of the State of Delaware in governing documents (like the Operating Agreement) for owners or high-ranking

executives does not give rise to the run-of-the-mill employer/employee concerns expressed in the Opinion.

Indeed, the typical concerns regarding bargaining power simply are not present here. Jackson was a founding member and a Vice President of Sunder. He was involved in discussions regarding the Operating Agreement and its scope. *See supra* Statement of Facts §A. Jackson was not a rank-and-file employee wholly without bargaining power—in fact, Sunder *had no restrictive covenants* for its independent sales representatives, only its high-ranking members. Thus, the lower court's equitable and public policy concerns do not carry the same weight against blue penciling here. *See Older*, 2002 WL 31458243, at *11-13 (noting that "[r]easonableness of duration must be determined based upon the nature of the employee's position and the context of a particular industry" and taking into account that the employee "held a key position," "ran . . . operations and, because of his business development responsibilities, he was able to build personal relationships with many of [the company's] major customers"); *DGWL Investment Corp. v. Giannini*, C.A. No. 8647-VCP, at 18 (Del. Ch. Sept. 19, 2013) (TRANSCRIPT) (concluding that the policy reasons not to blue pencil a restrictive covenant in an employment agreement did not apply to the "facts of this case where a corporate founder and CEO received $10 million in exchange for control of his company and his promise not to compete").

This is not a situation where, as the lower court and Jackson's counsel have put it, the Covenants were being wielded to prevent Jackson's "daughter [from going] door to door selling Girl Scout cookies." Opinion 54; A2150. Jackson is not trying to sell Girl Scout cookies. Nor is he trying to solicit Sunder employees to go sell Girl Scout cookies. He is not even trying to sell another product or sell in another industry. He left Sunder for ***its direct competitor in the same industry*** and took—and continues to want to take—Sunder's sales force with him. This is precisely the kind of restriction that any member of an LLC receiving distributions and signing a restrictive covenant should expect to be enforced against him. Sunder only seeks to correct and prevent further harm from Jackson's exodus, which would have violated even the most conservative restrictive covenant. To the extent Sunder's Covenants are impermissibly overbroad, this is precisely the set of circumstances under which the equities should favor blue penciling.

To underscore the point, Jackson agreed that if a court determined any of the Covenants were unenforceable due to their breadth, the "court shall have the power to reduce the duration or scope of such provision, as the case may be, and, in its reduced form, such provision shall then be enforceable." *See* A146 at § 13.2; A217 at § 13.2. Whether or not Delaware courts are bound by this provision (Opinion 51 n.70), it is not weightless. To wholly disregard it, as the Court of Chancery did, undermines Delaware's status as a contractarian state. *See* 6 *Del. C.* § 18-1101(b) ("It is the policy

of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.").

Put simply, if there were ever a case in which a court should blue pencil overbroad restrictive covenants, it is this case. Here, the Court of Chancery has already made preliminary factual findings that Jackson "committed to . . . compete with Sunder's business," "engage[d] in extensive solicitation efforts," and "thought in real-time that [those efforts] had an effect" when he joined a direct competitor (as its president and lead recruiter, no less) and poached hundreds of talented sales representatives from his former equity partners. *See* Opinion 27-29, 36 n.41. The Court of Chancery also offered ways to read or shape the non-compete and non-solicit Covenants to be more reasonable. Opinion 58 n.74, 60. Even if blue penciled to a scope considered reasonable by the Court of Chancery, Jackson would have egregiously breached these obligations.

This Court should remand with instructions for the Court of Chancery to either blue pencil the Covenants to conform to the reasonable evidence of breach or, in the alternative, remand with instructions to blue pencil with clearer guidance.

II. THE COURT OF CHANCERY ERRED IN RULING AGAINST SUNDER ON JACKSON'S ELEVENTH-HOUR, UNPLED FIDUCIARY DUTY DEFENSE

A. Question Presented

Did the Court of Chancery err in ruling, at the preliminary injunction stage, that the Covenants were invalid due to an unpled fiduciary duty defense raised for the first time during briefing for the preliminary injunction hearing? This question was raised below (A2133-44, A2183-86) and considered by the Court of Chancery (Opinion 40-48).

B. Standard of Review

This Court reviews generally "the grant or denial of a preliminary injunction for abuse of discretion." *Wininger*, 707 A.2d at 40. "Nevertheless, this Court reviews the grant of a preliminary injunction without deference to the embedded legal conclusions of the trial court." *Matheson*, 681 A.2d at 394. Moreover, "the Court of Chancery's legal conclusions are subject to de novo review." *Lawson*, 897 A.2d at 743. "Whether the [Vice] Chancellor correctly formulated the legal standard for determining if [Nielsen or Britton] owed a fiduciary duty to [Jackson] during the [Operating Agreement] negotiations presents a question of law that this Court reviews *de novo*." *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 48 (Del. 2006)

C. Merits of Argument

1. The Court of Chancery erred in ruling as a matter of law on a defense that was not pled and was presented on a limited preliminary injunction record

The start and end of this inquiry should be Jackson's pleadings in this matter. In his answer, Jackson raised eight affirmative defenses. A566-68. None bore even the specter of a defense that Sunder's principals had breached their fiduciary duties. It was error for the court to find the Operating Agreement unenforceable on the basis of an unpled defense.

The parties' defenses should not have been a mystery. Sunder propounded interrogatories asking Jackson to "[i]dentify any defenses You intend to assert in this action and state the complete factual and legal basis for each such defense." Jackson declined to respond on October 24, calling the interrogatory premature until he "has had a chance to review Sunder's document production or participate in depositions." A595-96. On November 8—the day after the close of fact discovery—Jackson supplemented those responses. He again declined to expand on any new defenses or their bases. A2016-17.

Instead, the first time Jackson ever even *used the phrase "fiduciary duty/ies*" in connection with Nielsen and Britton was in a single sentence of a November 3, 2023 reply in support of a motion to compel. A989 at ¶ 8 ("Jackson has shown that documents and communications . . . go directly to the crux of Jackson's defenses to

Sunder's forthcoming motion for preliminary injunction, including, *inter alia*, that the Agreement's noncompete and nonsolicitation provisions are unenforceable, that Sunder (i.e., Nielsen and Britton) engaged in fraud and violations of their fiduciary obligations, and that Sunder comes to this Court with unclean hands."). That statement came days before the close of fact discovery (November 7), Sunder's opening brief for its preliminary injunction (November 9), after all significant document productions, and in the middle of a rushed deposition schedule (during which multiple depositions were taken on a daily basis). Jackson ***never supplemented his interrogatory responses***, including in his subsequent November 8 supplement, to identify the factual and legal bases for this defense, or even that he intended to raise it.

The next time Sunder heard of the defense was Jackson's motion seeking leave to file a third-party complaint, which was filed just before midnight on November 13, 2023, the night before Jackson's opposition brief was due and almost a week after the completion of fact discovery. A2088. The defense then featured prominently in Jackson's opposition brief—which was not fully filed until *more than two hours* past its deadline and to which Sunder had less than 24 hours to respond.[2]

[2] Sunder partially responded to these newly-raised and untimely arguments out of an abundance of caution in its reply brief. A2183-86. But Sunder's argument—amounting to approximately three pages—was the full extent of any submissions available to the Court from Sunder when the Court issued its Opinion.

For this reason alone, the lower court should never have entertained, much less credited, this so-called "defense." Even where a "defense may have substantive merit," a defendant waives it when they fail to "plead the affirmative defense . . . or raise the spectre of the defense [such that] the plaintiffs were never put on notice that they needed to prepare to meet the inferences to be drawn from the facts supporting the defense." *Alexander v. Cahill*, 829 A.2d 117, 128 (Del. 2003); *see also Realty Enterprises, LLC v. Patterson-Woods*, 11 A.3d 228 (Del. 2010) (finding defenses waived when they were not raised in pre-trial stipulation or pled as affirmative defenses); *Kaufman v. DNARx LLC.*, 2023 WL 9060288, at *4 (Del. Ch. Dec. 29, 2023) (finding defenses waived when defendant "never pled [the] defense, never attempted to amend its answering brief, never disclosed [the] defense in its discovery responses, and failed to identify its . . . argument in the pre-trial order"); *Harrison v. Quivus Sys., LL*C, C.A. No. 12084-VCMR, at 25-26 (Del. Ch. Aug. 5, 2016) (TRANSCRIPT) ("Here, given the compressed schedule of this case, by raising its impossibility defense after the close of discovery, Quivus prejudiced Harrison's ability to challenge and rebut it. In my discretion, I consider this defense waived.").

The Court of Chancery declined to address this clear waiver. Instead, its decision acknowledged *sua sponte* the possibility that a separate fiduciary duty *claim* by Jackson might be untimely, but found that the timeliness inquiry did not apply to "invoking the breach of fiduciary duty as an affirmative defense." Opinion 46-48.

It was only in the Court of Chancery's opinion certifying this appeal that the Vice Chancellor addressed the unpled nature of the defense for the first time, stating:

> Jackson had raised an unclean hands defense in his answer, and unclean hands can be a vehicle for asserting a defense based on breach of fiduciary duty or fraud. . . . The fact that Jackson had not formally spelled out a defense based on breach of fiduciary duty thus did not prevent him from arguing that the Nielsen and Britton's breach of duty rendered the restrictive covenants unenforceable such that Sunder was not entitled to a preliminary injunction. Jackson had identified unclean hands as a defense in his answer, and he diligently pursued that defense by seeking discovery and moving to compel the production of documents related to that defense. *See* Dkt. 127. Jackson fairly presented the defense for purposes of the injunction application.

A2459-60.

First, whether or not unclean hands *can* be a vehicle for a breach of fiduciary duty is beside the point.[3] Here, it was not. That is clear from the record. Jackson's brief opposing the preliminary injunction does not mention "unclean hands" even once. A2098-2165. Nor does the transcript for the preliminary injunction hearing.

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[3] The Court of Chancery cited *Ray v. Williams*, 2020 WL 1542028 (Del. Ch. Mar. 31, 2020) and *In re Rural/Metro Corp. Stockholders Litig.*, 102 A.3d 205 (Del. Ch. 2014) for this statement. Neither permits Jackson's late filings. In *Ray*, although the defendant had raised an affirmative defense for unclean hands, she had also clearly asserted fiduciary duty grievances by way of counterclaim in the same pleading. *See* Answer to Complaint/Petition for Declaration of Disposition of Remains, Affirmative Defenses and Counterclaim, *Ray v. Williams*, 2017 WL 5513543, at Counterclaim ¶¶ 20-26. Similarly, unclean hands' role in the post-liability settlement credit dispute in *Rural/Metro* was in the context of years-long litigation regarding breaches of fiduciary duty, aiding and abetting those breaches, and frauds on the board. *In re Rural/Metro*, 102 A.3d at 214-15. In both cases, the parties were on notice from the start of defendant's intent to litigate that issue.

A2207-2364.[4] As a result, Sunder was not and could not have been on notice of Jackson's fiduciary duty defense based on the vague unclean hands defense.

Second, as noted above, Jackson's motion to compel did not put Sunder on notice of his intent to litigate a fiduciary defense. Jackson had never pled the defense, nor indicated that he planned to pursue it. But even if the motion to compel could have put Sunder on notice, Jackson subsequently supplemented his interrogatory responses and ***refused under oath to identify his new defense***. That is not "fairly present[ing]" a defense. A2459-60.

The Court of Chancery should have declined to reach Jackson's eleventh-hour fiduciary duty defense on this record. The defense had been waived and it was error for the Court to consider it. For that reason, this issue should be remanded with instruction not to consider the fiduciary duty defense.

[4] Even Jackson's November 3 reply to his motion to compel implies that Jackson viewed the unclean hands defense as separate from any argument regarding fiduciary duties. A989 at ¶ 8 (listing relevance of the sought documents as going to whether "the Agreement's noncompete and nonsolicitation provisions are unenforceable, that Sunder (i.e., Nielsen and Britton) engaged in fraud and violations of their fiduciary obligations, *and* that Sunder comes to this Court with unclean hands") (emphasis added).

2. Even if the fiduciary defense were properly raised, the Court of Chancery erred in ruling that Nielsen and Britton breached their duties as a matter of law on a preliminary injunction record

Even if the defense were properly before the Court of Chancery, it was error to rule as it did.

a. The Court of Chancery should not have ruled on a preclusive issue on an underdeveloped claim and on preliminary factual findings

As noted above, the fiduciary duty defense was raised late. It was raised after document productions. It was not even hinted at until the middle of depositions. And Sunder did not learn the bases of that defense until just before its reply brief in support of the preliminary injunction was due. At the preliminary injunction hearing, the word "fiduciary" or "fiduciaries" appears a mere total of eight times. A2217; A2304; A2310; A2314; A2360.

Every preliminary injunction record is inherently incomplete. As a result, parties seeking an injunction need only demonstrate "a reasonable probability of success on the merits at a final hearing." *In re Micromet, Inc. S'holders Litig.*, 2012 WL 681785, at *5 (Del. Ch. Feb. 29, 2012). The Vice Chancellor appropriately acknowledged this in the beginning of his factual findings, which he caveated were "the facts as they are likely to be found after trial, based on the current record," because "[t]he court must attempt to predict what the factual findings eventually will

be." Opinion 8. After all, "[t]he ***findings of fact after trial may be different***." *Id.* (emphasis added).

Any treatment of the issue by the Court of Chancery of the particularly underdeveloped fiduciary duty defense should have hewed even further from definitive findings of fact. Yet the Court of Chancery did the opposite. It ruled—as a matter of law—that "[e]ven at this preliminary stage, it is clear as a matter of law that Nielsen and Britton breached their fiduciary duty of disclosure" and that "the Operating Agreement [and its subsequent amendment] were therefore never validly approved." *Id.* at 40, 46. "Nielsen and Britton therefore cannot enforce the terms of the [Operating Agreement] against Jackson." *Id.* In its conclusion, the Court of Chancery underscored the point: "[Sunder's] options [at trial] are limited. This decision has held that Sunder cannot enforce the Covenants ***as a matter of law***, so Sunder cannot rely on those provisions to secure a remedy." *Id.* at 67 (emphasis added). In its opinion certifying the interlocutory appeal, the Court of Chancery acknowledged that, based on its rulings, "the defendants likely could move for summary judgment in their favor on those points" because the court's opinion was "akin to the granting of a motion to dismiss." A2457.

This ruling has cast the legitimacy of Sunder's Operating Agreement into question. Companies come to Delaware for its secure, even-handed corporate environment. Yet Sunder—seeking only to vindicate its rights and with ***no claims***

asserted against it—had its organizational platform ripped out from under it with no guidance on what remains or does not remain valid. Worse, this happened on an undeveloped record, on a contested and late-raised defense, and based on factual findings that the lower court admitted were merely preliminary and predictive but treated as sufficiently final to rule on as a matter of law.

At most, the Court of Chancery ought to have ruled on the fiduciary duty defense only on the familiar and appropriate "reasonable probability" standard. Even though Jackson was not seeking a preliminary injunction, the Court of Chancery recognized that "the asserted breach of fiduciary duty was a defense that Jackson had raised affirmatively and ***on which Jackson would bear the burden of proof***." A2459 (emphasis added). Had the court merely ruled on what it believed would be likely at trial, as is appropriate on a preliminary injunction record, the parties could have put their nose to the grindstone and vetted out the record fully. Instead, the lower court's decision's preclusive findings as a matter of law on an underdeveloped issue independently foreclosed Sunder's chief claim. That is error.

b. Sunder's principals did not violate their fiduciary duties on the preliminary injunction record

In any event, Nielsen and Britton *did not* violate their fiduciary duties. There is no dispute that Jackson received a complete and final copy of the Operating Agreement on December 31, 2019 *prior* to his signing the joinder agreement. Jackson argues that he did not have adequate time to review the Operating

Agreement and understand its contents. But in the cover email transmitting the Operating Agreement, Nielsen underscored for the members: "we don't expect any of you to sign something if you are uncomfortable with it or if you need more clarification from the attorney's [sic] on something. Please let me know if you have any questions." A098. Had Jackson wanted time to review the Operating Agreement in-depth, he could have requested it. His failure to do so does not grant let him cherry-pick what parts of the Operating Agreement he wishes to abide by.[5]

Certainly, Jackson is not clamoring to give back the millions of dollars he earned by virtue of the Operating Agreement's terms. And Delaware does not allow parties *carte blanche* to violate their duties under a contract by claiming that they failed to read it. *See Braga Inv. & Advisory, LLC v. Yenni*, 2023 WL 3736879, at *14-15 (Del. Ch. May 31, 2023) ("The court will not unwind a transaction due to a sophisticated party's decision to sign an agreement without having read it."); *Parke Bancorp Inc. v. 659 Chestnut LLC*, 217 A.3d 701, 711 (Del. 2019). This rule is strictly enforced where, like Jackson, a party has accepted the benefits of the agreement for years without objection. *See Pellaton v. Bank of N.Y.*, 592 A.2d 473, 477 (Del. 1991) ("A party to a contract cannot silently accept its benefits, and then

[5] Britton's testimony was not just empty words. Sunder later gave Jackson "weeks" to review contractual documents when Sunder was engaged in another transaction. A1344 at 281:6-10 (Nielsen).

object to its perceived disadvantages, nor can a party's failure to read a contract justify its avoidance." (cleaned up)).

And contrary to the lower court's findings otherwise, Sunder's other members testified—even those besides Britton and Nielsen—that the terms of the Operating Agreement had been thoroughly discussed prior to its effective date of December 31, 2019. A1659 at 77:1-4 (Gutschmidt); A1585 at 100:1-6 (Ganley); A1422 at 35:21-36:5 (Sewell); *see generally* Statement of Facts §A. Those discussions explicitly included the Covenants and membership splits. A1660 at 78:6-18 (Gutschmidt); A1585 at 100:1-101:22 (Ganley); *see generally* Statement of Facts § A. For example, Ganley testified that he remembered phone calls where the Sunder founders discussed ownership and restrictive covenants before entering into the Operating Agreement. A1585 at 100:9-19 (Ganley).

Nor does the Court of Chancery cite a single Delaware precedent in a situation like this to support its strict findings (again, as a matter of law) of what Nielsen and Britton *should* have done to satisfy their fiduciary duties. Opinion 42-46. Yet, as the Court of Chancery acknowledged, context matters for small, private companies. Opinion 42 (citing *Kurz v. Holbrook*, 989 A.2d 140, 183 (Del. Ch. 2010), *aff'd in part, rev'd in part on other grounds sub nom. Crown EMAK P'rs, LLC v. Kurz*, 992 A.2d 377 (Del. 2010). Here, Sunder's principals provided the full agreement, and even a quick scan of the table of contents reveals the presence of the Covenants and

other relevant provisions. Britton and Nielsen also assured Jackson and the other recipients that they need not sign it if they had any questions, and they even offered the company's attorneys for any such questions. This level of formality is typical for fledgling companies, like Sunder was at the time. It is staggering to consider how many Delaware LLC agreements the Court of Chancery's opinion provides a roadmap to retroactively invalidate whenever a disgruntled member might find it convenient (including, for example, members like Jackson who had already earned millions of dollars on the back of an LLC agreement).

At bottom, Nielsen and Britton did not breach their duties. But at the very least, the factual record on this matter is inconclusive and preliminary, and the Court of Chancery should have stayed its hand. The Court of Chancery should not have addressed the defense at all or, if it did, (i) should have ruled in Nielsen and Britton's favor based on the available evidence and Jackson's waiver, or (ii) only ruled as to probable likelihood of success. The decision of the Court of Chancery should be remanded with conforming instructions.

III. THE COURT OF CHANCERY ERRED IN EFFECTIVELY DISMISSING SUNDER'S TORTIOUS INTERFERENCE CLAIM AGAINST THE FF DEFENDANTS

A. Question Presented

Did the Court of Chancery err in (1) ruling that Utah law governs Sunder's tortious interference claim, and (2) effectively dismissing this claim? These questions were raised below (A2150 n.14, A2200-01) and considered by the Court of Chancery (Opinion 61-67).

B. Standard of Review

This Court reviews generally "the grant or denial of a preliminary injunction for abuse of discretion." *Wininger*, 707 A.2d at 40. "Nevertheless, this Court reviews the grant of a preliminary injunction without deference to the embedded legal conclusions of the trial court." *Matheson*, 681 A.2d at 394. Moreover, "the Court of Chancery's legal conclusions are subject to *de novo* review." *Lawson*, 897 A.2d at 743.

C. Merits of Argument

1. The Court of Chancery should have applied Delaware law to Sunder's tortious interference claim

"To determine the governing law for a claim for tortious interference with a contract, Delaware follows the choice of law principles of the Restatement [(Second) of Conflict of Laws] and applies the laws of the jurisdiction with the 'most

significant relationship.'"[6] *Xcell Energy & Coal Co. v. Energy Inv. Grp.*, 2014 WL 2964076 at *5 (Del. Ch. June 30, 2014) (citation omitted). "The Second Restatement is flexible." *KT4 P'rs LLC v. Palantir Techs. Inc*., 2021 WL 2823567, at *17 (Del. Super. Ct. June 24, 2021). "It allows courts to concentrate on factors unaccounted for when assessing a state's contacts," and "disapprov[es of] a one-size-fits-all approach to the most significant relationship analysis" (*id.* n.235 (citing Second Restatement § 145)). The Court must "assess[] and assign[] differing weight to the contacts as appropriate for the facts and issues involved in the particular case before it." *Id.* at *16.

The facts of this case implicate many states' interests: Sunder, FF, and SolarPros are headquartered in Utah, California, and Arizona, respectively; they operate in over 29 states across the country (including Delaware); and the sales personnel that Jackson, FF, and Solar Pros recruited (often in-person) to leave Sunder live and do business from Tampa, Florida, Portland, Oregon, and nearly every state in between.

The only common ground these parties share, however, is Delaware, where they all do business and deliberately chose to organize their LLCs. FF and Solar

[6] Delaware courts consider the four factors described in Section 145 of the Restatement and the six factors described in Section 6 of the Restatement. *KT4 P'rs LLC v. Palantir Techs. Inc*., 2021 WL 2823567, at *13 (Del. Super. Ct. June 24, 2021).

Pros should not be allowed to embrace Delaware law where it benefits them but dodge its reach when it becomes inconvenient.

This is especially true given that the central issue concerning these Defendants is whether they (as Delaware LLCs) tortiously interfered with another Delaware LLC's operating agreement, which they had carefully reviewed and knew was governed by Delaware law. *See supra* Statement of Facts §D. Indeed, expedited discovery proved a classic tortious interference fact pattern. Simply put, Delaware law has the most significant interest in this claim and should thus govern its adjudication. *See KT4*, 2021 WL 2823567, at *18 (applying Delaware law to a tortious interference claim where the most important contact of all was the "Delaware-based relationship" at the center of the dispute).

2. Under Delaware law, the FF Defendants tortiously interfered with Sunder's operating agreement

Under Delaware law, tortious interference claims require a showing that "(1) there was a contract, (2) about which the particular defendant knew, (3) an intentional act that was a significant factor in causing the breach of contract, (4) the act was without justification, and (5) it caused injury." *WaveDivision Hldgs., LLC v. Highland Cap. Mgmt.*, 49 A.3d 1168, 1174 (Del. 2012). The Operating Agreement is a valid contract, and the FF Defendants were abundantly aware of its terms. The FF Defendants' intentional acts were hiring and indemnifying Jackson to compete against and solicit workers from Sunder. Sunder also plainly suffered

injury from the loss of Jackson and the hundreds of sales people who left Sunder to join him at Solar Pros.

None of this behavior was justified. Following the Restatement Second of Torts, Delaware courts consider seven factors in determining whether intentional interference with a contract is without justification, including:

> (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties.

Id. All factors weigh in Sunder's favor.

First, the nature of the FF Defendants' misconduct is egregious, given their detailed knowledge about Jackson's Covenants and secretive campaign to onboard him and his confederates while pretending to negotiate in good faith Sunder over an amicable separation.

Second, the FF Defendants' motive and interests were plainly selfish and designed to harm Sunder.

Third, Sunder has a compelling interest in preventing its founders from gutting the company and repudiating their contractual obligations.

Fourth, Delaware courts have long recognized that an "employer acts at its own risk when it knowingly proceeds to sign up [an] employee and to engage in

discussions forbidden by [a] non-compete with the employee." *Hough Assocs., Inc. v. Hill*, 2007 WL 148751 at *17 (Del. Ch. Jan. 17, 2007).

Fifth, the FF Defendants' conduct proximately caused Jackson's breaches, underscored by their willingness to indemnify him for violating his Covenants and emboldening him to betray his co-founders and steal hundreds of talented sales representatives from Sunder.

Finally, the FF Defendants exploited their close relationship with Sunder and Jackson to undercut Sunder and benefit Solar Pros. Indeed, the FF Defendants were only able to inflict so much damage precisely because of their relationship with Sunder.

CONCLUSION

For the foregoing reasons, this Court should vacate the Court of Chancery's Opinion and remand for further proceedings.

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