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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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES & RULES

INTRODUCTION[1]

In this appeal, Sunder asks for three narrow forms of relief:

First, this Court should find that the Court of Chancery erred in declining to blue pencil Appellee Jackson's Covenants under the specific facts of this case, where Jackson took a job with a direct competitor in the same exact industry and in the same exact markets in which Sunder competes, notwithstanding his promise not to compete against or solicit from Sunder—and his agreement that the Court of Chancery had the specific power to blue pencil these Covenants, if necessary. Jackson does not and cannot deny that he competed directly against Sunder. And despite Appellees' many pages of explanations and excuses to the contrary, there is also no real dispute that Jackson also "engage[d] in extensive solicitation efforts, both before and after leaving Sunder," as the Court of Chancery found. Opinion 36 n.41.

This Court should reaffirm Delaware's respect for freedom of contract and clarify that the blue pencil remains an important equitable tool that the Court of Chancery should apply in a case like this, where a faithless co-founder brazenly

[1] Capitalized terms not otherwise defined bear the meanings from Sunder's Opening Brief. Dkt. 10 (the "Opening Brief" or "OB"). Appellees' answering briefs are cited as "Freedom's Brief" or "FAB" (Dkt. 11), and "Jackson's Brief" or "JAB" (Dkt. 12).

violates his promises not to compete against or solicit from a company he helped create and build up for years.

Second, this Court should find that the Court of Chancery erred in ruling, at the preliminary injunction stage on a preliminary factual record, that the Covenants were invalid due to a fiduciary duty defense that Jackson raised substantively for the first time during briefing for the preliminary injunction hearing. Appellees contend that this issue only challenges the lower court's "routine docket management." FAB 2. Nothing could be further from the truth. In fact, Jackson dropped a bombshell after the close of expedited discovery and after Sunder filed its opening brief in support of a preliminary injunction, asserting for the first time—other than oblique references in a motion to compel—that he was duped into signing Sunder's Operating Agreement and that the entire contract should therefore be void and unenforceable against him. This eleventh-hour tactic severely prejudiced Sunder and deprived Sunder of a fair opportunity to develop discovery on Appellees' defense and fight back.

It was also unfair for the Court of Chancery to make dispositive (and incorrect) factual findings based on an email in which Sunder's President advised Jackson and the other minority members that Sunder's principals did not expect them "to sign [Sunder's Operating Agreement] if [they were] uncomfortable with it or if [they needed] more clarification" or wanted to ask questions. A098.

Third, this Court should find that the Court of Chancery erred in applying Utah law to Sunder's tortious interference claim. Indeed, Sunder's tortious interference claim concerns the misconduct of two Delaware LLCs (FF and Solar Pros) and their senior-most executives (Bouchy and Towner), who targeted another Delaware LLC (Sunder), studied its operating agreement, and induced one of its founders violate the LLC agreement's restrictive covenants, which were expressly written to replace default fiduciary duties under Delaware law.

For the reasons set forth in this Reply and in Sunder's Opening Brief, this Court should vacate the Court of Chancery's decision and remand this case for further proceedings.

ARGUMENT

I. THE COURT OF CHANCERY COMMITTED REVERSIBLE ERROR BY NOT BLUE PENCILING THE COVENANTS WHEN THE FACTS DEMANDED RELIEF

A. The Court Should Provide Much-Needed Guidance: Delaware Courts Are Permitted to Blue Pencil—At Least Under the Very Pointed and Narrow Circumstances Presented In This Case

"The courts of this State hold freedom of contract in high—some might say, reverential—regard." *Cantor Fitzgerald, L.P. v. Ainslie*, 2024 WL 315193, at *1 (Del. Jan. 29, 2024); 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."). Here, Sunder's co-founders, including Jackson, agreed to be bound by restrictive covenants. They further agreed that Delaware courts are empowered to blue pencil those Covenants, if necessary. A146 at § 13.2 & A217 at § 13.2.

The Opening Brief explained what should be uncontroversial. Companies expect and rely on Delaware courts to enforce contracts. Appellees agree that Delaware's blue pencil jurisprudence *theoretically* recognizes this and allows Delaware courts to employ blue penciling when appropriate. But Appellees ignore the point of Sunder's argument: in practice, Delaware courts have only recently implemented a new policy decision and steered away from blue penciling in cases, like this one, where blue penciling makes sense and would address clear breaches of a restrictive covenant in an equitable manner.

Instead, Appellees spend pages of their briefs debating a strawman, claiming that "Sunder asks this Court to make blue-penciling ***mandatory*** in Delaware." FAB 22-27. That is wrong. To the contrary, Sunder only asks that Delaware courts use this power when the facts clearly require it and in the interest of justice. Here, the lower court summarily declined to blue pencil the Covenants without any consideration of the specific facts at issue and citing only academic (and inapplicable) concerns with blue penciling. OB 26-27.

By refusing to consider whether blue penciling was appropriate on the facts of this case, the lower court effectively (and erroneously) held that it is ***never***, or at least virtually never, appropriate to blue pencil certain restrictive covenants. Opinion 50. That is not and should not be the law of this state, particularly in a case like this, where a faithless co-founder betrays his company even after having agreed that the Court of Chancery "***shall have the power***" to blue pencil. A146 at § 13.2; A217 at § 13.2. The Court of Chancery wrongly found this provision to be completely weightless. OB 26-27.

Appellees point to recent decisions in which the Court of Chancery has declined to blue pencil restrictive covenants. *See* FAB 25-26;[2] JAB 42. But

[2] The FF Defendants also cite numerous decisions from other jurisdictions, as well as academic articles, that have no bearing on Delaware law or how Delaware courts should apply it. FAB 29-30. Yet those authorities just prove Sunder's point: other jurisdictions have interpreted Delaware law as being receptive to blue penciling. OB 23-24. Appellees cite decisions confirming the same. *See Cynosure*

Delaware has a long tradition of allowing courts to blue pencil all sorts of agreements—including restrictive covenants in the employment context—to make the terms consistent with Delaware law and, thus, enforceable. *See* OB 23-24 (citing cases). The FF Defendants attempt to re-characterize some of the decisions Sunder cited as being contrary to blue penciling, yet, in the same breath, go on to describe precisely how the court in each of those decisions enforced a narrower version of the restrictive covenant it had found to be overbroad. FAB 26-28.[3] Sunder's request—that the Court of Chancery should have exercised its equitable powers to enforce a narrower set of restrictions to remedy breaches that the Court of Chancery itself acknowledged—is entirely consistent with Delaware's tradition of using the blue pencil to remedy wrongs that would otherwise go unpunished. *See* Opinion 27-29, 36 n.41 (finding 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 and poached hundreds of talented sales representatives from his former equity partners).

LLC v. Reveal Lasers LLC, 2022 WL 18033055, at *10-11 (D. Mass. Nov. 9, 2022) (blue penciling geographic scope); *United HealthCare Servs., Inc. v. Corzine*, 2021 WL 961217, at *11 (S.D. Ohio Mar. 15, 2021) (blue penciling temporal scope).

[3] For example, the FF Defendants recognize that in *Knowles-Zeswitz Music* the Court redrafted the geographic scope from "100 miles of Wilmington, Delaware to only specified school districts in New Castle County," FAB 26-27, and that in *Norton Petroleum* the Court redefined both the field of work and geographic scope of the restrictive covenants before enforcing them, FAB 27.

Sunder does not deny the recent trend. OB 24 ("Certain recent Delaware decisions, like the Opinion, have questioned the appropriateness of blue penciling restrictive covenants."). Sunder just submits that it is wrong. Appellees ignore the real issue altogether: Delaware's current approach to blue penciling—theoretically discretionary but in practice hostile—is a recent phenomenon on which this Court has never had an opportunity to provide much needed guidance.[4] Accordingly, this Court should clarify that restrictive covenants may be blue penciled in a case like this, where the Court of Chancery has already found the predicates to show that Jackson betrayed his business partners by going to work for a direct competitor and solicited (and continues to solicit) Sunder's work force. At the very least, there is no basis for the *de facto* brightline rule against blue penciling that Appellees' own cases confirm is developing—courts should assess the particular facts of the case before exercising their discretion to or not to blue pencil, not toss out the issue altogether based on purely academic concerns not controlling in Delaware.

B. Relief For Jackson's Acknowledged Breaches Requires Blue Penciling

Based on the factual record here, the lower court should have blue penciled the Covenants to bring them within an appropriate scope. Indeed, this is the precise case in which blue penciling is appropriate—Jackson's actions and conduct would

[4] Appellees do acknowledge, however, that blue penciling is an appropriate exercise of the Court of Chancery's powers. *See* FAB 26.

have breached even the most conservatively drafted non-competition and non-solicitation provisions. The Court of Chancery recognized as much. Jackson, among other things:

- "committed to provide Freedom and Solar Pros with services that compete with Sunder's business," Opinion 29;[5]
- "engage[d] in extensive solicitation efforts, both before and after leaving Sunder, and that Jackson thought in real-time that his involvement had an effect," and "[h]is co-managers though so too," Opinion 36 n.41 (finding it "clear" that Jackson engaged in these solicitation efforts);[6]
- "circulated a Google document to multiple Solar Pros representatives in a group titled 'Gotta catch 'em all' [that] identified Sunder sales professionals to recruit," Opinion 31, and—within hours after the Court of Chancery issued an *ex parte* temporary restraining order—sent an

[5] *See* A260-67 §§ 1, 15 (Jackson's Independent Consulting Agreement with Solar Pros, in which Jackson agreed to provide sales and recruitment services to Solar Pros and for which Solar Pros agreed to indemnify Jackson against claims by Sunder for breaches of its Operating Agreement—and the Covenants specifically).

[6] *See also* A254 (text messages among Jackson and sales leaders regarding recruitment efforts for Solar Pros); A259 (audio recording of Jackson discussing his recruitment efforts and "doing the damn thing" by recruiting Sunder's sales force to join Solar Pros).

audio message instructing them to "request access to the Google document so they could continue his work."[7]

These were precisely the sorts of core competitive and solicitation activities that the Covenants were designed to protect against. Yet according to Appellees, they should *enjoy* the fruits of this inequitable behavior merely because Sunder had the audacity to expect that a Delaware court would enforce the contractual terms of an LLC agreement.

It is ironic, then, that Appellees invoke a so-called "*in terrorem* effect" on Jackson as a basis for not blue-penciling the Covenants. FAB 31-32; JAB 43-44. After all, if Jackson felt any fear about the consequences of his actions, it did not stop him from, as the Court of Chancery recognized, competing against Sunder and soliciting its workforce. OB 14-18.

Appellees' attempts to downplay Jackson's role and seniority should also be rejected. FAB 31-32; JAB 49-52. Like the Opinion below, Appellees paint Jackson as a mere "high school graduate" without "executive or officer responsibilities or authority." *See* FAB 31; JAB 51; Opinion 61 n.75. But there is no basis to create a special class of citizens who are incompetent to sign LLC agreements just because they did not choose to seek higher education.

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[7] *See* A489 (text message thread); A492 (audio recording).

Regardless, the record is clear. Jackson is a grown adult, one of Sunder's founders, and an enormously successful sales manager who had—and was envisioned at the time he signed the Operating Agreement to eventually have—massive authority and responsibility at Sunder. OB 7-14. He earned over six million dollars in approximately four years at Sunder and became a Vice President and the company's top sales leader. A279 (internal Sunder email concerning Jackson's compensation); A280 (attached spreadsheet showing Jackson's compensation during his time at Sunder); A998-99 at 9-10 (Jackson testifying that he was Sunder's only Vice President and most senior sales leader); *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 object to its perceived disadvantages, nor can a party's failure to read a contract justify its avoidance." (cleaned up)). The traditional concerns regarding unequal bargaining power are simply not present here. *See Delaware Exp. Shuttle, Inc. v. Older*, 2002 WL 31458243, at *14 (Del. Ch. Oct. 23, 2002) (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").[8]

Finally, the lower court's decision not to blue-pencil here was not a mere "alternative holding of the trial court." FAB 22 n.4. Indeed, reversal on this point would (and remand may) revive Sunder's contract claims, particularly given the Court of Chancery's findings that Jackson competed against and solicited from Sunder. As Vice Chancellor Laster recognized, "[i]f the Delaware Supreme Court disagrees with my rulings . . . , everyone has to go back to square one." A2450. Thus, it is an appropriate issue for this Court's consideration.

[8] If anything, courts have found that it is more relevant that an individual has founded a company or served as an executive than that he or she has received higher education. *DGWL Investment Corp. v. Giannini*, C.A. No. 8647-VCP, at 18 (Del. Ch. Sept. 19, 2013) (TRANSCRIPT, Opening Brief Compendium Tab 1) (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").

II. THE COURT OF CHANCERY COMMITTED REVERSIBLE ERROR BY ENTERTAINING AND ACCEPTING TYLER JACKSON'S CONTENTION THAT HE WAS DUPED INTO SIGNING SUNDER'S OPERATING AGREEMENT

A. The Court of Chancery Impermissibly Relied Upon Appellees' Unpled Fiduciary Duty Defense

Litigation by surprise is not how things are done in Delaware. *See Digiacobbe v. Sestak*, 1998 WL 684149, at *7 (Del. Ch. July 7, 1998) ("Surprise is . . . to be avoided as much as possible . . . ."); *cf. Concord Towers, Inc. v. Long*, 348 A.2d 325, 326 (Del. 1975) ("[U]nfair surprise-advantage obtained . . . is not to be condoned."). But that is exactly what Jackson did. After Sunder filed its Verified Complaint and obtained a temporary restraining order, the parties conducted expedited discovery over several short weeks. Discovery closed. Sunder filed its opening brief in support of a preliminary injunction, asking the Court of Chancery to effectively transform its TRO into a PI. Only then, with a few days left before the parties were scheduled to appear for the preliminary injunction hearing, did Jackson (i) seek leave to assert a fiduciary duty claim by third-party complaint, and (ii) substantively raise his fiduciary duty defense for the first time beyond minimalistic references in a motion to compel from a few days earlier. That defense was and remains unpled to this day.

Unable to contest these facts, Jackson's opposition resorts to red herrings and (again) strawmen—anything to avoid meaningfully addressing the issues from the Opening Brief. Sunder takes Jackson's points in turn. To be clear, Appellees have

waived argument on any issue they failed to address. *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived.").

First, Jackson insists that Sunder "presumes, without authority, that Jackson was required to plead an affirmative defense to challenge the enforceability of the LLC agreement based on Nielsen's and Britton's conduct." JAB 37. Not so. What Jackson was required to do was truthfully answer Sunder's interrogatories explaining the bases for his expected defenses. As the Opening Brief explained—and as Jackson's Brief fails to even acknowledge—he never identified a fiduciary duty defense in his pleadings, his interrogatory responses, or his supplemented interrogatory responses. OB 29-30; A595-96; A2016-17.

Second, Jackson suggests that this should all be excused because he "raised the affirmative defense of 'unclean hands' in his Answer," and this should have put Sunder on notice that what he *actually* intended to argue was a breach of fiduciary duty. JAB 37-38. Sunder addressed this in its Opening Brief. OB 32-33. The phrase "unclean hands" does not appear *anywhere* in Jackson's preliminary injunction briefs or in the transcript for the preliminary injunction hearing. Jackson strains that this is "self-defeating" because he "had no basis to argue separately for unclean hands when that defense encompassed the fiduciary duty breaches." JAB 37 n.5. This gives away the game. The invocation of unclean hands was not understood by anyone to mean "breach of fiduciary duty"—if it was, someone, at

some point, somewhere, would have just said so. They never did. To the contrary, and as Jackson again fails to acknowledge, Jackson's own filings in the Court of Chancery list it as an issue *separate* from fiduciary duty. OB 33 n.4; A989 ¶ 8.

Third, Jackson's accusation that Sunder is "complain[ing] the case was moving too quickly," JAB 39, turns Delaware litigation on its head. That an action is moving fast is not a pass for surprise litigation. Incredibly, Jackson attempts to assure this Court that his arguments were not premature because he raised them in a (still pending) motion to file a third-party complaint just ***two days*** before Sunder's reply brief was due. JAB 38. This Court should not bless that as fair game. The Opening Brief explained the resultant prejudice and why Jackson's motion to compel failed to actually put Sunder on sufficient notice of Jackson's unpled, last-minute defense. OB 29-31. Jackson fails to squarely address any of those arguments, including any of Sunder's authorities, and has waived any opposition to them. *Emerald P'rs*, 726 A.2d at 1224.

Finally, Jackson argues that he did not waive his fiduciary duty claims because his November 13 motion for leave to file a third-party complaint was purportedly timely under Court of Chancery Rule 15(a). JAB 39. That is a red herring. Whether or not that (*still pending*) motion was timely has no bearing on

whether it was premature as a defense for the preliminary injunction hearing held on November 17 when Jackson never pled it and never identified it as a defense.[9]

Jackson's last assertion—presented in a single sentence without argument—is that this issue is "beyond the scope of the order granting interlocutory review." JAB 36. He provides no explanation for this assertion and has thus waived argument on it. *Emerald P'rs*, 726 A.2d at 1224. Regardless, he is wrong. Nothing in this Court's order granting the appeal ruled out addressing any of the arguments in Sunder's application.

B. The Court Of Chancery Should Not Have Preclusively Ruled On Preliminary, Undeveloped Facts For An Unpled Claim

Even assuming that the fiduciary defense issue was timely, the Court of Chancery committed reversible error by ruling—as a matter of law—that Nielsen and Britton (with no actual claims asserted against them, let alone their company) breached their fiduciary duties based on the preliminary factual record of the hearing. The Appellees do not dispute this. In fact, they hardly address it.

This is no mere procedural quirk. As the Opening Brief explained, a preliminary injunction record is inherently incomplete, which the Court of Chancery acknowledged in stating that the Opinion was based on "the facts as they are likely

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[9] The parties had not yet addressed Jackson's motion for leave to file a third-party complaint by the time of this appeal. Sunder reserves its rights with respect to that motion.

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***" (emphasis added)). Yet the Court of Chancery ruled—again, with no claims actually asserted against Sunder or its principals—as follows:

- "Nielsen and Britton breached their fiduciary duty of disclosure," Opinion 39;
- "[T]he Operating Agreement [and its subsequent amendment] were therefore never validly approved," *id.* at 40;
- "Nielsen and Britton therefore cannot enforce the terms of the [Operating Agreement] against Jackson," *id.* at 46;
- "[Sunder's] options [at trial] are limited" because "[t]his 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; and
- "[T]he defendants likely could move for summary judgment in their favor on those points," A2457.

Appellees decline to address any of these points. Their sole substantive opposition is to assert that "[t]he factual record establishes that the Court of Chancery correctly found that the New Year's Email did not satisfy Nielsen's and

Britton's fiduciary obligations; rather, it was an intentional dereliction of duty by fiduciaries." JAB 35. That goes to the merits of defending the Court of Chancery's decision,[10] not the procedural propriety of *making those rulings at all* on a preliminary factual record and with no claims asserted against Nielsen or Britton.[11] Thus, the Appellees have waived any opposition to this issue. *Emerald P'rs*, 726 A.2d at 1224 (Del. 1999).

Appellees' only other argument is that "[t]his argument[] was not raised in Sunder's application for interlocutory appeal" and "is not properly before this Court." JAB 35. As with their last attempt to duck the Court's review, addressed in Section II.A above, this is wrong. *See also* A2439-40 ¶ 20, n.3 (application for interlocutory appeal raising precisely these issues); A2442 (presenting the Court of Chancery's decision on the breach of fiduciary duties as a substantial issue).

As explained in the Opening Brief, if the Court of Chancery ruled on this issue at all it should have limited itself only on the familiar and appropriate "reasonable probability" standard. *See also* A2459 (Court of Chancery recognizing 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***" (emphasis added)). Then,

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[10] *See infra* Section II.C.

[11] Putting that aside, the defense itself was also premature for the reasons addressed above.

at least, the parties could have put themselves to the task of developing the record. Instead, Sunder was forced to defend itself on a late-raised defense and undeveloped facts against a claim not formally raised against its principals. On that record, there should have been no ruling—much less a preclusive one as a matter of law that defines the parties' dispute going forward.

C. Regardless, Nielsen and Britton Did Not Breach Any Fiduciary Duties

The Court of Chancery fully credited Jackson's unpled defense. In fact, the lower court took Jackson's argument even further and expanded upon it at length, offering academic (but not legal) support for why Sunder's CEO and President somehow breached fiduciary duties to their co-founders. Opinion 42-46. Unsurprisingly, Jackson relies heavily on these aspects of the lower court's opinion throughout his brief. But the lower court got this wrong. Even on the extremely limited preliminary injunction record, it is clear that Sunder's principals did not violate any fiduciary duties when they reduced Sunder's Operating Agreement to a written document and asked their co-founders to execute and finalize their agreement. Indeed, neither the Court of Chancery nor Jackson has identified when the alleged oral agreement was formed or the specifics of its terms.

In his Answering Brief, Jackson contends that Nielsen's December 31, 2019 email, "standing alone," JAB 3, is dispositive as to his grave accusations that Nielsen and Britton breached fiduciary duties. This defies common sense and cannot be the

law. Far from amounting to something sinister, Nielsen's email advised Jackson and the other minority members of Sunder: "***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 on something. Please let me know if you have any questions***." A098 (emphasis added). Jackson did not ask any questions or object in any way. Instead, he voluntarily signed the Operating Agreement and proceeded to work with his fellow co-founders for years.

Jackson nonetheless argues that Nielsen and Britton executed a "self-interested transaction" by asking their co-founders to sign the Operating Agreement. JAB 32-33. But this ignores the clear evidence that Sunder's co-founders had discussed the Operating Agreement's terms for months, including the fact that it would include restrictive covenants and different classes of equity, with Nielsen and Britton receiving a greater share in the company based on their managerial positions and willingness to sign multi-million dollar personal guarantees that the other founders, including Jackson, did not. OB 7-9, 38. Jackson relies on a Sunder interrogatory response for the notion that only Nielsen and Britton discussed the Operating Agreement with Snell & Wilmer (JAB 9 (citing B711-B712)), ignoring the very next sentence that discussed "in-person and telephonic discussions with the potential signatories." B712. Relying on the lower court's opinion—and ignoring any contrary evidence—Jackson merely asserts that the Operating Agreement had

never been discussed. JAB 34. The preliminary factual record here is not only undeveloped but does not support the Court of Chancery's conclusions.

Jackson also contends—incredibly—that he should not be bound by the Operating Agreement because he did not benefit from it, ignoring the fact that it made him a multi-millionaire with greater earnings than many could fathom in a lifetime, let alone in the four years Jackson was with Sunder. JAB 34-35. Jackson calls this a "red herring" because he claims he had greater rights under an oral contract before he voluntarily signed the Operating Agreement. But again, that is not consistent with the testimony of Sunder's other six co-founders, who have remained bound to each other and their company despite Jackson's disloyal and highly destructive misconduct—and despite the lower court's incorrect conclusion that Sunder's CEO and President somehow breached fiduciary duties to the other members. OB 7-9; 38. The fact is, if the lower court's opinion were correct, the remaining minority members would have left after reading it. That did not happen.

Jackson also fails to address the simple fact that Delaware law does not allow him to violate his contractual obligations by claiming that he failed to read the Operating Agreement. *See Braga Inv. & Advisory, LLC v. Yenni*, 2023 WL 3736879, at *14-15 (Del. Ch. May 31, 2023). Nor does Jackson deny the well-settled principle of Delaware law that a "party to a contract cannot silently accept its

benefits, and then object to its perceived disadvantage." *Pellaton*, 592 A.2d at 477 (cleaned up).

In addition, Jackson ignores the policy problem with the Court of Chancery's opinion, OB 38-39, which clears the way for any disgruntled member of a Delaware LLC to claim—years after signing an LLC agreement and accepting millions of dollars of its benefits—that the founding documents are inconsistent with their original understanding, therefore justifying whatever harm they seek to excuse after the fact. The Court of Chancery's Opinion creates a serious problem that could lead to a flood of abusive litigation brought by bad actors who feel they have a new loophole to betray their LLCs with impunity, particularly for small, private companies, where context must matter. *See* Opinion 42; OB 38.

It was reversible error for the lower court to rule on the merits at all, much less as it did. OB 39.

III. THE COURT OF CHANCERY ERRED IN DISMISSING SUNDER'S TORTIOUS INTERFERENCE CLAIM

A. The Court of Chancery Should Have Applied Delaware Law

The lower court should have concluded that Delaware law governs Sunder's tortious interference claim under the unique circumstances in this case, which plainly show that Delaware has the most significant relationship to these parties and their dispute. OB 40-44.

Appellees suggest that, because Sunder is headquartered in Utah, its only injury occurred in Utah, favoring Utah law. FAB 37. But this simplistic analysis is inconsistent with reality, where a small startup with only a handful of employees at its headquarters—but thousands of sales representatives across the country—actually conducts the heart of its business in a distributed manner from coast to coast. *See, e.g.*, OB 13.[12]

Under the facts of this case, Delaware's practical and flexible approach to the choice of law analysis strongly favors the application of Delaware law because, as submitted in Sunder's Opening Brief, the tortious interference claim boils down to whether the FF Defendants, as Delaware LLCs (and officers of Delaware LLCs), tortiously interfered with another Delaware LLC's LLC agreement. In response, the FF Defendants simply assert that "the record demonstrates the opposite." OB 38.

[12] If anywhere, Sunder's injury in this case was most acute in Texas, where Jackson himself defected along with hundreds of his direct reports.

In fact, the record shows that the FF Defendants recruited Tyler Jackson to serve as Solar Pros's President and lead recruiter (in plain violation of his Covenants under the Operating Agreement) after they studied Sunder's Operating Agreement. The FF Defendants even prepared for this litigation, having agreed to indemnify Jackson in the event that Sunder sought to enforce the Operating Agreement in a Delaware court pursuant to Delaware law.

The FF Defendants are wrong to call this a departure from Delaware's choice of law analysis. FAB 40. To the contrary, Sunder simply asks this Court to use its familiar test and apply Delaware law because this jurisdiction has the most significant relationship to these parties with respect to this specific dispute. And contrary to Appellees' contention, there is nothing remarkable about applying Delaware law to a tortious interference with contract claim when the underlying contract that was targeted and attacked clearly identified Delaware law and Delaware courts as the appropriate legal authorities to govern any potential dispute. *See* A150.

B. The FF Defendants Violated Delaware Law By Tortiously Interfering With Sunder's Operating Agreement

Had the lower court applied Delaware law to Sunder's tortious interference claim, it should have held the FF Defendants liable for tortiously interfering with Sunder's Operating Agreement. "Delaware courts have consistently followed the Restatement (Second) of Torts, which recognizes a claim for tortious interference

with contractual relations where the defendant utilizes "wrongful means" to induce a third party to terminate a contract." *ASDI, Inc. v. Beard Rsch., Inc.*, 11 A.3d 749, 751 (Del. 2010).

In their Answering Brief, the FF Defendants mischaracterize and confuse the record, arguing that there was nothing "secretive" about their campaign to recruit Jackson and his confederates. FAB 47. But they do not (and cannot) deny that Solar Pros entered into a contract with Jackson *before Jackson had even resigned from Sunder* that specifically required Jackson to provide services that directly compete against Sunder and to solicit sales representatives to join Solar Pros. A269. Again, there is no dispute that the FF Defendants knew about Sunder's Operating Agreement and asked Jackson to breach it by violating the Covenants, causing Sunder injury.

Ignoring that this is where their tortious interference began, the FF Defendants instead seek only to justify their subsequent behavior when Sunder terminated its Dealer Agreement with FF and the FF Defendants' solicitation of Sunder's sales force hit full steam. FAB 44-45; 48-49. This also fails. For instance, the FF Defendants insist that they only sought to poach individuals who appeared on a list that Sunder knew about. FAB 47. But this ignores that the list they describe was created as a settlement proposal during a standstill period, which the FF Defendants violated in a transparent attempt to strong arm Sunder into accepting its lowball

offers. *See* Opinion 28-29. The FF Defendants likewise cannot justify their unfair competition based on a desire to "protect [FF's] legitimate business interest." FAB 48. Delaware law does not tolerate breaking the law to protect so-called "legitimate business interest[s]." This Court should reverse or remand with instructions to apply Delaware law.

CONCLUSION

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

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