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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, FREEDOM SOLAR PROS, LLC, and SOLAR PROS LLC, Defendants Below, Appellees.	)	No. 455, 2023 Case Below: The Court of Chancery of the State of Delaware, C.A. No. 2023-0988-JTL

APPELLEES FREEDOM FOREVER LLC, BRETT BOUCHY, CHAD TOWNER AND FREEDOM SOLAR PROS, LLC'S ANSWERING BRIEF ON APPEAL

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NATURE OF THE PROCEEDINGS

On this appeal, Sunder Energy, LLC ("Sunder") asks this Court to "vacate the Court of Chancery's Opinion and remand for further proceedings." (Opening Brief ("OB") 45) Notably, Sunder ***does not ask*** this Court to issue the preliminary injunction that Sunder sought below.

That is likely because the Court of Chancery noted that "Sunder's application faces challenges on other elements, but this decision need not reach them." (Op. 36; *id.* 61 n.75 ("Even if the Covenants were enforceable, the court would be inclined to deny the preliminary injunction application" based on the balance of the harms "and require Sunder to seek a monetary remedy."); *id.* 36 n.41 ("Causation is one serious impediment" because the sales representatives credibly testified "that factors other than Jackson drove their decision" to leave Sunder)) Thus, regardless of the outcome of this appeal, no injunction should issue.

Instead of continuing to seek a preliminary injunction, Sunder premised its request for interlocutory review, and this Court accepted that request, on the grounds that receiving the Supreme Court's views on the legal issues resolved in the Opinion would "establish the shape of the case for purposes of discovery and trial." (A2474) In particular, this Court identified four issues of material importance **(1)** whether Sunder's leaders – Max Britton and Eric Nielsen – owed

fiduciary duties to the minority members when they asked their "partners" to approve Sunder's operating agreement (the "LLC Agreement") (A2440 ¶¶21-22; A2442 ¶31; A2460; B1011-12 ¶7); **(2)** whether an email sent on New Year's Eve, standing alone, was sufficient to put minority members on notice of their need to bargain at "arm's-length" (*id.*); **(3)** whether the Vice Chancellor should have "blue-penciled" the overbroad restrictive covenants (the "Covenants") to render them reasonable and enforceable (A2440-41 ¶23; A2443 ¶32; A2444 ¶¶39-40; A2457-58; A2478-79; B1011-12 ¶7); and **(4)** whether Utah law governs Sunder's tortious interference claim, which could never meet the strict standards of Utah law (A2443 ¶34; Appeal Op. 2-13; B1011-12 ¶7).

Yet, in its Opening Brief, Sunder has pulled a bait and switch by ignoring the threshold issue – whether Britton and Nielsen owed fiduciary duties to Sunder's minority members in soliciting their consent to the LLC Agreement. Sunder's silence concedes that point. Nor does Sunder squarely address whether the New Year's Eve email provided sufficient notice to Jackson to bargain at arm's-length.

Instead, Sunder spends roughly half of its Opening Brief complaining about the trial judge's routine docket management in allowing Jackson to raise affirmative defenses at the preliminary injunction stage. That challenge to the wholly discretionary and unexceptional act of allowing an affirmative defense to

be heard when it was grounded in the pleadings and fairly raised during the injunction proceedings will not aid the resolution of this case on remand. Rather, Jackson could freely amend his pleading under Court of Chancery Rule 15 to assert such a defense before trial regardless of how that defense was handled at the preliminary injunction stage.

Defendants Freedom Forever LLC ("Freedom"), Brett Bouchy, Chad Towner and Freedom Solar Pros, LLC ("Solar Pros" and, collectively, the "Freedom Defendants") agree, however, that the trial court's rulings on the tortious interference claim effectively dispose of the sole claim against them. In other words, affirmance of this appeal will be case dispositive for the Freedom Defendants.

The first element of the tortious interference claim is the underlying breach of contract claim, which the trial court rejected on the basis of the fiduciary duty defense. To avoid duplicative briefing, the Freedom Defendants incorporate by reference Jackson's arguments in response to Argument II in the Opening Brief. This brief therefore only addresses Sunder's Argument I (blue-penciling) and III (choice of Utah law).

For all the reasons set forth in this Answering Brief and Jackson's Answering Brief, none of the issues Sunder raises are grounds for reversing the denial of injunctive relief as to the Freedom Defendants.

First, the Court of Chancery properly exercised its discretion in declining to blue-pencil the Covenants. Notably, Sunder does not challenge the court's analysis regarding the reasonableness of the Covenants on appeal. Instead, Sunder declares that Delaware is a "blue-pencil state" and the Court of Chancery was therefore ***required to*** blue-pencil. On the contrary, Delaware courts have consistently declined to blue-pencil agreements when such equitable relief is not supported by the circumstances. Here, there was no good faith effort to tailor the provisions to any legitimate interest of Sunder. Rather, the preliminary record overwhelmingly supports the conclusion that Nielsen and Britton sought to impose maximally overbroad covenants on their fellow partners to obtain an *in terrorem* advantage over the minority members, who entered into the contract from a position of unequal bargaining. Under such circumstances, it was hardly an abuse of discretion to decline to blue-pencil the abusive Covenants.

Second, the Court of Chancery correctly determined that Utah law applies to Sunder's tortious interference claim. The Court of Chancery properly applied the four-factor test found in Restatement (Second) Conflict of Laws § 145 to the choice-of-law analysis and concluded that those factors favored Utah. In response, Sunder inexplicably skips over the governing test for choice of law and insists that Delaware courts should always apply Delaware law to tort claims involving Delaware entities. That radical contention has no support in the governing law.

Third, the Court of Chancery correctly determined that Sunder could not establish a reasonable likelihood of success on the merits of the tortious interference claim. Sunder does not even argue that it could win under Utah's strict test. But even if Delaware law applied, Sunder's tortious interference claim would still fail on this record.

For all of these reasons and as set forth below, this Court should reject all of the arguments raised by Sunder and should affirm the Court of Chancery's Opinion.

SUMMARY OF ARGUMENT

1. Denied. This Court need not address the blue-penciling issue because the Court of Chancery correctly determined that the LLC Agreement is unenforceable. Furthermore, the Court of Chancery properly exercised its discretion by refusing to blue-pencil the Covenants. Delaware courts are not ***required to*** blue-pencil restrictive covenants and are not bound by a blue-pencil provision in the disputed agreement. Here, the Covenants do not warrant blue-penciling because they are grossly overbroad and were the result of disparate bargaining power.

2. Denied. For the reasons stated in Jackson's Answering Brief, the Court of Chancery did not abuse its discretion in considering Jackson's breach of fiduciary duty affirmative defense.

(a) Denied. For the reasons stated in Jackson's Answering Brief, the breach of fiduciary duty argument was properly raised as an affirmative defense.

(b) Denied. For the reasons stated in Jackson's Answering Brief, the record clearly demonstrates that Messrs. Nielsen and Britton (i) owed fiduciary duties to the minority members; and (ii) breached those duties in soliciting consent to the LLC Agreement.

3. Denied. The Court of Chancery correctly applied the Restatement (Second) Conflicts of Laws § 145 to determine that Utah law applies to the tortious

interference claim. The Court of Chancery also correctly found that the Freedom Defendants' conduct was not independently tortious or wrongful, as required by Utah law.

COUNTERSTATEMENT OF FACTS

A. Freedom And Its Super Dealers.

Freedom is a Delaware limited liability company ("LLC") with its principal place of business in Temecula, California. Freedom is one of the largest solar installers in the United States with operations in 31 states. (B414; Op. 1)[1] Defendants Brett Bouchy and Chad Towner both reside in California and are Freedom's Chief Executive Officer and Chief Revenue Officer, respectively. (B289 Bouchy 109:25-11:1; A1479 Towner 9:16-18) Since its founding in 2011, Freedom has been committed to combating the impacts of climate change through the adoption of solar panels. (B289 Bouchy 110:8-21; *see also* A1496 Towner 77:13-15) To carry out its mission, Freedom relies on a network of dealers that train and recruit door-to-door sales representatives. (A1496 Towner 78:16-79:13; Op. 9)

Solar Pros is a Delaware LLC headquartered in Arizona. (A1496 Towner 80:9-11; B444) Solar Pros is one of Freedom's dealers and exclusively sells Freedom installations.

Sunder is a Delaware LLC headquartered in Utah. Sunder was founded in August 2019 by Nielsen, Britton and five other partners. Like Solar Pros, Sunder

[1] The Freedom Defendants incorporate by reference Appellee Tyler Jackson's Answering Brief On Appeal ("Jackson's Answering Brief").

is a solar installation sales dealer. From its founding until September 2023, Sunder exclusively sold Freedom installations; since then, Sunder has sold for a variety of solar installers. (*See* A096; A1495-96 Towner 76:24-77:9; A1277 Nielsen 11:3-5)

On December 31, 2019, months after Sunder was formed, Nielsen and Britton sent the other Sunder partners, including Jackson, an already executed version of the LLC Agreement, recommending that everyone sign off on the agreement that night. (A098) As the Court of Chancery found in the Opinion, "[t]he New Year's Email did not provide any indication that the 2019 LLC Agreement gutted the Minority Members' rights." (Op. 15) In 2021, the LLC Agreement was substantively amended. (B736) Nielsen and Britton did not provide Jackson and others with the final amended agreement, nor did they inform Jackson that substantive changes were made. (Op. 17; B846-47; A1101 Jackson 421:7-22; B194 Glassman 190:20-191:5; A1431 Sewell 73:2-13; *see also* B1008-09)[2]

B. Sunder's Mass Exodus From Industry Competitor.

Sunder was formed after Nielsen and Britton left LGCY Power ("LGCY"), another solar dealer, due to growing concerns regarding the future of LGCY's relationship with its installer, Sunrun. (A1277 Nielsen 11:3-5, A1278 15:6-11;

[2] The Court of Chancery found that "Jackson did not have the opportunity to engage in bargaining with Sunder, and the Covenants should not be interpreted as if he had that chance." (Op. 49 n.66)

A1749 Britton 18:1-4, A1749-50 21:11-24:13; A1076 Jackson 320:5-7, 321:3-7; A1495-96 Towner 76:24-77:9) Nielsen testified that he and Britton "wanted to break apart from some of the toxic traits of [the] industry," including the use of "non-compete provisions." (A1278 Nielsen 16:4-17:3)

In response to Sunder's exodus, LGCY sued Nielsen, Britton and other Sunder co-founders for breaches of non-compete and non-solicitation clauses in LGCY's independent sales representative agreements and long-term incentive plan. (B467) That lawsuit is ongoing.

C. Sunder's Initial Success With Freedom.

The relationship between Sunder and Freedom was governed by an Independent Dealer Agreement (the "Dealer Agreement," B518), which required that Sunder exclusively sell Freedom installations. The Dealer Agreement is governed by Utah law. (*See* B537 §21(i))

From the outset, Freedom viewed its relationship with Sunder as a partnership and invested substantial resources to help Sunder "flourish." (A1496 Towner 78:16-79:7) Freedom provided Sunder with hiring, payroll and marketing support, commissions calculations and other administrative resources. (A1496 Towner 78:16-79:22; A1082 Jackson 342:8-17, A1085 355:9-19; Op. 18)

A core concept of Freedom's business model is that paying more money to representatives selling Freedom installations door-to-door is the key to increasing

the rate of adoption. (B290 Bouchy 116:7-11, B289-90 111:2-114:19 ("[M]y theory is if you paid out more money to the reps, the reps would then bring down to the cost to the consumer, you would grow, you would have further economies of scale, and you would accelerate the rate of residential solar adoption."); *see also* A1496 Towner 77:13-78:15)

At first, Sunder was aligned with Freedom's business model: Sunder executives kept only a small percentage of each sale and paid nearly all of the rest (approximately 80%-85%) to the Sunder sales force. (B289 Bouchy 112:18-22; A1496 Towner 78:4-15) As a result, Sunder experienced explosive growth and became Freedom's largest dealer. (A1496 Towner 79:5-7; B288 Bouchy 108:21-22; A1314 Nielsen 159:14-160:4)

D. Creation Of Solar Pros And Sunder's Philosophy Shift.

In September 2022, Josh Sluyter founded a new Freedom dealer, Solar Pros.[3] (*See* A614 Sluyter 7:24-25, 8:12-15) Aligned with Freedom's philosophy, Solar Pros' business model hinges on offering better pay to sales representatives. (A1496-97 Towner 80:20-81:13)

"During 2022 and 2023, Sunder's relationship with Freedom deteriorated." (Op. 1) As Sunder "started making a lot of money," Nielsen and Britton "changed philosophies." (A1497 Towner 81:14-25) Unlike Solar Pros, which took only

[3] Neither Bouchy nor Freedom owned equity in Solar Pros. (B417)

8.5% of each sale to fund corporate operations, Sunder executives collected nearly triple that – approximately 25% of each sale. (A644 Sluyter 125:12-126:11; *see, e.g.*, Op. 20-21)

While Sunder continued to diverge from Freedom's core philosophy, Solar Pros flourished under its representative-focused model, becoming Freedom's largest dealer by sales volume by June 2023. (*See* A642 Sluyter 117:15-17, 143:4-8; A1949 Powell 194:23-195:8) Unsurprisingly, hundreds of Sunder representatives left Sunder to join Solar Pros to do the same job, but for higher pay. (B595-605)

As their philosophies diverged, a break-up between Freedom and Sunder became increasingly likely. By mid-2023, Nielsen and Britton revealed to Sunder's sales force that they were soliciting bids from installers other than Freedom. (*See*, *e.g.*, A1211 Tisdale 58:25-60:12, A1229 131:14-132:1)

E. Freedom Pitches Sunder Various Business Proposals.

Throughout 2022 and 2023, Freedom "c[a]me up with numerous" proposals for Sunder and Freedom to continue working together. (A1497 Towner 83:21-23) For example, in 2022, Freedom offered an equity swap for cross-ownership, and in 2023, Freedom suggested that Sunder and Solar Pros merge. (A1497 Towner 82:4-25; Op. 19) None of these proposals came to fruition. (A1497 Towner 83:1-4; A1763 Britton 74:4-8)

Because Sunder "wasn't willing to" explore Freedom's prior proposals, on August 31, 2023, Towner texted Nielsen and Britton with another "new concept" to "try and bring Sunder back into the fold." (A1498 Towner 87:25-88:20; B570-71) After dragging their feet for weeks (A1033-34 Jackson 149:23-150:3), Nielsen and Britton finally met with Freedom's executives in Las Vegas on September 13-14, 2023, to discuss their relationship and new potential business proposals. (Op. 25-26)

During negotiations, Freedom and Sunder discussed a proposal whereby Sunder would consent to the transfer of Jackson and his entire group to Solar Pros in exchange for a payment of $10 million. (A1483 Towner 26:3-22) Towner explained Freedom was "trying to do the right thing." (A1499 Towner 89:4-92:8, A1500 96:7-19, A1501 98:5-99:2) Britton's contemporaneous notes from the meetings show that the parties discussed, among other things, identifying the sales representatives who would be transferred, a mutual release of claims (including a potential $16 million claim that Freedom has against Sunder), a payment schedule for the $10 million and the treatment of Jackson's Sunder incentive units. (B580; *accord* A1483 Towner 27:3-15, A1499 92:6-101:1; Op. 26)

The Court of Chancery found that, while "[t]he parties did not reach an agreement ... they also did not seem that far apart." (Op. 26) Indeed, Nielsen understood "that if [Freedom] could deliver what was talked about in that room

that day, we would have a deal." (A1324 Nielsen 200:14-16) Likewise, as of September 15, 2023, Jackson believed that "a settlement had essentially been agreed upon." (A1043 Jackson 189:5-19) Nielsen and Britton told Jackson directly that they "would like to work towards" finalizing the agreement. (A1092 Jackson 382:18-383:1)

It was only when the parties believed a deal was inevitable that Freedom and Jackson began working on integrating the "Jackson Division." At this time, Jackson first spoke with Towner about becoming Solar Pros president. (A1045 Jackson 194:6-17) The proposed deal also required the parties to identify the members of Jackson's "group" who would be eligible to transfer dealers. (B580) Freedom prepared a proposed list of transferees and on September 20, Jackson reviewed that list with Britton and Nielsen. (*See* B583) In other words, Jackson's efforts were not in any way hidden from Sunder.

F. Sunder's Discontented Sales Managers Leave.

Contrary to Sunder's unsupported contention that "Jackson was the reason so many people left Sunder" (OB 17), six former Sunder regional managers from Jackson's division unequivocally stated, in testimony the trial court noted was credible, that they would have joined Solar Pros even if Jackson stayed at Sunder. (Op. 36; A708 Armstrong 80:10-21; A782 Granch 159:25-160:14; A955-56 Parker 104:18-105:1; B352-53 Simmons 100:23-101:4; A1230 Tisdale 133:15-16

("Jackson never comes up in any of my conversations, no. Tyler is irrelevant[.]"); A882 Wilson 207:10-22)

These six "Jackson Division" managers left for four reasons, which were entirely unrelated to Jackson. *First*, and most importantly, they wanted to continue working with Freedom, and were concerned that Sunder would end its relationship with Freedom. (A778 Granch 143:10-144:14; A1229 Tisdale 130:17-132:1) *Second*, they could earn significantly more money at Solar Pros. (A778 Granch 141:20-143:3; B352 Simmons 98:20-99:2) As noted by the Vice Chancellor, "[j]oining Solar Pros was attractive for Sunder's sales professionals because Solar Pros ... offered significantly better commissions." (Op. 21) *Third*, several of them no longer trusted Nielsen and Britton, and disagreed with Sunder's decision to pay its sales representatives less commissions. (Op. 23; A779-80 Granch 146:5-149:18; A953 Parker 94:9-96:1 ("Because Pros and Freedom do[]n't do the fake pricing floors. Reps are actually making more money. I'm making more money.")) *Fourth*, many of them believed Sunder fired them after Britton announced Sunder was going through a "detox," and Sunder revoked their access to its sales tools program, Enzy. (A955 Parker 101:6-104:4; A709 Armstrong 82:23-83:13; *see also* B903 at 12:27-12:31); A880 Wilson 200:16-17, A881 202:10-204:14, A882 205:22-207:1; *see also* Op. 20-21) These sales leaders all left ***before*** Jackson joined Solar Pros on September 22.

- Clayton Granch, a former senior regional manager at Sunder who had no non-solicit agreement with Sunder, left Sunder on September 11, 2023, following months of intense personal tension with Nielsen. (A750 Granch 29:9-10, A779 146:17-152:18; Nielsen A1312 150:23-25) Granch considers himself – not Jackson – to be the "catalyst" for managers and representatives leaving Sunder for Solar Pros. (B141-45; Op. 26-27)
- Jason Tisdale and Joshua Simmons left Sunder with their teams on September 12, shortly after Granch. (A1230 Tisdale 135:2-9; B345-46 Simmons 72:24-73:10)
- Zeke Parker left Sunder with his 130-person team between September 16 and 19. (A943 Parker 55:13-56:3)
- Chase Armstrong, a former Sunder regional manager, transferred to Solar Pros on September 20. (A700-701 Armstrong 48:5-51:22)
- Brandon Wilson was a former Sunder senior regional manager who, like others, onboarded with Solar Pros on September 21 after Sunder deactivated his sales tools. (A854 Wilson 93:12-24, 215:12-216:9)

G. Sunder Wrongfully Terminates The Dealer Agreement.

While the parties advanced toward a final deal, Solar Pros signed a consulting agreement with Jackson on September 22 and announced Jackson's new

position on September 25, which is typical procedure for Solar Pros. (A648 Sluyter 141:4-17; 142:16-22) Jackson also helped Freedom confirm that it got the benefits of the deal by calling on the few representatives who had not moved to Solar Pros on their own to make sure they would participate in the planned transfer of the "Jackson Division." (A254-58)

Then, without warning, on September 29, Sunder launched a three-pronged attack. Sunder (1) wrongfully terminated the Dealer Agreement without the requisite notice and opportunity to cure, thereby depriving Freedom of its bargained-for opportunity to prepare for a potential loss of a large chunk of its sales force (B521 §4(c)); (2) filed this lawsuit and sought an *ex parte* TRO (B1; B98); and (3) filed an arbitration in Utah alleging that Freedom breached the Dealer Agreement. (B103)

H. Freedom Attempts To Reduce Harm To Its Business.

After Sunder wrongfully terminated the Dealer Agreement, Freedom sought to avoid crippling harm to its business by maintaining relationships with its sales force. (A1504 Towner 112:20-24) Freedom announced via multiple platforms that representatives selling for Freedom could fill out a form if they wanted to remain at a Freedom dealer. (A1504-05 Towner 111:3-113:17; A1312 Nielsen 215:12-16)

Hundreds of sales representatives voluntarily filled out the form. In addition, the Freedom Defendants reached out to the individuals who had expressed interest in Solar Pros. (A1057-58 Jackson 245:9-246:16; B573) "Several hundred" sales representatives chose to leave Sunder and stay with Freedom, with "a good portion" going to Freedom dealers other than Solar Pros. (A1505 Towner 114:4-17) These efforts violated no obligations to Sunder – Freedom had no non-solicit agreement with Sunder.

Freedom's efforts to preserve its sales force came to a sudden stop when the Court of Chancery issued a TRO that included the Freedom Defendants on October 11, 2023. (A496) All efforts to contact Sunder's sales force in the "Jackson Division" ceased on that date. (A1506 Towner 118:2-119:8; B287 Bouchy 101:2-16)

I. The Court Of Chancery Denies Sunder's Preliminary Injunction And Sunder Appeals.

Following expedited discovery and an evidentiary hearing, on November 22, 2023, the Court of Chancery issued the Opinion, denying Sunder's application for a preliminary injunction. The court found that Sunder could not establish a likelihood of success on the merits on its breach of contract claim because the Covenants originated in an "egregious breach of fiduciary duty." (Op. 7) The Covenants include restrictions that prohibit the holder from:

- Engaging in any competitive activity;

- Soliciting Sunder's employees and independent contractors;
- Soliciting, selling to, accepting any business from, or engaging in any business relationship with any of Sunder's customers; and
- Inducing, influencing, causing, advising, or encouraging any Sunder stakeholder to terminate its relationship with Sunder.

(Op. 1-2)

The court further found that the Covenants are "facially unreasonable" and refused to blue-pencil them. (Op. 7, 50-51) Among other findings, the Vice Chancellor determined that the non-competition restriction is "potentially indefinite" and that "[a]s written, Jackson's daughter cannot go door to door selling Girl Scout cookies." (Op. 54-55)

The court denied relief on Sunder's tortious interference claim for lack of an underlying breach of contract, and further because it was governed by Utah law, and Sunder could not show that the Freedom Defendants engaged in the "inherently tortious" conduct that Utah law requires. (Op. 7, 65)

The court further noted that even if the Covenants were enforceable, "the court would be inclined to deny the preliminary injunction application" under the balance of equities. (Op. 61 n.75)

On December 4, 2023, Sunder filed an application for interlocutory appeal with the Court of Chancery. (A2433; B967; B981) On December 22, 2023, the

court certified Sunder's appeal. (A2448) On January 25, 2024, this Court accepted Sunder's interlocutory appeal. (B1007-13)

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY REFUSED TO BLUE-PENCIL THE COVENANTS.

A. Question Presented.

Whether the Court of Chancery properly exercised its discretion in declining to blue-pencil the facially overbroad Covenants. Blue-penciling was raised by Sunder (A2188 n.5) and considered by the Court of Chancery. (Op. 50-60)

B. Scope Of Review.

This Court reviews discretionary decisions of the Court of Chancery for abuse of discretion. *See Rosenbloom v. Esso Virgin Islands, Inc.*, 766 A.2d 451, 459 (Del. 2000). This Court similarly reviews the Court of Chancery's exercise of its equitable powers for abuse of discretion. *See In re Peierls Charitable Lead Unitrust*, 77 A.3d 232, 235 (Del. 2013).

C. Merits Of The Argument.

As an initial matter, Sunder has not challenged on appeal the Court of Chancery's well-reasoned analysis concluding that the Covenants are overbroad, facially unreasonable and unenforceable as a matter of Delaware law. (Op. 48-60) Such arguments are therefore waived. *See* Supr. Ct. R. 14(b)(vi)(A)(3); *Harris v. State*, 2014 WL 3883433, at *2 (Del. July 29, 2014). The narrow question presented to this Court is whether the Court of Chancery properly ***exercised its***

discretion in declining to blue-pencil, *i.e.*, reform, the Covenants after determining that they were overbroad. (OB 22)[4]

On appeal, Sunder contends that the court's refusal to "blue-pencil" the Covenants was "reversible error and should be reversed or remanded with instructions for the Court of Chancery to blue-pencil the Covenants with appropriate guidance." (OB 5) In other words, Sunder asks this Court to make blue-penciling ***mandatory*** in Delaware. This proposed fixed rule ignores the origins of the "blue-pencil" power. Blue-penciling is another word for reformation, which "'is an equitable remedy which emanates from the maxim that equity treats that as done which ought to have been done.'" *Obsidian Fin. Grp., LLC v. Identity Theft Guard Sols., Inc.*, 2021 WL 1578201, at *10 (Del. Ch. Apr. 22, 2021) (citation omitted). Delaware courts should only use such extraordinary powers where equitable.

The Court of Chancery did not abuse its discretion by refusing to blue-pencil the Covenants. Where, as here, the covenants were not drafted in good faith, were designed to have an *in terrorem* effect and arose out of unequal bargaining, blue-penciling to favor the dominant negotiator would be inappropriate. The trial court's decision should be affirmed.

[4] This was an alternative holding of the trial court. Reversal on this point would not change the outcome below.

1. The Decision To Blue-Pencil Is A Matter Of Discretion.

Delaware courts are not *required* to blue-pencil restrictive covenants. "While, in some circumstances, a court may use its discretion to blue-pencil an overly broad non-compete to make its restrictions more reasonable, [the Court of Chancery] has also exercised its discretion in equity not to allow an employer to back away from an overly broad covenant by proposing to enforce it to a lesser extent than written." *FP UC Hldgs., LLC v. Hamilton*, 2020 WL 1492783, at *8 (Del. Ch. Mar. 27, 2020) (citations omitted).

Notably, in the briefing below, Sunder conceded that blue-penciling is a matter of "discretion." (A2188 n.5 ("Although Mr. Jackson argues that the Court should not 'blue-pencil' the Covenants (JAB 50-52), the Court may do so in its discretion ….")) Sunder should be bound by its position below. *See CCSB Fin. Corp. v. Totta*, 302 A.3d 387, 403 (Del. 2023) (finding argument made on appeal that contradicted acknowledgments made to court below was waived).

Nevertheless, on appeal, Sunder now argues: (a) blue-penciling should be the "official policy" under Delaware law (OB 24); (b) this case involves the "appropriate circumstances" that warrant blue-penciling (OB 24); and (c) the Court of Chancery should have deferred to the "blue-penciling" provision in the LLC Agreement. (OB 26) Each of Sunder's arguments fails.

2. Delaware Courts Should Only Blue-Pencil Where The Equities Require Redrafting The Contract.

Delaware is not "a blue pencil state," as Sunder suggests. (OB 24) On the contrary, Delaware courts have repeatedly declined to exercise this extraordinary power where circumstances did not warrant it.[5] Sunder's ill-considered demand that this Court "affirm[] the blue pencil rule as the official policy of the State of Delaware" (OB 24) would recklessly unleash a tool that has traditionally been applied with appropriate judicial humility only when justice requires it.

Sunder's reliance on *Cantor Fitzgerald, L.P. v. Ainslie* is misplaced. (OB 22-23) Unlike this case, *Ainslie* did not involve the enforcement of a covenant not-to-compete. Nevertheless, in *Ainslie*, this Court reaffirmed the settled doctrine that, "[i]n the restrictive-covenant context, the former employee is effectively deprived of his livelihood and, correspondingly, exposed to the risk of serious financial hardship. This gives rise to the strong policy interests that

[5] *See, e.g., C & J Energy Servs., Inc. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr.*, 107 A.3d 1049, 1054 (Del. 2014) ("To blue-pencil a contract ... is not an appropriate exercise of equitable authority in a preliminary injunction order."); *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1022-23 (Del. Ch. 2005) (refusing to "blue-pencil" merger agreement and noting, "[t]o grant that sort of mandatory relief would ... be inappropriate on disputed facts"); *Farmers for Fairness v. Kent Cnty.*, 2007 WL 1651931, at *5 (Del. Ch. May 25, 2007) (refusing to blue-pencil ordinance where doing so could result "in significant unintended consequences"), *aff'd*, 940 A.2d 945 (Del. 2007); *FrontFour Cap. Grp. LLC v. Taube*, 2019 WL 1313408, at *33 (Del. Ch. Mar. 11, 2019) (refusing to blue-pencil merger agreement).

justifies the review of unambiguous contract provisions for reasonableness and a balancing of the equities, two exercises typically foreign to judicial review in contract actions." --- A.3d ---, 2024 WL 315193, at *13 (Del. Jan. 29, 2024). The Court expressly declined, however, to take up the blue-pencil issue in that case. *Id.* at *1, *13. But that does not mean Delaware law on this issue is a clean slate.

In the proceedings below, the trial court appropriately expressed reluctance to employ the blue-pencil power: "When a restrictive covenant is overbroad, a Delaware court will resist 'blue-penciling' the provision to make it reasonable." (Op. 50) The court's observation is consistent with many recent Delaware cases declining to rewrite contracts in this manner. *See Intertek Testing Servs. NA, Inc. v. Eastman*, 2023 WL 2544236, at *1 (Del. Ch. Mar. 16, 2023) (declining to blue-pencil unenforceable restrictive covenant and granting motion to dismiss); *Kodiak Building Partners, LLC v. Adams*, 2022 WL 5240507, at *13 n.108 (Del. Ch. Oct. 6, 2022) ("The inequities inherent in blue-penciling a noncompete also counsel against enforcing only those portions … that are supported by Kodiak's legitimate business interests, even as Adams appears to have violated those portions."); *FP UC*, 2020 WL 1492783, at *8 (finding non-compete was likely overbroad and expressing "serious doubts that the Court would be inclined to

rewrite the clause to make it more reasonable as a matter of equity").[6] But the Court of Chancery's resistance to employ its extraordinary powers does not mean that such powers are unavailable when equity demands their use.

Sunder ignores the many cases declining to invoke this extraordinary power and contends that blue-penciling is "commonplace under Delaware law." (OB 23) As Sunder's own cases support, blue-penciling is available under Delaware law, but a court of equity should not use this power to favor powerful interests who abuse unequal bargaining power.

For example, in the 1969 opinion *Knowles-Zeswitz Music, Inc. v. Cara*, the Court of Chancery expressly rejected the so-called "blue-pencil test," in which the court would partially enforce restrictive covenants under the doctrine of contract divisibility, for the "modern view," in which the court would only enforce such covenants to the extent reasonable to do so. 260 A.2d 171, 175 (Del. Ch. 1969). In that case, the court limited the geographic scope of the non-compete from 100

[6] *See also Centurion Serv. Grp., LLC v. Wilensky*, 2023 WL 5624156, at *2 (Del. Ch. Aug. 31, 2023) ("Delaware courts are hesitant to 'blue pencil' [restrictive covenants] to make them reasonable"; declining to blue pencil overbroad non-compete); *Elite Cleaning Co. v. Capel*, 2006 WL 1565161, at *8 (Del. Ch. June 2, 2006) ("Although the Court arguably could reform Capel's noncompetition agreement …, I do not consider that *appropriate* here because I find the agreement as a whole unenforceable.") (emphasis added); *Jones v. Estep*, 1982 WL 17837, at *3 (Del. Ch. Nov. 9, 1982) (refusing to reform restrictive covenants at preliminary stage).

miles of Wilmington, Delaware to only specified school districts in New Castle County for which the former employee was the sole sales representative during his last year of employment. *Id.* at 175-76. This is an example of the court applying its equitable discretion and not an endorsement of a mandatory blue-pencil regime.

In both *Norton Petroleum Corp. v. Cameron* and *RHIS, Inc. v. Boyce*, the Court of Chancery refused in whole or in part to enforce the non-competition provision. In *Norton*, the court declined to enjoin the defendant from working for a company engaged in a business "similar to" the plaintiff and significantly limited the geographic restriction of the non-competition provision from 100 miles to 20 miles for the sale of a single product – only after finding that the limited injunction would not pose an undue hardship on the enjoined party. 1998 WL 118198, at *3-4 (Del. Ch. Mar. 5, 1998). In *RHIS*, the Court of Chancery found after trial that the evidence showed that the former employee had opened a directly competing business within the proscribed geographical area, but the covenant not to compete was unreasonable and the court declined to enforce it. 2001 WL 1192203 (Del. Ch. Sept. 26, 2001). Although the court partially enforced the non-solicitation provision, it did so only to the extent of, and in light of, the equities. *Id.* at *7.

Sunder's two remaining Delaware cases are likewise distinguishable because they involved situations in which disparate bargaining power did not apply. In *Delaware Express Shuttle, Inc. v. Older*, the Court of Chancery specifically

observed that "the precise language of the restrictions was negotiated … in a setting where there was no doubt as to when or if the restrictions would ever come into effect." 2002 WL 31458243, at *11-14 (Del. Ch. Oct. 23, 2002) (limiting geographic scope of non-compete to Elkton, Maryland and a portion of New Castle County). And in *DGWL Investment Corp. v. Giannini*, the company's sole founder and longtime CEO received $10 million in connection with a change-of-control transaction. C.A. No. 8647-VCP, at 20, 28 (Del. Ch. Sept. 19, 2013) (TRANSCRIPT); *see also Kodiak*, 2022 WL 5240507, at *4 ("covenants not to compete in the context of a business sale are subject to a 'less searching' inquiry'") (citation omitted). The Covenants here were not negotiated in connection with the sale of a business.

Unable to locate any recent Delaware authority in support of its position, Sunder instead points this Court to cases from courts outside of Delaware interpreting Delaware law. But those cases simply recognize the unremarkable proposition that blue-penciling is discretionary. *Cynosure LLC v. Reveal Lasers LLC*, 2022 WL 18033055, at *10 (D. Mass. Nov. 9, 2022) (noting parties' agreement that Delaware law permits "blue-pencil[ing]"); *United HealthCare Servs., Inc. v. Corzine*, 2021 WL 961217, at *11 (S.D. Ohio Mar. 15, 2021) ("Delaware law gives the Court discretion to enforce the covenants to the extent reasonable."); *WebMD Health Corp. v. Dale*, 2012 WL 3263582, at *9 (E.D. Pa.

Aug. 10, 2012) (incorrectly relying on *Delaware Elevator*, in which the Court of Chancery applied Maryland law, in support of blue-penciling under Delaware law, but acknowledging Delaware courts blue-pencil only "if the equities so dictate").

In many other states, the blue-pencil power is governed by statutes.[7] The states, like Delaware, that do not have a blue-pencil statute show the same reluctance to use these extraordinary remedies to fix unenforceable contracts. *See, e.g.*, *Product Action Int'l, Inc. v. Mero*, 277 F. Supp. 2d 919, 932 (S.D. Ind. 2003) (refusing to reform restrictive covenant because "[t]he consequence [of an employer overreaching] is that the covenant cannot be enforced at all"); *Pactiv Corp. v. Menasha Corp.*, 261 F. Supp. 2d 1009, 1016 (N.D. Ill. 2003) (refusing to blue-pencil restrictive covenant because "'modif[ying] could have the potential effect of discouraging the narrow and precise draftsmanship which should be

[7] Some states generally prohibit restrictive covenants. *See, e.g.*, Cal. Bus. & Prof. Code § 16600 ("[E]very contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."). In other states, courts are statutorily required to engage in blue-penciling. *See, e.g.*, Tex. Bus. & Com. Code § 15.51(c) ("[T]he court shall reform the covenant to the extent necessary to cause the limitations contained in the covenant as to time, geographical area, and scope of activity to be restrained to be reasonable…."). Still others have statutes expressly prohibiting or limiting the practice. *See, e.g.*, Wis. Stat. § 103.465 ("Any covenant … imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint."); Ga. Code Ann. § 13-8-53(d) ("Any restrictive covenant not in compliance with the provisions of this article is unlawful and is void and unenforceable; provided, however, that a court may modify a covenant … so long as the modification does not render the covenant more restrictive with regard to the employee….").

reflected in written agreements'") (citation omitted); *Reddy v. Cmty. Health Found. of Man*, 298 S.E.2d 906, 915-16 (W. Va. 1982) (finding courts may modify non-compete agreement if it is both facially reasonable and made in good faith). Courts in states with permissive statutory regimes have likewise refused to blue-pencil agreements that are facially overbroad, particularly where the covenants were the product of disparate bargaining power. *See, e.g., Eichmann v. Nat'l Hosp. & Health Care Servs., Inc.*, 719 N.E.2d 1141, 1148-50 (Ill. App. Ct. 1999) (refusing to modify agreement where original restraint is especially unfair, even if the parties expressly authorized modification); *Solari Indus., Inc. v. Malady*, 264 A.2d 53, 56 (N.J. 1970) ("When an employer, through superior bargaining power, extracts a deliberately unreasonable and oppressive noncompetitive covenant he is in no just position to seek, and should not receive, equitable relief from the courts.").

In addition, Delaware's disinclination to blue-pencil is supported by a robust body of academic research and detrimental real-world consequences, as the Court of Chancery has observed on numerous occasions. *See, e.g.*, *Del. Elevator, Inc. v. Williams*, 2011 WL 1005181, at *10-11 (Del. Ch. Mar. 16, 2011) (citing Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 Neb. L. Rev. 672, 690 (2008) ("The employer … receives what amounts to a free ride on a contractual provision that the employer is well aware would never be enforced.")); *FP UC*, 2020 WL 1492783, at *8 n.55;

Kodiak, 2022 WL 5240507, at *4 n.49; *Intertek*, 2023 WL 2544236, at *5 n.47. (*See also* Op. 50-51 nn.68-70)

3. The Court Of Chancery Properly Exercised Its Discretion In Refusing To Blue-Pencil The Covenants.

The Court of Chancery did not abuse its discretion by refusing to blue-pencil the Covenants. Where, as here, the covenants were not drafted in good faith to be limited to the employer's legitimate interests, were designed to have an *in terrorem* effect and arise from unequal bargaining, blue-penciling is inappropriate.

(a) The Covenants Do Not Warrant Blue-Penciling.

The facts of this case as found on the preliminary injunction record do not warrant the court's exercise of its equitable jurisdiction to rewrite the Covenants. None of Sunder's arguments mandate a different result. Sunder claims "the typical concerns regarding bargaining power simply are not present here" because Jackson was a "Vice President," "high-ranking" and "founding member" of Sunder. (OB 25) Sunder's assertions directly conflict with the facts found by the trial court. (Op. 12-18, 40-46)

When the Covenants purportedly came into effect, Jackson was *not* a senior executive; Nielsen and Britton were. (A1277 Nielsen 11:24-12:25) Jackson was a regional manager with a high school education. (B475-76 ¶¶43-44); *see Del. Elevator*, 2011 WL 1005181, at *11 ("It is trite and naive to suggest that low to mid-level employees freely agree to restrictive covenants."). Nor was he a

"founding member" or "owner" in any meaningful sense. He received effectively phantom equity, which Sunder later repurchased for $0. (B909-10) Likewise, Sunder's argument that Jackson's involvement in discussions regarding the LLC Agreement supports its assertion of equal bargaining power (OB 25) also fails because there were no negotiations or discussions concerning the restrictive covenants or their scope. (A1080-81 Jackson 336:13-338:12)

Next, Sunder claims that if the restrictive covenants are not blue-penciled, "[Delaware] risks losing confidence in the courts' 'reverential' regard for upholding parties' contractual intent." (OB 23) That argument misconstrues the relief sought, which would rewrite the contract, not enforce it as written.

Further, under the facts found by the trial court, Sunder, Nielsen and Britton deserve no reverence. Late on New Year's Eve, Nielsen and Britton emailed Jackson, an employee with a high school education who was not represented by counsel, an agreement drafted by counsel and a separate DocuSign signature page, and then pressured him to sign before midnight as "the attorney's [sic] highly recommend." (Op. 15) Nielsen and Britton did not inform the minority members of the drastic changes that stripped them of rights and empowered Nielsen and Britton. (Op. 15-17) Nielsen and Britton again engaged in abusive tactics in 2021 when they obtained consents to a joinder agreement without disclosing the actual unfavorable terms to the minority members. (Op. 17-18)

On this record, the trial judge did not abuse his discretion in "question[ing] whether Delaware's policy interest in upholding a *lingua franca* for sophisticated commercial parties is squarely implicated." *FP UC*, 2020 WL 1492783, at *11, n.88 (finding company had imposed draconian non-competes on employees for minimal consideration through LLC membership units).

Demonstrating tone-deafness to the misconduct of Nielsen and Britton, Sunder argues that "if there were ever a case in which a court should blue pencil overbroad restrictive covenants, it is this case." (OB 27) The Vice Chancellor gave sound reasons for not rewriting the contract, including:

- Creating a no-lose situation for the employer to draft the provision as broadly as possible;
- Chilling some individuals from departing the company; and
- Enabling employers to extract benefits at the expense of employees.

(Op. 3-6, 50-51)

The mere fact that a "facially overbroad" covenant "could reasonably address a particular breach" (OB 24) is not a justification for the court to rewrite it. There was no attempt to write a reasonable restriction here. As noted by the Vice Chancellor, the Covenants would have prohibited Jackson's children from selling Girl Scout cookies, and Jackson himself from working at McDonald's. (Op. 54, 57-58)

In sum, the Court of Chancery evaluated the full context of the Covenants and determined the situation did not warrant blue-penciling. Sunder fails to demonstrate how the Court of Chancery abused its discretion.

(b) The "Blue-Pencil" Provision Is Permissive and Non-Binding.

Sunder argues that the Court of Chancery should have blue-penciled the Covenants because "Jackson ha[d] agreed to blue penciling in the Operating Agreement." (OB 3; *see also id.* 26) But the provision in the LLC Agreement is permissive, not mandatory. (A146 §13.2; A217 §13.2 (the "court shall have the power")) With or without that provision, Delaware courts undoubtedly have the power to blue-pencil, but they are not required to exercise such power in all circumstances. In any event, Delaware courts are not bound by such provisions. *See Kodiak*, 2022 WL 5240507, at *4 n.49 (rejecting request to blue-pencil agreement despite judicial reformation provision present in the agreement). Sunder does not argue otherwise. (OB 26 ("[w]hether or not Delaware courts are bound by this provision")) (*See also* Op. 51 n.70)

II. THE COURT OF CHANCERY CORRECTLY DETERMINED THAT UTAH LAW APPLIES TO THE TORTIOUS INTERFERENCE CLAIM.

A. Question Presented.

Whether the Court of Chancery correctly determined that Utah law applies to Sunder's tortious interference claim. Choice of law was raised by the Freedom Defendants (B442-45) and considered by the Court of Chancery. (Op. 62-64)

B. Scope Of Review.

This Court "review[s] the trial court's decision on the choice of law to apply to tort claims, including the issues of liability, damages, and remedies, *de novo*." *Bell Helicopter Textron, Inc. v. Arteaga*, 113 A.3d 1045, 1052 (Del. 2015) (internal citations omitted).

C. Merits Of The Argument.

1. The Court Of Chancery Properly Applied The Restatement Test.

The Court of Chancery correctly applied the routine choice-of-law analysis employed by Delaware courts to determine which law should apply to specific legal claims. As this Court has recognized, where an actual conflict exists between the laws of two different jurisdictions, Delaware courts apply the principles from Section 145 of the Restatement (Second) of Conflict of Laws. *See Travelers Indem. Co. v. CNH Indus. Am., LLC*, 191 A.3d 288, 2018 WL 3434562, at *4 (Del. July 16, 2018) (ORDER).

Thus, the Vice Chancellor began his choice-of-law analysis by observing that "the court applies the law of the state with the most significant relationship to the controversy." (Op. 62) Because Sunder's only claim against the Freedom Defendants is a tort claim, the Vice Chancellor next looked at the Restatement's guidance for *tort* claims.

A Delaware court conducting a choice-of-law analysis on a tort claim analyzes four factors to determine which state has the "most significant relationship to the controversy" (Op. 62): "1) the place where the injury occurred; 2) the place where the conduct causing the injury occurred; 3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and 4) the place where the relationship, if any, between the parties is centered." *UbiquiTel Inc. v. Sprint Corp.*, 2005 WL 3533697, at *3 (Del. Ch. Dec. 14, 2005).

As it did below, Sunder fails to engage in the Restatement's four-factor analysis. Instead, Sunder asserts that the Court of Chancery erred because the Vice Chancellor "refused to apply Delaware law" to the tortious interference claim. (OB 4) On the contrary, the trial court did not heedlessly "refuse" to apply Delaware law. Rather, the court properly applied Delaware choice-of-law principles, which led to the application of Utah tort law to Sunder's tort claim.

Sunder at least concedes that "[t]he facts of this case implicate many states' interests." (OB 41) The Court of Chancery properly searched for the state with the most significant relationship by applying the Restatement's four-factor test.

The first factor looks to where the injury occurred. The Vice Chancellor found that "[w]hen an injury consists of the loss of customers or business, '[t]he effect of the loss, which is pecuniary in its nature, will normally be felt most severely at the plaintiff's headquarters or principal place of business.'" (Op. 62-63 (quoting Restatement §145(2), cmt. f)) Because Sunder is headquartered in Utah, its injury occurred in Utah, favoring Utah law. (*See* Op. 63)

The second Restatement factor looks to where the conduct occurred. The court stated "that when the injury occurred in two or more state[s] … the place where the defendant's conduct occurred will usually be given particular weight." (Op. 63 (internal quotation marks and citation omitted)) Here, the alleged wrongful actions took place in multiple states. But "no one contends that any of the conduct took place in Utah or Delaware. When choosing between those jurisdictions, the second factor is immaterial." (Op. 63) Sunder does not challenge that determination.

The third Restatement factor looks to the parties' principal place of business. The Vice Chancellor found that "[i]f the interest is a business or financial one, such as in the care of unfair competition, interference with contractual relations or trade

disparagement … the place of business is the more important contact." (Op. 63-64 (internal quotation marks and citation omitted)) And "where the injury occurs in two or more states, the ***plaintiff's principal place of business is the single most important contact*** for determining the state of the applicable law as to most issues in situations involving financial injury." (*Id.* (emphasis added)) *See also UbiquiTel*, 2005 WL 3533697, at *4 (same). Because Sunder is headquartered in Utah, the Court of Chancery correctly determined that factor three favors Utah law.

The fourth Restatement factor concerns the parties' relationship. Contrary to what Sunder now argues – "that the central issue concerning these Defendants is whether they (as Delaware LLCs) tortiously interfered with another Delaware LLC's operating agreement" (OB 42) – the record demonstrates the opposite. Sunder cites nothing in the record to support its proposition that "unlike some Delaware companies, Sunder does business in this state." (OB 22) The Vice Chancellor correctly observed that "[n]either party contends that their relationship is centered in Delaware." (Op. 64) As a Delaware LLC, Sunder's relationship with its members has a connection to Delaware, but the Freedom Defendants are not members. The Freedom Defendants have been sued as independent business competitors participating in a talent war with Sunder.

The Vice Chancellor identified where the various competitive relationships were centered. Between Sunder and Jackson, the choices were Utah and Texas;

between Sunder and the Freedom Defendants, the choices were Utah and California; and between Sunder and Solar Pros, the choices were Utah and Nevada. Thus, this factor also favors Utah over Delaware.

Sunder's assertion that its contract with Jackson is governed by Delaware law is meaningless. The Freedom Defendants are not parties to that agreement. The *only* contract between Sunder and Freedom is the Dealer Agreement, which is governed by Utah law. (B537 §21(i))

In sum, the Vice Chancellor correctly determined that the fourth factor "favors Utah." (Op. 64)

2. Established Legal Principles Must Be Followed.

The Court of Chancery's straightforward application of the traditional four-factor test results in Utah law governing this tort claim. Sunder implicitly asks this Court to reject the Restatement's test and instead declare that the trial court "should have applied Delaware law." (OB 40)

According to Sunder, the "common ground these parties share" is that they are Delaware entities, so Delaware law should govern ***all*** of their relationships. (OB 41) That would radically change settled Delaware choice-of-law principles. "Delaware follows the Restatement and applies the laws of the jurisdiction with the *most significant relationship*." *Xcell Energy & Coal Co., LLC v. Energy Inv. Grp.*, 2014 WL 2964076, at *5 (Del. Ch. June 30, 2014) (internal quotation marks and

citation omitted) (emphasis added). Sunder's "common ground" test is not found in any Delaware case law.

According to Sunder, the Freedom Defendants "should not be allowed to embrace Delaware law where it benefits them but dodge its reach when it becomes inconvenient." (OB 42) The fact that the Freedom Defendants have selected Delaware law to govern their internal affairs does not reflect a consent to Delaware law in every other respect. And, of course, two of the Freedom Defendants, Brett Bouchy and Chad Towner, are not Delaware entities.

Sunder makes no effort to connect its arguments to the well-settled four-factor test. Rather, Sunder argues Delaware law must apply because "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." (OB 42) In short, Sunder contends that a *tort* claim should be governed by a *contract*'s choice-of-law provision. But nothing in the contracts Sunder cites reflects a broad consent to Delaware law in each and every dispute concerning these companies. *See, e.g.*, *Pascal Metrics, Inc. v. Healthy Catalyst, Inc.*, C.A. No. 2020-1078-MTZ, at 80:23-81:9 (Del. Ch. Sept. 14, 2021) (TRANSCRIPT) (refusing to apply contract's choice-of-law provision to tortious interference claim). Put simply, the internal affairs doctrine of a Delaware LLC has no bearing on an external tort defendant.

Because the Vice Chancellor correctly applied the Restatement test and determined that Utah law applies, this Court should affirm the Court of Chancery's determination.

III. THE COURT OF CHANCERY CORRECTLY HELD THAT SUNDER HAS NO REASONABLE PROBABILITY OF SUCCESS ON THE MERITS OF THE TORTIOUS INTERFERENCE CLAIM.

A. Question Presented.

Whether, under Utah law, the Freedom Defendants tortiously interfered with the LLC Agreement. Tortious interference was raised by Sunder (A2074-77) and considered by the Court of Chancery. (Op. 65-67)

B. Scope Of Review.

Tortious interference is a question of law that this Court reviews *de novo*. *See Bhole, Inc. v. Shore Invs., Inc.*, 67 A.3d 444, 449 (Del. 2013).

C. Merits Of The Argument.

1. The Freedom Defendants Did Not Tortiously Interfere Under Utah Law.

After determining that Utah law applies, the court analyzed Sunder's tortious interference claim. On appeal, Sunder makes *no argument* that the Vice Chancellor erred in his analysis of tortious interference under Utah law, and he did not.

Under Utah law, tortious interference requires: (1) the defendant intentionally interfered with existing economic relations (like a contract), (2) by improper means, and (3) causing injury to the plaintiff. *See Eldridge v. Johndrow*, 345 P.3d 553, 565 (Utah 2015). Because the court found that Sunder had "not shown a reasonable likelihood of proving a breach" of the LLC Agreement, the

court correctly concluded that Sunder's claim for tortious interference could not succeed. (Op. 65)[8] Under Utah law, tortious interference with contract requires a predicate breach of contract. *See MediaNews Grp., Inc. v. McCarthey*, 432 F. Supp. 2d 1213, 1236 (D. Utah 2006), *aff'd*, 494 F.3d 1254 (10th Cir. 2007). As the Vice Chancellor found, "[t]hat alone is dispositive." (Op. 65)

The Court of Chancery also found Sunder could not satisfy Utah's improper means requirement. The Vice Chancellor recognized that "[t]he Supreme Court of Utah has defined 'improper means narrowly to include only those actions that are contrary to law….'" (Op. 65 (citation omitted)) The Utah Supreme Court has endorsed a "non-exhaustive list of conduct that would constitute improper means: violence, threats or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehoods." *C.R. England v. Swift Transp. Co.*, 437 P.3d 343, 353 (Utah 2019) (internal quotation marks and citation omitted). Thus, any action by the Freedom Defendants had to be "independently tortious or wrongful." *Id.* at 354.

The Vice Chancellor recognized that "Sunder does not argue that the Freedom Defendants used improper means to recruit Jackson. Any claim for

[8] For the reasons set forth in Jackson's Answering Brief and herein, Sunder has failed to show the Covenants were valid and binding on Jackson.

tortious interference based on Sunder's contractual relationship with Jackson therefore fails under Utah law." (Op. 66) That was not legal error.

The court then focused on Sunder's argument that the Freedom Defendants used "deceit, misrepresentation, and disparaging falsehoods" when they offered Sunder sales representatives employment at Solar Pros. (Op. 66) The court noted that "Sunder seemingly refers to communications that (i) Freedom posted on September 29, 2023, on a portal for sales representatives that Freedom operates and (ii) Freedom sent to Sunder sales personnel in emails and text messages." (Op. 66) The Vice Chancellor correctly determined that these statements were all true.

For example, one communication informed sales representatives that Sunder had terminated the exclusive Dealer Agreement. (*See* A350-52 ¶¶150, 156; A354 ¶159) Another informed sales representatives that Sunder had requested that Freedom stop paying commissions to them and included a screenshot of Sunder's termination letter. (A350-52 ¶¶150, 156; A354 ¶159) Both were true.

The Vice Chancellor then looked at Freedom's communications that offered the Sunder sales representatives a job with another Freedom dealer. These communications stated that Freedom would "ensure that you receive the full commissions on your entire pipeline" and that sales representatives could "submit this webform and we will reach out to assist you in making this transition as soon as possible." (A350-52 ¶¶150, 156; A354 ¶159) The Vice Chancellor found that

"[n]either statement was misleading, deceitful, or disparaging. Sunder has tried to suggest that Freedom's statement implied that sales representatives would not be paid if they stayed at Sunder, but the statement instead makes clear that sales representatives would not be walking away from their commissions if they joined another Freedom dealer." (Op. 67)

After looking at the evidence, the Vice Chancellor found that the "communications do not constitute an independently tortious act. Sunder has failed to show a reasonable likelihood that the Freedom Defendants used improper means to interfere with the Covenants." (Op. 67) This Court should affirm the Vice Chancellor's well-reasoned conclusion that the Freedom Defendants did not use improper means under Utah law.

2. Sunder's Tortious Interference Claim Also Fails Under Delaware Law.

Sunder argues on appeal that its tortious interference claim against the Freedom Defendants succeeds under Delaware law. The court below made no such determination because the court correctly found that Utah law applies. Nevertheless, Sunder's claim would fail under Delaware law.

"The elements of a tortious interference claim are well established under Delaware law: [t]here must be (1) a contract, (2) about which defendant knew and (3) an intentional act that is a significant factor in causing the breach of such contract (4) without justification (5) which causes injury." *Aspen Advisors LLC v.*

United Artists Theatre Co., 861 A.2d 1251, 1265-66 (Del. 2004) (internal quotation marks and citation omitted). The primary difference from Utah law is that a plaintiff must show that the defendant "acted without justification" rather than by improper means. *See Matthew v. Laudamiel*, 2015 WL 5723985, at *16 (Del. Ch. Sept. 28, 2015), *aff'd*, 143 A.3d 709 (Del. 2016).

This Court has adopted the seven-factor test for justification found in the Restatement (Second) of Torts § 767:

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

WaveDivision Hldg., LLC v. Highland Cap. Mgmt., L.P., 2011 WL 5314507, at *11 (Del. Ch. Nov. 2, 2011), *aff'd*, 49 A.3d 1168 (Del. 2012).

Here, the balance of these factors weighs heavily in favor of justification.

First, the nature of the actor's conduct "requires consideration of the means utilized by the actor in causing the interference." *Id.* at *12. Sunder claims that the Freedom Defendants' "misconduct is egregious" and constitutes a "secretive

campaign to onboard [Jackson] and his confederates." (OB 43) The record demonstrates otherwise. There was no "secretive campaign." Jackson and others openly contacted potential sales representatives from a diligence list that Jackson had reviewed with Nielsen and Britton. (B436-37) Freedom limited its outreach to that list. (B439-40; A1493 Towner 65:20-66:17) And the list of sales representatives, email addresses and phone numbers Freedom used came from Freedom's own records – not Sunder's. (B436-40)

The second, third, fourth and seventh Restatement factors are related because they involve Freedom's interest in protecting its investment in its sales force. Without any supporting record cites, Sunder claims that: (i) the Freedom Defendants' "motive and interests were plainly selfish and designed to harm Sunder"; (ii) Sunder has a "compelling interest in preventing its founders from gutting the company and repudiating their contractual obligations"; and (iii) Delaware courts recognize that an employer acts at its own risk when it hires an employee with a non-compete agreement. (OB 43-44)

The actual record shows that Freedom reacted to Sunder's unexpected and wrongful termination of the Dealer Agreement by seeking to maintain its relationships with independent contractors who were not bound by a non-compete. In order to protect its business, Freedom sought to retain sales representatives who wanted to continue selling for Freedom. (B439-40) This was not an ideal

outcome: there was no advantage for sales representatives to "transition from one dealer to another, especially through the chaos." (A1502 Towner 103:11-104:6) The best thing for the sales representatives was for them "to stay at their existing dealer." (A1502 Towner 104:4-6) But Sunder's sudden severing of its relationship with Freedom made that impossible.

Freedom's actions to protect its legitimate business interests were justified under Delaware law. *See, e.g.*, *WaveDivision*, 2011 5314507, at *12 (finding justification where motive was to protect business investment and not solely to interfere with contract); *Hursey Porter & Assocs. v. Bounds*, 1994 WL 762670, at *15 (Del. Super. Ct. Dec. 2, 1994) (finding justification where actions were motivated by desire to protect investment and preserve business assets); *Laudamiel*, 2015 WL 5723985, at *16 (finding justification where party sought to protect interests in ongoing business).

Sunder's sole legal authority is inapposite because it does not analyze whether challenged actions were justified. *See Hough Assocs., Inc. v. Hill*, 2007 WL 148751, at *14 (Del. Ch. Jan. 17, 2007) (finding, by clear and convincing evidence, that restrictive covenant satisfied "special requirements" to be enforceable).

Sunder's last two arguments against justification also fail because they are likewise unsupported by the record. Contrary to Sunder's assertions on appeal, the

Freedom Defendants did not "embolden[] [Jackson] to betray his co-founders and steal hundreds of talented sales representatives from Sunder." (OB 44) The Freedom Defendants had no obligation *not* to hire Sunder's sales representatives. No sales representatives other than Jackson had a non-compete. After Sunder terminated the Dealer Agreement, Freedom announced that sales representatives could fill out a form to remain with a Freedom dealer. (A1505 Towner 113:1-17) Hundreds of sales representatives wanted to keep selling for Freedom and filled out the form. (A1505 Towner 114:4-17) This was not an orchestrated attempt by Freedom to "steal" workers but to maintain its business. In any case, those representatives were free to switch dealers.

Sunder argues that the Freedom Defendants "were only able to inflict so much damage precisely because of their relationship with Sunder." (OB 44) Sunder leaves out that the relationship between Sunder and Freedom was an *exclusive* relationship, focused around the Dealer Agreement: since Sunder's founding, it was required to sell only Freedom installations. (A1496 Towner 78:16-18; B519 §2) Sunder terminated that agreement and predictably experienced calamitous effects. (B521 §4(c)) But that is because of Sunder's decision to wrongfully terminate the Dealer Agreement, not any action by the Freedom Defendants.

Even under Delaware law, the Freedom Defendants did not tortiously interfere with the LLC Agreement because their actions were justified.

CONCLUSION

For all of the foregoing reasons, the opinion of the Court of Chancery below should be affirmed.

Respectfully submitted,

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